TRANSCRIPT OF RECORD

71894

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 191.

ALBERT S. BIGELOW, PLAINTIFF IN ERROR,

vs.

OLD DOMINION COPPER MINING & SMELTING COMPANY.

ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

FILED JANUARY 26, 1910.

(21,981.)

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a UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States, to the Honorable the Justices of the Supreme Judicial Court of the Commonwealth of Massachusetts, holden at Boston, within and for the County of Suffolk, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between Old Dominion Copper Mining & Smelting Company, a New Jersey corporation, Plaintiff and Albert S. Bigelow, of Cohasset, in the Commonwealth of Massachusetts, Defendant, in a suit in equity, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity or statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendant, Albert S. Bigelow, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the twenty-ninth day of December, in the year of our Lord one thousand nine hundred and nine.

CHARLES H. DARLING,
Clerk of the Circuit Court of the United States, District of Massachusetts.

Allowed by
MARCUS P. KNOWLTON,
Chief Justice of Supreme Judicial Court, but Writ not to Operate as Supersedeas.

b COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

And now, here, the Judges of the Supreme Judicial Court make return of this writ by annexing hereto and sending herewith, under the seal of the said Supreme Judicial Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, Walter F. Frederick, Clerk of said Supreme Judicial Court, have hereto set my hand and the seal of said Court this fourth day of January A. D. 1910.

[Seal Nulli Vendemus Nulli Negabimus Justitiam.]

WALTER F. FREDERICK, *Clerk.*

[Endorsed:] —. 8099 Eq. Old Dominion Copper Mining & Smelting Co'y. vs. Albert S. Bigelow. Writ of Error. Suffolk, ss. Supreme Judicial Court. Received Dec. 31, 1909. Attest: Walter F. Frederick, Clerk.

c COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To all persons to whom these presents shall come, Greeting:

Know ye, that among the Records of our Supreme Judicial Court, sitting at Boston in said County of Suffolk, for the hearing of all causes in equity between the first day of January in the year of our Lord one thousand nine hundred and nine, and the thirty first day of December in the same year, both inclusive, it is thus contained, the following being the entire record in the case:

1 Old Dominion Copper Mining and Smelting Company, a corporation duly organized under the laws of the State of New Jersey, and having a usual place of business at Boston in our County of Suffolk brings its Bill of Complaint against Albert S. Bigelow, of Cohasset in the County of Norfolk, having his usual place of business in said Boston.

Said Bill of Complaint being in the words following, to wit:

Bill of Complaint.

First. The plaintiff, the Old Dominion Copper Mining and Smelting Company, is a corporation duly organized under the laws of the State of New Jersey and having a usual place of business in Boston in said County of Suffolk. Said corporation is the owner of copper mining and smelting works in the Territory of Arizona, and is carrying on the business of mining, smelting, and selling copper.

Second. On and prior to March 24, 1895, there existed a certain corporation called the Old Dominion Copper Company of Baltimore City (hereinafter called the Baltimore Old Dominion Company) organized under the laws of the State of Maryland and having a usual place of business in said Baltimore. Said Baltimore Old Do-

minion Company was then the owner of mines and mining claims in Arizona. It had a capital stock of five hundred thousand (500,000) dollars divided into twenty-five thousand (25,000) shares of the par value of twenty (20) dollars each. Of said shares there were then owned by the executors of the will of Michael H. Simpson, late of said Boston, deceased, about seventeen thousand eight hundred and fifty-seven (17857) shares and the balance of said
2 shares were then owned by one William Keyser of Baltimore in the State of Maryland and others. Said Keyser also then held the title in his own name to certain mines and mining claims known as the Old Dominion Mine, the New York Mine, the Chicago Mine, the Keystone Mine, and a certain parcel of land near the Bloody Tanks, so-called all in said Arizona, but whether said Keyser held said property solely in his own right or in trust, wholly or in part for others or for said corporation the plaintiff is ignorant.

Third. At some time prior to March 24, 1895, the defendant and one Leonard Lewisohn, late of New York City, deceased, formed the plan of acquiring all the stock of said Baltimore Old Dominion Company and all said real estate, title to which then stood in the name of said Keyser, as aforesaid, and of organizing a new corporation to acquire and of selling to such new corporation at a large advance in price, all the property of said Baltimore Old Dominion Company and all the real estate held by said Keyser, as aforesaid, and putting upon the market and selling to such of the public as might be induced to buy the same a large number of the shares of such new corporation in order to provide the same with a working capital, and make necessary improvements in the plant, and acquire additional mining claims, and of thereby securing for themselves and such persons as they might associate with them a large profit from the purchase and resale to said new corporation to be organized by them of said property; and said defendant and said Lewisohn thereupon conspired together to carry out said plan and thereby to injure the future stockholders in said new corporation, and to secure for themselves as the promoters and organizers thereof a large secret profit.

Fourth. Pursuant to said plan and conspiracy said defend-
3 ant alone or in conjunction with said Lewisohn at some time prior to March 24, 1895, procured a number of persons, whose names are to the plaintiff unknown, to subscribe to the Old Dominion Syndicate so-called; said syndicate was formed for the purpose of raising about one million (1,000,000) dollars or so much thereof as was necessary to carry out said plan and conspiracy of the defendant and said Lewisohn above described for the benefit of the members of said syndicate. The terms of said subscription were that the subscribers should pay in fourteen (14) per cent. of the amount of their respective subscriptions on March 24, 1895, twenty-eight and two-thirds (28 2/3) per cent. on July 24, 1895, twenty-eight and two-thirds (28 2/3) per cent. on August 25, 1895, and twenty-eight and two-thirds (28 2/3) per cent. on September 24, 1895, and with each of said last three instalments five (5) per cent. interest thereon from March 24, 1895; and that the amount so subscribed and paid in should be used so far as required for the pur-

pose of acquiring the property or all the capital stock of said Baltimore Old Dominion Company, and that the subscribers to said syndicate should receive in cash or in stock of the new corporation to be formed to purchase said property from said syndicate two million (2,000,000) dollars to be distributed pro rata according to their several subscriptions. The precise terms of said syndicate agreement are to the plaintiff unknown and the plaintiff has no copy thereof which it can attach hereto, but said defendant well knows the terms of said agreement and has a copy or the original thereof in his possession or control.

Fifth. Thereafter, to wit, on or about March 24, 1895, said defendant, alone or in conjunction with said Lewisohn received the first instalment payable by the subscribers to said syndicate
4 amounting to about one hundred and forty thousand (140,000) dollars. Thereafter, to wit, on or about May 2, 1895, said Bigelow, alone or in conjunction with others, for the purpose of carrying out said plan and conspiracy and the purposes of said syndicate, made an agreement with the executors of the will of said Michael H. Simpson for the purchase from said executors of seventeen thousand eight hundred and fifty-seven (17857) shares of the capital stock of said Baltimore Old Dominion Company, being five-sevenths (5/7) of the total capital stock of said corporation, at a price not exceeding six hundred and thirteen thousand one hundred and thirty-seven dollars and thirty-nine cents ($613,137.39); the plaintiff is ignorant of the precise terms of said agreement, but is informed and believes, and therefore charges that said agreement was in the form of an option for which a sum not exceeding one hundred thousand (100,000) dollars was paid, under which option said defendant and his said associates were entitled to acquire said stock at the price aforesaid by making further payments at a future time or times.

Sixth. At some time prior to July 1, 1895, said defendant, alone or in conjunction with others, for the purpose of carrying out said plan and conspiracy and for the purposes of said syndicate, made an agreement with said William Keyser and with other persons to the plaintiff unknown by which the defendant and his associates acquired the remaining two-sevenths (2/7) of all the capital stock of said Baltimore Old Dominion Company, to wit, seven thousand one hundred and forty-three (7143) shares at a price not exceeding one hundred and seventy-five thousand one hundred and eighty-two dollars and eleven cents ($175,182.11). The plaintiff is unable to state more particularly the terms of said purchase, but the
5 terms thereof are well known to the defendant.

Seventh. At about the time of the purchase from said Keyser and others of said seven thousand one hundred and forty-three (7143) shares of stock in said Baltimore Old Dominion Company said defendant or said Lewisohn, or the two in conjunction, for their common benefit acquired from said Keyser for the same consideration paid for said seven thousand one hundred and forty-three (7143) shares, but, as they claimed, for their own benefit and not for the benefit of said Old Dominion Syndicate, the parcels of real

estate in Arizona, title to which then stood in the name of said Keyser, as above set forth, to wit, the four mining claims known as said Old Dominion Mine, said New York Mine, said Keystone Mine, and said Chicago Mine, and said parcel of land near the Bloody Tanks. All said real estate was acquired in the name of and was conveyed by said Keyser to said Lewisohn, but for the common benefit of said Lewisohn and said Bigelow, as hereafter set forth, and pursuant to and as a part of the plan and conspiracy and for the purposes hereinbefore set forth.

Eighth. On or about July 8, 1895, said defendant in conjunction with said Lewisohn, in pursuance of said plan and conspiracy and for the purpose of carrying out the same for the benefit of themselves and of the subscribers to said Old Dominion Syndicate so-called, caused the Old Dominion Copper Mining and Smelting Company, the plaintiff herein, to be organized under the general corporation laws of the State of New Jersey. Said corporation was formed by seven persons selected and employed for the purpose by said defendant and said Lewisohn, to wit, Jesse Lewisohn, Allen W. Evarts,
Edgar Buffam, Charles W. Welch, Sidney Riddlestorffer,
6 William V. Rowe, and William R. Montgomery. None of said seven persons, except said Jesse Lewisohn, who was a brother of said Leonard Lewisohn, had any actual interest in said corporation or acted in the formation thereof otherwise than as the representative and agent of said defendant and said Leonard Lewisohn. Each of said individuals nominally subscribed and paid for four (4) shares of the capital stock of said corporation except said Jesse Lewisohn who subscribed and paid for sixteen (16) shares; but in fact all said subscription were made for the benefit and at the request of the defendant and said Leonard Lewisohn, and each subscription was paid for by said defendant and said Leonard Lewisohn, or one of them.

Ninth. On July 9, 1895, the first meeting of said corporation, organized as aforesaid, was held in Jersey City and all of said incorporators were then present. By-laws were adopted and upon an election of directors by ballot said seven incorporators above named were duly chosen directors, and it was further voted to increase the capital stock to three million seven hundred and fifty thousand (3,750,000) dollars, divided into one hundred and fifty thousand (150,000) shares of twenty-five (25) dollars each. A recess was taken by said meeting, and thereupon said seven directors met and organized and elected officers, to wit, said Allen W. Evarts, president, said Sidney Riddlestorffer, vice-president, said Jesse Lewisohn, treasurer, and said Edgar Buffam, secretary. Said meeting of directors confirmed the action of the prior meeting of incorporators increasing the capital stock, as above set forth. The organization
of said corporation and the proceedings of said meetings of
7 incorporators and directors were duly had according to the laws of the State of New Jersey, and the by-laws adopted, as aforesaid, and thereby the plaintiff became duly organized as a corporation and the individuals above named became the lawful officers of the corporation holding respectively the offices above named.

Tenth. A meeting of the directors, of said plaintiff corporation, organized as aforesaid, was duly held on July 11, 1895, at the office in New York City of the firm of Lewisohn Brothers, of which firm said Leonard Lewisohn was a member; all of the directors except said Montgomery were present. Pursuant to instructions from the defendant the resignation of said Montgomery as a director was presented and duly accepted, and the defendant was thereupon chosen a director in his place. Thereupon, pursuant to instructions from the defendant, the successive resignations of said Rowe as a director, of said Welch as a director, of said Jesse Lewisohn as treasurer and as director, of said Evarts as president, and of said Riddlestorffer as Vice-president and as director were presented and duly accepted, and said Leonard Lewisohn, one Henry M. Whitney, one Thomas Nelson, and one Joseph G. Ray were successively duly chosen directors, and said Thomas Nelson was duly chosen treasurer, and said defendant was duly chosen president of said corporation. Said defendant and said Leonard Lewisohn were present at said meeting, and upon their respective elections as directors took their places in said meeting. All said resignations were duly received and acted on and said elections to fill the vacancies caused by said resignations were duly had pursuant to the laws of the State of New Jersey and the by-laws of said corporation.

8 Eleventh. At some time prior to July 11, 1895, to wit, on or about July 8, 1895, said defendant in pursuance of said plan and conspiracy, either alone or in conjunction with said Leonard Lewisohn, completed the purchase of all said shares of stock in said Baltimore Old Dominion Company upon the terms of the agreement with the executors of the will of Michael H. Simpson and with William Keyser and others hereinbefore referred to, and all said stock was delivered and transferred to the defendant or to persons designated by him, and the directors and officers of said Baltimore Old Dominion Company resigned and new directors nominated by said defendant were duly chosen and said defendant was duly chosen president and said Allen W. Evarts secretary of said corporation. At the same time, to wit, on or about July 8, 1895, and prior to July 11, 1895, said Keyser conveyed to said Leonard Lewisohn said real estate in Arizona above referred to, pursuant to said agreement, and the legal title to said real estate became vested in said Leonard Lewisohn.

Twelfth. At said meeting of the directors of the plaintiff corporation on July 11, 1895, above referred to, after the several changes of directors and other officers by resignation above set forth, and after said defendant had been elected president of said corporation there remained present four directors, to wit, said defendant, said Leonard Lewisohn, said Evarts, and said Buffam. Said Evarts was the attorney employed by said defendant and said Leonard Lewisohn to attend to the incorporation of the plaintiff corporation and to carry out their said plan and conspiracy; said Buffam was a person selected by them and employed by them to act as director and assist them in carrying out said plan and conspiracy. The remaining

9 directors were said Thomas Nelson, Henry M. Whitney, and Joseph G. Ray, no one of whom was present and each of whom

was a subscriber to said Old Dominion Syndicate and interested to assist said defendant and said Leonard Lewisohn in their plan to sell said property to the plaintiff and in the success of said plan and conspiracy.

Thirteenth. At said meeting of the directors of the plaintiff company on July 11, 1895, after the change of directors and officers above set forth and after said defendant had been chosen president as aforesaid, said defendant through said Evarts presented to said board of directors of the plaintiff an offer to the plaintiff to sell and convey substantially all the property of said Baltimore Old Dominion Company to the plaintiff, except the cash assets, for one hundred thousand (100,000) shares of the capital stock of the plaintiff corporation to be issued to said Baltimore Old Dominion Company or its nominees. Said offer was signed by the defendant as president of and by said Evarts as secretary of said Baltimore Old Dominion Company. A copy of said offer and of the schedule therein referred to is hereto annexed and marked "A" and made a part of this bill. Upon presentation of said offer, on motion of said Leonard Lewisohn, seconded by said Evarts, it was unanimously voted to accept said offer and to issue one hundred thousand (100,000) shares of the capital stock in payment for said property, and the defendant and said Nelson were appointed a committee to supervise and carry out the details.

Fourteenth. Immediately after the passage of the vote last above referred to at said meeting of directors of the plaintiff on July 11, 1895, said Leonard Lewisohn presented to said board of directors of the plaintiff a proposition to the plaintiff to sell and convey to the plaintiff said real estate in Arizona acquired by said Leonard Lewisohn from said Keyser as above set forth for thirty thousand (30,000) shares of the capital stock of the plaintiff to be issued to said Lewisohn or his nominees, accompanied with a request to issue said shares to the defendant and said Lewisohn. A copy of said proposition is hereto annexed and marked "B" and made a part of this bill of complaint. Upon presentation of said proposition the defendant and said Leonard Lewisohn caused the directors to unanimously vote to accept said proposition and to issue thirty thousand (30,000) shares of the capital stock in payment for said property, and the defendant and said Nelson were appointed a committee to supervise and carry out the details.

Fifteenth. Thereafter the defendant and said Lewisohn, pursuant to the original plan and conspiracy, and for the purpose of furnishing the plaintiff corporation, promoted by them as aforesaid, with working capital and with funds required to develop its plants and other properties, caused to be offered twenty thousand (20,000) shares of the capital stock of the plaintiff corporation, not theretofore disposed of, for public subscription and sale at the price of twenty-five (25) dollars per share; and all of said shares were so subscribed for and sold and the price therefor paid by said subscribers to the plaintiff. Said subscribers and purchasers of said shares were ignorant at the time said shares were offered for subscription and at the time they severally subscribed and paid therefor and received their shares, as hereinafter set forth, of the facts hereinbefore set forth as to the promotion and organization of the plain-

tiff corporation by the defendant and said Lewisohn, and the large profit to be made by said defendant and said Lewisohn and by the other members of said Old Dominion Syndicate therefrom.

11 Sixteenth. Thereafter the sale and conveyance of the property of said Baltimore Old Dominion Company, included in the offer marked Exhibit "A" and the schedule thereto annexed, was consummated by the transfer of said property to this corporation, and the sale and conveyance of the property included in the proposition of said Leonard Lewisohn marked Exhibit "B" was consummated by the transfer of said property to this corporation. Thereafter, to wit, on or about September 18, 1895, the board of directors of the plaintiff corporation at a meeting duly called held at Boston —see amendment—voted at the request of said Baltimore Old Dominion Mining Company to issue one hundred thousand (100,000) shares of the capital stock of this corporation to one Philip K. Dumaresq as representing said corporation as and for the price of said property so transferred and conveyed, and said shares were duly issued pursuant to said vote. And said board of directors of this corporation at said meeting further voted to issue thirty thousand (30,000) shares of the capital stock of this corporation to the defendant and said Leonard Lewisohn as and for the price of said property transferred and conveyed by the latter to this corporation, as above set forth, and said shares were thereupon duly issued pursuant to said vote. And said board of directors of this corporation at the same meeting voted to issue twenty thousand (20,000) shares of the capital stock thereof to persons who had subscribed therefor, as above set forth, upon receiving payment of twenty-five (25) dollars per share therefor.

Seventeenth. Said parcels of real estate sold and conveyed by said Lewisohn to the plaintiff as aforesaid, to wit, said several mining claims known as Old Dominion Mine, New York Mine, Chicago Mine, and Keystone Mine respectively, and said parcel of

12 land near the Bloody Tanks, so called, were in fact of substantially no value, to wit, of a value not exceeding five thousand (5,000) dollars, and were known by said Lewisohn and by the defendant when said Lewisohn acquired the same as aforesaid, and when he offered to sell and convey the same to the plaintiff as aforesaid, to be of substantially no value. And said parcels were acquired by said Lewisohn in the manner aforesaid with intent on the part of himself and of said defendant to sell the same for a large price. No disclosure was at any time made to the plaintiff corporation of the fact that said real estate was of substantially no value, and by reason of the control by said defendant and said Lewisohn of the plaintiff corporation and its board of directors, as above set forth, said purchase was made without any disclosure to or inquiry by the plaintiff corporation as to the reasonable value of said property; and no disclosure was ever made to any of the persons who subscribed for or afterwards purchased shares of stock in the defendant corporation, or to any other persons of the facts as to the purchase of said property or as to the reasonable value thereof, and said facts were not known to any of said persons or to any of the members of said Old Dominion Syndicate, except said defendant and said Leonard Lewisohn.

Eighteenth. By the transactions above set forth, said defendant and said Lewisohn carried out their said plan and conspiracy, and having, for the purpose of promoting a corporation and selling to such corporation at a price much in excess of the cost thereof the property of said Baltimore Old Dominion Company and the property so conveyed to said Lewisohn, acquired all the capital stock of said Baltimore Old Dominion Company for the sum of less than
13 eight hundred thousand (800,000) dollars, and acquired without making any further payment, but for themselves as they claimed, all the property conveyed by said Lewisohn to the plaintiff, and promoted the plaintiff corporation and caused the same to be organized, and thereupon did sell to it the property of said Baltimore Old Dominion Company for one hundred thousand (100,000) shares of the capital stock of this corporation of the par value of twenty-five (25) dollars each, to wit, the aggregate par value of two million five hundred thousand (2,500,000) dollars, and also sold to it all the property conveyed to said Lewisohn for thirty thousand (30,000) shares of said stock of the aggregate par value of seven hundred and fifty thousand (750,000) dollars.

And for the purpose of providing the corporation so promoted and formed by them pursuant to and in execution of said plan and conspiracy, to wit, the plaintiff corporation, with working and other capital, said defendant and said Lewisohn, in further execution and performance of said plan and conspiracy, sold to the public twenty thousand (20,000) shares of the capital stock of said corporation so formed as aforesaid, to wit, this corporation. The shares of this corporation so issued in payment for the property sold to it as aforesaid were at the time of the fair market value of twenty-five (25) dollars each, and continued for a long time thereafter to be of such or greater value, and said defendant and said Lewisohn thus made for themselves and their associates in said syndicate from the sale of the property conveyed by the Baltimore Old Dominion Company a profit of more than one million five hundred thousand (1,500,000) dollars, and in addition thereto made for themselves alone on the property conveyed by said Lewisohn to the plaintiff a profit
14 of over seven hundred and fifty thousand (750,000) dollars.

Nineteenth. The subscribers to said Old Dominion Syndicate so-called were entitled by the terms of the agreement forming said Syndicate to receive each his proportionate share of two million (2,000,000) dollars in repayment of his original advance and as his share of profits. To effect this division each member of said Syndicate was permitted to apply for shares of this corporation at par to the amount so payable to him, and said shares were thereupon issued to such applicant in lieu of his proportionate share of said sum. All or substantially all the subscribers to said Syndicate availed themselves of this privilege, and so far as such privilege was not availed of, the money required was advanced by the defendant or others interested, and the corresponding number of shares was issued to the person so advancing the money. Of the one hundred thousand (100,000) shares of the capital stock of this corporation issued to Philip K. Dumaresq, as above set forth, upon and as con-

sideration for the conveyance of all the property of said Baltimore Old Dominion Company, as aforesaid eighty thousand (80,000) shares were thus distributed to and among the members of said Old Dominion Syndicate, so-called, or persons exercising the privilege of such members in the manner above set forth. And of this amount more than one-half was a profit made in the manner above described, and said Syndicate thereby made a profit of not less than one million (1,000,000) dollars. Of the eighty thousand (80,000) shares thus divided, the defendant received as his proportion four thousand (4000) shares, not less than one-half of which represented and was a profit to him as a member of said Syndicate from
15 the purchase of the stock of said Baltimore Old Dominion Company and the sale of its property as aforesaid, to this corporation, pursuant to the plan and conspiracy formed by said defendant and said Lewisohn, as hereinbefore set forth.

Twentieth. The defendant and said Leonard Lewisohn by agreement between themselves, and as the plaintiff is informed and believes, without the knowledge or assent of the other members of said Old Dominion Syndicate, took from the one hundred thousand (100,000) shares issued to Philip K. Dumaresq, as above set forth, ostensibly in payment of expenses and their own services in connection with the matter, the twenty thousand (20,000) shares remaining after dividing eighty thousand (80,000) shares among the members of said Syndicate, as above set forth. The expenses actually incurred by them did not exceed six thousand (6000) dollars. These twenty thousand (20,000) shares were divided between the defendant and said Lewisohn, said defendant receiving ten thousand nine hundred and forty (10,940) shares as his proportion thereof, and said Lewisohn nine thousand and sixty (9060) as his proportion thereof, and said thirty thousand (30,000) shares issued to said defendant and said Lewisohn for said conveyance of real estate by said Lewisohn were also divided between the defendant and said Lewisohn, said defendant receiving sixteen thousand four hundred and ten (16,410) shares thereof and said Lewisohn thirteen thousand five hundred and ninety (13,590) shares.

Twenty-first. Prior to the formation of said Old Dominion Syndicate, so-called, and prior to making the several agreements hereinbefore referred to for the acquisition of the stock of said
16 Baltimore Old Dominion Company, and for the acquisition by said Lewisohn of said several parcels of real estate in Arizona, conveyed to him by said Keyser, as aforesaid, said defendant and said Lewisohn had formed the plan and intention of organizing a corporation to acquire the property of said Baltimore Old Dominion Company and to acquire said several parcels of real estate; and had formed the plan and intention of selling said property and said real estate to such new corporation at a large advance in price and of thereby securing and obtaining for themselves and such persons as they might associate with them a large profit from such sale to said corporation so to be formed, and of selling to the public a sufficient number of shares in the corporation so formed to provide said corporation with a working capital. And said defendant and

said Lewisohn formed said Old Dominion Syndicate, so-called, and purchased said stock of said Baltimore Old Dominion Company and said real estate conveyed to said Lewisohn, as aforesaid, for the purpose and with the intent of carrying out the prior plan and intention so formed by them as aforesaid, and of selling the property of said Baltimore Old Dominion Company and the property so conveyed to said Lewisohn, to the plaintiff corporation when the same should be formed, at a large advance in price; and said defendant and said Lewisohn caused the plaintiff corporation to be organized and to acquire the property of said Baltimore Old Dominion Company and to acquire the real estate conveyed by said Keyser to said Lewisohn, and caused said corporation to offer for sale and to sell to the public sufficient shares, to wit, twenty thousand (20,000) shares to provide it with working and other capital, in the manner aforesaid in further execution and performance of said plan
17 and intention. When said offer was made by said Baltimore Old Dominion Company to the plaintiff corporation, and when said proposition was made by said Lewisohn to the plaintiff corporation, and when said offer and proposition were accepted, said defendant and said Lewisohn were in absolute control of the plaintiff corporation through the ownership by them and their associates of all stock in said plaintiff corporation then outstanding, and through the selection of a board of directors and other officers chosen by them and selected for the purpose of enabling them to carry out said plan, and consisting of themselves, their employees, and associates, all of whom were expressly chosen for the purpose of carrying out said plan and intention and had expressly undertaken to do so; and said offer of said Baltimore Old Dominion Company and said proposition of said Lewisohn were accepted by the plaintiff corporation through its board of directors, as above set forth, by the direction of said defendant and said Lewisohn, and the other directors in acting thereon acted solely at the direction of and pursuant to previous agreement with said defendant and said Lewisohn, and for the express purpose of carrying out the said plan and intention of said defendant and said Lewisohn, and all of said action was taken and was intended by the individuals who took part therein to carry out said plan and intention and to enable said defendant and said Lewisohn and such persons as they had associated with them, to make a large profit by the sale of said property of the Baltimore Old Dominion Company and of said real estate to the plaintiff corporation at a price greatly in excess of the cost to said defendant and said Lewisohn and their associates of all the stock of said Baltimore Old Dominion Company and of said real estate. And when said
18 twenty thousand (20,000) shares of stock were offered to and were sold to the public, as above set forth, said defendant and said Lewisohn were in absolute control of the plaintiff corporation, as aforesaid and said shares were so offered for sale and sold to carry out said plan and conspiracy of said defendant and said Lewisohn aforesaid.

Twenty-second. From July 11, 1895, when said purchase in behalf of the plaintiff corporation of the property of said Baltimore

Old Dominion Company and of said real estate from said Lewisohn was consummated, as above set forth, until April 4, 1902, the defendant was continuously the president and chief executive officer of the plaintiff corporation: throughout said period the board of directors of the plaintiff corporation was continuously composed of persons selected by the defendant and said Leonard Lewisohn, and at all times until April 4, 1902, a large majority of the persons so acting as directors were personal friends of the defendant and had been interested with the defendant in the transactions above set forth, and had received some share in the profits thereof, and the remaining directors took no active part in the management of the plaintiff corporation, and were ignorant of the facts hereinbefore set forth. No disclosure was at any time made to any of the subscribers for or to any purchasers of the capital stock of the plaintiff corporation not disposed of to the defendant and his associates, or to any purchasers thereof from them or any of them of the profit made by the defendant as above set forth as promoter of the plaintiff corporation or of any part thereof, and no disclosure was made to those persons other than the defendant and said Lewisohn who shared in the distribution of the eighty thousand (80,000)
19 shares of stock distributed to the members of said Old Dominion Syndicate of the profit made by said defendant and said Lewisohn in the division between them of said additional twenty thousand (20,000) shares derived from the sale of the property formerly held by the Baltimore Old Dominion Company or of the thirty thousand (30,000) shares derived from the sale of the property conveyed by said Lewisohn as above set forth, in the proportion of twenty-seven thousand three hundred and fifty (27,350) to the defendant and twenty-two thousand six hundred and fifty (22,650) to said Lewisohn, and this plaintiff had not until after April 4, 1902, any knowledge or information of any of the facts hereinbefore set forth as to the profit derived by said defendant in the manner above stated as promoter of this corporation, or of any profit having been derived by him, or by any other person interested or participating in the promotion and organization of this corporation, and immediately upon receiving information relating thereto investigated the same, and thereupon promptly made demand upon the defendant.

Twenty-third. Said Leonard Lewisohn died on March 5, 1902, and was at the time of his death a citizen and resident of the City, County, and State of New York. The executors of the estate of said Lewisohn, who are also citizens and residents of said City, County and State, have been duly appointed by the courts of said state, but no executors or legal representatives of said Lewisohn have been appointed or are within this Commonwealth, and there is no property within this Commonwealth belonging to said estate which could be reached by any process, and it is impossible to get service within this Commonwealth upon the executors of said Leonard Lewisohn.

20 Twenty-fourth. The property conveyed to the plaintiff by the Baltimore Old Dominion Company, as above set forth,

consists mainly of the copper mine which was then and ever since has been in active operation, and from which large amounts of ore have since been taken, and upon which large expenditures have been made in the development and establishmnt of the necessary plant. The property conveyed to the plaintiff by Leonard Lewisohn, as above stated, consists merely of mining claims and a parcel of land for a mill site, all of which property has since said conveyance remained undeveloped and is now in substantially the same condition that it was in at the time of the conveyance by said Lewisohn to the plaintiff.

Twenty-fifth. The plaintiff has rescinded the ostensible sale and conveyance to it of said parcels of real estate conveyed by said Leonard Lewisohn as aforesaid, and will, by appropriate proceedings, seek to recover the consideration ostensibly paid therefor, to-wit, said thirty thousand (30,000) shares conveyed to the defendants and said Leonard Lewisohn, but does not now seek any relief in respect thereto. The plaintiff says, however, that it is entitled by reason of the facts hereinbefore set forth, to require the defendant to account for all shares of its stock issued to said Philip K. Dumaresq at the request and direction of said Baltimore Old Dominion Company, and as the consideration for said transfer from it to this defendant which were received by the defendant or said Lewisohn or any other person or persons as profits arising from the transaction hereinbefore set forth.

Wherefore the plaintiff prays:

21 1. That said defendant be required to account to the plaintiff for all shares of stock in the plaintiff corporation other than the thirty thousand (30,000) shares issued to him and said Lewisohn ostensibly as consideration for the conveyance by said Lewisohn of said parcels of real estate, to wit, for all of said one hundred thousand (100,000) shares of stock originally issued to said Philip K. Dumaresq as hereinbefore set forth, which were received by said defendant or by said Lewisohn or by any other person or persons as profit in the transaction set forth in the foregoing bill of complaint in connection with the promotion and organization of the plaintiff corporation.

2. In the alternative that the damages suffered by the plaintiff corporation from the acts of the defendant above complained of, other than the sale to the plaintiff of said parcels of real estate conveyed to it by said Lewisohn, be ascertained, and that the defendant be ordered to pay to the plaintiff the amount so ascertained.

3. For such other relief as to this Honorable Court shall seem meet.

By Their Solicitors, BRANDEIS, DUNBAR & NUTTER.

LOUIS D. BRANDEIS,
WILLIAM H. DUNBAR,
Of Counsel.

22 A.

To the Old Dominion Copper Mining & Smelting Company, a Corporation Organized and Existing Under the Laws of the State of New Jersey:

The Old Dominion Copper Company of Baltimore City, a corporation organized and existing under the laws of the State of Maryland being the owner of certain mines and mining properties at Globe in the Territory of Arizona described in the annexed Schedule and of machinery, lumber, wood, tools, implements and other personal property for use for and in connection with the operation and maintenance thereof hereby makes the following proposition. To convey, assign and transfer all its property, both real and personal of every kind and nature whatsoever and wheresoever situated by good and sufficient deeds and instruments properly executed so as to confer absolute title thereto to the Old Dominion Copper Mining and Smelting Company upon receiving from said Company one Hundred thousand shares of its capital stock to be issued to said Old Dominion Copper Company or to its nominees.

It being understood that the Old Dominion Copper Mining and Smelting Company shall assume all obligations of The Old Dominion Copper Company of Baltimore City incurred since the first day of June 1895, and shall be entitled to all earnings and profits of said Company since that date.

July eleventh 1895.

A. S. BIGELOW, *President.*

A. W. EVARTS, *Secretary.*

Schedule.

First. The Globe Mine, patented by the United States Government to B. W. Reagan on the 18th day of October 1881, by patent recorded in the office of the Recorder of Pinal County, Territory of Arizona on the 19th day of November 1881, to which record reference is made for a fuller description of said Mine.

Second. The Globe Ledge Mine, patented by the United States Government to Benjamin W. Reagan on the eighteenth day of October 1881, by patent recorded in the office of the Recorder of Pinal County, Territory of Arizona on the nineteenth day of November 1881, to which record reference is made for a fuller description of said Mine.

Third. The Copper Jack Mill Site of which the location is recorded in the office of the Recorder of Gila County Arizona in Book 2 of Records of Mines at page 311, and to which record reference is hereby made for a fuller description of said Mill Site, and upon which the Smelting Works, formerly owned by the Old Dominion Copper Mining Co. are situated.

Fourth. The Globe Mill Site, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona in Book 2 of Records of Mines at page 311, to which record reference is hereby made for a fuller description of said Mill Site.

Fifth. The Globe Ledge Mill Site, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona in Book 2 of Records of Mines at page 310, to which record reference is hereby made for a description of said Mill Site.

23 A. (Continued.)

Sixth. The South-east Globe Mine, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona in Book 2 of Records of Mines at page 312, and reference is hereby made to said records for a fuller description of said Mine.

Seventh. All of the certain Mining claim known as the Interloper in Globe District Records on pages 116 and 117 in Book 3, reference to which will more fully show, being the same property conveyed to William Keyser by Thomas H. Mason, by deed bearing date January 3rd, 1887 and recorded at page 586, Book 2, record of deeds to Mines Gila County, Arizona Territory.

Eighth. The Fraction Mine of which the location notice is recorded in the office of the Recorder of Gila County, Arizona in Book 2 of Records of Mines at page 569, to which record reference is hereby made for a fuller description of said mine.

Ninth. The Alice Mine or lode, located October 10th, 1875 by A. R. Hammond and J. W. Reed and notice of location recorded in Book 1, page 131, Globe District Mining Records (now a part of the Records of Gila County) and relocated February 28th 1879, and notice of location recorded in Book 5, Globe District Mining Records (now a part of the Records of Gila County) on pages 184 and 185, said Mine or Lode being more particularly described in the last mentioned notice of location, as follows to wit:—Commencing at this monument of stones in a gulch, being the centre of South west end of claim, and upon which this notice is posted, thence South east 300 feet to a monument of stones, thence North east 1400 feet to a monument of stones, thence north west 300 feet to a monument of stones, being the centre of the North east end of claim, thence North west 300 feet to a monument of stones thence South west 1400 feet to a monument of stones, under a tree, thence South east 300 feet to the place of beginning, being the same mining claim conveyed to Michael H. Simpson, deceased, by deed of the Globe City Mining Company dated July 1st, 1884, and recorded with Gila County Deeds to Mines Book 2 page 227 et seq.

Tenth. The Mining Claim called and known as the Hypatia Mine, situated, lying and being in Globe Mining District, Gila County, Territory of Arizona and more particularly described in the notice of location recorded at page 66, Book 2, Records of Mines, Gila County Records, to which record reference is made for a more definite description of said Mine. Said Mine was formerly known as the South west Alice Mine, being the same mining claim conveyed to said Michael H. Simpson, lately deceased, by deed of William H. Cook, dated November 18th 1884, and recorded with Gila County Deeds, Book 2, page 305.

24 **B.**

To the Old Dominion Copper Mining and Smelting Company:

I hereby offer to convey the following described property now owned and held by me upon receiving thirty thousand shares of the capital stock of the Old Dominion Copper Mining and Smelting Company to be issued to me or to my nominees.

1st. The Old Dominion Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1883, in the United States Land Office at Tucson Arizona, Entry #267, Lot #45 situated in Globe Mining District, Gila County, Arizona.

2nd. The New York Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1883, in the United States Land Office at Tucson, Arizona, Entry #268, Lot #46 in Globe Mining District in Gila County, Arizona.

3rd. The Chicago Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1883, in the United States Land Office at Tucson, Arizona, Entry #269, Lot #51, in Globe Mining District, Gila County, Arizona.

4th. The Keystone Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1885, in the United States Land Office at Tucson, Arizona, Entry #384, Lot #54 in Globe Mining District, Gila County, Arizona.

5th. A lot or parcel of land situated near the Bloody Tanks and deeded by E. A. Saxe to the Old Dominion Copper Mining Company, Deed recorded in Book 1 of Deeds to Real Estate at page 126 and 127 in the office of the Recorder of Gila County, Arizona and reference is hereby made to said record for a fuller description of said parcel of land.

New York, July 11, 1895.

LEONARD LEWISOHN.

Please issue said 30,000 shares of stock to Mr. A. S. Bigelow and myself.

LEONARD LEWISOHN.

25 This Bill was filed and entered in this Court on the seventh day of October, A. D. 1902, and thereupon a writ of summons and attachment was issued, returnable at the Rules holden at Boston aforesaid on the first Monday of November then next ensuing, which said writ was returned with acceptance of service by the defendant endorsed thereupon by his attorney, Alfred Hemenway, Esquire.

And on the second day of December A. D. 1902, the defendant filed his answer, the same being in the words following, to wit:

Defendant's Answer.

1. The defendant admits the allegations contained in the first, second, twenty-third and twenty-fourth paragraphs of the plaintiff's bill, but avers that the title alleged in the second paragraph to have

been held by William Keyser was held by him in trust for the Baltimore Old Dominion Company. The defendant admits the allegations contained in paragraphs eight, nine, ten, twelve, thirteen, fourteen and sixteen of the bill, subject to the qualifications stated in paragraph seven of this answer.

2. The defendant denies the allegations contained in paragraphs three, four, five, six, seven, eleven, fifteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two and twenty-five of the bill, except as to such matters and things set out in said allegations as are hereinafter specifically admitted.

3. On April 30, 1895, J. Morris Meredith procured from one of the executors of the will of Michael H. Simpson an option to himself and his assigns for the purchase of 17,857 shares of the capital stock of the Baltimore Old Dominion Company belonging to the estate of said Michael F. Simpson. This option was superseded by a contract executed May 4, 1895 by and between said Meredith and all the executors of said will. By the terms of this contract Mere-
26 dith was given the right in consideration of $2000 paid by him to the executors, to purchase said 17,857 shares of stock from said executors on or before May 28, 1895, for $40 a share, or $714,280 in all, payable $100,000 in cash and the balance in satisfactory notes of thirty, sixty and ninety days, bearing interest at the rate of five per cent per annum, the shares of stock to be delivered indorsed in blank to the Old Colony Trust Company in trust to hold as collateral security for the payment of the notes, and, upon their payment, to deliver to said Meredith or his assigns. It was stipulated that the surplus assets of the company, consisting of ingot copper, pig copper, and notes and bills receivable should be paid over to said executors and to William Keyser who owned the remaining shares of the capital stock of the company, and that all debts of the company should be met by said executors. Said Meredith agreed that upon notice and tender he would purchase the shares of stock owned by said Keyser at the same pro rata price and upon the same general terms and conditions as above set forth. The contract ran to Meredith and his assigns. Upon its execution it was sold and assigned by said Meredith to Leonard Lewisohn.

4. Thereafterwards, but prior to May 24, 1895, said Lewisohn agreed to give the defendant one-half of his interest under said contract, and the defendant agreed with said Lewisohn to furnish one-half of the purchase price provided for by said contract. Subsequently it was arranged between them that as to the Keyser stock, the defendant's interest should be two-thirds, and Lewisohn's interest one-third.

On May 24, 1895, a syndicate called the Old Dominion Syndicate, and consisting of the defendant, said Lewisohn and others, was formed as a pool for purposes to be determined and carried out by the defend-
ant and said Lewisohn, in the exercise of their own discretion
27 exclusively, after their acquisition of the shares of the capital stock of the Baltimore Old Dominion Company to be purchased by them from the Simpson Estate and from William Keyser. It was agreed that said Lewisohn and the defendant should purchase

and pay for said shares as aforesaid and in their own names hold and deal with the same and with the property of said company as to them should seem best; and that their associates in the syndicate should receive so much only of the profit realized in the enterprise as the defendant and said Lewisohn might deem it proper to distribute among them, and that the remaining profit should be retained by said Lewisohn and the defendant to their own use. The members of the syndicate agreed to pay into the pool stated sums upon the terms aforesaid, and to pay such sums to the defendant and Lewisohn as follows: Fourteen per cent May 27, 1895; twenty-eight and two thirds per cent July 26, 1895; twenty-eight and two thirds per cent August 26, 1895; twenty-eight and two-thirds per cent Sept. 24, 1895, with interest at the rate of five per cent. Said payments were duly met as they severally became due.

On May 28, 1895, the defendant and said Lewisohn exercised the option conferred by the aforesaid contract with the executors of the will of Michael Simpson, paying to said executors $100,000, which they furnished in equal shares from their own moneys, and delivering notes made by said Lewisohn and indorsed by the defendant for $614,280 payable in 30, 60 and 90 days, with interest at the rate of five per cent per annum; and said executors delivered to the Old Colony Trust Company the said 17,857 shares of stock, indorsed in blank, to be held by said company upon the trust aforesaid.

5. On June 10, 1895, William Keyser agreed to sell his
28 shares of the capital stock of the Baltimore Old Dominion Company, to wit, 7,143 shares, to said Lewisohn for $40 per share or $285,720 in all, and upon the same general conditions set out in the aforesaid contract between Meredith and the executors of the Simpson will; and thereupon notes for said amount of $285,720 made by said Lewisohn and indorsed by the defendant were delivered to said Keyser, and said Keyser delivered the shares of stock indorsed in blank, to the Old Colony Trust Company to hold as collateral security for the payment of said notes, and to turn over to the defendant and said Lewisohn when said notes should be paid.

6. On or about June 20, 1895, the notes which had been executed by said Lewisohn and the defendant to the executors of the will of Michael Simpson and to William Keyser as aforesaid were paid by said Lewisohn, and on the same day a meeting of the Baltimore Old Dominion Company was held at which all the shares of the capital stock were transferred to said Lewisohn and the defendant, and a new board of directors was chosen, consisting of said Lewisohn, the defendant, William Keyser, P. Brent Keyser, George A. Pope; and the defendant was chosen president and Allen W. Evarts secretary. The mines of said company had been worked by the company at a large profit for many years. The defendant and said Lewisohn upon acquiring the shares of stock of the company continued the operation of the mines at a profit until the same were conveyed to the plaintiff corporation. In addition to the purchase price paid for the shares of stock of the Baltimore Old Dominion Company, the defendant and said Lewisohn paid out large sums of money for necessary expenses incurred by them in the transactions herein set out.

7. On or about July 8, 1895, the plaintiff corporation was
29 organized, and thereafterward the property of the Baltimore Old Dominion Company was conveyed to the plaintiff corporation and paid for by it by the issue of one hundred thousand shares of its capital stock, as set out in paragraphs 8, 9, 10, 12, 13, 14 and 16 of the bill. The defendant admits the allegations of said paragraphs, saving the allegations as to the conspiracy, purpose and plan therein set forth, and the allegations as to the selection, nomination and employment by the defendant of attorneys, incorporators, directors and officers of the plaintiff corporation, and as to instructions, orders and directions by the defendant to said attorneys, incorporators, directors and officers, as to the manner in which said directors and officers, became shareholders in order that they might be qualified to act as directors and officers, and as to their actual non-interest, which he denies.

8. The one hundred thousand shares of the capital stock of the plaintiff corporation issued by it to Philip K. Dumaresq as the nominee of the Baltimore Old Dominion Company, on or about Sept. 18, 1895, in payment for the conveyance of property made to it by the Baltimore Old Dominion Company, as alleged in paragraph sixteen of the bill, were tranferred by said Dumaresq to the defendant and said Lewisohn, and subsequently, to wit, on or about Sept. 24, 1895, the defendant and said Lewisohn, upon payment to them of the last instalment payable under the syndicate agreement hereinbefore set out, distributed said shares among the members of the syndicate in proportion to the respective interests of such members, except in the case of a few members who elected to take the money value of the shares, such money value being paid to them by the defendant and said Lewisohn. Said shares were of the fair market value of twenty-five dollars each at the time when they were issued
30 and transferred as aforesaid. The defendant admits that the plaintiff corporation was formed for the purpose of acquiring and working the mines of the Baltimore Old Dominion Company, but the defendant avers that in the transactions relative to the purchase of the shares of stock of the Baltimore Old Dominion Company, neither he nor said Lewisohn acted or was bound to act in behalf of or for the benefit of the plaintiff corporation, but on the contrary that they acted and had the right to act solely for themselves; that they acquired said shares of stock with their own moneys prior to the time when they contemplated or decided upon the formation of the plaintiff corporation, and under such circumstances, as herein stated, that the plaintiff corporation is not entitled to claim the benefit of their purchase or their profit. No steps were taken toward the promotion or formation of the plaintiff corporation until subsequent to the purchase of all said shares of stock and payment therefor in full by the defendant and said Lewisohn as aforesaid. The associates of said Lewisohn and the defendant in the syndicate acquired their interest under said syndicate agreement prior to the time when the formation of the plaintiff corporation was first contemplated, and made full payment out of their own moneys for their interest before any of the shares of the capital stock of the plaintiff corporation came into their hands.

9. At the time when the plaintiff corporation made its purchase of the mining properties from the Baltimore Old Dominion Company, as hereinbefore stated, and of the mines and mining
31 claims upon said Lewisohn, as hereinafter in paragraph ten, the defendant and said Lewisohn and their associates in the syndicate were the only shareholders of the plaintiff corporation; and all said shareholders had full knowledge of the facts relative to the purchase by the defendant and said Lewisohn of the shares of the capital stock of the Baltimore Old Dominion Company and of the mines and mining claims hereinafter referred to in paragraph ten, and the price paid therefor, and also of the facts in connection with the formation and organization of the plaintiff corporation, and the purchase by it of the property of the Baltimore Old Dominion Company and of said mines and mining claims. The authorized capital of the plaintiff corporation was $3,750,000 divided into 150,000 shares of $25. each. By the terms of the contracts of purchase and sale hereinbefore and hereinafter referred to, 100,000 shares were to be issued to the Baltimore Old Dominion Company or its nominees, and 30,000 shares to Lewisohn and his nominees. It was determined to issue the remaining 20,000 shares at par, in order to provide a working capital; but it was never contemplated that they should be offered to or taken by the public, and no prospectus was issued. A subscription paper was opened, not to the public, but exclusively to members of the syndicate by whom it was expected that all said shares would be taken. The defendant and said Lewisohn stood ready to take any shares not taken by their associates in the syndicate. In fact, the said shares were subscribed for and taken by members of the syndicate, with the exception of a few shares which certain friends of such members were allowed to take wholly on their own solicitation. The defendant cannot now state whether he did or did not disclose to the
32 few persons, not members of the syndicate, who took shares as aforesaid, the facts as to the prior purchase of the stock of the Baltimore Old Dominion Company by himself and said Lewisohn, and the price paid by them therefor, or the facts as to the interest of the syndicate hereinbefore set out. But he avers that if such persons made inquiry of him he did disclose the facts to them fairly, fully and without concealment. He further avers that, if in the absence of inquiry he omitted to disclose any facts, he had no intention thereby to conceal such facts, but believed that said persons had full information from their friends in the syndicate through whom, and not by reason of any invitation on his part or on the part of said Lewisohn or on the part of the plaintiff corporation, they became subscribers. And he denies that said persons did not have knowledge of the facts relative to the transactions herein set out. The defendant avers that he and the said Lewisohn acted in good faith, that they consulted competent counsel, to wit, the firm of Evarts, Beaman and Choate, of the City of New York, as to all the matters and things herein set out before taking action relative thereto, that they took no action not passed upon or recommended by said counsel, and that they were

advised by said counsel that their action was in all respects proper and legal. The defendant avers that he believed at and subsequent to the time when the purchase by the plaintiff corporation from the Baltimore Old Dominion Company and from said Lewisohn, set out in the bill was made, and now believes, that such purchase, under the conditions and prospects which then existed, was advantageous to the corporation and at a fair price. And he denies that he secretly or otherwise received any profit in the transactions herein set forth to which he was not justly and legally entitled.

10. As to the mines and mining claims known as the Old
33 Dominion Mine, the New York Mine, the Chicago Mine, the Keystone Mine, and a certain parcel of land near the Bloody Tanks, so called, in Arizona, referred to in the plaintiff's bill, but excepted from the matters and things concerning which relief is sought in and by said bill, the defendant avers the facts which he is advised are material to this cause to be as follows:

11. At and prior to the time when the defendant and said Lewisohn exercised the option to purchase the shares of stock held by the Simpson Estate, they were not aware that the Baltimore Old Dominion Company was the beneficial owner of said mines and mining claims and land, but they learned that fact when negotiating for the purchase of the shares of stock from William Keyser, hereinbefore set out, and insisted that said mines and mining claims should follow the ownership of the stock, and thereupon said Keyser and the executors of the will of Michael Simpson agreed with them that as a part of the contracts for the sale of the shares of stock owned by them respectively, and as a part of the consideration for the purchase of said shares, said mines and mining claims and land should be conveyed by said Keyser to said Lewisohn upon payment of the notes given in accordance with the requirements of said contracts. And it was agreed between said Lewisohn and the defendant that said Lewisohn should hold the title to said mines and mining rights and land as property acquired under the aforesaid contracts, to be dealt with by them according to the terms of their agreement with the syndicate hereinbefore set out. Upon payment of the notes given by the defendant and said Lewisohn to Keyser and to the Simpson Estate, to wit, on or about June 20, 1895, said mines and mining claims and land were conveyed by said Keyser to said Lewisohn. The defendant avers that
34 said mines and mining claims and land were purchased by himself and by said Lewisohn as aforesaid, and were paid for by them out of their own moneys before any steps were taken toward the promotion or formation of the plaintiff corporation; that they made and had the right to make the purchase for themselves, and that the plaintiff corporation is not entitled to claim the benefit of the purchase or their profit.

12. On the same day and at the same time that the property, the title to which stood in the name of the Baltimore Old Dominion Company, was conveyed by said company to the plaintiff corporation, as hereinbefore set out, said Lewisohn conveyed said mines and mining claims and land to the plaintiff corporation. As the

purchase price for said conveyance, the Baltimore Old Dominion Company received one hundred thousand shares of the capital stock of the plaintiff corporation issued to its nominee Philip K. Dumaresq, and said Lewisohn received thirty thousand shares of the capital stock of the plaintiff corporation issued to himself and to his nominee the defendant. In form, the transaction was separable as to the property held by the company and the property held by Lewisohn, but in reality the contract for the purchase and sale of all said property was an entire contract for the purchase and sale of said property as a whole for an entire price, to wit, one hundred and thirty thousand shares of the capital stock of the plaintiff corporation. The transaction, while an entire transaction in fact, was made divisible in form by advice of counsel for the purposes of convenience.

13. And the defendant, in addition to the foregoing answer, avers that the cause of action, if any there may be, arising to the plaintiff corporation, on account or by reason of the several allegations and complaints in the bill contained, did not accrue within
35 six years before the said bill was filed; and that the plaintiff is guilty of laches and this allegation the defendant makes in bar of the bill, and prays that he may have the same benefit therefrom as if he had formerly pleaded the same.

ALFRED HEMENWAY,
Solicitor for the Defendant.

And on the twenty sixth day of said December, the plaintiff joined issue upon the defendant's answer.

And on the thirteenth day of November, A. D. 1903, the defendant filed a motion to amend his answer, which said motion was allowed, the same being in the words following, to wit:

Defendant's Motion to Amend Answer.

And now comes the defendant and moves to amend his answer by striking out from the ninth paragraph thereof that portion beginning with the word "By" in the thirteenth line on page seven, and ending with the word "out" in the thirteenth line on page eighth, and substituting therefor the following:

The defendant says that at the time when the plaintiff corporation purchased the property standing in the name of the Baltimore Old Dominion Mining Company and the mines and mining claims and land as hereinbefore and hereinafter set forth, it was agreed between the parties to such purchase and sale, as a part of the transaction, that the defendant and said Lewisohn should not only cause the title to said property and mines, mining claims and land to be vested in the plaintiff corporation, but also furnish the plaintiff corporation with a working capital of five hundred thousand dollars in cash, and that the plaintiff corporation should issue to them or their nominees its entire capital stock, to wit, one hundred
36 and fifty thousand shares of the par value of twenty-five dollars each. And the defendant says that the plaintiff cor-

poration, in pursuance of said agreement, upon the conveyance of said property, mines, mining claims and land to it, issued all of its said shares to the following named persons: the defendant and said Lewisohn, and Philip K. Dumaresq and Thomas Nelson, as agents and nominees of the defendants and said Lewisohn, that is to say, one hundred thousand shares to said Dumaresq nominally on account of the property standing in the name of the Baltimore Old Dominion Mining Company, thirty thousand shares to the defendant and said Lewisohn nominally on account of the mines, mining claims and land, and twenty thousand shares to said Nelson nominally on account of the working capital of five hundred thousand dollars to be furnished by the defendant and said Lewisohn; that said persons, as holders and owners of the entire capital stock of the plaintiff corporation, procured and consented to the issue of said entire capital stock to themselves, as performance by the plaintiff corporation of its part of the aforesaid agreement; that the defendant and said Lewisohn fully performed their part of said agreement; that subsequent shareholders acquired their shares, not from the plaintiff corporation, but from the then owners of said shares, namely, the defendant and said Lewisohn, either directly or through their nominees, the said Nelson and Dumaresq; and that none of said shares were offered to the public, by prospectus or otherwise, by or in behalf of the corporation, but were disposed of to various persons by the defendant and said Lewisohn under contracts of subscription which they took and received wholly on their own account, as the owners of said shares; wherefore the plaintiff corporation is not entitled to complain of the transaction set out in the bill, said transactions having been performed at the instance and with the consent of the holders of its entire capital stock.

37 The defendant further moves to amend his answer by adding after the word "corporation" in the seventeenth line of paragraph 12 the following:

And as a part of the transaction, the defendant and said Lewisohn agreed to furnish the plaintiff corporation with a working capital of five hundred thousand dollars in cash, and received from the plaintiff corporation the remaining twenty thousand shares of its capital stock, issued to their nominee and agent Thomas Nelson. The defendant says that the agreement with the plaintiff corporation which was in fact made and carried out was an entire agreement, to wit, that said Lewisohn and the defendant, who owned all the shares of the capital stock of the Baltimore Old Dominion Company, and said mines and mining claims, and land should not only cause the title of the property standing in the name of said Company, and of said mines, mining claims and land to be vested in the plaintiff corporation, but also furnish the plaintiff corporation with a working capital of five hundred thousand dollars in cash, and that the plaintiff corporation should issue to them or their nominees its entire capital stock, to wit, one hundred and fifty thousand shares.

ALBERT S. BIGELOW,
By his Solicitor, ALFRED HEMENWAY.

And on the sixth day of November, A. D. 1907, the defendant filed his Substituted Answer, by leave of Court, the same being in the words following, to wit:

Defendant's Answer.

1. The defendant admits the allegations contained in the first, second, twenty-third and twenty-fourth paragraphs of the
38 plaintiff's bill, but avers that the title alleged in the second paragraph to have been held by William Keyser was held by him in trust for the Baltimore Old Dominion Company. The defendant admits the allegations contained in paragraphs eight, nine, ten, twelve, thirteen, fourteen and sixteen of the bill, subject to the qualifications stated in paragraph nineteen of this answer and except in so far as inconsistent with later matter set forth in this answer, in which case the allegations are denied.

2. The defendant denies the allegations contained in paragraphs three, four, five, six, seven, eleven, fifteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, and twenty-five of the bill, except as to such matters and things set out in said allegations as are hereinafter specifically admitted.

3. Further answering, the defendant says that on April 30, 1895, J. Morris Meredith procured from one of the executors of the will of Michael F. Simpson an option to himself and his assigns for the purchase of 17,857 shares of the capital stock of the Baltimore Old Dominion Company belonging to the estate of said Michael F. Simpson, said 17,857 shares being five-sevenths of the entire capital stock of said Baltimore Company. This option was superseded by a contract executed May 4, 1895, by and between said Meredith and all the executors of said will. By the terms of this contract Meredith was given the right in consideration of $2,000 paid by him to the executors to purchase said 17,857 shares of stock from said executors on or before May 28, 1895, for $40 a share, or $714,285 in all, payable $100,000 in cash and the balance in satisfactory notes of thirty, sixty and ninety days, bearing interest at the rate of five per cent. per annum, the shares of stock to be delivered endorsed in blank to the Old Colony Trust Company in trust to hold as collateral security for the payment of the notes, and upon their
39 payment to deliver to said Meredith or his assigns. It was stipulated that the surplus assets of the company, consisting of ingot copper, pig copper, and notes and bills receivable should be excepted and that the company should be free of debt. Said Meredith agreed that if required upon notice and tender he would purchase any or all of the remaining two-sevenths of the shares of stock of said Baltimore Company at the same pro rata price and upon the same general terms and conditions as above set forth. This contract ran to Meredith and his assigns, and after its execution it was sold and assigned by said Meredith to Leonard Lewisohn.

4. Thereafter, on or before May 15, 1895, said Lewisohn agreed to give the defendant one-half of his interest under said contract, and the defendant paid said Lewisohn $1000 as one-half the consider-

ation given for said contract, and agreed to take one-half interest in said contract and to furnish one-half of the purchase price provided for by said contract. At this time there was no contract, plan or understanding in regard to the acquisition of said remaining two-sevenths of said stock of said Baltimore Company other than a willingness to purchase the same in accordance with the terms of said contract between said Baltimore Company and said Meredith, as above set forth.

5. Thereafter the defendant and said Lewisohn, each having severally undertaken to provide one-half ($357,142.50) the consideration ($714,285) provided for in said contract, each made arrangements to provide for obtaining his share of said consideration. In this respect, however, there was no privity or understanding between the defendant and said Lewisohn, each making his own arrangements irrespective of the other, said arrangements in no wise affecting the relation of said Lewisohn and the defendant, and said Lewisohn and the defendant remaining the sole per-
40 sons holding said option or contract for said five-sevenths of said capital stock of said Baltimore Company.

The defendant accordingly entered into an arrangement with five other persons, whereby the defendant and said persons agreed to take and pay for the defendant's proportion of said 17,857 shares of the Baltimore Company, to-wit, 8928 shares, at the same price, to-wit, $40 per share, as provided in said contract or option of Meredith which had been assigned to said Lewisohn.

The terms of said arrangement are set forth in the following copy of the original agreement, but although said agreement is dated May 22, 1895, said arrangement had been made with said five other persons on or prior to May 16, 1895.

"Whereas A. S. Bigelow has contracted to purchase eighty-nine hundred and twenty-eight (8928) shares of the stock of the Old Dominion Copper Company, a Corporation organized under the laws of Maryland, and owning property in Arizona, at Forty Dollars ($40) per share, or thereabouts, the undersigned hereby agree to take the number of shares set opposite their respective names and pay for the same at the rate of Forty Dollars ($40) per share; the said stock to remain in the hands of A. S. Bigelow, and the management of the property to be left with him.

Payments to be made as follows:—

May 27th, 1895, fourteen per cent (14%)

July 26th 1895, Twenty-eight and two thirds per cent (28 2-3%) and interest at 5% from date of first payment.

August 25th, 1895, Twenty-eight and two thirds per cent (28 2-3%) and interest at 5% from date of first payment.

September 24, 1895, Twenty eight and two thirds per cent
41 (28 2-3%) and interest at 5% from date of first payment.

The conditions, covenants and agreements herein contained shall be binding on the substitutes, successors, heirs, representatives and assigns of the respective subscribers hereto.

In witness whereof we have hereunto set our hands and opposite thereto the amounts of our subscriptions respectively, this 22d day of May A. D., 1895:

Matthew Luce	$ 100,000
A. S. Bigelow	50,000
J. A. Coram	100,000
Henry M. Whitney	50,000
J. Morris Meredith	25,000
(in pencil)	
Thomas Nelson	32,142.50
(in pencil)	$357,142.50

6. By reason of the circumstances hereinafter set forth the parties to the said agreement were never called upon to fulfill the terms thereof, but it was the intention and understanding of the defendant that said Luce, Coram, Whitney, Meredith and Nelson should thereby become entitled to an interest with the defendant in the profits of said contract or option of said Meredith, and the defendant thereafter divided with said persons profits made by him, not only from his interest in said contract or option of said Meredith, but also profits made by him from the entire transaction.

7. On or about May 24, 1895, the defendant began to form a syndicate called the Old Dominion Syndicate as a means of reimbursing himself in part for moneys to be expended in the
42 fulfillment of said contract or option of said Meredith. This Syndicate was formed as a pool for purposes to be determined and carried out by the defendant in the exercise of his uncontrolled discretion, the terms of said syndicate subscription being set forth in several papers of the same tenor but different dates.

A copy of the form of said papers follows:

"We the undersigned propose to form a syndicate to be called the Old Dominion Syndicate.

And we hereby agree to pay to A. S. Bigelow the sums set against our respective names.

Subscriptions to this syndicate shall be payable as follows:

May 27, 1895, fourteen per cent (14 per cent).

July 26, 1895, twenty-eight and two thirds per cent (28 2-3 per cent) and interest at five per cent from date of first payment.

August 25, 1895, twenty-eight and two thirds per cent (28 2-3 per cent) and interest at five per cent from date of first payment.

September 24, 1895, twenty-eight and two thirds per cent (28 2-3 per cent) and interest at five per cent from date of first payment.

It is expressly agreed and understood that each subscriber hereto acts for himself alone and that the relation of partners shall not exist or be deemed to exist between the subscribers hereto by virtue hereof.

The conditions, covenants and agreements herein contained shall be binding on the substitutes, successors, heirs, representatives and assigns of the respective subscribers hereto.

In witness whereof we have hereunto set our hands and opposite thereto the amounts of our subscriptions respectively this
43 twenty-first day of May, A. D. 1895."

8. It was the intention, understanding and agreement of

all parties that said Lewisohn and the defendant, having purchased and paid for said shares as aforesaid and holding them in their own names, should deal with the same as to them should respectively seem best; and that the associates in the syndicate should receive so much only of the profit realized in the enterprise as the defendant might deem it fair and proper to distribute among them, and that the remaining profit should be retained by the defendant to his own use.

9. On or about May 28, 1895, the defendant and said Lewisohn exercised the option conferred by the aforesaid contract of Meredith with the executors of the will of Michael Simpson, paying to said executors $100,000, which they furnished in equal shares from their own moneys, and delivering notes made by said Lewisohn and endorsed by the defendant for $614,285, payable in thirty, sixty and ninety days, with interest at the rate of five per cent. per annum; and said executors delivered to the Old Colony Trust Company the said 17,857 shares of stock, endorsed in blank, to be held by said company upon the trust aforesaid.

10. On or about June 13, 1895, the owners of the remaining two-sevenths of the stock of said Baltimore Company, to-wit, William Keyser and others, agreed, in the name of Keyser, to sell their shares of the capital stock of the Baltimore Old Dominion Company, to-wit, 7143 shares, to said Lewisohn for $40 per share, or $285,715 in all, $40,000 in cash payable June 20, 1895 and the balance in notes then to be delivered, and upon the same general conditions set out in the aforesaid contract between Meredith and the executors
41 of the Simpson will.

11. It was also agreed between the defendant and Lewisohn that in said two-sevenths of the stock of said Baltimore Company the defendant should have an interest of two-thirds and said Lewisohn of one-third; so that the defendant's interest in the entire transaction was one-half of five-sevenths plus two-thirds of two-sevenths, or twenty-three forty-seconds, or 547-1000.

12. At and prior to the time when the defendant and said Lewisohn exercised the option to purchase the shares of stock held by the Simpson estate, they had no knowledge of the fact that the Baltimore Old Dominion Company was the beneficial owner of the mines, mining claims and lands known as the Old Dominion mines, the New York mine, the Chicago mine, the Keystone mine, and a certain parcel of land near the Bloody Tanks, so-called, in Arizona, being the mines, mining claims and land referred to in the plaintiff's bill. During the negotiation for the purchase of the shares of stock of the Baltimore Old Dominion Company held by William Keyser, they learned that although the legal title to said mines and mining claims stood in the name of said William Keyser, that the Baltimore Old Dominion Company was the beneficial owner of said mines, mining claims and land. Thereupon they insisted that said mines, mining claims and land should follow the ownership of the stock. The said Keyser and the executors of the will of Michael Simpson thereupon agreed that said mines, mining claims and land should be conveyed by said Keyser to said Lewisohn upon the payment of the notes

given in accordance with the requirements of said contracts for the purchase of the shares of stock of the Baltimore Old Dominion Company, hereinbefore referred to; and it was agreed between said Lewisohn and the defendant that said Lewisohn should hold, when conveyed to him, the title to said mines, mining claims and land
45 as property acquired under the aforesaid contracts.

13. After the said agreement for the purchase of said remaining two-sevenths of the shares of said Baltimore Company was concluded, and it was thereby determined that the total amount of money to be paid by said Lewisohn and the defendant was to be $1,000,000 in all, the said Old Dominion Syndicate was enlarged on the same terms as heretofore set forth.

14. On or about June 20, 1895, all the shares of the said Baltimore Company having been theretofore deposited in the Old Colony Trust Company in accordance with the terms of the said agreements with the executors of said Simpson and William Keyser, the cash payment to Keyser was made and the first notes to Keyser and the said executors were paid by said Lewisohn and the defendant. On the same date there was held in Baltimore a meeting of the Baltimore Old Dominion Company at which the control of said Company was transferred to said Lewisohn and the defendant; at the said meeting of the Baltimore Old Dominion Company a new board of directors being chosen consisting of said Lewisohn, the defendant, William Keyser, P. Brent Keyser and George A. Pope. The defendant was chosen president and Allen W. Evarts secretary.

15. The said mines of the said Baltimore Company had been worked by the Baltimore Company at a large profit for many years; and the defendant and said Lewisohn continued the operation of the mines of the said Baltimore Company under and through the said Baltimore Company until the plaintiff corporation was formed, the said mines and property were conveyed to it and it undertook the operation thereof. In addition to the purchase price paid for the shares of stock of the Baltimore Old Dominion Company, the defendant and said Lewisohn paid out large sums of money for operating expenses at the mines and for necessary expenses in-
46 curred by them in the transactions hereinbefore set forth, and expended a large amount of valuable time and service in regard to said transactions.

16. It was not until some time about July 1st, 1895, or thereafter, that the defendant and said Lewisohn formed any definite plan or intention for the ultimate disposition of said stock of said Baltimore Company, and not until long after said Lewisohn and the defendant, as purchasers, had paid for said stock to said executors of said Simpson and said Keyser, was the formation of a new corporation determined upon.

17. Thereafter said Lewisohn and the defendant consulted eminent counsel, to wit, Messrs. Evarts, Choate & Beaman of New York, who advised the formation of a New Jersey corporation. Said Lewisohn and the defendant informed counsel that they would convey or cause to be conveyed to such new corporation all the property of the said Baltimore Company, the said mining claims which said

Keyser had agreed to convey to said Lewisohn, and $500,000. for working capital; and in return said Lewisohn and the defendant were to have all the capital stock of said corporation. Said Lewisohn and the defendant thereafter determined that the new corporation should be capitalized at $3,750,000, divided into 150,000 shares of the par value of $25 each, and thereupon left the details of the organization of said corporation to their counsel.

18. The defendant avers that said stock and said mines, mining claims and land were purchased by himself and by said Lewisohn as aforesaid, and were paid for by them before any steps were taken towards the promotion or formation of the plaintiff corporation and before the defendant and said Lewisohn had formed the purpose, intent or plan of forming said corporation; that said stock and said mines, mining claims and land were rightfully purchased
47 by the said defendant and said Lewisohn as and for their own individual property, and that the plaintiff corporation is not entitled to claim the benefit or profit of such purchase.

19. On or about July 11th, 1895, the plaintiff corporation was organized. The defendant admits that the allegations as set forth in paragraphs 8, 9, 10, 12, 13, 14 and 16 of the plaintiff's bill contain a substantially correct statement of the facts and dates of the formation of the plaintiff corporation, but he denies all the allegations contained in said paragraphs as to conspiracy, purpose and plan therein set forth and the allegations as to the selection, nomination and employment by the defendant of attorneys, incorporators, directors and officers of the plaintiff corporation, and as to instructions, orders and directions by the defendant to said attorneys, incorporators, directors and officers; and as to the manner in which said directors and officers became shareholders in order that they might be qualified to act as directors and officers and as to their actual non-interest.

20. Thereafter it was agreed between the plaintiff corporation and the defendant and said Lewisohn that the defendant and said Lewisohn should convey or cause to be conveyed to the plaintiff corporation all the property of the Baltimore Old Dominion Company, including the mines, mining claims and land conveyed by said Keyser to said Lewisohn, and which then stood in the name of said Lewisohn, and should furnish the plaintiff corporation with a working capital of $500,000 in cash. That in consideration therefor the plaintiff corporation should issue to the defendant and said Lewisohn or their nominees and to the nominees of said Baltimore Company, of which said Lewisohn and the defendant owned the entire capital stock, its entire capital stock, to wit, 150,000 shares.

48 21. The transaction which thereafter took place, though in form separate, were in fact all in pursuance of the said agreement. In form the transactions were separable as to the property held by the Baltimore Old Dominion Company, the said mines, mining claims and lands held by Lewisohn, and the capital to be furnished by the said Lewisohn and the defendant; but really the contract for the purchase and sale of all said property and for the furnishing of said capital was an entire contract and for an entire

price, to wit, all the capital stock, or 150,000 shares, of the plaintiff corporation.

22. The said transactions which thereafter took place as above stated were the conveyance to the plaintiff corporation of the property of the Baltimore Old Dominion Company by said Baltimore Old Dominion Company, the conveyance by said Lewisohn of said mines, mining claims and land to the plaintiff corporation, the obligation and later fulfilment of said obligation by the defendant and said Lewisohn to furnish a working capital of $500,000 to said plaintiff corporation. Upon the conveyance of said property, mines, mining claims and land, and upon the undertaking of the defendant and said Lewisohn to furnish the said capital of $500,000, the plaintiff corporation issued all of its said shares, to wit, 150,000 shares, to the following named persons: the defendant and said Lewisohn, Philip K. Dumaresq, as the agent and nominee of said Baltimore Company, the total capital stock whereof was owned by said defendant and said Lewisohn, and Thomas Nelson, acting for the defendant, the syndicate managed by the defendant and said Lewisohn, that is to say, one hundred thousand shares to said Dumaresq nominally on account of the property standing in the name of the Baltimore Old Dominion Mining Company, thirty thousand shares to the defendant and said Lewisohn, nominally on ac-
49 count of the mines, mining claims and land, and twenty thousand shares to said Nelson, nominally on account of the working capital of $500,000 to be furnished by the defendant and said Lewisohn. And the defendant further says that said persons, as holders and owners of the entire capital stock of the plaintiff corporation, procured and consented to the issue of said entire capital stock to themselves, as performance by the plaintiff corporation of its part of the aforesaid agreement; that the defendant and said Lewisohn fully performed their part of said agreement; that subsequent shareholders acquired their shares, not from the plaintiff corporation but from the owners of said shares, namely, the defendant and said Lewisohn, either directly or through their agents, the said Nelson and Dumaresq; and that none of said shares were offered to the public, by prospectus or otherwise, by or in behalf of the corporation, but were disposed of to various persons by the defendant and said Lewisohn under contracts of subscriptions which they took and received wholly on their own account, as the owners of said shares.

23. Thereafter the defendant was solicited by many friends and acquaintances to allow them to purchase some of his shares of stock in the plaintiff corporation. In order to in part reimburse the defendant and said Lewisohn for the moneys paid by them for the purchase of the stock in the said Baltimore Company, and in order to assist said Lewisohn and the defendant in fulfilling their obligation of furnishing $500,000 to the plaintiff corporation, the defendant formed a list upon which were set down the offers to him to purchase his said stock.

24. It thereafter appeared that many of the persons who, by the Old Dominion Syndicate papers, had agreed to pay certain sums of

money to the defendant, desired in some way to take all
50 profit or reimbursement to which the defendant might determine them entitled in the form of stock in the plaintiff corporation, in lieu of money. It was moreover agreed between the defendant and said Lewisohn that said Lewisohn should take as part reimbursement for the moneys paid by him for the purchase of the stock of said Baltimore Company, stock in the plaintiff corporation.

25. Accordingly the defendant on July 19th sent a circular letter to the members of the Old Dominion Syndicate, including said Lewisohn, a copy of the form of said circular letter being as follows:

(*Letter of July* 19.)

"A number of the largest subscribers to the Old Dominion syndicate have requested that they be allowed to take shares in the new company at a par value of $25 in lieu of the money which they originally advanced and which was to be repaid to them from the proceeds of the new stock. As a subscriber to the syndicate, you are hereby informed that it has been decided to grant this request. If you wish to avail yourself of the opportunity, you must notify me in writing on or before August 1, 1895, after which date this option will positively expire.

(Signed) A. S. BIGELOW."

26. Nearly all of the members of the Old Dominion Syndicate notified the defendant that they desired to purchase his stock in the plaintiff corporation to the extent of the option afforded them by said letter of July 19th, and certain members of the syndicate also offered to buy from the defendant further shares of said stock at the rate of $25 per share, and certain other friends and acquaintances offered to buy still further shares of stock at the same rate.

51 27. The defendant determined to allot to the members of the Old Dominion Syndicate as their profit in the transaction 40,000 shares, and further determined to sell 60,000 shares of the stock owned by him and said Lewisohn in accordance with these several offers. Said offers in the aggregate were for 72,120 shares, were all addressed to the defendant personally, were from friends and acquaintances of the defendant, and neither the defendant nor anyone on his behalf or on the behalf of the corporation made any representation, misrepresentation or solicitation to obtain said offers and concealed nothing from anyone. Thereupon it was determined to accept said offers in part, and the defendant did so according to his personal and uncontrolled discretion, arbitrarily determining which of said offers he would accept, which he would reject, and which accept in part and reject in part.

28. It having been determined by the defendant to return to each syndicate member one share for each $25 subscribed to the defendant by the Old Dominion Syndicate paper, and for how many shares he would accept the offer of those persons offering new cash, whether said persons were originally members of the Old Dominion

Syndicate or otherwise, the defendant thereupon notified said persons appearing on the said "List of July 18" by sending to each circular letters of one of the following forms:

"Sears Building, Boston, Mass., *Aug.* 13, 1895.

Referring to your subscription to the stock of the Old Dominion Copper Mining and Smelting Company, you are hereby notified that (—) shares have been allotted to you at $25 a share. Notice will be sent in due course when payment for this should be made.

Besides this, you will receive — shares on your subscription of $— to the Old Dominion Syndicate, being the stock taken by you in accordance with circular of July 19th, 1895; and, of
52 course, in addition, the — shares to which you are entitled under your original subscription to the Old Dominion Syndicate.

In other words, on a further payment by you of $— you will be entitled to — shares of the stock of the Old Dominion Copper Mining and Smelting Company. When the stock is ready for delivery you will be notified.

A. S. BIGELOW."

To —— ——.

"Boston, Mass., *August* 23, 1895.

Referring to your subscription to the stock of the Old Dominion Copper Mining and Smelting Company, you are hereby notified that shares have been allotted to you at $25 a share. Notice will be sent in due course when payment for this should be made and also of the time when the stock will be ready for delivery.

(Signed) A. S. BIGELOW."

29. The defendant by this acceptance having obligated himself to deliver shares to those persons whose offer he had accepted, thereafter delivered said shares in accordance with this obligation.

30. The entire capital stock of the plaintiff corporation, to wit, 150,000 shares, was issued to the defendant, to said Lewi-ohn or to their nominees, and to persons having full and complete knowledge of all transactions entered into by the corporation and all matters in relation thereto or connected therewith, and each and every stockholder in the plaintiff corporation acquiesced in the transaction complained of or acquired his interest or share in said corporation
53 from some one or more of the persons who so acquiesced.

31. All the aforesaid transactions were done with the utmost publicity, full and truthful information being given to all persons making inquiry, and the account of said transactions appeared in the public press and in the columns of financial journals, before there was any contract completed between the defendant and the persons offering to buy his stock. Absolutely no misrepresentation of any kind was made by the defendant or by anyone connected with the corporation, and there was no concealment of any of said transactions or of anything in relation to them. There was absolutely no solicitation of purchasers for the defendant's stock in the

plaintiff corporation, and no stock was sold by the defendant or by the corporation except stock of the defendant's to persons who had requested the defendant personally to allow them to purchase said stock, and no contracts for the sale or purchase of stock were made except between the defendant individually and persons purchasing from them.

32. In return for the said 150,000 shares of the stock of the plaintiff corporation, the defendant and said Lewisohn gave the plaintiff corporation moneys and property purchased with their own money and for their own use, which moneys and property were and are, and which they then believed and still believe to be of far greater value than the par value of said 150,000 shares of the plaintiff corporation's stock. No shareholder paying $25 for his share or shares of stock has been in any wise deceived; he has received full value, and said stock has been and now is of far higher value than its par value.

33. The conveyance to the plaintiff of said mining claims was a part of the entire transaction, as above stated, and moreover was a part of a contract by the defendant and said Lewisohn to
54 convey or cause to be conveyed the property of said Baltimore Company and said mining claims as an entire transaction and contract and not severally; and for an entire price and not a several price; and neither said Lewisohn and the defendant nor the plaintiff corporation intended or was willing to separate said transactions or would have been willing to make or perform one part of said contract without the other. Said property of the Baltimore Company and said mining claims were and are and were believed and still are believed by the defendant to be of a fair value greatly in excess of the par value of the stock received therefor.

34. The stockholders of the plaintiff corporation have on September 18th, 1899, April 5, 1899, June 15th, 1899 and April 3d, 1901, ratified and acquiesced in all said transactions, and at none of those times, except perhaps the first, did the defendant and said Lewisohn or either of them control the said plaintiff corporation or the action of its stockholders.

35. The transactions, matters and contracts complained of in the plaintiff's bill took place and were made in the state of New York, by the laws whereof said transactions, matters and contracts are valid and cannot be complained of.

36. The defendant denies each and every allegation in the plaintiff's bill contained as fully and specifically as if each of said allegations was separately recited and denied, except in so far as said allegations have been herein specifically admitted.

37. And the defendant, in addition to the foregoing answer, avers that the cause of action, if any there may be, arising to the plaintiff corporation on account or by reason of the several allegations and complaints in the bill contained, did not accrue within six years before the said bill was filed and that the plaintiff is guilty of
55 laches; and this allegation the defendant makes in bar of the bill and prays that he may have the same benefit therefrom as if he had formally pleaded the same.

Wherefore the defendant prays that the plaintiff's bill may be dismissed with costs.

By his Solicitor, J. W. FARLEY.

Of Counsel:
ALFRED HEMENWAY.
EUGENE TREADWELL.

And on the eleventh day of said November, the plaintiff filed its amendment to its Bill of Complaint, which was allowed, the said amendment being in the words following, to wit:

Amendment to Bill of Complaint.

In the above entitled case the plaintiff amends the Bill of Complaint therein by striking out the Tenth paragraph thereof and substituting therefor the following:

Tenth. The defendant and said Leonard Lewisohn caused all the directors aforesaid, except said Montgomery, to assemble at the office in New York City of the firm of Lewisohn Brothers, of which firm said Leonard Lewisohn was a member, and all said directors except said Montgomery were present, and said Montgomery was absent, was not notified of said meeting, and did not waive notice thereof. Pursuant to instructions from the defendant, the resignation of said Montgomery as a director was presented to said other six persons and accepted, and the defendant was thereupon chosen by them a director in his place. Thereupon, pursuant to instructions from the defendant, the successive resignations of said Rowe as a
56 director, of said Welch as a director, of said Jesse Lewisohn as treasurer and as director, of said Evarts as president, and of said Riddlesdorffer as vice-president and as director were presented and duly accepted, and said Leonard Lewisohn, one Henry M. Whitney, one Thomas Nelson and one Joseph G. Ray were successively chosen directors by said persons present, and said Thomas Nelson was duly chosen treasurer and said defendant was duly chosen president of said corporation. Said defendant and said Leonard Lewisohn were present at said meeting, and upon their respective elections as directors took their places in said meeting, but said Whitney, said Nelson and said Ray were not present at said meeting, had no notice thereof, and did not waive notice thereof; and said meeting was not a legal meeting of the Board of Directors of the plaintiff corporation under and in accordance with the laws of the State of New Jersey, and the acts done at said meeting were not valid and binding acts of said corporation or of the Board of Directors thereof.

The plaintiff further amends the Bill of Complaint in the above entitled case by adding in the Sixteenth paragraph thereof, in the tenth line of said paragraph, after the word "called" the words "and held in Boston in the Commonwealth of Massachusetts."

By its Attorneys, BRANDEIS, DUNBAR & NUTTEN.

And thereafterwards on the fifth day of December, A. D. 1907, after having heard the parties and their evidence and the arguments of counsel, the following Report of Facts and Order for Decree was filed by the Court (this case and case numbered 8098 having been heard together upon the same evidence) to wit:

Report of Facts Found at the Hearing and Order for Decree.

At the request of counsel for the plaintiff, I file the fol-
57 lowing statement of facts found by me, and this report, although filed in only one case, is intended to be applied to both of them.

For some time prior to April 1, 1895, the Old Dominion Copper Company of Baltimore, Maryland, a corporation organized under the laws of Maryland and hereinafter called the Baltimore company, had been operating copper mines in Arizona. It had had a fair success, and had been paying dividends upon its stock, but to what amount did not appear. The defendant was largely interested in copper mining, and was the president of and interested in several mining companies. Leonard Lewisohn, of New York, both individually and as a member of the firm of Lewisohn Brothers and of a corporation of the same name, was also largely interested in copper. At some time in April, 1895, they formed a plan or device to secure control of the stock of the Baltimore company and to cause its property to be transferred to a new corporation which they should procure to be organized with a much larger capital, for a much increased price. The capital stock of the Baltimore company was $500,000, divided into 25,000 shares, of the par value of $20 each; and 5-7 of this stock, or 17,857 shares, were held by the executors of Michael H. Simpson, deceased, and 2-7, or 7,143 shares, were held by one William Keyser of Baltimore, and others represented by him. The defendant and said Lewisohn procured J. M. Meredith, a real estate broker of Boston, to negotiate with the executors of Simpson, and he did so. The executors were unwilling to deal with the defendant or to make any sale to him; but Meredith finally did obtain from them a written agreement, signed by one of them, dated April 30, 1895, for the sale to himself of their stock at the price of forty dollars a share upon the terms therein stated, for which Meredith paid
58 them down the sum of two thousand dollars. This agreement he forwarded to Lewisohn. Its form and provisions were unsatisfactory to Lewisohn's attorneys, and a new agreement or option was substituted for it, dated May 4, 1895, of which a copy is annexed, marked "A." Lewisohn repaid the $2000 to Meredith, and Meredith assigned the agreement to him. The defendant then repaid $1000 of this sum to Lewisohn. Afterwards, on June 13, 1895, a somewhat similar agreement was made by Lewisohn with William Keyser, for the purchase of the remaining 7,143 shares of the stock of the Baltimore company. A copy of this agreement is annexed, marked "B." There are mentioned also in this agreement certain other mining properties in Arizona, hereinafter called the outside properties. The legal title to these was held by William

Keyser, but really in trust, one-half for the Baltimore company and one-half to Simpson; but Keyser agreed, and all other parties in interest consented, that these should go with the stock of the Baltimore company, without any further consideration being paid.

The defendant, by the understanding between himself and Lewisohn, was to pay for and have one-half of the Simpson stock and two-thirds of the Keyser stock; Lewisohn was to take and pay for the rest; and they arranged to take, pay for and hold the whole, including both stock and outside properties, in the proportion of 547 parts to the defendant and 453 parts to Lewisohn, so that of the $1,000,000 *dollars* needed to carry through the transaction ($714,285 to the Simpson estate and $285,715 to Keyser and his associates) $547,000 was to be furnished by the defendant and $453,000 by Lewisohn. The defendant and Lewisohn availed themselves of these agreements; paid the price thereof before July 10, 1895, in advance of the coming due of their notes given therefor; and the
59 stocks were delivered to them, and the outside properties were conveyed to Lewisohn for them.

In the meantime they had proceeded to make their respective arrangements for the raising of the money needed to make these payments; for each one of them was to provide separately his money, although they were acting together in dealing with Simpson's executors and Keyser, and intended to act together in disposing of the stock when they should have acquired it.

For this purpose, the defendant, before taking up either of these options and before any agreement had been made with Keyser, procured first an underwriting agreement, which was made verbally before May 16, 1895, and afterwards was reduced to writing and dated May 22, 1895, and signed by Matthew Luce, J. A. Coram, Henry M. Whitney, Meredith, Thomas Nelson, and the defendant, whereby each of these parties agreed to take a certain number of the shares of the Baltimore company at $40 a share, the total price amounting to $357,142.50, or the amount to be paid by the defendant for his one-half part of the Simpson shares. But it was understood that these men, called the underwriters, were to be called upon to pay only for what should not be paid by the members of the syndicate hereafter mentioned, which was intended to be formed and which was soon after formed. A copy of this underwriting agreement is hereto annexed, marked "C."

The defendant also formed what was called the "Old Dominion Syndicate," hereinafter called his syndicate, to provide the means for making his payments, and to share in the profits expected to be realized. Those who joined the syndicate signed written agreements, of which the first (though actually subsequent to the underwriting agreement) was dated May 21, 1895. A copy of this first agreement is annexed, marked "D." Other papers of the same purport were dated May 24 and June 14, and a blank date, 1895. The
60 amounts so subscribed on these four papers were respectively $100,000; $20,000; $179,119; and $123,500; or in all $422,619. In addition to this, of the underwriters, Whitney was treated as a syndicate subscriber for $50,000; Meredith for $25,000;

and the defendant himself for $50,000; making in all $547,619,— practically the amount that the defendant was to pay.

The members of the syndicate made their payments, and the defendant and Lewisohn made their payments to Simpson and Keyser, taking up their notes as aforesaid, on July 9, 1895.

When the scheme was first formed, it had been the plan and the avowed intention of the defendant and Lewisohn to form a new corporation with a capital stock of $2,500,000, which should take the property of the Baltimore company and the outside properties for $2,000,000, and raise $500,000 of working capital with the rest of its stock. This would give the defendant stock for the money raised and applied by him at the rate of just two for one, and he expected, and stated to various members of his syndicate that he expected, to give to each subscriber to his syndicate cash to the full amount of his subscription and stock at par to the same amount, the cash to be raised by selling the surplus stock, which at par would produce just that amount. They proceeded, however, to organize the plaintiff corporation under the laws of New Jersey, with a capital stock of $3,750,000, being one hundred and fifty thousand shares of the par value of $25 each.

The organization of this corporation was controlled entirely by the defendant and Lewisohn, with the advice of the latter's attorneys. The formal written agreement for its formation was signed by Lewisohn's son, one of his attorneys, and five of the employees of Lewisohn Brothers. The first meeting of the stockholders was held July 7, 1895, and the seven incorporators above men-
61 tioned were elected directors. Six of these appeared to have taken and paid for four shares each, and the seventh to have taken and paid for sixteen shares, or forty shares in all. These forty shares really had been paid for by Lewisohn; and although the money was deposited in bank to the credit of the company upon its organization, it afterwards was returned by the company to Lewisohn in accounting with him. Through these incorporators the organization was effected; and they were elected directors of the plaintiff company.

A meeting of these directors was held in New York, at the office of Lewisohn Brothers, on July 11, 1895, at which some of these directors successively resigned, and the vacancies thus created were filled by the board, so that the new board of directors consisted of the defendant, Lewisohn, Thomas Nelson, and Messrs. Whitney, Ray, Buffum and Evarts. These directors were all selected and were controlled by the defendant and Lewisohn. The defendant and Lewisohn had now taken full control of the Baltimore company; the quick assets and working capital of that company including all the surplus assets mentioned in the first and — clause of the Simpson agreement, marked "A 1" had been divided among its former stockholders; the defendant had become its president, and its board of directors had come under the control of the defendant and Lewisohn.

At the meeting of the directors of the plaintiff company held as aforesaid at New York on July 11, 1895, there were present, after the new appointments, four directors, being the defendant, Lewisohn, their attorney Mr. Evarts, and Lewisohn's employee,

Mr. Buffum. The three absent directors, Nelson, Ray and Whitney, were members of the defendant's syndicate, and Nelson and Whitney were two of the defendant's original underwriters. Whether these three directors had had any notice of the meeting did not appear; the records of the company do not show that any such notice
62 had been given to them. At this meeting, under these circumstances, the defendant, through Mr. Evarts, presented an offer from the Baltimore company to transfer all its property and assets to the plaintiff company in return for 100,000 shares of the plaintiff company, to wit, a par value of $2,500,000. A copy of this offer is hereto annexed, marked E. Thereupon Lewisohn proposed and Evarts seconded a resolution accepting this offer and appointing the defendant and Nelson a committee to supervise and carry out the details. The resolution was passed. A copy of this resolution is hereto annexed, marked F. In fact no report as to the value of the property had been made to the plaintiff corporation; but one Hyams and one Colquhoun had examined the property and had made a report to Lewisohn and the defendant for their guidance in buying from Simpson and Keyser, which was put in evidence. This report was not communicated to the plaintiff.

Lewisohn then presented a written proposition to convey to the plaintiff company the outside properties acquired from Keyser, in return for 30,000 shares of the capital stock of the plaintiff company, to wit, a par value of $750,000. A copy of this offer is annexed, marked "G," with a request to issue said stock to the defendant himself. Thereupon Evarts moved and Buffum seconded a resolution accepting the offer, and appointing the same committee to supervise and carry out the details. This resolution was carried. A copy of the resolution is annexed, marked "H." No examination had been made of these properties, and no report was or had been submitted about them either to the plaintiff company or the defendant or Lewisohn, as they were not regarded by the defendant or by Lewisohn, or, so far as appeared, by any one else, as possessing any substantial value. These transactions were carried out; deeds from the Baltimore company of its properties, and from
63 Lewisohn of the outside properties, were delivered to the plaintiff company in December, 1895, or January, 1896, and the stock aforesaid, amounting to 130,000 shares of the par value of $3,250,000, and then of fully as great market value, was issued to Lewisohn and the defendant, or to their nominees, on September 18 and 19, 1895.

During all these transactions, the full control of the plaintiff company was in the hands of and was exercised by the defendant and Lewisohn, who were its promoters, and who themselves determined upon and dictated, under the advice of their counsel, everything that was done by the plaintiff company or in its behalf; it had no directors, representatives or advisers other than themselves or their agents; and they did not disclose to it any of the facts which have been stated. This continued to be the case until April, 1902, as hereinafter stated.

It was intended also by Lewisohn and the defendant that 20,000 shares of the capital stock of the plaintiff should be issued to new

subscribers at par; and this was done in the summer and fall of 1895.

Neither the defendant nor Lewisohn disclosed to the new corporation the fact that they had paid only $1,000,000 for the stock representing all the mining property of the Baltimore company, or that they procured the outside properties without any other consideration; nor did they or either of them see that the new company had any independent advice before accepting the offers made to it as aforesaid, really by themselves. On the contrary they organized and promoted the plaintiff company for the purpose of having it accept, and they exercised their control over it to cause it to accept, said offers, and really, through their own action and that of their employees, themselves accepted said offers in the name of
64–66 the corporation. The stock which they thus took was then of fully its par value, this being due mainly to the skilful conduct and manipulation of the defendant and Lewisohn, and continued to be for some time, and until the defendant had sold out substantially all the stock that he took for his own use.

If it be material, I find also that the defendant did not act towards the members of his syndicate with the good faith which they had a right to expect. The result of his and Lewisohn's transactions with the plaintiff company was that for the $1,000,000 of their own and their associates' money which they invested, they received, subject to the payment of legitimate expenses of not over $20,000, stock to the par value of $3,250,000, and of the then actual value of at least that amount; that is, at the rate of more than three dollars for one. He gave to the members of his syndicate two dollars for one, either wholly in stock or half in cash and half in stock as they elected. With a few individual exceptions, he did not disclose the facts to them. The very great majority of the members of his syndicate did not become aware of the details of what he and Lewisohn had done; they did receive what it had been represented to them that they would receive; and they generally contented themselves in their ignorance with the fact that they had doubled their money. The residue of the gain received by the defendant he dealt with as he chose, taking a part of it to himself, distributing a part among some of the underwriters, or otherwise disposing of it. But the averments of the eighth paragraph of the defendant's final answer (filed November 6, 1907) are not according to the facts.

The defendant contended that the real transaction as intended to be carried out between Lewisohn and himself on the one side
67 and the plaintiff company on the other was that they should convey or cause to be conveyed to the plaintiff company the property of the Baltimore company and the outside properties, and should supply to it the sum of $500,000 for working capital, and should receive therefor all the capital stock of the plaintiff company; that this was actually done, though put in the form of different transactions; that Lewisohn and the defendant really took accordingly themselves the 20,000 shares which were to be used for raising the working capital, and bound themselves to pay to the plaintiff company therefor the said sum of $500,000; that the parties who afterwards subscribed for and received these shares really took them from the defendant and Lewisohn and not from the plain-

tiff company; and that at the time of the transaction above stated Lewisohn and the defendant became and were the real owners of all the authorized capital stock of the plaintiff company. There was some evidence in support of this contention; but I find that the real facts are as already stated.

The mining property of the Baltimore Company so conveyed to the plaintiff company was not of the intrinsic value of more than $1,000,000. But its market value at the time of its transfer to the plaintiff company seems to have been greater than this. This increased market value may have been, and probably was, due in large part of the skilful manipulation of the defendant and Lewisohn, and the ingenious manner in which they created a desire on the part of men interested in mines as investors or speculators to be allowed to join in the transaction they were carrying out. This market value however was less than $2,000,000. But taking the most favorable view of the situation possible for the defendant, he and Lewisohn did by reason of their failure to disclose the real facts as aforesaid make out of their sale to the plaintiff company a secret profit of 50,000 shares of its capital stock, of which the defendant's
68 portion was 27,350 shares and Lewisohn's portion 22,650 shares. If he had fully disclosed the facts to the plaintiff company and had secured for it independent advice, it would not have given to him this secret profit; if he had dealt fairly and openly with the members of his syndicate, he would have shared with them this secret profit less a comparatively small sum to reimburse his expenses. Unless one of his independent defenses is made out, he must account to the plaintiff for his secret profit. This amount of 50,000 shares includes however the 30,000 shares received for the outside properties, so that in the suit numered 8,099 the defendant is to be held accountable only for 20,000 shares, or for 10,940 shares if he is not liable in solido for the total amount received by Lewisohn and himself.

I am of opinion that the defendant is liable in solido, and must account to the plaintiff company for the whole of the secret profit realized by Lewisohn and himself, and not merely for the part which he himself actually received. Lewisohn and he were acting in the formation and execution of the scheme together and in concert. Each of them was doing his part to carry out a joint scheme, which was intended to inure to the advantage of both. The control exercised by them over the plaintiff company was a joint control, and was exercised by each for the benefit of both. A proper disclosure of the real facts by either would have frustrated the schemes of both; they both acted together in pursuance of a common design, and for the profit of both. The equitable tort of which the plaintiff complains was the act of both; and they must be held responsible for it both jointly and severally.

In the other suit, that numbered 8,098, the outside properties conveyed by Keyser to Lewisohn for the benefit of himself and
69 the defendant, and then turned over to the plaintiff in return for 30,000 shares of stock, were acquired by them really for nothing. They were thrown in as a mere make-weight in the pur-

chase made by Lewisohn and the defendant from Keyser and the Simpson estate. It cannot be said that they were of no value; nor can I find on the evidence exactly what their value was. But I am satisfied on the evidence that this value could not have exceeded the sum of $50,000. The plaintiff seeks in the first instance to rescind this transaction, and, upon reconveying to the defendant these outside properties, to have him ordered to return to it the 30,000 shares issued therefor. But I think that the situation of the paries has so far changed that this ought not now to be permitted. The properties themselves have not been worked; and are in the same condition as when conveyed to the plaintiff. But substantially all the capital stock of the plaintiff company has been transferred to another company, the Old Dominion Company of Maine, a holding company; the defendant disposed of his stock some time before the suit was brought, has not the 30,000 shares to surrender, and apparently could not procure them in the market. He ought not to be required to buy them of the holding company at whatever price that company might choose to fix. Moreover, since these transactions the plaintiff company has increased its capital stock to 200,000 shares, of the amount at par of $5,000,000, and has bought new and additional mining properties, the value and profitableness of which have not been shown. 30,000 shares out of 200,000 representing a larger number of mines cannot be said to be the same thing as the same number of shares out of 150,000 shares representing a smaller number of mines. Accordingly I do not think that the plaintiff can now have this transaction rescinded. But as the shares issued were then of the value of at least $750,000, while the properties received for them were worth less than $50,000, the plaintiff has sustained dam-
70 ages in this transaction of not less than $700,000, of which $382,900 went to the advantage of the defendant, and $317,100 to that of Lewisohn; and for the reasons already stated as to the other transaction, I think that the defendant is liable for the whole $700,000.

It has been claimed that the agreements made at the directors' meeting of July 11, 1895, are governed by the law of New York. That meeting was held in New York city, and the proposals were made and accepted there. The plaintiff is a New Jersey corporation, and was to have places of business also in Arizona, New York and Massachusetts. I find that it was the intention of the parties that these agreements should be carried out and consummated by the delivery of the deeds and the issue of certificates of stock in Massachusetts, where it was intended that the offices of the company should be, and where they were, established, in Boston, and where in fact they were so carried out. It was intended that the business of the company, outside the actual mining and smelting operations, which were to be conducted in Arizona, should be carried on in Massachusetts; and this was done. I rule on these findings that the agreements in question are governed by the law of Massachusetts. If however they are governed by the law of New York, then I find that the law of New York applicable to the case upon the facts which I have found, does not differ from the law of Massachusetts.

As to the claim that the transactions in question have been ratified and acquiesced in by the stockholders of the plaintiff company, I find that at a meeting of the directors of the plaintiff company, held at Boston September 18, 1895, it was voted that 100,000 shares of the company's full paid stock be issued to Philip E. Dumaresq, and
30,000 shares to the defendant and Lewisohn; and this was
71 done. The 100,000 shares were for the property of the Baltimore company, and Dumaresq took them as the nominee for the benefit and subject to the orders of the defendant and Lewisohn. The 30,000 shares were for the outside properties. At the end of the records of this meeting, which had been attended only by five directors, all the directors signed on the record book of the company a statement that all the action taken by the directors at that meeting was confirmed and approved of in all respects; and the following statement was then appended:

"The undersigned, stockholders of the Old Dominion Copper Mining & Smelting Co., do hereby approve of the action of the Directors shown by the above record of meeting held on the 18th day of September, 1895."

This was signed by the defendant and Lewisohn, purporting to represent 30,000 shares; by Dumaresq, 100,000 shares; and by Thomas Nelson, Treasurer, 20,000 shares, being the total authorized capital of the company. The Dumaresq shares, as already stated, were held for and controlled by the defendant and Lewisohn. Thomas Nelson was treasurer of the defendant company, and the 20,000 shares which he claimed to represent were the stock which was to be issued to independent subscribers for a working capital as already stated, and were still the property of the corporation itself; and Nelson had no right to sign for them. This action, like everything else in the conduct of the company at, and for some years after, that time, was taken at the dictation of the defendant and Lewisohn, in the manner and for the purpose already stated.

On June 15, 1899, a special meeting of the stockholders was held, having been duly called "to consider and act upon the question of increasing the capital stock of the corporation." At this meeting a
majority in interest of the stockholders were represented, all
72 of them by proxies running to Stone, King, Sheehan and Dumaresq. These men were controlled by the defendant and Lewisohn. At the meeting, after transacting the business for which the meeting had been called, it was voted: "That all acts, matters and things which have been entered into or performed by the board of directors are hereby approved, ratified and confirmed." The terms of the proxies held by the four men who passed this vote did not appear. Neither the stockholders nor the company itself had gained any knowledge of the matters hereinbefore stated as to the transactions in question.

On April 3, 1901, an annual meeting of the stockholders of the plaintiff company was held, at which were present in person two stockholders, representing together 1,700 shares; Dumaresq, representing by proxy 85,200 shares; and three other proxies, representing together 4,563 shares. The terms of none of the proxies appeared.

Dumaresq was still under the control of the defendant. At this meeting, it was by vote "Resolved, that all acts, matters and things entered into and performed by the officers and directors of this company since the organization of this company be and they hereby are fully and in all respects ratified, confirmed and approved." At this meeting the defendant as president of the company had presented a report in which he stated the net profits of the company at a greatly exaggerated amount; and at this time neither the corporation nor the subscribers to the 20,000 shares of stock, nor the other stockholders outside of a few who were in the confidence and under the control and acting in the interest of the defendant and Lewisohn, had learned or knew of the transactions hereinbefore set forth. Full reports of these meetings and of the other meetings of the directors and of the stockholders were in evidence. The very great majority of the stockholders, including both those who took their shares di-
73 rectly from the corporation and those who acquired their stock as members of the defendant's syndicate, never except as already stated consented to or, until after April, 1902, knew of the operations by means of which the defendant and Lewisohn acquired their 50,000 shares as a secret profit. They had not, until after that date, knowledge of or access to the books or records of the corporation from which some of these operations might have been and afterwards were discovered.

Upon these facts, I rule that these actions are not barred by the acquiescence or ratification of the stockholders of the plaintiff company.

As to laches and the statute of limitations, it appeared that the defendant Lewisohn or the defendant alone, remained in full control of the plaintiff company until April, 1902. The working of the mines had yielded but very scanty profits, and no dividends. At the annual meeting of the stockholders of the company in 1902, a new board of officers was elected. They at once began investigations, learned many of the facts without any unnecessary delay, and thereupon promptly brought these suits. I rule that upon these facts the bills are not barred by laches or by the operation of the statute of limitations.

Of the special findings which the plaintiff has asked me to make, I refuse the one marked D, and make the others. I place on file the request for such special findings. As I have stated my rulings so far as they seem to me material, I have not stated the requests for rulings in detail. So far as not stated to have been given, they may be treated as refused.

In No. 8,098, a decree is to be entered that the defendant pay to the plaintiff the sum of $700,000 with interest from September 18, 1895. In No. 8,099, that the defendant pay to the plaintiff the sum of $480,000, (being the sum of $500,000 less $20,000 allowed
73*a* for legitimate expenses,) with interest from the same date.

HENRY N. SHELDON,
J. S. J. C.

74 **A.**

Memorandum of Agreement Between Frank E. Simpson of Framingham, Massachusetts, and William Butler of Boston, Massachusetts, for Themselves and the Other Executors of Michael H. Simpson, Parties of the First Part, and J. Morris Meredith of Boston, Massachusetts, Party of the Second Part, Made at New York This Fourth Day of May, Eighteen Hundred and Ninety-five.

The Old Dominion Copper Company is a corporation organized under the laws of Maryland, having a capital of five hundred thousand dollars ($500,000) divided into twenty-five thousand (25,000) shares of twenty (20) dollars each and owns certain property in Arizona known as the Old Dominion mine, which has been worked for some years, and other property in Arizona and elsewhere. The estate of Michael H. Simpson is the owner of seventeen thousand eight hundred and fifty-seven (17,857) shares of the capital stock of said company and is desirous of selling the same. The property owned by the company consists of mines, mining rights, smelting furnaces, buildings, mining tools and other appurtenances; also ores in dump and in process and in the furnaces; also pig or ingot copper and cash and certain notes receivable and amounts due.

Mr. Meredith is desirous of buying the seventeen thousand eight hundred and fifty seven (17,857) shares of the capital stock owned by the said Simpson estate.

Now, therefore, in consideration of two thousand dollars paid to the parties of the first part by the said Meredith, the parties of the first part agree with the said Meredith, his executors, administrators and assigns as follows:

First. The said parties of the first part agree to sell, transfer and deliver to the said Meredith seventeen thousand eight hundred and fifty seven (17,857) shares of the capital stock of the said
75 Old Dominion Copper Company at and for the price of seven hundred and fourteen thousand two hundred and eighty five dollars ($714,285) and an additional sum not exceeding two hundred and fifty thousand dollars ($250,000), such additional sum to be equal to the value of five sevenths of the pig or ingot copper and of the cash and notes receivable and amounts due which shall constitute part of its assets when the first payment on account of said sale shall have been made as hereinafter provided and which are hereinafter called surplus earnings.

Second. Payments for said stock are to be made as follows: One hundred thousand dollars ($100,000) on the deposit of the said capital stock endorsed in blank with the Old Colony Trust Company in Boston on or before the twenty eighth day of May eighteen hundred and ninety five, said stock to be held by said trust company in trust to secure to the said parties of the first part the balance of the said payments. The balance of said seven hundred and fourteen thousand two hundred and eighty five dollars ($714,285), namely, six hundred and fourteen thousand two hundred and eighty

five dollars ($614,285) shall be evidenced by three notes made by the said Meredith or his assigns, of equal amount each, namely, for two hundred and four thousand seven hundred and sixty one dollars and sixty six cents ($204,761.66), bearing interest at the rate of five per cent per annum and payable respectively in sixty, ninety and one hundred and twenty days from the date of the deposit of said stock, said stock to be held as security for the payment of said notes and the said notes also have an endorsement satisfactory to the said parties of the first part.

Third. It is understood and agreed that the payment of any or all of said notes may be anticipated by the said Meredith with interest down to the date of payment, and the stock shall be
76 delivered to the said Meredith when all of the said notes are paid, and the said parties of the first part will try in all practicable ways to cause such steps to be taken that whenever the first of said notes shall have been paid, the majority of the board of directors of said Old Dominion Copper Company shall be persons satisfactory to said Meredith or his assigns, and that the president or other officers of said company and the superintendent of said mine shall be persons satisfactory to the said Meredith or his assigns.

Fourth. It is further agreed that the value of the five sevenths of said surplus earnings shall be determined as follows: As soon as practicable and prior to the fourteenth day of May eighteen hundred and ninety five the parties of the first part will give to the said Meredith a written memorandum showing in detail said surplus assets, and if the said Meredith purchases the said seventeen thousand eight hundred and fifty seven (17,857) shares of the capital stock, such of the said surplus assets as remain shall either be retained by the company and five sevenths of the value thereof be paid by said Meredith to the parties of the first part or shall be divided in kind pro rata to the said parties of the first part and to the holders of the remainder of the capital stock of said company.

Fifth. The said parties of the first part guarantee and agree that the said mining company and its property is or will be at the time of said [Dic.] of said stock free from all debts, claims, liens or mortgages, and that there are no outstanding contracts between it and any other person or corporation except as stated in the list thereof to be furnished to the said Meredith on or before the fourteenth day of May eighteen hundred and ninety five.

Sixth. It is also agreed that at the time of depositing said
77 seventeen thousand eight hundred and fifty seven (17,857) shares of stock as above provided and paying said one hundred thousand dollars ($100,000) said Meredith shall give a good and satisfactory guarantee to the said parties of the first part that at any time within sixty days thereafter on ten days' notice and tender he will take and pay for at the same pro rata price and on the same general terms and conditions as hereinbefore provided any part or all of the remainder of the capital stock of said company.

Seventh. Said parties of the first part give to said Meredith the option until and during the twenty eighth day of May eighteen hundred and ninety five to purchase said shares of stock on the terms

herein set forth and agree that meanwhile and until that time said Meredith shall have every facility by himself or by his assigns to examine the property of said company and its title thereto.

Eighth. It is understood and agreed that the two thousand dollars ($2000) paid on the signing of this agreement shall form part of the first one hundred thousand dollars ($100,000) to be paid thereunder.

Ninth. It is understood and agreed that the foregoing agreement finds the estate of Michael H. Simpson and is for the benefit of the executors, administrators and assigns of the said Meredith.

In Witness Whereof the parties hereto have set their hands and seals this — day of —— eighteen hundred and ninety five.

I, Lucius W. Smith of Boston, Massachusetts, one of the executors of Michael H. Simpson, for value received do hereby approve, ratify and make the agreement hereinbefore made by Frank E. Simpson and William Butler for themselves and other ex-

78 ecutors of Michael H. Simpson with J. Morris Meredith.

(NOTE.—The following is written in ink on the margin of the first page of this agreement.)

"Received from Leonard Lewisohn, assignee of J. Morris Meredith, one hundred thousand dollars, being the payment due this date under the within agreement on the deposit with the Old Colony Trust Co. of 17,857 shares of the capital stock of the Old Dominion Copper Company.

(Signed) WILLIAM BUTLER.
For Self and Co-executor of Thos. C. Simpson's Estate of M. H. Simpson.

Boston, May 28, 1895."

79 B.

William Keyser of Baltimore and associates are the owners of seven thousand one hundred and forty three shares of twenty dollars each of the Old Dominion Copper Company of Baltimore City. Leonard Lewisohn and associates have already bought seventeen thousand eight hundred and fifty seven shares of the capital stock of the said company from the estate of Michael H. Simpson, and Lewisohn and associates are desirous of buying the other seven thousand one hundred and forty three shares and Keyser and associates and Lewisohn and associates have agreed together as follows:

Keyser and associates agree to sell their shares of stock for two hundred and eighty five thousand seven hundred and fifteen dollars, forty thousand dollars of which shall be payable on Thursday the twentieth day of June, and the balance of the payments shall be made by three promissory notes, each for eighty one thousand nine hundred and five dollars bearing interest at five per cent from the twenty eighth day of May eighteen hundred and ninety five, and running respectively sixty, ninety and one hundred and twenty days from that date. The payments of any or all of these notes may be anticipated, and on the payment of the first note Keyser and associates agree to do everything practicable to turn over to Lewisohn

and associates the board of directors and the absolute management of the company.

The stock is to be deposited with the Old Colony Trust Company in Boston as security for the parties here and for the payment of the notes, the general understanding being that this sale is made in pursuance of and in general accordance with the agreement made between Frank E. Simpson and others representing the estate
80 of Michael H. Simpson and J. Morris Meredith for himself, dated the first day of May eighteen hundred and ninety five, Lewisohn and associates having become the assignee of the rights of said Meredith under said contract.

It is further understood that so far as this particular sale is concerned of the seven thousand one hundred and forty three shares Lewisohn and associates are to protect Keyser and associates from any claim for commissions by J. Morris Meredith, the understanding being that Keyser and associates are to receive their agreed price net.

There are certain mines in Arizona near the property of the Old Dominion Copper Company which are known as the Old Dominion mine, the Keystone mine and the Chicago and New York mine. Those mining properties now stand in the name of William Keyser, but he states that he is only interested to the extent of one-half thereof, and that Michael H. Simpson's estate is the owner of the other half thereof, and Mr. Keyser agrees that in consideration of the purchase of the stock hereinbefore arranged for, he will transfer, deliver and assign to Leonard Lewisohn or to his order all his interest in the said mines without any additional consideration than the purchase of the stock herein provided for.

Keyser and associates agree to guarantee to Lewisohn and associates that they will hold them and the Old Dominion Copper Company harmless from all debts, claims, liens or mortgages or outstanding contracts existing between it and any other person or corporation as of May twenty-eight. It is understood that in this matter William Keyser represents himself and all associates, and that payments may be made to him and the note made payable to his order.

Baltimore, June 13th, 1895.

WILLIAM KEYSER.

Witness:
N. S. WHEAT.

81 Received June 20th, 1895, of Leonard Lewisohn & associates one hundred & twenty two thousand one hundred & 66/100 dollars and two notes of eighty one thousand nine hundred and five dollars each in accordance with the foregoing agreement, said money and notes having been paid to the Old Colony Trust Co., Boston, for my account.

WM. KEYSER.
P. P. R. BRENT KEYSER.

82 C.

Whereas A. S. Bigelow has contracted to purchase eighty-nine hundred and twenty-eight (8928) shares of the stock of the Old Dominion Copper Company, a corporation organized under the laws of Maryland, and owning property in Arizona, at Forty dollars ($40) per share, or thereabouts, the undersigned hereby agree to take the number of shares set opposite their respective names and pay for the same at the rate of Forty dollars ($40) per share; the said stock to remain in the hands of A. S. Bigelow, and the management of the property to be left with him.

Payments to be made as follows:

May 27th, 1895, fourteen per cent (14%).

July 26th, 1895, Twenty-eight and two-thirds per cent (28 2/3%) and interest at 5% from date of first payment.

August 25th, 1895, Twenty-eight and two thirds per cent (28 2/3%) and interest at 5% from date of first payment.

September 24, 1895, Twenty-eight and two-thirds per cent (28 2/3%) and interest at 5% from date of first payment.

The conditions, covenants and agreements herein contained shall be binding on the substitutes, successors, heirs, representatives and assigns of the respective subscribers hereto.

In witness whereof we have hereunto set our hands and opposite thereto the amounts of our subscriptions respectively, this 22d day of May, A. D. 1895.

	MATTHEW LUCE,	$100,000
	A. S. BIGELOW,	$50,000
	J. A. CORAM,	$100,000
83	HENRY M. WHITNEY,	$50,000
	J. MORRIS MEREDITH,	$25,000
		(in pencil)
	THOMAS NELSON,	$32,142.50
	(in pencil)	$357,142.50

84 D.

We the undersigned propose to form a syndicate to be called the Old Dominion Syndicate.

And we hereby agree to pay to A. S. Bigelow the sums set against our respective names.

Subscriptions to this syndicate shall be payable as follows:

May 27, 1895, fourteen per cent (14 per cent).

July 26, 1895, twenty-eight and two-thirds per cent (28 2/3 per cent) and interest at five per cent from date of first payment.

August 25, 1895, twenty-eight and two-thirds per cent (28 2/3 per cent) and interest at five per cent from date of first payment.

Sept. 24, 1895, twenty-eight and two-thirds per cent (28 2/3 per cent) and interest at five per cent from date of first payment.

It is expressly agreed and understood that each subscriber hereto acts for himself alone and that the relation of partners shall not exist or be deemed to exist between the subscribers hereto by virtue hereof.

The conditions, covenants and agreements herein contained shall be binding on the substitutes, successors, heirs, representatives and assigns of the respective subscribers hereto.

In witness whereof we have hereunto set our hands and opposite thereto the amounts of our subscriptions respectively this twenty-first day of May, A. D. 1895.

CHARLES J. HODGE,	Ten thousand dollars,	$10,000.
D. L. DEMMON,	Ten thousand dollars,	10,000.
HENRY T. COE,	Six thousand dollars,	6,000
By S. B. CAPEN.		
C. H. PALMER,	Ten thousand dollars,	10,000.
85		
JAMES S. CUMSTON AND WILLIAM CUMSTON,	Ten thousand dolars,	10,000
By S. W. RICHARDSON.		
STEPHEN M. CROSBY,	Ten thousand dollars,	10,000.
SAMUEL N. BROWN,	Ten thousand dollars,	10,000.
GEORGE H. BALL,	Ten thousand dollars,	10,000.
H. H. STEVENS,	Five thousand dollars,	5,000
A. S. MALTMAN,	Ten thousand dollars,	10,000.
By J. A. CORAM, *Atty.*		
		$91,000
J. A. CORAM,	Nine thousand dollars,	9,000
		$100,000

MEMO.—See other paper.

86

E.

Minutes of a Meeting of the Directors, Duly Called, Held at the Office of Lewisohn Brothers, at 81 Fulton Street, in the City of New York, on the Eleventh Day of July 1895, at 12 O'clock Noon.

"Mr. Evarts presented and read a proposition from 'The Old Dominion Copper Company of Baltimore City' as follows:

To the Old Dominion Copper Mining and Smelting Company, a corporation organized and existing under the laws of the State of New Jersey.

The Old Dominion Copper Company of Baltimore City, a corporation organized and existing under the laws of the State of Maryland being the owner of certain mines and mining properties at Globe in the Territory of Arizona described in the annexed Schedule and of machinery, lumber, wood, tools, implements and other per-

sonal property for use for and in connection with the operation and maintenance thereof hereby makes the following proposition: To convey, assign and transfer all its property, both real and personal of every kind and nature whatsoever and wheresoever situated by good and sufficient deeds and instruments properly executed so as to confer absolute title thereto to the Old Dominion Copper Mining and Smelting Company upon receiving from said Company one hundred thousand shares of its capital stock to be issued to said Old Dominion Copper Company or to its nominees.

It being understood that the Old Dominion Copper Mining and Smelting Company shall assume all obligations of the Old Dominion Copper Company of Baltimore City incurred since the first day of June 1895, and shall be entitled to all earnings and profits of said Company since that date.

July eleventh 1895.

A. S. BIGELOW,
President.

A. W. EVARTS,
Secretary."

87 F.

"Whereupon Mr. Lewisohn moved and Mr. Evarts seconded the adoption of the following resolutions:—

"Whereas The Old Dominion Copper Company of Baltimore City has made and submitted a proposition to convey all of its property to this Company which has just been presented and read; and

Whereas it is reported and appears that such property is reasonably and fairly worth the par value of the stock proposed to be paid and issued and received therefor,

Resolved: that said proposition be and the same is hereby accepted and that this Company do purchase and acquire all said property upon the terms contained in said proposition and in payment therefor issue one hundred thousand shares of its capital stock to said The Old Dominion Copper Company of Baltimore City or to its nominees, all such stock to be full paid and not subject to assessment: and

Resolved that Messrs. Bigelow and Nelson be appointed a committee to supervise and carry out the details of such purchase and issue of stock, which were thereupon duly adopted."

88 G.

"Mr. Lewisohn presented and read a written proposition as follows:

"To the Old Dominion Copper Mining and Smelting Company:

I hereby offer to convey the following described property now owned and held by me upon receiving thirty thousand shares of the capital stock of the Old Dominion Copper Mining and Smelting Company to be issued to me or to my nominees:

1st. The Old Dominion Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1883 in the United States Land Office at Tucson, Arizona, Entry No. 267, Lot No. 45, situated in Globe Mining District, Gila County, Arizona.

2nd. The New York Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1883, in the United States Land Office at Tucson, Arizona, Entry No. 268, Lot No. 46 in Globe Mining District, in Gila County, Arizona.

3rd. The Chicago Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1883, in the United States Land Office at Tucson, Arizona, Entry No. 269, Lot No. 51 in Globe Mining District, Gila County, Arizona.

4th. The Keystone Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1883, in the United States Land Office at Tucson, Arizona, Entry No. 384, Lot No. 54 in Globe Mining District, Gila County, Arizona.

5th. A lot or parcel of land situated near the Bloody Tanks and deeded by E. A. Saxe to the Old Dominion Copper Mining Company. Deed recorded in Book 1 of Deeds to Real Estate at page 126 & 127 in the office of the Recorder of Gila County, Arizona. and reference is hereby made to said record for a fuller description of said parcel of land.

New York, July 11th, 1895.

LEONARD LEWISOHN.

Please issue said 30,000 shares of stock to Mr. A. S. Bigelow & myself.

LEONARD LEWISOHN."

89 "Whereupon Mr. Evarts moved and Mr. Buffum seconded the adoption of the following resolutions:

"Whereas Mr. Leonard Lewisohn of the City of New York has made and submitted a proposition to convey certain mining properties in Arizona to this Company which has just been presented and read: and

Whereas it is reported and appears that such properties are reasonably and fairly worth the par value of the stock proposed to be paid and issued and received therefor:

Resolved that said proposition be and the same is hereby accepted and that this Company do purchase and acquire said properties upon the terms contained in said proposition and in payment therefor issue thirty thousand shares of its capital stock to said Leonard Lewisohn or to his nominees all such stock to be full paid and not subject to assessment: and

Resolved that Messrs. Bigelow and Nelson be appointed a Committee to supervise and carry out the details of such purchase and issue of stock, which were thereupon duly adopted."

And on the tenth day of said December, the following Final Decree was entered by the Court, to wit:

Final Decree.

This cause came on to be further heard this tenth day of December, 1907, for the entry of a final decree, and was argued by counsel for both parties, and was considered by the Court, and upon consideration thereof it was and hereby is

Ordered, adjudged and decreed that the complainant the Old Dominion Copper Mining and Smelting Company recover of the respondent Albert S. Bigelow the sum of four hundred and eighty thousand dollars ($480,000) and interest thereon from September 18, 1895, amounting to three hundred and fifty-two thousand one hundred and sixty dollars ($352,160),—being the total sum of eight hundred and thirty-two thousand one hundred and sixty dollars ($832,160), and costs taxed by the Clerk at twenty eight dollars and sixty eight cents ($28.60); and that execution issue for said total sum and costs in common form in favor of said Old Dominion Copper Mining and Smelting Company against said Albert S. Bigelow.

By the Court:

WALTER F. FREDERICK,
Ass't Clerk.

December 10, 1907.

90 And on the twenty fourth day of said December, the plaintiff appealed from the Final Decree, the claim of appeal being in the words following, to wit:

Claim of Appeal.

Now the complainant appeals to the Full Court from the final decree entered in this case on December 10, 1907, by reason of the fact that the amount of said final decree should have been larger.

By Its Attorneys, BRANDEIS, DUNBAR & NUTTER.

And on the sixth day of January, A. D. 1908, the defendant appealed from the Final Decree, the claim of appeal being in the words following, to wit:

Respondent's Claim of Appeal.

And now comes the respondent in the above entitled cause and appeals to the full Court from the Final Decree entered therein on December 10th, 1907.

ALBERT S. BIGELOW,
By His Solicitors, ALFRED HEMENWAY,
J. W. FARLEY.

And on the sixth day of August, A. D. 1908, the plaintiff filed his petition for injunction and attachment for contempt, the same being in the words following, to wit:

Petition for Injunction and Attachment for Contempt.

The complainant in the above entitled cases says as follows:

1. These cases were upon the printed list of cases for argument before the Full Bench of this court at its sitting beginning on January 6, 1908, and said cases were ready for argument at
91 said sitting.

2. On January 6, 1908, the respondent, by his attorney, Alfred Hemenway, moved for a postponement of the cases in terms as follows:

"I have asked for a postponement of this case until March, so that the other cases the defendant appeals may be argued at the same time."

3. The court thereupon made this order, namely:

"The court is unanimously of the opinion that the case should be continued and assigned for the first case at the March sitting."

4. On February 26, 1908, six days prior to the beginning of said sitting, the respondent filed in the Court of Chancery of New Jersey a bill of complaint, a copy whereof is hereunto annexed marked Exhibit 1, and made a part hereof. The record referred to in said bill of complaint as "Exhibit C" is a facsimile of the record of these cases in this Supreme Judicial Court, pages 1-78, both inclusive.

5. At this time the only office of the complainant corporation in New Jersey was in the city of Jersey City, which is the most accessible place in the state of New Jersey to persons going there from the state of Massachusetts. The solicitors of said Bigelow in said bill of complaint was John Griffin, Esquire, who is a resident of said City of Jersey City, and has his only office for the practice of law in said city.

6. Said Court of Chancery of New Jersey is presided over by the Chancellor of the State of New Jersey, and he has as his advisers seven Vice Chancellors. The respondent Bigelow presented his bill of complaint to the Vice Chancellor sitting—with one exception—more remotely than any other from said Jersey City, namely, in the city of Trenton.

7. Said Vice Chancellor directed the issuance of a restrain-
92 ing order and order of notice, a copy whereof is hereunto annexed marked Exhibit 2.

8. Notwithstanding the fact that said order of notice was issued on said day, and that the complainant corporation had an office in said Jersey City, no notice of the intention to file said bill or to apply for said order, or of the fact that said order had been granted, was served upon said corporation or anyone connected therewith until February 28, 1908, three working days prior to the time at which this case was assigned for argument before this Supreme Judicial Court.

9. The time when said notice was served did not permit of an adequate hearing before said Court of Chancery of New Jersey, nor, except by the exertion of unusual effort, of an appearance before said court before the time set for the argument of these cases in this Supreme Judicial Court.

10. All the facts alleged as a basis for relief from said Court of Chancery of New Jersey had for a long time been well known to the

respondent Bigelow. The suits of the complainant corporation against the Executors of the Estate of Leonard Lewisohn—which suits are referred to in said bill of complaint—were begun in the year 1903, and the fact that they were then begun was then well known to the respondent Bigelow. The decision of the Circuit Court of the United States for the Southern District of New York sustaining the demurrer of said executors was rendered February 24, 1905, was known to the respondent Bigelow on or about said date, and was referred to in the opinion of this Supreme Judicial Court filed June 19, 1905. The decision of the Circuit Court of Appeals in the suit against said executors was rendered on December 4, 1906, and was known to the respondent Bigelow on or about said date.

93 There has been no change in the laws of the State of New Jersey favorable to the respondent Bigelow, and no announcements by the courts of said state concerning the laws thereof favorable to said Bigelow since the institution of these present suits in this Supreme Judicial Court.

11. The law of the state of New Jersey is no more favorable to the respondent Bigelow upon the facts appearing in these cases before this Supreme Judicial Court than the laws of this Commonwealth of Massachusetts.

12. When these suits were called for argument on March 3, 1908, before this Supreme Judicial Court, the complainant corporation was ready, able and willing to argue said cases, and had filed its briefs, but deemed it impossible to argue said cases with due respect to the restraining order issued by said Court of Chancery of New Jersey.

13. On or about March 24, 1908, the respondent Bigelow caused to be introduced into the legislature of the state of New Jersey a bill, a copy whereof is hereunto annexed and marked Exhibit 3, and made a part hereof; and thereafter the respondent, by his attorneys, was actively engaged in seeking to obtain the passage of said bill; and no persons except the respondent and his attorneys and persons whom they interested in said bill sought the passage thereof; but said legislature refused to pass said bill and has adjourned for the year.

14. Said bill, so far as by its terms it purported to affect the rights of a corporation against an individual standing in the position occupied by the complainant corporation and the respondent Bigelow, would be contrary to the provisions of the Constitution of the United States,—which fact was well known to said Bigelow and the attorneys, acting for him.

15. Said bill of complaint did not present to the Court of Chancery of New Jersey any question open to legitimate argument under the laws of said state, but on the contrary it is the law of said

94 state, well established by decisions rendered therein, that where a suit is pending before a court having jurisdiction of the parties and of the subject matter of the nature of these suits before this Supreme Judicial Court, the courts of the state of New Jersey will not interfere by injunction against the parties with the prosecution of such suits before the courts already having jurisdiction of

them. These announcements appear in numerous reported cases in said state, and among other in these cases, namely:—

Home Ins. Co. v. Howell, 24 N. J. Eq. 238.
N. J. Zinc Co. v. Franklin Iron Co., 29 N. J. Eq. 422.
Title Guaranty & Trust Co. v. Trenton Potteries Co., 56 N. J. Eq. 441.
Shaw v. Frye, 69 N. J. Eq. 321.
Minchin v. Second Nat. Bank, 36 N. J. Eq. 436.

And the complainant corporation makes said decision a part of this petition, and prays leave to refer thereto.

16. In accordance with the law of the state of New Jersey, the court first acquiring jurisdiction—as this Supreme Judicial Court has acquired jurisdiction—has the right to enjoin, and should enjoin, any interference with the prosecution of a suit before it, although said interference is in the form of a proceeding subsequently begun before another court.

17. The grounds assigned by said Bigelow for relief in the said bill of complaint in the Court of Chancery in New Jersey are not, according to the law of the state of New Jersey, grounds for relief therein, and said Court of Chancery of New Jersey has no greater power or jurisdiction than that of this Supreme Judicial Court to consider said various grounds for relief and to give to said grounds such weight as, in accordance with the principles of law and equity, should be given to them.

18. The complainant corporation promptly applied to the Chancellor of said Court of Chancery of New Jersey to dismiss said
95 bill of complaint, and said motion and arguments thereon by the counsel for complainant and counsel for defendant were heard by said Chancellor on April 6, 1908.

19. According to the practice in the Court of Chancery of the State of New Jersey, said motion to dismiss is equivalent to a demurrer filed to a bill in equity in this Commonwealth of Massachusetts.

20. On August 4th, 1908, said Chancellor entered an order dismissing said bill of complaint.

21. Said order has the same effect under the practice of said court as a final decree dismissing a bill of complaint in the Commonwealth of Massachusetts after hearing upon demurrer, and also has the effect of dissolving any restraining order or preliminary injunction issued in said suit.

22. Under the law and practice of the state of New Jersey, the respondent Bigelow has the right to appeal from said order dismissing said bill of complaint, and will appeal from said order unless restrained therefrom by this Supreme Judicial Court.

23. An appeal from said order takes the case to the Court of Errors and Appeals of the State of New Jersey, which is the court of last resort of said state.

24. There is grave danger that the respondent will, unless restrained by this court, not only prosecute said appeal, but will also seek to obtain other restraining orders and injunctions, and bring

other suits and proceedings, and seek other legislation,—all solely for the purpose of harassing the complainant corporation and preventing it from obtaining a final decision and decree in this Supreme Judicial Court in these pending cases.

25. None of the proceedings undertaken by the respondent Bigelow as aforesaid have presented any question for legitimate
96 argument before a court; none of them have been brought for said purpose; on the contrary, they have been brought solely for the purpose of hampering the complainant corporation and preventing it from presenting these cases to this Supreme Judicial Court and obtaining the decision of this court thereon and final decrees therein; and the delay in bringing said suit and in notifying the complainant corporation thereof and of the restraining order therein until within three working days prior to the time set for the argument of these cases in this Supreme Judicial Court, was solely for the purpose of permitting so short a time to elapse after said proceedings had been begun that it would be impossible to get these cases before this Supreme Judicial Court for hearing at its March sitting in 1908.

26. The conduct of the respondent in the respects aforesaid was in contempt of the power, dignity and authority of this Supreme Judicial Court.

27. Unless these cases are heard by this Supreme Judicial Court before its regular sitting in November, 1908, the purpose of the respondent to delay these cases until said sitting will have been accomplished.

28. The complainant corporation is without any security for the satisfaction of any financial decrees that may be entered in these cases except an attachment bond in the sum of $500,000.

29. The complainant corporation makes the allegations contained in the 1st, 2nd, 3rd, 4th, 7th, 8th, 9th, 12th, 18th, 20th, 27th and 28th paragraphs of its own knowledge, and those contained in the 5th, 6th, 10th, 11th, 13th, 14th, 15th, 16th, 17th, 19th, 21st, 22nd, 23rd, 24th, 25th and 26th paragraphs as it has made careful investigation thereof, been credibly informed, and verily believes
97 that they are true.

Wherefore the complainant corporation prays as follows:

First. That the respondent Albert S. Bigelow, his servants, agents, attorneys and representatives, be forthwith enjoined from instituting any suits or prosecuting any suits, taking any appeals therein prosecuting any appeals, or taking any other action, or attempting to take any other action not in the Supreme Judicial Court of Massachusetts tending to prevent the plaintiff corporation from arguing the cases pending in said court, or to prevent the obtaining of final decrees therein, and the orderly and regular use of process thereon to secure satisfaction of said decrees, or in any manner tending to delay or impede the arguing of said cases in said court, the obtaining of final decrees therein, and the obtaining of satisfaction of said decrees.

Second. That said injunction be made permanent.

Third. That said Albert S. Bigelow be attached and held to answer

for contempt of this court by reason of the proceedings set forth in this petition.

Fourth. That these cases be heard by this court forthwith.

OLD DOMINION COPPER MINING AND SMELTING COMPANY,
By its Solicitors BRANDEIS, DUNBAR & NUTTER.

BRANDEIS, DUNBAR & NUTTER,
Solicitors for Old Dominion Copper Mining & Smelting Company.

COMMONWEALTH OF MASSACHUSETTS,
County of Hampden, ss:

AUGUST FIFTH, 1908.

98 I Edward F. McClennen being duly sworn depose and say that I am one of the solicitors for the complainant in this case, that I have read the foregoing petition and am familiar with the contents thereof and that as therein set forth the allegations thereof are true of my own knowledge except as to those matters alleged on information and belief and as to them I believe them to be true and this affidavit is not made by an officer of the complainant company, solely because the knowledge of all of said officers concerning said matters has come from reports, coming through me or my firm, of the facts aforesaid and because it has been impossible since the dismissal of said bill of complaint in New Jersey to obtain the presence of such officer.

EDWARD F. McCLENNEN

Subscribed and sworn to before me

LOUIS D. BRANDEIS,
Justice of the Peace.

EXHIBIT I.

In Chancery of New Jersey.

To his Honor Mahlon Pitney, Chancellor of the State of New Jersey:

Humbly complaining, showeth unto your Honor your orator Albert S. Bigelow of Cohasset, in the Commonwealth of Massachusetts:

(1) That prior to March, 1895, the Executors of the Will of Michael H. Simpson owned 17857 shares of the capital stock of the Old Dominion Copper Company of Baltimore City, a corporation of the State of Maryland (hereinafter called the Baltimore Company), and one William Keyser of Baltimore owned 7143 shares of

99 the capital stock, making in all the sum of 25,000 shares, being the entire capital stock of said Baltimore Company, which shares were of the par value of $20 each, and the aggregate capitalization amounted to $500,000. That one Leonard Lewisohn

of the City, County and State of New York, who had a great familiarity and experience with mining properties, and was an expert in their management and operation began to acquire the capital stock of said Baltimore Company. That one J. Morris Meredith of Boston entered into negotiations with the Executors of the Will of said Simpson, to procure a contract to purchase the stock held by them, the final executed copy of said contract being prepared by and the legal work in connection therewith being done under the advice and direction of C. C. Beaman of the firm of Evarts, Choate & Beaman, which resulted finally in said Meredith procuring a contract to purchase the said shares from said Executors at $40 a share, amounting in the whole to $714,285, payable $100,000 in cash and the balance in notes at thirty, sixty and ninety days, bearing interest at the rate of 5% per annum, the shares of stock to be delivered, endorsed in blank, to the Old Colony Trust Company, in trust to hold as collateral security for the payment of the notes, and upon their payment to deliver the stock to said Meredith or his assigns; that there was paid by said Meredith, on account of his contract, the sum of $2,000, which sum was repaid to him by said Lewisohn, as so used for that purpose. That thereafter said Meredith assigned said contract to said Leonard Lewisohn. That on or before May 15th, 1895, said Lewisohn agreed that your orator was to receive one-half of his interest under said contract, and complainant paid to him $1,000, being one-half the sum paid by Meredith on the contract to purchase.

That on or about May 28th, 1895, your orator and said
100 Lewisohn completed said contract and paid said executors $100,000, which they furnished in equal shares from their own moneys, and delivered notes, made by said Lewisohn and endorsed by your orator, for the sum of $614,285, payable in 30, 60 and 90 days, with interest at 5% per annum, and said stock, endorsed in blank, was delivered by said executors to the Old Colony Trust Company, to be held by it upon the trust aforesaid.

That on or about June 13, 1895, the owners of the remaining two-sevenths of the stock of said Baltimore Company agreed to sell their shares of said capital stock namely 7143 shares, to said Lewisohn at $40 per share, or $285,715 in all, $40,000 in cash, payable June 20, 1895, and the balance in notes then to be delivered upon the same general conditions set out in the aforesaid contract between Meredith and the executors of Simpson's Will. That of this latter stock so agreed to be purchased your orator, by agreement with the said Lewisohn, was to receive two-thirds and the said Lewisohn to retain one-third thereof.

And your orator further shows that while the title to the mines, mining claims and lands, known as the Old Dominion Mines, the New York Mine, the Chicago Mine, the Keystone Mine, and a certain parcel of land, near the Bloody Tanks so-called, in Arizona, stood in the name of William Keyser, said Keyser held the same in trust for the sole benefit of the Baltimore Company; that these facts were not known to said Lewisohn or your orator at the time of the negotiations with the executors of Simpson, but the facts were learned during the negotiations for the purchase of the Keyser

stock, and thereupon the said Lewisohn and your orator insisted that the said mines, mining claims and land so held should follow the ownership of the stock, which was agreed to by said Keyser
101 and the executors of the Simpson Will and the Baltimore Company, and that the said Keyser should convey said mines, mining claims and lands to said Lewisohn upon payment of the notes given on account of the purchase price of the stock; that it was agreed between the said Lewisohn and your orator that when so conveyed to said Lewisohn he should hold the title to said mines, mining claims and land as property acquired under the contracts for the purchase of the stock.

(2) And your orator further shows unto your Honor that on or about the 20th day of June, 1895, the cash above provided to be paid to the said executors and the said Keyser having been paid, and the first notes of the said Lewisohn, endorsed by your orator, to the said executors and Keyser having been paid a meeting of the Baltimore Company was held, in which the control of said company was transferred to Lewisohn and your orator, and a new board of directors was chosen, consisting of Lewisohn, William Keyser, R. Brendt Keyser, George A. Polk, and your orator; that your orator was chosen president, and Allen W. Evarts, a member of the law firm of Evarts, Choate & Beaman of New York City, secretary.

(3) And your orator further shows unto your Honor that he is thoroughly familiar with mining properties and investment and the management and operation thereof and is and has for many years been the President and Manager of various large mining properties which have been successfully and profitably operated; and both he and the said Lewisohn had a thorough investigation made of these mining properties, to ascertain their value, prior to the purchase; that this investigation was made by Messrs. Hyams and Colquhoun, experts in such matters, who reported that the minimum earnings of said properties should not be less than $350,000 annually, a copy of such report being hereto annexed and marked "A." That said mining properties had been worked by the Baltimore Com-
102 pany at a large profit for many years and justified the report of said experts, and your orator and Lewisohn continued the operations of the mines under and through the Baltimore Company until the defendant herein was formed as a corporation of the State of New Jersey and the said mines and property were conveyed to it and it undertook the operation thereof.

That the subsequent notes were paid to said executors and Keyser before maturity and before the formation of the defendant company and in addition to the purchase price paid for the shares of stock your orator and said Lewisohn expended a large amount of valuable time and rendered very valuable service in regard to said transactions.

(4) And your orator further shows that at the time of the making of the contracts for the purchase of said stock and the taking over of the control of the Baltimore Company, your orator and said Lewisohn had no definite plans with respect to the disposition of the stock of said Baltimore Company or the property thereof, and it was not until about July 1, 1895, or some time thereafter, that the for-

mation of a new corporation was determined upon. That thereafter your orator and said Lewisohn consulted Messrs. Evarts, Choate and Beaman, eminent counsel of the city of New York, and fully advised them of the facts above stated and were advised by them throughout as to the legality of the subsequent acts of your orator and Lewisohn and all such acts were done under the advice of said counsel and with their approval as to the legality thereof, said counsel advising the formation of a New Jersey corporation; that your orator and said Lewisohn informed counsel that they would convey or cause to be conveyed to such new corporation all the property of said Baltimore Company, the said mines, mining claims and lands which said

Keyser had agreed to convey to said Lewisohn, and furnish
103 $500,000 for working capital, in return for all the capital stock of the corporation, which should be capitalized at $3,750,000, divided into 150,000 shares of the par value of $25 each; and the details of the organization and the carrying out of said plan *was* left to counsel.

(5) And your orator further shows unto your Honor that on or about July 8, 1895, the Old Dominion Copper Mining and Smelting Company was organized under the laws of the State of New Jersey, with an authorized capital stock of $3,750,000, divided into 150,000 shares of the par value of $25 each, and the amount said company was to begin business with was $1000, divided into 40 shares of the par value of $25 each; a copy of the certificate of incorporation of which company is hereto annexed as part thereof. That said corporation held its first meeting on or about the 9th day of July, 1895, at which all the incorporators were present, and by-laws were adopted, and the first directors duly elected, viz.—Jesse Lewisohn, Allen W. Evarts, Edgar Buffum, Charles W. Welch, Sydney Riddlesdorffer, William V. Rowe, and William R. Montgomery. That the following officers were elected by said directors: Allen W. Evarts, president; Sydney Riddlesdorffer, vice-president; Jesse Lewisohn, treasurer, and Edgar Buffum, secretary.

(6) And your orator further shows unto your Honor that at a meeting of the directors of the defendant, held on July 11, 1895, Messrs. Montgomery, Rowe, Welch, Lewisohn and Riddlesdorffer resigned as directors, and as each one resigned another director was lawfully appointed in his stead, pursuant to the by-laws, with the result that the following persons then and there constituted the board of directors: Allen W. Evarts, Leonard Lewisohn, Henry M. Whitney, Joseph G. Ray, Thomas Nelson, Edgar Buffum and your orator.

104 (7) And your orator further shows that thereafter it was agreed between your orator and Lewisohn and the defendant company that your orator and Lewisohn should convey or cause to be conveyed to the defendant company, all the property of the Baltimore Company, including the mines, mining claims and land conveyed by said Keyser to said Lewisohn, and which then stood in the name of said Lewisohn, and should furnish the defendant corporation with a working capital of $500,000 in cash, in consideration

whereof the defendant corporation should issue to your orator and said Lewisohn, or their nominees, and to the nominees of said Baltimore Company (of which your orator and said Lewisohn owned the entire capital stock) its entire capital stock of 150,000 shares.

(8) And your orator further shows that the transactions which thereafter took place, though in form separate, were in fact all in pursuance of the said agreement; that in form the transactions were separable as to the property held by the Baltimore Company, the said mines and mining claims and lands held by Lewisohn and the capital to be furnished by the said Lewisohn and your orator; but really the contract for the purchase and sale of all of said property and for the furnishing of said capital was an entire contract for an entire price, viz., the capital stock of 150,000 shares of the defendant corporation. That an offer was made by the Baltimore Company, through its proper officers, to the defendant company, to sell and convey substantially all the property of the Baltimore Company to the defendant company (excepting cash assets) for 100,000 shares of the capital stock of the defendant corporation, to be issued to the Baltimore Company or its nominees; that there was then at the same meeting presented the offer of Lewisohn to sell the real estate acquired by him as aforesaid for 30,000 shares of the capital stock of the defendant company, to be issued to him, or his nominees, which offer was accompanied with a request that the stock be issued
105 to said Lewisohn and your orator. That said offers were unanimously accepted by the defendant company, and thereafter the said Baltimore Company requested that said 100,000 shares of capital stock of the defendant company be issued to Philip K. Dumaresq.

(9) And your orator further shows that thereafter the said properties were conveyed by the Baltimore Company to the defendant company, and that the said Lewisohn conveyed to the defendant company the properties conveyed to him by Keyser, and having performed the obligation to furnish $500,000 for working capital, the said defendant company issued 150,000 shares of its capital stock to the following persons: to your orator, said Lewisohn, Philip K. Dumaresq, as the nominee of the Baltimore Company (the total capital stock whereof was owned by your orator and said Lewisohn), Thomas Nelson, acting for your orator, a Syndicate formed by your orator and said Lewisohn for the purpose of furnishing said $500,000; that said stock was issued in the following manner: 100,000 shares to Dumaresq, nominally on account of the property standing in the name of the Baltimore Company; 30,000 shares to your orator and Lewisohn, nominally on account of the mines, mining claims and land conveyed by Lewisohn to the Company; and 20,000 shares to said Nelson, nominally on account of the working capital of $500,000 so furnished by your orator and said Lewisohn, which said sum of $500,000 was actually procured by your orator and said Lewisohn through the sale of stock to their friends.

(10) And your orator further shows that the persons, holders and owners of the entire authorized capital stock of the defendant company, procured and consented to the issue of said entire capital

stock as aforesaid as performance by the defendant company
106 of its part of the aforesaid agreement, and no person who was a stockholder at the time of the consummation of the transaction objected or dissented thereto, or therefrom, but on the contrary all and every one assented, ratified and approved formally and on the books of record of the New Jersey Company, such assent, ratification and approval being with full and complete knowledge of all the facts. That subsequent shareholders acquired their shares, not from the defendant company, but from the owners of said shares, viz., your orator and said Lewisohn; that none of said shares were offered to the public by prospectus, or otherwise, by or on behalf of the defendant corporation, but were disposed of to various persons by your orator and said Lewisohn, under contracts of sale which they took and received wholly on their own account as the owners of said shares.

(11) And your orator further shows that prior to the commencement of the suit in the Supreme Judicial Court of Massachusetts for the County of Suffolk, hereinafter stated, no claim was made by the Baltimore Company, the defendant company, or any of the stockholders of the defendant company that the property which was conveyed and turned over to the defendant company, in consideration of the issue of 130,000 shares of the capital stock of the defendant company, was not worth the par value of said stock in cash. And your orator charges and insists the truth to be that the property so turned over by your orator and the said Lewisohn and the Baltimore Company to the defendant company was and still is worth a much greater sum than $3,250,000, and has been worth more than said sum continuously since the date of said sale; that while there have been some fluctuations in the prices paid for stock sold, due to the conditions of the market, said stock sold, in Boston, in September
1907, at $100 per share, being four times its par value, and
107 in February 1907, for $106 per share, being more than four times its par value; and that your orator believes that said stock cannot be purchased at the present time at $100 a share.

(12) And your orator further shows unto your Honor that at the present time about 140,000 shares of the capital stock of the defendant company are owned by a corporation of the State of Maine, known as the Old Dominion Mining Company, as a holding corporation, which company has little other property of known value; that the par value of the stock of said Maine Company is $25 a share; that its issued and outstanding capital stock is $7,200,000; and its stock is selling in the market from $35 to $40 a share, which is accounted for by the fact that the stock of the defendant company has been, and still is, worth at least four times its par value.

(13) And your orator further shows to your Honor that the various transactions, matters and contracts touching and concerning the purchase of the property aforesaid and the issuance of the stock aforesaid, were duly ratified by the stockholders of the defendant company at meetings held on April 5, 1899, June 15, 1899, and April 3, 1901, at none of which times did your orator and said Lewisohn, or either of them, control the said defendant Company or the action of its stockholders.

And your orator further shows unto your Honor that the defendant company, treating the contracts of sale from the Baltimore company and the said Lewisohn to the defendant company and the issue of the 100,000 shares and the 30,000 shares, as aforesaid, as separable and distinct contracts, filed two separate bills against your orator, in the Supreme Judicial Court of Suffolk County, in the Commonwealth of Massachusetts, in equity, the prayers of which bills are as follows:

108 (*a*) As to the 30,000 share transaction:

1. "That this honorable court will declare said sale of said parcels of real estate conveyed by said Leonard Lewisohn to the plaintiff, as hereinbefore set forth, rescinded, and will direct this plaintiff to execute such reconveyance thereof, if any, to such person as this honorable court shall think proper.

2. "That said defendant be required to return to the plaintiff the consideration paid by this plaintiff for said conveyance, to wit, thirty thousand (30,000) shares of its capital stock, or if, and so far as, said shares are no longer in his control, to account to the plaintiff therefor.

3. "In the alternative in case this honorable court shall deem that the plaintiff has not rescinded, and is not entitled to rescind, said sale of said parcels of real estate conveyed by said Lewisohn to the plaintiff as above set forth, that this honorable court will ascertain the amount of damages suffered by the plaintiff by reason of the sale of said parcels of real estate as above set forth, and will by its decree establish the right of the plaintiff to recover said amount, and order said defendant to pay said amount to this plaintiff.

4. "For such other relief as this honorable court shall seem meet.

(*b*) As to the 100,000 share transaction:

1. "That said defendant be required to account to the plaintiff for all shares of stock in the plaintiff corporation other than the thirty thousand (30,000) shares issued to him and said Lewisohn, ostensibly as consideration for the conveyance by said Lewisohn of said parcels of real estate, to wit, for all of said one hundred thousand (100,000) shares of stock orignally issued to said Philip K. Dunnaresq as hereinbefore set forth, which were received by said defendant or by said Lewisohn, or by any other person or persons as profit in the transaction set forth in the foregoing bill of complaint in connection with the promotion of the organization of the plaintiff corporation.

2. "In the alternative that the damages suffered by the plaintiff corporation from the acts of the defendant above complained of, other than the sale to the plaintiff of said parcels of real estate conveyed to it by said Lewisohn, be ascertained, and that the defendant be ordered to pay to the plaintiff the amount so ascertained.

3. "For such other relief as to this honorable court shall seem meet."

Copies of which bills and answers and other documents forming the record (excluding the testimony) are hereto annexed as part thereof Marked "C".

And your orator further shows unto your Honor that he is advised by counsel that said bills were, in effect, filed to recover from

your orator, as one of the promoters of said defendant company, undisclosed profits made by them in the formation of said corporation and the turning over of said property to the defendant
109 company at a much greater sum than they paid for the same. That upon the filing of said bills your orator filed a demurrer in the 30,000 share suit, and answered in the 100,000 share suit; that said demurrer was argued before the full bench of the Supreme Judicial Court of the Commonwealth of Massachusetts, and in the opinion of said court (which will be found in 188 Mass. 315) the demurrer was overruled, and your orator then answered in said suit, and the causes proceeded to trial. That both said causes were heard together before his Honor Henry N. Sheldon, Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts sitting within and for the County of Suffolk; that said Justice decided said causes in favor of the defendant company and against your orator, in the 100,000 share suit for $832,160, principal and interest, with costs of suit, and in the 30,000 share suit gave judgment for $1,213,566.67, with costs of suit, making in all the sum of $2,045,726.67; that decrees were accordingly entered in said two suits, on the 10th day of December, 1907, and after the entry thereof both parties thereto appealed to the full bench of the Supreme Judicial Court of the Commonwealth of Massachusetts, and the argument of said appeals is set for hearing on March 3rd next, which appeals, by both parties, your orator is advised by Massachusetts counsel, vacated said decrees.

And your orator further shows that after the commencement of the suits against your orator, the defendant Company likewise began two suits in equity, in the Circuit Court of the United States for the Southern District of New York, against Frederick Lewisohn et al. executors of the last will and testament of said Leonard Lewisohn, who was then deceased; that the two bills filed against Lewisohn's executors were identical with the two bills filed against your orator and were predicated and founded upon the same identical
110 state of facts and transactions set out in the bills against your orator; to one of which bills, viz., the 30,000 share bill, the defendants demurred, and answered in the other, following the course of your orator in the Massachusetts suits; that the cause on demurrer was argued before his Honor Judge Lacombe, who filed an opinion (which may be found in 136 Fed Rep. 915) sustaining the demurrer and is as follows:

LACOMBE, *Circuit Judge:*

It was conceded by complainant upon the argument that the bill prayed no relief except rescission of a contract for the sale of certain mining rights and a parcel of real estate in Arizona. Irrespective of such concession, the court would be inclined so to construe the bill. Therefore the objection that it is multifarious cannot be sustained.

The demurrer asserts that the complainant has not by the bill stated such a case as entitled it to have such contract and sale rescinded. This sufficiently challenges the equity of the bill. The facts as

averred in the bill are as follows: The deceased, Leonard Lewisohn, and one Albert S. Bigelow were the promoters of the complainant company, and caused it to be organized under the laws of New Jersey on July 8, 1895, by seven persons selected and employed for said purpose, none of whom had any actual interest in the corporation, or acted in the formation thereof other than as the representative and agent of the promoters. Forty shares were nominally subscribed and paid for by these persons, but, as in fact, all of said subscriptions were made for the benefit and at the request of Bigelow and Lewisohn, and each subscription was paid for by them. The company having been organized, elections for officers and directors ensued, as a result of which, on July 11, 1895, Bigelow and Lewisohn both became directors, and Bigelow the president of the Company. Prior to July 11th they had become the owners of several mining claims and a parcel of real estate in Arizona, which were worth on that day, as the bill alleges, not more than $5,000. On that day, at a directors' meeting attended by themselves and two of their dummy directors, they sold and conveyed to the corporation the said mining claims and real estate for 30,000 shares of the capital stock of the par value of $25 a share. Thereafter, at times not specified, additional shares of capital stock (to the amount of 20,000) were from time to time offered and sold to the public at par, to obtain working capital. The bill also alleges a similar sale, for stock, on July 11th, of a mine owned by the promoters, at an excessive valuation, but no relief is prayed as to that transaction. The prayer of the bill is that the sale of the mining claims and real estate be rescinded, the property reconveyed, and the shares of stock returned or accounting had therefor, or, in the alternative of rescision, that the court will ascertain the amount of damages suffered by the complainant, and decree therefor.

111 Whether the contract for the sale of the real estate was voidable, so as to give the corporation the right to rescind or to demand damages, must be determined under the conditions which existed when it was made. Ordinarily, when a director or promoter contracts to sell property to his corporation, the corporation not being independently represented, it may rescind the contract, upon the theory, of course, that the relation between the parties is fiduciary, and that the other stockholders and subscribers to the stock are to be protected against an abuse of trust. But where there are no other stockholders nor subscribers, there is no one who is deceived, no stockholder or subscriber who is defrauded, since all the profit put into one pocket by the "faithless" directors is taken out of their other pocket as the sole stockholders. This principle is abundantly established by decisions controlling here, so it will be unnecessary to cite numerous authorities from other courts. In Foster v. Seymour (C. C.) 23 Fed. 65, which was decided in this court (Wallace, J.) the facts were very similar, except that the sale was for scrip, the stock not having yet been issued. The court said:

"There was no fraud on the corporation. At the time the scrip was exchanged for the mining property, the trustees were all there

were of the corporation. There were no stockholders unless they were stockholders. What was done was done by the corporation: By the exchange the corporation got the mining property, and gave it back again to those from whom it got it, divided into 100,000 shares of the nominal value of $100 each."

And it held that whether or not a subsequent purchaser of stock could recover against those who had misled him, against the corporation or the trustees, "the corporation has no cause of action against the trustees." Subsequently the same question came before the Court of Appeals in this circuit (McCracken v. Robinson, 57 Fed. 375, 6 C. C. A. 400), where, as the court expressed it,

"When they entered into the contracts they owned the corporation and all its stock, and represented only themselves. While directors in fact, they were principals in name."

It was held that in such a case the rule prohibiting persons in a fiduciary relation from contracting for their own advantage in the name of their beneficiaries had no application.

This demurrer to the bill is well taken, and it is therefore unnecessary to discuss the special demurrer as to defect of parties. The bill is dismissed with costs.

and a final decree was entered thereon; that from said decree this defendant company appealed to the United States Circuit Court of Appeals for the Second Circuit, and said Court affirmed the decree of the Court below in sustaining the demurrer (the opinion may be found in 148 Fed. Rep. 1020) and is as follows:

112 The Bill prays for relief as follows:

First. That the sale of the mining claims to the complainant by Leonard Lewisohn—the defendants' testator—and Albert S. Bigelow—a citizen of Massachusetts and not a party to this action, be rescinded and the real estate reconveyed to the defendants upon receipt by the complainant of the consideration paid therefor.

Second. That defendants return to the complainant the consideration paid by complainant for said property, namely, 30,00- shares of its capital stock, or account therefor.

Third. That if the Court shall decide that the complainant is not entitled to rescind the sale of said real estate to it, then, and in that event, that the court ascertain the amount of damages sustained by complainant and direct the defendants as executors to pay the amount to complainant.

We are unable to perceive how this relief or any part thereof can be granted the complainant upon the facts alleged in the bill.

The fundamental difficulty with the bill is that it fails to state any facts showing that the complainant was in any way injured or defrauded by the transactions complained of. At the time of the transfer by Bigelow and Lewisohn to the company Bigelow and Lewisohn and their representatives owned the entire issue of stock of the corporation. The sale by them to the corporation was in effect a sale by them to Bigelow and Lewisohn. A corporation can only act through the human beings who compose it; it cannot be deceived or defrauded unless its stockholders and directors are deceived or

defrauded. The corporation knew all that Bigelow and Lewisohn knew and no one of the original parties to the transfer was defrauded by the exchange of the stock controlled by Bigelow and Lewisohn for the real estate controlled by them.

It may be that such a large over-capitalization as is alleged in the bill might mislead and deceive careless and credulous purchasers of the stock, but we are not now dealing with the case of a stockholder alleging concealment, fraud and misrepresentation. The stockholders, apparently, have no complaint; at least they have not propounded any.

Indeed, it is not easy to see how a purchaser, who paid $25 per share, could be defrauded in view of the allegation of the bill that "The shares of this corporation so issued in payment for the property sold to it as aforesaid were at the time of the fair market value of twenty-five (25) dollars each, and continued for a long time thereafter to be of such or greater value." It is enough, however, that this is not a stockholders' action.

The subscribers for the 20,000 shares subsequently issued were not deceived; they asked for no statement and received none; they got what they purchased and are not complainants here.

A protracted discussion is unnecessary for the reason that this court and the Circuit Court of the Southern District have
113 decided the question adversely to the complainant's contention.

Foster v. Seymour (23 Fed. Rep. 65); McCracken v. Robinson (57 Id. 375).

To the same effect are the decisions of the New York Court of Appeals.

Barr v. N. Y. L. E. & W. R. Co. (125 N. Y. 263); Blum v. Whitney (185 N. Y. 232).

It is true that the Supreme Court of Massachusetts (188 Mass. 315) has taken a different view, but we feel constrained to adhere to the prior adjudication of this circuit.

The decree is affirmed with costs.

That thereupon the defendant company presented its petition to the Supreme Court of the United States for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, alleging as a reason why said Court should take jurisdiction of the cause, that there was conflict between the decisions of the Circuit Court of Appeals of the Second Circuit and the Circuit Court of Appeals of the Sixth Circuit and the Supreme Judicial Court of Massachusetts, and that the questions involved were of great public importance; that thereupon the Supreme Court of the United States granted the petition and allowed the writ of certiorari.

And your orator further shows unto your Honor that the order of the decrees on the demurrers of your orator in the Massachusetts Court and of Lewisohn in the United States Circuit Court was as follows: (1) The United States Circuit Court sustained the Lewisohn demurrer; (2) The Supreme Court of Massachusetts overruled your

orator's demurer; and (3) The United States Circuit Court of Appeals affirmed the judgment below sustaining the demurrer.

And your orator further shows unto your Honor that the total profit of your orator on the whole transaction was the sum
114 of $151,000. but that in the decrees entered in Massachusetts said Court charged your orator not only with the sum which it conceived he would have been primarily liable for if Lewisohn had been a party to the suit and it had likewise been adjudged against him, but with the whole sum it conceived. That your orator and Lewisohn should return to the company as appears by Judge Sheldon's finding copy of which is hereto annexed and marked "C."

And your orator further shows unto your Honor that he is advised by New Jersey counsel (1) that under the laws and decisions of the State of New Jersey your orator is not liable to respond to the defendant company in manner and form set out in said decrees, or otherwise; (2) that if your orator is liable for any sum such sum should not exceed the profit he personally realized on the transaction. (3) That the liability of your orator on the matters and facts set out in the bills filed in the Massachusetts Court is fixed and governed by the laws of our State, the decisions of our courts, and the policy of our State, and not by the laws, decisions and policies of other States; that the decision of the Massachusetts Court, in said suits, is contrary to the laws, decisions and policies of this State, and charges your orator with a liability not existing in this State. (4) That if the judgment of the Massachusetts Court sounds in tort, the judgment of the United States Circuit Court for the Southern District of New York likewise sounds in tort; and as the proceeding in the United States Circuit Court was instituted by the defendant company without the assent of your orator, and the decree entered therein, if affirmed by the United States Supreme Court, operates as an absolute discharge of the estate of said Lewisohn, it likewise operates as a discharge of the causes of action set out in the bills filed in Massachusetts as against your orator, the decrees
115 therein not having been entered until after the final decree was entered in the United States Circuit Court on demurrer and the decree on remittitur from the Circuit Court of Appeals had been entered. (5) That he is advised that said judgment of the United States Circuit Court for the Southern District of New York estopped the defendant company from further proceeding with its suits in Massachusetts. (6) That if the United States Supreme Court upholds the judgment of the Circuit Court for the Southern District of New York, and the Supreme Judicial Court of Massachusetts should affirm the decree of its Court below, then your orator will be without remedy against the estate of said Lewisohn, because it was judicially determined, in the suits against said executors, that they were not liable.

And your orator further shows that in view of the fact that the defendant company is a corporation organized and existing under the laws of the State of New Jersey, that the matters in controversy between the defendant company and your orator, as well as their several rights and liabilities, arise under the laws of the State of

New Jersey and should be decided in conformity with the laws and decisions of the State of New Jersey, and in view of the fact that there is a conflict between the decisions of the United States Circuit Court of Appeals for the Second Circuit and the Supreme Judicial Court of Massachusetts, in suits where the pleadings are identically the same and where the legal responsibility, if any, of the estate of Lewisohn, for the acts complained of, is at least as great, if not greater, than that of your orator, on the facts alleged in said bills, and the decision of the Supreme Judicial Court of Massachusetts is also in conflict with the laws and decisions of the State of New Jersey, and charges your orator with a liability not existing
116 under the laws and decisions of the State of New Jersey, and thereby the defendant company has obtained an unconscionable and inequitable advantage over your orator, due solely to the selection of the court in which the proceedings were instituted, and may, if permitted to proceed with the prosecution of said cause in the Supreme Judicial Court of Massachusetts, obtain a further unconscionable and inequitable advantage over your orator, by the said court following the doctrine theretofore enunciated in the decision of the cause on your orator's demurrer, wherein it refused to follow the laws and decisions of the State of New Jersey, as well as the decision of the United States Circuit Court in the Lewisohn suit, this honorable court should assume jurisdiction of the controversy between the defendant company and your orator, to determine and fix the rights and liabilities of the defendant company, your orator and all parties to the controversy, in accordance with the laws and decisions of the State of New Jersey, and to prevent the manifest injustice and unconscionable and inequitable advantages which have heretofore been obtained in the Supreme Judicial Court of Massachusetts, on the argument of said demurrer, being availed of by the defendant company, and the further manifest injustice and unconscionable and inequitable advantages which may be done, and which the defendant company may obtain, if it is permitted to proceed with the prosecution of the cause above stated, before the Supreme Judicial Court of Massachusetts, being the same court which decided the cause on demurrer, which court is the court of last resort in said Commonwealth of Massachusetts.

And your orator further shows unto your Honor, that in said suits in Massachusetts your orator gave a surety bond or bonds in the sum of $500,000 to indemnify the defendant company; that the term of the Supreme Judicial Court of Massachusetts follow-
117 ing the March term is the November term; that the case of the defendant company against the executors of Lewisohn now pending on certiorari in the Supreme Court of the United States, it is expected, will be argued during the month of March of this year, and it is practically sure that the cause will be decided by the United States Supreme Court prior to the November term of the Supreme Judicial Court of Massachusetts, and that to restrain the defendant company from prosecuting its cause in the Supreme Judicial Court of Massachusetts and from proceeding further in said suit, in Massachusetts, will do no injury whatsoever to the defend-

ant company; whereas, in the situation as it now presents itself, if the cause is prosecuted in Massachusetts and the final decrees entered therein against your orator, your orator will be without remedy, and will suffer an irreparable injury.

And your orator further shows unto your Honor that it is the intention of said defendant company, unless restrained by the injunction or decree of this honorable court, to prosecute said causes before the Supreme Judicial Court of Massachusetts, on the third day of March next, or as soon thereafter as counsel can be heard, and to proceed therein, after which procedure the decisions of the court below can be affirmed and final decrees entered therein, without the intervention of the defendant; and that to permit such procedure of said causes places the defendant company beyond the control of this honorable court, in that if the above court should decide in favor of the defendant company against your orator, it would thereby obtain an inequitable and unconscionable advantage against your orator, and your orator might be bound thereby and without remedy, even though the Supreme Court of the United States should, on the same subject matter and cause of action, enunciate a different rule to that found in the Supreme Judicial Court of Massachusetts and
118 declare that the defendant company was not entitled to the relief prayed for in its bills.

And your orator further shows that he submits himself to the jurisdiction of this honorable court, and is willing to submit himself to the jurisdiction of this honorable court, in any proceeding which may be brought by the defendant company against him, touching the subject matters set out in said bills in the Massachusetts suits, and to do and perform every act and thing required by this court, and to obey such decrees, and pay such sums of money, if any, as this court may make or direct in the premises.

And your orator further shows that the estate of said Lewisohn owns a large amount of property within the State of New Jersey and can, and he believes that said executors may, be brought within the jurisdiction of this honorable court, and that it is proper in the settlement of the matters in controversy that the estate of Lewisohn and your orator should be joined in the same suit, to the end that all the parties interested or who should be affected by the decrees, will be brought before this court, and the court, by its decree, may then and there settle once for all, all controversies existing between the parties.

And your orator further shows that in the suit against your orator in Massachusetts the said defendant company urged as an excuse for not making the executors of the estate of Lewisohn parties to the suit, on the ground of non-residence, and stated in its bills as follows:

"Said Leonard Lewisohn died on March 5, 1902, and was at the time of his death a citizen and resident of the City, County and State of New York. The executors of the estate of said Lewisohn were also residents of said City, County and State and have been duly appointed by the courts of said State, but no executors or legal representatives of said Lewisohn have been appointed or are within this com-

monwealth, and there is no property within this common-
119 wealth belonging to said estate which could be reached by any process, and it is impossible to get service within this commonwealth upon the executors of said Leonard Lewisohn."

That in the bills filed in the United States Circuit Court as aforesaid, the defendant company excused its failure to make your orator a party to said suit, alleging as follows:

"Said Bigelow is a citizen and resident of Boston, in the Commonwealth of Massachusetts, and cannot be served with process in this District or in the State of New York."

But by reason of the willingness of your orator to appear in a suit brought in the State of New Jersey, and the presence of property of the estate of Lewisohn within the State of New Jersey, jurisdiction can be obtained over all the parties concerned in the state of New Jersey.

And your orator further shows to your Honor that in view of the premises the determination of the controversies existing between the defendant Company and your orator and the Lewisohn estate should be and is properly cognizable before this Honorable Court to prevent a multiplicity of suits and to prevent injustice through technical conflicts in different jurisdictions, and to the end that a decision might ultimately be reached binding on all the parties in conformity with the spirit of the laws of the State of New Jersey, under whose laws said corporation was organized and the duties and obligations of the parties were created and exist.

That after the institution of the suits aforesaid certain interests owning or controlling about 100,000 out of the total 150,000 shares of the capital stock of the New Jersey Corporation, caused to be formed a Maine company known as the Old Dominion Copper Company, and caused to be conveyed to such Maine Company at or about the time of its incorporation 100,804 shares of the capital
120 stock of the New Jersey Company, and since such time have caused to be conveyed to the Maine Company further shares of the New Jersey Company to the amount of about 40,000 shares, and as a part of such conveyance and transfer and as a part of the plan of organization of said Maine Company, an agreement was entered into between the New Jersey Company and the Maine Company and one Charles Sumner Smith, Vice-President of the Maine Company and President of the New Jersey Company, and one D. Blakely Hoar, a partner or associate of counsel for the New Jersey Company in all four suits, providing that the Maine Company as a majority shareholder of the New Jersey Company should cause the New Jersey Company to realize upon these four suits against your orator and the Lewisohn estate and distribute the proceeds thereof, as in said agreement provided, a copy of which said agreement is hereto annexed and marked "Exhibit F." Thereafter or substantially at the same time the said Smith and Hoar executed a trust deed in which they declared themselves to be Trustees of any fund obtained by virtue of the foregoing arrangement, and issued certificates of interest known as Old Dominion Trust Receipts, a copy of one of such trust receipts which is referred to in Wainwright's affidavit (as annexed)

hereto annexed and marked "B." Such trust receipts are sold from time to time in the markets of Boston, New York and elsewhere, and the holders of such certificates are not in any substantial part the holders of the shares of the Maine Company or the holders of the shares of the New Jersey Company, and the complainant is advised and therefore alleges that the holders of the trust receipts are the persons ultimately entitled to the sums of money to be paid by the Maine Company to the respondents Smith and Hoar under the agreement aforesaid. The complainant is informed and believes that the voting power on the stock of the New Jersey Company held
121 and owned by the Maine Company as aforesaid, has been as to the matters referred to in said agreement between the Maine Company and the said Smith and Hoar, transferred to the said Smith and Hoar, Trustees as aforesaid, who are not in that capacity shareholders in the New Jersey Company, and the prosecution of the claims and suits against Bigelow and Lewisohn is not being had with the object or purpose of benefiting the New Jersey Company, but for the purpose of realizing the largest sum possible on the trust certificates issued as aforesaid, so that the above trust receipts are simply evidences of the owners' interest in the law suits which the Old Dominion Copper Mining & Smelting Company of New Jersey in name has b-ought against the Lewisohn Estate and your orator, and the buying and selling of such certificates constitutes the trading in a law suit and the proceeds of any recovery in any or all of the aforementioned four law suits will neither go to any persons who were originally interested in the New Jersey Company as stockholders, syndicate subscribers or in any other way whatsoever, nor will it go substantially as far as fourteen-fifteenths is concerned, to the New Jersey Company, but to persons who are entire strangers to the transactions but who have bought in purchasing such trust receipts as a speculative interest in law suits.

In tender consideration whereof, and forasmuch as your orator is without adequate remedy in the premises, at and by the strict rules of the common law, and can only obtain relief in this Honorable Court where matters of this nature are properly cognizable and relievable.

122 To the end therefore, that the said Old Dominion Copper Mining and Smelting Company of New Jersey may, to the best and utmost of its knowledge, remembrance, information and belief (but without oath, the oath being waived), full, true and perfect answer make to all and singular the matters aforesaid, and that as fully and particularly as if the same were here repeated and they and every of them distinctly interrogated thereto, and that the said Old Dominion Copper Mining and Smelting Company, its officers, servants, agents, attorneys, solicitors, counsel and eemployés, be by the injunction and decree of this Honorable Court perpetually restrained and enjoined from proceeding in any manner to enforce or establish its claims against your orator as stated in two bills of complaint in the Supreme Judicial Court of Massachusetts entitled, Old Dominion Copper Mining and Smelting Company, a corporation duly organized under the laws of the State of New Jersey and having a usual place

of business at Boston in said County of Suffolk, against your orator, described as Albert S. Bigelow, of Cohasset in the County of Norfolk and Commonwealth of Massachusetts, having his usual place of business in Boston, and from taking any further action or proceedings in said suits or otherwise, and from in any manner instituting proceedings and suits with respect to or touching the claims against your orator set out in said two bills filed as aforesaid, in any court or jurisdiction whatsoever excepting the courts of the State of New Jersey, and that this court will take jurisdiction of the controversies alleged to exist between the Old Dominion Copper Mining and Smelting Company and your orator and determine if any liability exists from your orator to the Old Dominion Copper Mining and Smelting Company, and that if any liability is found the estate of said Leonard Lewisohn being made a party hereto, this Honorable Court
123 will determine the respective rights of your orator and the said estate, and do equity between them whether by contribution or otherwise, and that your orator may have such further or other relief in the premises as the nature of the case may require, and as shall be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to grant unto your orator not only the state's writ of injunction, issuing out of and under the seal of this Honorable Court, to be directed to the said Old Dominion Copper Mining and Smelting Company, its officers, servants, agents, attorneys, solicitors, counsel and employés, restraining them and each of them from proceeding in any manner to enforce or establish its claims against your orator as stated in two bills of complaint in the Supreme Judicial Court of Massachusetts, entitled Old Dominion Copper Mining and Smelting Company a corporation duly organized under the laws of the State of New Jersey and having a usual place of business at Boston in said County of Suffolk, against your orator, described as Albert S. Bigelow, of Cohasset in the County of Norfolk and Commonwealth of Massachusetts, having his usual place of business in Boston, and from taking any further action or proceeding in said suits or otherwise, and from in any manner instituting proceedings and suits with respect to or touching the claims against your orator set out in said two bills filed as aforesaid, in any court or jurisdiction whatsoever, excepting the courts of the State of New Jersey, and from in any manner assigning, selling or disposing of said claims, but also the state's writ of subpœna, issuing out of and under the seal of this Honorable Court, to be directed to the said Old Dominion Copper Mining and Smelting
124 Company, commanding it by a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor in this Honorable Court, then and there to answer all and singular the premises and to stand to, abide by and perform such order and decree therein as to your Honor shall seem meet, and shall be agreeable to equity and good conscience.

And your orator, as in duty bound, will ever pray, &c.

(Signed) JOHN GRIFFIN,

Solicitor and Counsel with Complainant.

A.

CLIFTON, ARIZONA, *June 18th*, 1895.

To Messrs. A. S. Bigelow and Leonard Lewisohn.

GENTLEMEN: In compliance with your instructions we have examined the property of the Old Dominion Copper Co., of Globe, Ariz., and we now take pleasure in submitting our report on the same.

Globe is situated about 100 miles to the Northwest of the Clifton copper belt and is reached by the G. V. G. & N. Ry. which terminates at Fort Thomas, 61 7-10 miles distant from the connection with the Southern Pacific Railway at Bowie, and 71 miles distant from Globe. From Fort Thomas freight and passengers are presently conveyed by wagons and by stage. We may here state that for the proper and economical working of the Globe properties it is necessary that the G. V. G. & N. Ry. should be extended to Globe.

In our calculations we have considered the completion of the railroad as an assured fact. The property of the Old Dominion Co. comprises the following:—

The Globe Mine.

125

The Globe Ledge.
" Fraction.
" S. E. Globe.
" Interloper.
" Globe, S. W.
" Hidden Globe.
" Alice.
" S. W. Alice of Hypatia.
" S. E. Globe Millsite } Of these the present Smelting Plant
" Interloper " } is built.
" Hidden Globe " }
" S. W. Globe Millsite.
" Hypatia "
" Alice "

Smelting Plant.

The smelting plant consists of 2 60-ton water jacket furnaces and 1 40-ton furnace, each supplied with an independent Baker blower propelled by independent engines. The steam boilers and machinery we found ample for the requirements of the plant. The building covering the plant and the ore bins we found roomy and commodious, the ore bins having a capacity of 3500 tons. On a self-fluxing charge the furnaces could be pushed to 80 or 90 tons per day, as the ore is probably the finest smelting ore in the world, being remarkably free from fines and admirably suited for rapid and economical running. For matting the ores a somewhat larger furnace, say 7 ft. x 3′ 3″ would be required. But if the object be to

make black copper, in that case the present plant is probably as economical as any, and it had the advantage of being ready
126 to commence work at a moment's notice. The admirable condition of everything connected with this plant showed that the management had taken the greatest pains to keep everything in perfect order.

The Interloper shaft, the main outlet for the mines, is situated less than a quarter of a mile from the smelting Works on an upper slope of the same hill, and a Bleichert tramway, with a capacity of 200 tons in 10 hours, furnishes a cheap and exceedingly convenient method of haulage. For the present system of working, the Smelting Plant and the haulage leave but little to be desired.

Mines.

In locating the Mines of the property the locators have been singularly happy in covering in length and width what we cannot but regard as the principal lode of the district and one of the largest in Arizona. The surface level and the first level are tapped without hoisting, both delivering their ores direct to the Bleichert tramway. The second, third, fourth, fifth, sixth and seventh levels are connected to and deliver their ores through the Interloper shaft, which has been sunk to the eighth level, the latter being at the present time no more than a pumping station. The levels have not been run in straight lines and they are therefore longer than is shown by the figures given below, which represent the length in a straight line opened up by each level.

Surface level	625	feet.
Alice Tunnel	600	"
No. 1 level	2500	"
No. 2 level	2500	"
No. 3 level	1500	"
No. 4 level	850	"
127 No. 5 level	1650	feet.
No. 6 level	1350	"
No. 7 level	1700	"
No. 8 level	375	"

Surface Level.

The surface level, run in at an average depth of 50 feet below the surface of the hill, exposes large ore bodies at three different points on each of which stoping to a considerable extent has been done. At the main outcrop the vein is 200 feet in width and practically all ore, mainly of the low grade self-fluxing character. The tremendous outcrop, the most noticeable feature on the prop- practically all ore, mainly of the low grade self-fluxing character. In stoping here, as on all the other levels, only the rich streaks have been followed, and the main portion of the vein has, therefore, been but little disturbed.

The rich ore descends in sheets with layers of the low grade ore and occasionally of vein matter between. This characteristic we found repeated on the lower levels. A careful examination satisfied us that there is every reason to expect a continuous ore body for a distance of 700 feet on this level. In opening up this ground the footwall should be closely followed and in stoping upwards the ore should be followed to its junction with the hanging wall, and this also applies to the lower levels. The low grade ore in the backs will nearly all pay to smelt and in running we expect that sheets of richer ore will be uncovered.

First Level.

Development on this level has been done altogether between the Moony shaft and the outcrop, the total length of vein broken into being 600 feet, the main working being on the downward
128 extension of the outcrop which showed as strong here as it did on the surface 160 feet above. With the exception of the work on the extension of the outcrop, stoping has not been conducted to a height greater than from 20 to 25 feet above the level, the lower grade ores being as usual left untouched in the backs. The promising ground lying to the Southwest of the Moony shaft lies untouched. Here there should be no difficulty in finding the extension of the ore body. It is evident that this level should produce much more than it has done heretofore.

Second Level.

On this level ore has been touched in spots for a length on the vein of 1200 feet, but only over a distance of 500 feet has stoping been done to a considerable extent and that altogether on the hanging wall and away from the main contact. At the Moony shaft, ore is to be seen in place on the footwall. Ore is again exposed at a point 50 feet to the Southeast of the same shaft. At this point the vein narrows to a few feet in width, but it opens out immediately. In the belt of ground 1400 feet in length practically no work has been done along the footwall. Judging from the relative position of the stopes it would appear as if the ore body might have left the footwall immediately below the first level and folding out horizontally had again descended on the hanging wall. This theory however finds no support in the developments on the levels above and below which invariably expose the main ore body making on the footwall. The development of the ore bodies on the hanging wall has no doubt been due to the driving of the main levels through the limestone. These ore bodies will I have no
129 doubt be ultimately followed to their starting point,—the footwall. With ore to commence upon at the Moony shaft it should not be difficult to prove up this ground.

Third Level.

With the exception of two small stopes on the footwall on the S. W. end of the property, all the development work has been done in the hanging wall. The work to the N. E. of the Moony shaft has been run too far into the country rock and has been done in ground which cannot be considered as in the vein or as likely to be ore bearing. We consider this level as practically so much undeveloped ground. As the ore is very strong on the footwall in the fourth level we see no reason why it should not be found in the same position on the third.

Fourth Level.

With the exception of a block of 90 ft. the ore has been followed on the footwall and found to be continuous for a distance of 900 feet. All of this work has been done to the S. W. of the Moony shaft. Stoping as usual has been done only on the rich ore sheet, good fluxing ore being left in the back. Ore has also been mined to a considerable extent along the footwall. The vein shows a width between walls of fully 200 feet for quite a distance. Much good stoping ground remains, and between the walls there is a big unprospected territory which can hardly fail to be highly productive. The ground lying to the N. E. of the Moony shaft should be tested along the footwall.

Fifth Level.

On this level the ore body on the footwall has been shown up and stoped for a distance of about 800 feet on the vein, the work being done to the S. W. of the Moony shaft. Most of this ground being inaccessible on account of a large cave due to insufficient timbering, it is impossible to judge with any degree of accuracy how much ore has been left. As only the rich ore was stoped, it is obvious that the bulk of it will pay to turn over, and we should expect it to yield besides the low grade fluxing ores quite abundantly in high grade ore. With the exception of a stone situated 600 feet to the Northeast of the Moony shaft no ore has been developed or touched on the extension of the vein in that direction. No doubt this is due to the fact that the main level and all cross-cuts have been driven in the country rock and away from the vein. In a distance of 850 feet not a single cross-cut has been run to test the footwall. While indications point to a narrowing of the vein on its Northeast extension there is good reason to believe that ore will be found by prospecting along the footwall and by following up the ore body in the stope last referred to. This view is strengthened by the work on the sixth and seventh levels which show the extension of the vein for a distance of 600 feet N. E. of the Moony shaft.

130

Sixth Level.

Ore has been stoped at intervals for a total distance of 1100 feet on the vein. In a total number of nine crosscuts run in to cut the footwall, no less than eight of them struck ore, which is an excellent proof of the continuity of the ore body and emphasized the need of systematic work in this direction. The most noticeable feature of this and of the fifth level has been the development of the ore body to the S. W. of the Interloper shaft. The ground in this direction justifies further prospecting in height, length and width. We consider it very important ground.

Seventh Level.

The continuation of the ore body in depth is shown by three large stopes opened at widely separate points on the vein.
131 As on the upper levels the bulk of the development work has been done in the hanging wall and in no case has ore been found on this level in crosscutting into the limestone. All the ore found has been discovered in crosscutting towards the footwall. Rich sulphide ore in pay streaks shows for a considerable distance, along the floor and roof of the main level. These streaks should be followed downward and upward, especially downward in order to develop the sulphides as rapidly as possible. So little real development work has been done that this level must be regarded as new and undeveloped. The vein is undoubtedly slimmer here than on the upper levels, but it is still wide enough to hold large ore bodies. Development work to the S. W. of the Interloper should also be pushed with vigor as the ground is very favorable and inviting.

Summary.

We need not encumber this report with a detailed description of the geological conditions which obtain in the Mines at Globe. It will suffice for your clear understanding of the situation if we explain only its more important features. The ores occur altogether in a strong fissure between the diorite which forms the footwall and the limestone which is the country rock lying to the East of the vein. The ore body has been found in the various levels, at intervals, over a total length of 1800 feet, and it has been followed to a depth of 515 feet from the surface of the main outcrop to the floor of the seventh level, where such small developments as have been made go to show that it is still a strong body. Near the fissure the limestone has been fractured, leaving fissures and pockets in it which have in places been filled with ore derived no doubt from the same source
132 which impregnated the main vein. This is particularly evident on the third level where the ore makes in the limestone and away from the vein. On the same level the ore is also found in the vein on the footwall. The nature of the vein being such—and in this it resembles most limestone formations—it was impossible to

block out and measure the ore in sight, and we were compelled to rely altogether on our own judgment of the ground, assisted, of course, by our knowledge of what it had produced in the past, and by our experience in other limestone formations and also by a close study of the geological conditions. The immensity of the vein and of the ore bodies in sight made this a fairly simple task. Particularly were we impressed by the enormous bodies of low grade fluxing ores, nearly all of which can be treated to profit with the assistance of the cheap coke which will be obtained when the railroad is completed. With coke ranging from 40 to 60 per ton, all low grade ore had to be avoided, and wherever struck it was left standing in the Mine. Sulphide ore, in like manner, whenever found *were* at once abandoned, on the ground that it was difficult to treat.

Metallurgy.

The method of treatement heretofore followed had been the simple one of smelting oxidized ores into black copper of high grade. The same method can still be followed and with good profit, but there are heavy losses in it which can be avoided by converting all the ores into copper matte and then bessemerizing. But to make the ores, a great deal more sulphur will be required than is presently in sight. It is therefore highly necessary that while the plant is shut down the development of the sulphides should proceed with vigor. The sinking of the Interloper shaft for a further depth of 300 feet we look upon as an immediate necessity. At the same time winzes should be sunk in the sulphide ores to prove them in depth and thus work should keep pace with the shaft sinking. As this work proceeds, short campaigns should be made in smelting to treat the ores now in stock and those that will be derived from the prospecting. If necessary the production of black copper may be commenced at any time; but as the present shaft would not be able to keep up a large output and at the same time allow of its being sunk, we deem it better to sink before commencing to smelt on the large scale. The rich sulphide ores will probably be found for a considerable depth, possibly 200 to 300 feet below the eighth level, and much of it will be associated with considerable vein matter, forming a low grade ore which will require to be concentrated. For the treatment of this ore a concentrator will be required. Later it will be necessary to erect a leaching plant, but this need not be thought of until a sufficiency of iron pyrites has been developed. Since the commencement of the Company there has been produced about 68,000,000 lbs. fine copper, and we think that a very conservative estimate would give a like amount still to be extracted from the ground opened by the Old Company. This would give a supply of five and a half years at the rate of 6,000 tons copper per annum. Taking the figures of the Old Company as a basis and reducing them to figures based on present situation of the railroad showing a wagon haul of 65 miles, will show a net profit at present price of black copper (10 1-2c.) of $60. per ton, or $360,000. on 6,000 tons of copper per annum. To this can be added $60,000. when the railroad is completed into Globe.

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Of course when the low grade sulphides are mined and the matter obtained treated by the Bessemer process, this yield
134 can be materially increased, but of this we have taken no account in our calculations. Calculating on a yearly output of 6,000 tons of black copper and on the market value of the same of 8 1-2 cents per pound, and also the completion of the railroad, the profit should be $180,000. per annum; with black copper realizing 9 1-2c. per pound, the profits should be $300,000. per annum; with black copper realizing 10 cents per pound, $360,000. per annum, and with black copper realizing 10 1-2 cents, $420,000. per annum.

In this estimate we have counted upon a yield from the ores of 9 per cent. of copper, an average which can easily be sustained, and we have not counted upon the richer sulphides likely to be opened out in depth. With this much assured from the ground already opened out, and with every prospect of an extension of the ore bodies both in length on the vein and in depth, we consider the property as certain to be a heavy producer for many years to come.

Attached hereto is a plan showing the ground covered by the various claims and also the trend of the footwall through the Globe Ledge and Globe claims, which have produced nearly all of the ore so far produced.

The following analysis shows the composition of the ore, amounting to 4,600 tons, now in the furnace bins and ready for smelting. The sample was taken from all over the surface of the ore pile:

	Per cent.
Moisture and volatile matter	12.40
Silica	22.48
Oxide of Copper (Metallic copper 16.9%)	21.18
Oxide of Iron (F20)	27.26
Alumina	9.44
Oxide of Manganese	2.09
Lime (Ca O)	1.35
Alkalies, Oxygen and loss	3.80
	100.00

This ore should form a slag not exceeding 36% in silica.
135 It is perfectly self fluxing. Samples of the sulphide ores taken from various parts of the Mine assayed as follows:—

	Per cent. copper.
Sulphide streaks in raise from 5th level	28.85
" " " Main drift "	9.60
" ore from stope near 7th level	12.90
" from main drift 7th level	34.90

During the 18 months ending at the time the Works were closed down, 50,947 tons of ore were smelted, resulting in a yield of 6,068 tons of black copper, being equal to an average yield of 11.9%

The cost of Pocohontas coke during the same time was $13.10 per ton at Wilcox or $39.60 per ton at Globe. Timber is obtained from

the Pinal Mountains where the Company own a saw mill. The fuel is wood from the same mountains. Water is obtained from Pinal Creek which flows past the smelter dump. A small quantity will also be obtained from the Mines.

We consider that the railroad should make you a rate of $5 per ton on coke, coal and copper hauled between Bowie and Globe and vice versa. On all other material they should be allowed to make their own rate.

For smelting purposes an ample supply of water can be obtained from the creek and from the Mine. The latter will undoubtedly give an increased supply in depth.

Globe is situated at an elevation of 3500 feet above sea level. The climate is superb, being cool and pleasant every night in the year. The water being of most excellent quality, and the climate so superior, Globe has long been considered the healthiest camp in Arizona.

In conclusion we would say that we consider the property one of very great value. We have found nothing either above
136 ground or below the surface pointing in the slightest degree to a shortening or narrowing of the ore bodies either in depth or length. The work done in the past has served to open up vast ore bodies from which only the richest streaks running from 15 to 30 per cent copper have been removed, while the large bodies of rich sulphide ores have hardly been touched. The Mining and Smelting Plant is ample for present purposes except a boiler or two, and everything about the property is in excellent shape. We have no hesitation in recommending it as a safe and profitable investment and one which will undoubtedly increase rapidly in value as new development work is completed.

All of which is respectfully submitted.

JAMES COLQUHOUN.
G. M. HYAMS.

This is to certify, that we, the undersigned Jesse Lewisohn and Allen W. Evarts of the City, County and State of New York, Edgar Buffum, of Newark, in the County of Essex in the State of New Jersey, Charles W. Welch, of the City of Brooklyn in the State of New York, Sidney Riddlesdorffer, William V. Rowe, and William R. Montgomery, of the City, County and State of New York, do hereby associate themselves into a Company under and by virtue of the provisions of an Act of the Legislature of the State of New Jersey entitled "An Act concerning corporations" approved April 7, 1875, and the several supplements thereto and Acts amendatory thereof for the purposes hereinafter mentioned, and to that end we do by this our Certificate set forth:

First. That the name which we have assumed to designate such Company and to be used in its business and dealings is "Old Dominion Copper Mining and Smelting Company."

Second. That the place in the State of New Jersey where the business of such company is to be conducted is the City of Jersey

City, in the County of Hudson. That the principal part of the business of such Company within said State of New Jersey is to be transacted at said Jersey City, in the County of Hudson, and the places out of said State where the same is to be conducted are the town of Globe and other places in the Territory of Arizona, the City of Boston, in the State of Massachusetts, the City of New York, the States of Massachusetts and New York, and such other states and territories of the United States and such foreign Countries as shall, from time to time be deemed necessary or convenient for any of the purposes of the Company.

That the objects for which such Company is formed are the purchase, acquisition and sale of copper and other mines and mining property and the working, operation and maintenance of the same; the holding, purchase and conveyance of real property useful or convenient for the purposes of its business either in or out of the State of New Jersey and the mortgaging or leasing thereof; the construction and maintenance of water-works, reservoirs, dams, and aqueducts, the erection and maintenance of works, mills, factories,
136½ shops and other structures, engaging in and carrying on the business of treating, smelting and refining copper and other ores; manufacturing, buying, selling and dealing in copper, copper ores and other metals and ores and articles made wholly or in part of the same; issuing bonds, debentures or other obligations and securing the same by mortgage of any of the property, rights and franchises of the Company; the acquisition, purchase and sale or other disposition of the stocks, bonds or other securities of other Companies; and in general doing all acts and transacting all business necessary for and incident to the objects aforesaid, or in any wise connected therewith.

That the portion of the business of such Company which is to be carried on out of the State of New Jersey is the owning and operation of mines and such other part of its business as may be lawful and as may from time to time be deemed necessary or convenient by reason of locality, or other conditions, or circumstances.

That the principal office and place of business of such Company out of the State of New Jersey is to be situated in the town of Globe in the County of Gila, in the Territory of Arizona. That such Company proposes to carry on operations in the town of Globe and other places in the Territory of Arizona, the States of Massachusetts and New York, and in such other States and Territories of the United States and in such foreign Countries as shall from time to time be deemed necessary or convenient for any of the purposes of the Company.

Third. That the total amount of the capital stock of such Company is to be three millions seven hundred and fifty thousand dollars, divided into one hundred and fifty thousand shares of the par value of twenty-five dollars each.

That the amount with which said Company will commence business is One thousand dollars, divided into forty shares of the par value of twenty-five dollars each as aforesaid.

Fourth. That the names and residences of the Stockholders and ne number of shares held by each are as follows, to-wit:

Jesse Lewisohn, of the City, County and State of New York, ixteen Shares., Allen W. Evarts of the City, County and State of ew York, Four shares.

Edgar Buffum, of Newark, Essex County, New Jersey, Four shares.

Charles W. Welch, of the City of Brooklyn, in the state of New ork, Four shares.

Sydney Riddlesdorffer, of the City, County and State of New ork, Four shares.

William V. Rowe, of the City, County and State of New York, our shares.

William R. Montgomery, of the City, County and State of New ork, Four shares.

Fifth. That the period at which such Company shall commence s the eighth day of July, One thousand eight hundred and ninety ive and the period at which it shall terminate is the eighth day of July one thousand nine hundred and forty five.

37 In witness whereof, we have hereunto set our hands and seals the eighth day of July, One thousand eight hundred nd ninety five.

JESSE LEWISOHN.	[L. S.]
ALLEN W. EVARTS.	[L. S.]
EDGAR BUFFUM.	[L. S.]
CHARLES W. WELCH.	[L. S.]
SIDNEY RIDDLESDORFFER.	[L. S.]
WM. V. ROWE.	[L. S.]
WM. R. MONTGOMERY.	[L. S.]

STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered that on this eighth day of July One thousand eight hundred and ninety five, before me the subscriber, a Commissioner of Deeds for the State of New Jersey, personally appeared Jesse Lewisohn, Allen W. Evarts, Edgar Buffum, Charles W. Welch, Sidney Riddlesdorffer, William V. Rowe and William R. Montgomery, who I am satisfied are the persons named in and who executed the foregoing certificate, and I, having first made known to them the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year last aforesaid.

[SEAL.] GEO. H. COREY,
Commissioner of Deeds for the State of New Jersey in New York.

Endorsed: "Received in the Hudson Co., N. J. Clerk's Office July 8 A. D. 1895 and Recorded in Clerk's Record No. 25 on Page —. John G. Fisher Clerk. Filed Jul- 8, 1895. Henry C. Kelsey, Secretary of State."



138 State of New Jersey.

[SEAL.]

Department of State.

I, S. D. Dickinson, Secretary of State of the State of New Jersey, do hereby certify that the foregoing is a true copy of the Certificate of Incorporation of the Old Dominion Copper Mining and Smelting Company," and the endorsements thereon, as the same is taken from and compared with the original filed in my office on the Eighth day of July, A. D. 1895, and now remaining on file and of record therein.

[SEAL.]

In testimony whereof, I have hereunto set my hand and affixed my Official Seal at Trenton, this Twenty-fifth day of February, A. D., 1907.

(Signed) S. D. DICKINSON,
Secretary of State.

Endorsed: Certified copy of Certificate of Incorporation of "Old Dominion Copper Mining and Smelting Company."

139 F.

Agreement Between the Old Dominion Company, a Corporation Organized under the Laws of Maine, and Charles Sumner Smith and D. Blakely Hoar.

Whereas, pursuant to a proposal embodied in an agreement signed by F. S. Mosely & Company and others, dated December 30th, 1903, the Old Dominion Company has been organized and is the corporation referred to in said agreement as the Maine Company, and is about to acquire one hundred thousand eight hundred and four (100,804) shares of the capital stock of the Old Dominion Copper Mining and Smelting Company (hereinafter called the Mining Company); and

Whereas by Article First, section 6, of said agreement, it is stipulated that upon such acquisition of stock by said Old Dominion Company, it shall provide for realizing upon certain assets of said Mining Company and the distribution of the proceeds thereof, as in said agreement, to which reference is hereby made, more fully set forth; and

Whereas Charles Sumner Smith and D. Blakely Hoar (hereinafter called the Trustees) have consented to act as trustees, under a declaration of trust of even date herewith executed by them, for the benefit of said assenting stockholders of said Mining Company referred to in said agreement:

Now, therefore, this agreement witnesseth:

First: The Old Dominion Company acknowledges that the assets of the Mining Company referred to in Article First, section
140 6, of the agreement above referred to, comprise certain claims against one Albert S. Bigelow and against the estate of one

Leonard Lewisohn, deceased, on which suits are now pending brought by said Mining Company in the Supreme Judicial Court of Massachusetts for the County of Suffolk and in the Circuit Court of the United States for the Southern District of New York, together with the other assets enumerated in the schedule hereto annexed marked "A."

Second: Said Old Dominion Company covenants and agrees with said Trustees to use all reasonable efforts;

1. To cause said Mining Company to realize upon said other assets specified in Schedule "A" in such manner as said Trustees may from time to time direct, subject, however, to the provisions hereinafter contained.

2. To cause said Mining Company actively to prosecute said claims above referred to against said Bigelow and against the estate of said Lewisohn, in such manner and through such counsel and attorneys as said Trustees may from time to time request, and upon like request to make any settlement and adjustment of said claims or any of them, subject, however, to the provisions hereinafter contained.

3. To cause said Mining Company, if and so far as any sums of money are realized from said other assets or from said claims:

(*a*) To pay all expenses that may have been incurred in realizing on said other assets or said claims, including the repayment of all sums that may have been advanced by said Trustees and the
141 satisfaction of all liabilities that may have been incurred by them in realizing on said other assets of said claims; or authority to do so;

(*b*) To apply any surplus moneys then remaining to the payment of all debts and unliquidated claims of said Mining Company incurred prior to January 1, 1904, in excess of Twenty five thousand ($25,000) dollars, other than those incurred for new construction.

(*c*) To receive such part, if any, as said Trustees may request of any surplus then remaining for use in providing for the further expenses of prosecuting said claims and realizing on said other assets, if and so far as the same have not been finally disposed of and realized on;

(*d*) To distribute any surplus then remaining as a dividend among its stockholders, if it lawfully may do so, and if it cannot then lawfully make such a dividend to make the same as soon thereafter as any legal impediment is removed.

Third: The Old Dominion Company agrees to pay over to said Trustees, after making the deductions hereinafter provided for, any and all sums received by it as a stockholder in said Mining Company, or that would have been so received by it if it had at all times remained the holder of the same proportions of the capital stock of said Mining Company outstanding as all the stock in said Mining Company now held and that may hereafter be acquired by said Old Dominion Company bears to the capital stock of said Mining Company now outstanding, whether so received under the foregoing provisions of this agreement or otherwise, so far as each sum
142 is derived from the other assets and claims of said Mining Company herein referred to.

Said Old Dominion Company shall first deduct from sums so payable amounts advanced under this agreement by the Old Dominion Company for expenses, including counsel fees of the Old Dominion Interest, so called, in connection with the proposal and agreement dated December 30th, 1903, above referred to. It shall pay over the balance of sums so payable to the Trustees from time to time as the same are received or would have been received for distribution by said Trustees among the assenting stockholders of said Mining Company and their assigns, but without responsibility on the part of said Old Dominion Company for the application of any sum so paid over.

Fourth. The Old Dominion Company agrees to use all reasonable efforts, so far as it lawfully may in the performance of Article Second, Section 1, of this agreement, to cause said Mining Company to permit said Trustees in the name and behalf of said Mining Company, but for the purposes set forth in this agreement, to take from time to time all such action as said Trustees shall deem desirable in prosecuting or settling or otherwise realizing on or discounting said claims or any of them, of said other assets or any of them; and to cause said Mining Company from time to time and as often as in writing requested, at the expense of said Trustees so far as any expenditure is required but without charge so far as acts by the officers or employees of the Mining Company or of the Old Dominion Company are concerned, to assist said Trustees in preparing and maintaining any and every suit at law or in equity or other pro-
143 ceedings now pending or that may hereafter be brought to enforce or realize on any of said claims or other assets, and particularly to permit said Trustees to have free access at all reasonable times to the papers and records of said Mining Company relating thereto, and to take for use in any suit or other proceeding any document or books relating to said corporation.

Fifth. Said Old Dominion Company agrees, in case for any reason it is impossible lawfully to carry out this agreement in the manner hereinbefore provided or any part thereof, to do all that it lawfully and reasonably can do to cause said Mining Company to take such action that said other assets and claims shall be realized on to the best advantage reasonably possible, and the net proceeds thereof as defined in said proposal and agreement distributed among the stockholders in said Mining Company, and all sums received by said Old Dominion Company as a stockholder in said Mining Company or that would have been so received by it had it at all times remained the holder of the same proportion of the capital stock of said Mining Company outstanding that all the stock in said Mining Company now held and that may hereafter be acquired by said Old Dominion Company bears to the capital stock of said Mining Company now outstanding, shall be paid over to said Trustees for distribution by them as above provided.

Sixth. Said Old Dominion Company agrees:

1. Upon request of said Trustees to satisfy all expenses incurred by the Old Dominion interest, so called, for the incorporation fees and incidental expenses connected directly with the organization of the Old Dominion Company.

2. Upon request of said Trustee to pay all expenses including counsel fees, incurred by the Old Dominion interest, so
144 called, in connection with the proposal and agreement dated December 30th, 1903, above referred to.

Seventh. The Old Dominion Company agrees that in case at any time anything is done by which it will cease to hold a majority of the capital stock of the Mining Company it will before such act is done make provision reasonably satisfactory to the Trustees by which the holders of a majority of all the stock of said Mining Company shall until all the purposes of this agreement are carried out be bound to do all things then remaining undone which the Old Dominion Company is hereby bound to do.

Eighth. The word "Trustees in this agreement shall mean the trustees above named and their successors in office who are for the time being such trustees.

(Signed) OLD DOMINION COMPANY,
By JAMES R. PARSONS,
President.

WM. M. BRADLEY,
Treasurer.

(Signed) CHARLES S. SMITH.
(Signed) D. BLAKELY HOAR.

Jan. 15, 1904.

145 "B."

No. —. — Shares.

Old Dominion Trust.

This certifies that —— —— is entitled to — shares in the trust (known as the Old Dominion Trust) created by declaration of trust executed by Charles Sumner Smith and D. Blakely Hoar, dated January 15, 1904, and to all the rights and benefits of a share-holder under the terms of said declaration of trust, to which the holder by acceptance of this certificate fully assents. Shares in said trust are transferable only in writing on the books of the trustees by the shareholder in person or by duly authorized attorney and upon surrender of the certificate therefor.

Witness our hands this — day of —— A. D. 190–.

—— ——,
—— ——,
Trustees.

Countersigned:

—— ——,
Transfer Agent.

146 EXHIBIT 2.

In Chancery of New Jersey.

Between ALBERT S. BIGELOW, Compl't,
and
OLD DOMINION COPPER MINING AND SMELTING COMPANY, Def't.

On Bill, &c., Order to Show Cause.

On reading and filing the bill, with the affidavits thereto annexed and the exhibits, in the above entitled cause:

It is on this twenty-sixth day of February, nineteen hundred and eight, on motion of John Gritlin, solicitor of complainant, Ordered that until the further order of this court the defendant, Old Dominion Copper Mining and Smelting Company, its officers, servants, agents, attorneys, solicitors, counsel and employees be and they are hereby enjoined and restrained from proceeding in any manner to enforce or establish by trial, argument or otherwise the claims of the said defendant against the complainant as stated in two bills of complaint filed in the Supreme Judicial Court of Massachusetts, entitled Old Dominion Copper Mining and Smelting Company, a corporation duly organized under the laws of the State of New Jersey and having a usual place of business at Boston in said County of Suffolk, against the complainant, described as Albert S. Bigelow of Cohasset, in the County of Norfolk and Commonwealth of Massachusetts, having his usual place of business in Boston, and from taking any further action or proceedings by trial, argument or otherwise in said suits, or any other suits or otherwise, and from in any manner
147 instituting proceedings and suits with respect to or touching the claims against the complainant set out in said two bills filed as aforesaid, in any court or jurisdiction whatsoever, excepting the courts of the State of New Jersey, or from selling, assigning or disposing of said claims, and that the defendant entirely stay its present proceedings and suits against the complainant Bigelow.

And it is further Ordered, that said defendant do show cause before this court, on Tuesday, the seventeenth day of March, nineteen hundred and eight, at half past ten in the forenoon, at the Chancery Chambers, in the city of Trenton, why said injunction and restraint should not be continued to final hearing.

And it is further Ordered, that true copies of this order and the bill which copies need not be certified be served upon the statutory agent of the defendant in this State, within five days from the date hereof.

(Signed) MAHLON PITNEY, *C.*

Respectfully advised
E. R. WALKER, *V. C.*

A true copy:
VIVIAN M. LEWIS.

(Endorsed on back:) In Chancery of New Jersey. Between Albert S. Bigelow, Compl't, and Old Dominion Copper Mining and Smelting Company, Def't. On Bill, &c., Rule to Show Cause. John Griffin, Sol'r, 15 Exchange Place, Jersey City, N. J.

148 Filed Feb'y 26, 1908. E. R. W., V. C.

Chancery of the State of New Jersey, the same being a Court of Record, do hereby certify that the foregoing is a true copy of the Order to Show cause filed Feb. 26, 1908, in a cause wherein Albert S. Bigelow is complainant and Old Dominion Copper Mining and Smelting Company is defendant now on the files of my office.

[SEAL.]

In testimony whereof, I have hereto set my hand and affixed the seal of said Court, at Trenton, this Twenty-seventh day of February A. D. nineteen hundred and eight.

(Signed) VIVIAN M. LEWIS, *Clerk.*

I, Mahlon Pitney, Chancellor of the State of New Jersey, do hereby certify that Vivian M. Lewis, whose name is subscribed to the above certificate, was, at the date thereof, and now is, the Clerk of the Court of Chancery of the State of New Jersey; that said attestation is in due form, that the seal thereto annexed is the seal of said Court, and that the signature of the said Vivian M. Lewis is in his own proper handwriting.

Witness my hand at the City of Trenton this Twenty-seventh day of February A. D. nineteen hundred and eight.

(Signed) MAHLON PITNEY, *C.*

NOTE.—This certificate is made pursuant to an act of Congress (Rev. Stat. U. S. 1875, sec. 905, p. 170).

149 A true copy.
Attest:
ALBERT C. TILDEN,
Deputy Sheriff.

EXHIBIT 3.

As Amended in Committee.

Committee Substitute for Assembly, No. 368.

STATE OF NEW JERSEY:

A Supplement to an Act Entitled "An Act Concerning Corporations (Revision of 1896)," Approved April Twenty-first, One Thousand Eight Hundred and Ninety-six.

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. When any director, officer, organizer, promoter or agent of any corporation of this State has been heretofore sued or shall be

hereafter sued without this State by any such corporation on account of any bonus, profit or reward of any kind whatsoever heretofore made or received, or hereafter made or received, out of, or on account of, any transaction taking place within or without this State for or with such corporation because of failure to disclose the fact of such bonus, profit or reward, or failure to obtain the approval of the corporation thereto, he may, at any time after the passage of this act, file a petition in the Court of Chancery making the corporation a party defendant, and have such liability, if any, finally determined on such petition in accordance with the rules and practice of the Court of Chancery.

2. After the filing of such petition the Court of Chancery may, upon the motion of the petitioner, enjoin the corporation from prosecuting, maintaining or continuing any pending or bringing any new suits or proceedings at law or in equity for the enforcement of the liability in question elsewhere in the State of New Jersey.

3. On the hearing of such petition the petitioner, if found liable, may be held and adjudged to be liable only for his own actual net profits, and no more.

4. If any section or part of this act shall be held to be void or unconstitutional, it shall in no wise impair the validity of the balance hereof.

5. This act shall take effect immediately.

(Endorsed:) Edgartown—Aug. 6, 1908. On filing this petition let an order of notice issue to show cause why the prayer should not be granted returnable at Boston, Aug. 7th, 1908, at 2 o'clock P. M. Henry K. Braley, J. S. J. C.

And on the fourteenth day of said August, the following memorandum of decision and order for decree was filed by the Court, to wit:

In the matter of the motion or petition of the Plaintiff for an injunction restraining the Defendant from beginning or prosecuting before other courts any action or actions involving the same issues, pending the suit, and for an attachment for contempt, and for a speedy hearing by the Full Court of the appeal now before it.

Memorandum of Decision.

The hearing having been confined to the first ground only and the allegations as to the course of litigation between the parties both in Massachusetts and in New Jersey either having been proved or not denied, I find them to be true.

From this general finding it appears that after having voluntarily tried before a Justice of this Court all questions of law or fact which, under the pleadings so far as material, either were involved in the controversy or could have been raised by him not only by the pleadings as they stood but by any amendment which became necessary

for the presentation of such questions and while the case was pending for argument before the Full Court on cross-appeals from
151 the final decree, Mr. Bigelow, by a bill filed in the Chancery Court of New Jersey, obtained an injunction restraining the plaintiff, whose domicile was in that state, from any further prosecution of the case before this court. In substance, with the exception of the allegation as to the effect upon the present suit of the decision, in favor of the defendants, of the Circuit Court of Appeals of the United States for the Southern District of New York, in the case of the Old Dominion Copper Mining & Smelting Co. vs. Frederic Lewisohn, et al, Executors of Leonard Lewisohn, who is alleged in the present suit to have been a copromoter with the defendant and equally liable with him, the issues on the merits of both suits appear to be similar. That Bigelow during the litigation, from the filing of the bill here on October 7, 1902, up to the time of the present petition, was domiciled in Massachusetts, in whose courts the plaintiff had a right to implead him has not been doubted or denied. Indeed it is undisputed that this court has lawfully obtained jurisdiction of the subject matter and of the parties. There is now no question "that whenever the parties are resident within a country, the courts of that country have full authority to act upon them personally with respect to the subject of suits in foreign courts as the ends of justice may require, and with that view to order them to take, or omit to take any steps and proceedings in any other court of justice, whether in the same country or in any foreign country," or the courts of one state may enjoin its citizens from taking such proceedings in the courts of a sister state.

2 Storey Eq. Jur. 13th Ed., Sec. 900.
Bushby v. Munday, 5 Madd. 297.
Carron Iron Co. v. McLaren, 5 H. L. Cas. 416.
De Hon v. Foster, 4 Allen, 545.
Cunningham v. Butler, 142 Mass. 47.
Cole v. Cunningham, 133 U. S. 107,—where may be found a very full review of the cases by Mr. Chief Justice Fuller.

152 See also on this point the exhaustive opinion of Chancellor Pitney of New Jersey in Bigelow v. Old Dominion Copper Mining & Smelting Co.

This power may be exercised not only to enjoin the bringing of suits, but to stay the prosecution of suits already begun.

Bushby v. Munday, ubi supra.
Dinsmore v. Neresheimer, 32 Hun, 204, 207.
Carson v. Dunham, 149 Mass. 52.

While the bill in New Jersey having been dismissed by the Chancellor and "no order of stay" having yet been granted, the injunction theretofore issued was thereby dissolved, Mr. Bigelow, through counsel there, announced his intention to take and prosecute an appeal from the decision to the Court of Errors and Appeals of New Jersey, the laws of which permit him again to make application for an "order of stay" to the Chancellor; or upon taking an appeal then such application may be made to the appellate court itself. If such an ap-

plication is granted the injunction would be in force, and all further action here would again be indefinitely postponed.

As I have said, the entire merits of the controversy either have been or could have been tried before the single Justice who heard the case. It would seem as if the time elapsing between the filing of the bill and the filing of the final amended answer, November 6, 1907, was sufficient to enable the defendant to avail himself of every opportunity of defense that he might deem advisable or material. It was only until defeated before a tribunal and in a forum, where he was content up to that point to make the contest,—presumably with all the legal weapons that eminent and learned counsel could furnish,—that Mr. Bigelow sought the courts of New Jersey to obtain, if possible, a different decision, and to prevent any further proceedings here. If he is now to be left either to prosecute at will the appeal in New Jersey, or to begin other suits in the courts
153 of sister states in which, however deftly phrased, substantially the same issues are again presented, he obtains an unjustifiable advantage over the plaintiff by preventing it from prosecuting to a final determination a suit in which it has been so far successful as to obtain a finding and decree for the payment of large damages. Obviously this Court cannot do justice between the parties unless he is enjoined from taking this threatened or possible course of procedure.

Home Ins. Co. v. Howell, 24 N. J. Eq. 238.
See Kempson v. Kempson, 58 N. J. Eq. 94.

What are the objections urged by him against the entry of such an order?

First, that a single Justice has no jurisdiction to pass upon the question, as the whole case is before the Full Court on the appeal.

Under R. L. ch. 159, Sec. 19, upon an appeal in equity from the final decree of a single justice and the entry of the appeal in the Supreme Judicial Court for the Commonwealth, the decree is vacated, and the case, as shown by the record, whether of law or law and fact is pending before the Full Court which "shall affirm, reverse or modify the decree appealed from." This means that the case is before the Full Court upon the record as made up at the time of the appeal. If that record is to be either enlarged or diminished, it would seem that the application must be made to a single justice.

Commonwealth & Suffolk Trust Co., 161 Mass., 550, 551.

But is is plain enough that in practice after such an appeal has been taken and perfected, and while it is pending, interlocutory questions, often of much importance, may arise calling for a speedy hearing and decision, but in no wise affecting the questions covered by the final decree.

154 It was not the purpose of the Legislature, as shown by sections 17, 21 and 22, that the Full Court should hear and determine such matters, but that a single justice in the first instance should hear and pass upon them.

Dorr vs. Tremont Nat'l Bank, 128 Mass., 349.
Parker vs. Nickerson, 137 Mass., 487, 491.

The order asked for does not affect "the proceedings under such decree," but is remedial and purely interlocutory and distinct.

R. L., c. 159, sec. 17.

It is next urged that the equities are such that the Court in its discretion should refuse to interfere. But this objection has been already generally considered and need not be further discussed.

It is also claimed that "the remedy sought by the plaintiff is in violation of a privilege and immunity granted the defendant by the constitution of the United States." But I am unable to see that any federal question is involved.

The defendant further says that "the plaintiff is estopped from further prosecuting these actions by the judgment against it in the Federal Court of New York;" since affirmed by the Supreme Court of the United States.

It is sufficient upon this last objection to say that while the decision of the Supreme Court of the United States in the case of Old Dominion Copper Mining and Smelting Company v. Lewisohn is in favor of the position as to liability taken by the defendant, I am bound by the decision of this Court in Old Dominion Copper Mining and Smelting Company v. Bigelow, 188 Mass., 315, that the bill stated a case for equitable relief, and by the finding on the merits by Mr. Justice Sheldon, who decided that Bigelow was
155 accountable to the plaintiff. But it should be further said that although the defendant had every opportunity to plead the pendency of the litigation in the Federal Courts which might result in an alleged estoppel, he has not done so, and this question is not raised by the pleadings.

If, however, on the motion for a temporary injunction this question of possible estoppel ought to be considered as bearing upon whether the defendant equitably ought to be allowed to contest this question before the Court of Errors and Appeals of New Jersey, it is sufficient, now, for me to say that I understand the present suit and the decree to go upon the ground that the action is in personam to recover from the defendant as a trustee property of the company which it is claimed he wrongfully appropriated, and the fact that Lewisohn, his co-promoter, may have acted with him as a "joint equitable tort feasor," but who during his lifetime was domiciled in another jurisdiction, where his legal representatives are also domiciled, and who have successfully contested the plaintiff's claim, affords no bar to the plaintiff's prosecution of this suit.

Having first obtained jurisdiction, and having judicial authority to hear and determine fully the subject-matter of the suit, the usual rule should be applied, that this right, having once attached, Mr. Bigelow, who is domiciled in Massachusetts, should not be permitted either to nullify or to take it away by proceedings in other courts.

Home Ins. Co. v. Howell, ubi supra.

Stevens v. The Central Nat'l Bank, 144 N. Y. 50, 60.

Hines v. Hobbs, 40 Ga., 356.

Decree accordingly.

HENRY K. BRALEY, *J. S. J. C.*

156 And on the said fourteenth day of August, the following Interlocutory Decree was entered by the Court, to wit:

Interlocutory Decree.

Upon motion of the Plaintiff that the Defendant be enjoined from beginning or prosecuting any suit or suits other than in this Court involving the matters in controversy between the parties, and after taking evidence and hearing the arguments of counsel, upon consideration thereof, it is

Ordered and Decreed that an injunction issue restraining the defendant Albert S. Bigelow, his attorneys, agents and servants from further prosecuting the action commenced by said Bigelow against the plaintiff in the Court of Chancery in the State of New Jersey, as is in the plaintiff's petition set forth; and from commencing or prosecuting any other suit or proceeding either in law or in equity, except in this court, against the plaintiff to prevent it from obtaining the final decision and decree of this Court, or in any manner to delay or impede the presentation of said case according to the due and orderly course of procedure in this Court, or until further order of the Court.

By the Court:

WALTER F. FREDERICK, *Clerk.*

August 14, 1908.

And on the twenty-sixth day of said August, the defendant filed his motion to vacate the decree of August 14, 1908, the said motion being in the words following, to wit:

157 *Application of the Defendant to Vacate the Decree of August 14, 1908, and Dissolve the Injunction Issued Thereon.*

And now comes the defendant, Albert S. Bigelow, and moves that the decree entered by this Honorable Court on August 14, 1908, be vacated and the injunction issued thereon be dissolved.

(1) Upon the ground that said decree and injunction denies, impairs and abridges the rights, privileges and immunities of the defendant arising under Article 3, Sections 1 and 2, and Article 4, Sections 1 and 2, of the Constitution of the United States, and under Section 1 of the Fourteenth Amendment to the Constitution of the United States, and the rights, privileges and immunities arising under the Acts of Congress enacted pursuant to, under the authority of and for the purpose of carrying into effect the foregoing provisions of the Federal Constitution.

(2) And, without limitation or waiver of the foregoing ground, the defendant specifically moves that said decree be vacated and said injunction issued thereon be dissolved on the ground that it denies, impairs and abridges the rights, privileges and immunities of the defendant arising under Article 4, Sections 1 and 2, of the Constitution of the United States and under Section 1 of the Fourteenth Amendment of the Constitution of the United States, and the rights, privi-

leges and immunities arising under the Acts of Congress pursuant to, under the authority of and for the purpose of carrying into effect the foregoing provisions of the Federal Constitution in this, that said decree and injunction prevent the defendant from continuing the prosecution of a bill in equity now pending in the State of New Jersey, referred to in the plaintiff's petition in which said decree was entered, wherein the defendant herein is the plaintiff and the plaintiff herein is the defendant, and thereby deprives the defendant herein of his right to enter and prosecute an appeal to the Court
158 of Errors and Appeals in said State of New Jersey, the highest Court of said State, from a decision which has been rendered against him in said cause by an inferior Court in said State; that the defendant herein has the right in said State of New Jersey to perfect said appeal and prosecute said cause, and, to deny the defendant herein such right, will operate to make final and conclusive in favor of the plaintiff herein the decree heretofore entered in said cause in the State of New Jersey in favor of the plaintiff herein, and will operate to dismiss and dissolve the injunction heretofore granted in said cause in the State of New Jersey, and will deprive the defendant herein of his right to apply for a continuance or renewal of said injunction.

(3) And, without limitation or waiver of the foregoing grounds, the defendant specifically moves that said decree be vacated and said injunction issued thereon dissolved, on the ground that it denies, impairs and abridges the rights, privileges and immunities of the defendant arising under Article 3, Sections 1 and 2, and Article 4, Sections 1 and 2, of the Constitution of the United States, and under Section 1 of the Fourteenth Amendment to the Constitution of the United States, and the rights, privileges and immunities arising under the Acts of Congress pursuant to, under the authority of and for the purpose of carrying into effect the foregoing provisions of the Federal Constitution in this, that said decree and injunction prevent the defendant herein from asserting in any of the Courts of the United States in any manner the rights, privileges and immunities guaranteed to him by and arising under the Federal Constitution and laws aforesaid in connection with the matters in controversy in this cause.

159 By His Solicitors, ALFRED HEMENWAY.
J. W. FARLEY.

And on the said twenty-eighth day of August the defendant filed his application to modify the decree of August 14, 1908, and the injunction issued thereon, said application being in the words following, to wit:

Application of the Defendant to Modify the Decree of August 14, 1908, *and the Injunction Issued Thereon.*

And now comes the defendant, Albert S. Bigelow, and moves:

(1) That the decree entered by this Honorable Court on August 14, 1908, and the injunction issued thereon be so modified and lim-

ited as not to prevent the defendant from continuing the prosecution of and perfecting his appeal in a certain cause now pending in the State of New Jersey, referred to in the plaintiff's petition on which said decree was entered, wherein the defendant herein is the plaintiff and the plaintiff herein is the defendant; and the defendant herein says that, unless said decree and injunction are so modified, it will prevent the defendant herein from entering and prosecuting an appeal to the Court of Errors and Appeals in said State of New Jersey, the highest Court of said State, from a decision in said cause which has been rendered against the defendant herein by an inferior court in said State; that the defendant herein has the right in said State of New Jersey to perfect said appeal and prosecute said cause, and to deny the defendant herein such right will operate to make final and conclusive in favor of the plaintiff herein the decree heretofore entered in said cause in the State of New Jersey in favor of the plaintiff herein and will operate to dismiss and dissolve
160 the injunction heretofore granted in said cause in the State of New Jersey, and will deprive the defendant herein of his right to apply for a continuance or renewal of said injunction, and will deny, impair and abridge the rights, privileges and immunities of the defendant herein arising under Article 4, Sections 1 and 2 of the Constitution of the United States, and under Section 1 of the Fourteenth Amendment of the Constitution of the United States, and the rights, privileges and immunities of the defendant herein arising under the Acts of Congress enacted pursuant to, under the authority of and for the purpose of carrying into effect the foregoing provisions of the Federal Constitution.

(2) And, without limitation or waiver of the foregoing ground, the defendant herein further moves for the modification of said decree and injunction of this Honorable Court of August 14, 1908, so as not to restrain the defendant herein from proceeding in any of the Courts of the United States, and the defendant herein says that, unless said decree and injunction are so modified, the same will deny, impair and abridge the rights, privileges and immunities of the defendant herein arising under Sections 1 and 2 of Article 3, and Sections 1 and 2 of Article 4, of the Constitution of the United States, and under Section 1 of the Fourteenth Amendment to the Constitution of the United States, and the rights, privileges and immunities of the defendant herein arising under the Acts of Congress enacted pursuant to, under the authority of and for the purpose of carrying into effect the foregoing provisions of the Federal Constitution.

(3) And, without limitation or waiver of the foregoing ground, the defendant herein further moves for the modification of said decree and injunction of this Honorable Court
161 of August 14, 1908, so as not to restrain the defendant herein from proceeding in any of the Courts of the several States or Territories of the United States, other than the Courts of New Jersey or the Courts of the United States wherein jurisdiction of the parties and of the subject matter in any manner arising out of or in connection with the controversy herein can be obtained.

By His Solicitors, ALFRED HEMENWAY.
J. W. FARLEY.

And on the said twenty-eighth day of August, the defendant filed his motion to modify the decree of August 14, 1908, and the injunction issued thereon, said motion being in the words following, to wit:

Application of the Defendant to Modify the Decree of August 14, 1908, and the Injunction Issued Thereon.

And now comes the defendant, Albert S. Bigelow, and says:

That the said decree and the injunction issued thereon, except in so far as the same relates to the action for injunction pending in the Court of Chancery in the State of New Jersey is too indefinite, general and uncertain to be a valid decree, and said Albert S. Bigelow respectfully prays,

That the portion of said decree hereinbefore referred to as too indefinite, general and uncertain, and the injunction issued thereon be made specific, definite and certain.

By His Solicitors, ALFRED HEMENWAY.
J. W. FARLEY.

162 And on the said twenty-eighth day of August the motion and application for modification and vacation of the decree of August 14, 1908, were each denied by the Court.

And on the first day of September, A. D. 1908, the defendant appealed from the decree of August 14, 1908, the claim of appeal being in the words following, to-wit:

Defendant's Appeal.

And now comes the defendant and appeals from the decree entered in the above entitled cause on August 14, 1908, and from the orders denying the defendant's motions to modify or vacate said decree.

By His Solicitors, ALFRED HEMENWAY,
J. W. FARLEY.

And on the fourth day of said September, it was ordered by the Supreme Judicial Court for the Commonwealth by its Rescript, that the Clerk of this Court for the County of Suffolk make the following entry under this case in the docket of the Court, viz:

The defendant having made an application for leave to file a supplemental answer, the decree is vacated and the case remitted for hearing before a single Justice upon the question whether the
162*a* defendant shall be allowed to file the supplemental answer and if his motion for leave to file the supplemental answer is allowed, for a further hearing upon the matters set up in this answer, and for reversal or such modification of the original decree, if any, as ought to be made by reason of these matters. After the hearing or hearings the original decree is to be entered, unless reversed, with or without such modification, and the parties shall have the same right of appeal as they had when the decree was first made, or the Judge may reserve for the full court the questions that arise upon the supplemental answer.

By the Court, C. H. COOPER, *Clerk.*
September 4, 1908.

Motion of the Defendant.

Now comes the defendant and moves for leave to file the supplemental answer hereto annexed, to introduce evidence to prove the facts therein alleged, and to have said answer and evidence consolidated with and made a part of the existing record in the above entitled causes, for the following reasons:

(1) There are now pending before the Supreme Judicial
163 Court for the Commonwealth of Massachusetts two (2) causes in equity in which the Old Dominion Copper Mining & Smelting Company is plaintiff and Albert S. Bigelow is defendant, and numbered, or heretofore numbered, 8098 and 8099 in Equity for the Supreme Judicial Court for the County of Suffolk. At the time of the hearing of the above entitled causes in the Supreme Judicial Court for the County of Suffolk there were pending in the Circuit Court for the United States for the Southern District of New York two (2) actions in equity brought by the plaintiff, the Old Dominion Copper Mining & Smelting Company, against the Executors of the Estate of Leonard Lewisohn, said Lewisohn being the same person referred to in the bills of complaint in the above entitled causes. One of said actions pending in said Circuit Court was, and is, identical with said above entitled cause numbered 8098, and the other of said actions pending in said Circuit Court was, and is, identical with said above entitled cause numbered 8099.

(2) The allegations set forth in the bills of complaint in said actions in said Circuit Court were, in the first instance, identical mutatis mutandis with the allegations in the bills of complaint in the above entitled causes. One of said bills of complaint in said Circuit Court corresponding to 8098 was thereafter twice amended by the plaintiff, but said allegations remained substantially the same, and throughout said bill of complaint stated and relied upon the same contracts, matters and transactions as set forth in the bills of complaint in the above entitled causes.

(3) Thereafter, that one of the said actions in the Circuit Court, corresponding to No. 8098 of the above entitled causes, having been demurred to by the defendants therein, resulted on July
164 23, 1908, in a final decree, dismissing the plaintiff's bill of complaint through the course of procedure hereinafter described. The other of said actions in the Circuit Court corresponding to No. 8099 of the above entitled causes, after answer by the defendant therein, has been and now is pending in said Circuit Court, under an agreement between counsel (the counsel for the complainant in said actions in the Circuit Court being the same as the counsel for the plaintiff in the above entitled causes) that the depositions taken in the above entitled causes may be considered as evidence in said pending action. The procedure hereinafter described in said Circuit Court refers only to the action corresponding to No. 8098 of the above entitled causes.

(4) At the time of the hearing in the above entitled causes there was no final judgment or decree or any judgment or decree in the

said action or actions in said Circuit Court which could be in any way properly pleaded and proved in the above entitled causes as a bar thereto, nor has there at any time been such a judgment or decree until the twenty-third day of July, 1908.

(5) The course of procedure in said action in said Circuit Court was substantially as follows:—

Said action was begun by the plaintiff on or about the sixth day of January, 1903, the Executors of said Lewisohn, defendants therein, duly demurred to the bill of complaint in said action, and on hearing said demurrer was sustained, and thereafter a decree, in accordance therewith, was entered in said action on or about the eighteenth day of November, 1905. The plaintiff on or about the third day of January, 1906, appealed from said decree to the United States Circuit Court of Appeals for the Second Circuit and said Court sustained the demurrer and affirmed the decree of said Circuit Court, said order affirming said decree being filed in said
165 Circuit Court of Appeals on or about the seventeenth day of December, 1906. On or about the fifteenth day of January, 1907, the plaintiff presented a petition to the Supreme Court of the United States for a writ of certiorari in said action to said Circuit Court of Appeals, and, on the twenty-seventh day of February, 1907, said Supreme Court granted said petition and issued said writ of certiorari.

(6) At the time of said hearing in the above entitled causes said action, which had been begun in said Circuit Court, was pending before the said Supreme Court of the United States upon said writ of certiorari, there had been no hearing therein and no decision or decree had been rendered thereon.

(7) Under and by virtue of the law of the State of New York, and of the law as applied by the Federal Courts, which laws the defendant herein expressly offers to prove as a fact, the plaintiff's appeal from the decree of said Circuit Court to said Circuit Court of Appeals operated as a supersedeas to and vacated the decree of said Circuit Court, and said writ of certiorari to said Circuit Court of Appeals vacated and suspended its said decree and that of said Circuit Court, and suspended all action thereunder by either of said Courts or upon the decrees of said Courts.

(8) Thereafter, subsequently to said hearing of the above entitled causes and to the decrees therein and the appeals of both parties therefrom, upon hearing said Supreme Court of the United States sustained the demurrer to the bill of complaint in said action in said Circuit Court, and, in due course, on the twenty-third day of July, 1908, in accordance with the mandate from said Supreme Court, a final decree and judgment, dismissing the plaintiff's bill, was entered in said Circuit Court.

(9) Said Lewisohn, the Executors of whose estate were the defendants in New York in said action in said Circuit Court,
166 was in said contracts, matters and transactions complained of in said action, and in the above entitled causes the trustee, representative and agent of your defendant, Albert S. Bigelow, and the defendant would have been a proper party and was, in fact, a

privy to said action, and the defendant, through one of his counsel, participated in the actual defence of said action in the Circuit Court, and assumed with said Lewisohn's Executors the joint defence thereof, and the defendant, both through his agents and counsel, has, by large expenditure of time and money, contributed to and joined and taken part as privy thereto in the defence of said action, with the knowledge of the plaintiff, throughout the entire period of the aforesaid litigation.

(10) By the law of the State of New York and by the law as applied by the Federal Courts and by the law of this Commonwealth, the mere pendency of said action or any action in said Circuit Court was not properly pleadable or provable as a bar or for any purpose in the above entitled causes.

(11) At the time of said hearing of the above entitled causes and until July 23, 1908, owing to the acts of the Old Dominion Copper Mining & Smelting Company the aforesaid matters could not be pleaded and proven in the above entitled causes, and, owing to the acts of said Old Dominion Copper Mining & Smelting Company there was not at that time, and has never since been, until the twenty-third day of July, 1908, any decree or judgment in said action in said Circuit Court which he could plead and prove in the above entitled causes as a bar thereto or for any purpose.

(12) The bill of complaint in said Circuit Court did not allege that the contracts, matters and transactions there complained of were governed by the law of Massachusetts, but, on the con-
167 trary the plaintiff in said action in said Circuit Court proceeded on the sole and exclusive ground that the causes of action there sought to be enforced, and the transactions there complained of, arose and wree governed by the laws of New York.

(13) The plaintiff in the above entitled causes, the Old Dominion Copper Mining & Smelting Company, by prosecuting to final judgment in another forum an action in equity based on the same cause of action as that in the above entitled causes, and said action having been finally determined adversely to it, is forever estopped and barred against prosecuting the above entitled causes against the defendant herein.

(14) Under and by virtue of the law of the State of New York (which law the defendant herein hereby expressly offers to prove as a fact) the legal effect and operation of said final decree of July 23rd, 1908, in said Circuit Court is to estop and forever bar the plaintiff in any action against this defendant upon either and both of the causes of action set forth in the two (2) bills of complaint now or formerly pending in this Court in the above entitled causes. Said decree in said action is a conclusive judicial determination that the plaintiff, the Old Dominion Copper Mining & Smelting Company, has no cause of action against the defendant, Albert S. Bigelow, and renders res adjudicata between the plaintiff and this defendant all matters and causes of action complained of or shown by the evidence in the above entitled causes.

(15) The defendant, Albert S. Bigelow, desires to plead to the plaintiff's bills of complaint in the above entitled causes as a bar

thereto, and all decrees, if any, now existing or hereafter to exist,
in the above entitled causes, said final decree and judgment
168 of July 23rd, 1908, of said Circuit Court. The defendant
claims the benefit of all privileges and immunities guaranteed to him by the Constitution and the Acts of Congress of the United States and by Article I, Section X and Article IV, Sections I and II of said Constitution, and by Section I of the Fourteenth Amendment thereto, and all Acts of Congress enacted pursuant to, under the authority of and for the purpose of carrying into effect the foregoing provisions of the Federal Constitution, and the defendant claims that, by virtue of said Constitution and said Articles and Sections thereof and said Acts of Congress, he is entitled to a final adjudication and decree in the above entitled causes dismissing the plaintiff's bills of complaint.

The defendant further claims all the rights, privileges and immunities guaranteed to him by the United States Constitution and the Acts of Congress, and, more especially, by Article I, Section X, Article IV, Sections I and II of said Constitution, and Section I of the Fourteenth Amendment thereto, and all Acts of Congress enacted pursuant to, under the authority of and for the purpose of carrying into effect the foregoing provisions of said Constitution, and claims that to deny him the right to plead and prove the aforesaid matter in the above entitled causes will deprive him of said Constitutional rights, privileges and immunities.

And, without limitation or waiver of the foregoing, the defendant expressly says:

(1) That to deny that said final decree and judgment of July 23, 1908, of said Circuit Court is a final bar to the causes of action in issue in the above entitled causes is to deny to said decree full faith and credit under Section I of Article IV of the Constitution of the United States and the Acts of Congress enacted pursuant thereto.

(2) That to deny that said final decree and judgment of
169 July 23, 1908, of said Circuit Court rendered res adjudicata
between the plaintiff and the defendant all contracts, matters and transactions and the alleged cause of action resulting therefrom in issue in the above entitled causes is to deny to said decree full faith and credit under Section I of Article IV of the Constitution of the United States and the Acts of Congress enacted pursuant thereto.

(3) That to deny that said final decree and judgment of July 23, 1908, of said Circuit Court is an estoppel upon the plaintiff from prosecuting the above entitled causes is to deny to said decree full faith and credit under Section I of Article IV of the Constitution of the United States and the Acts of Congress enacted pursuant thereto.

(4) That to deny that the law of New York governed the validity of the contracts, matters and transactions in issue in the above entitled causes is to deny to this defendant the due process of law and the equal protection of the laws under Section I of the Fourteenth Amendment to the Constitution of the United States and the Acts of Congress enacted pursuant thereto.

(7) That to deny that the law of New York governed the validity of said contracts, matters and transactions in issue in the above entitled causes is not finally determined by said decision of the Supreme Court of the United States is to deny to said decision full faith and credit under Section I of Article IV of the Constitution of the United States and the Acts of Congress enacted pursuant thereto.

(6) That to determine or find the law of New York governing the validity of the contracts, matters and transactions in issue in the above entitled causes differently from the law of New York, as expressly enunciated by its highest Court prior to the making of said contracts and the execution of said matters and transactions, and to apply such law as so determined or found thereto so as
170 to render such contracts, matters and transactions invalid and voidable when the same were valid and unassailable by the law of New York theretofore enunciated is to impair the obligation of said contracts under Section X of Article I of the Constitution of the United States and under Section I of the Fourteenth Amendment to the Constitution of the United States and under the Acts of Congress enacted pursuant thereto.

(7) That to deny that the law of New York governed the validity of the contracts, matters and transactions in issue in the above entitled causes, after the plaintiff on the sole ground that the law of New York did govern the same, prosecuted to final decree an action based on the same contracts, matters and transactions and cause of action and thereby released and discharged the estate of said Lewisohn from all liability on account thereof either to the plaintiff or by way of contribution to this defendant is a denial to this defendant of the due process of law, the equal protection of the laws and is an impairment of the obligation of said contracts under Section X of Article I of the Constitution of the United States and under Section I of the Fourteenth Amendment to the Constitution of the United States and the Acts of Congress enacted pursuant thereto.

Wherefore, the defendant says that the said decree in said action is a final bar to the cause of action relied upon by the plaintiff in this cause, and that the defendant's motion should be allowed.

By His Solicitors, ALFRED HEMENWAY.
J. W. FARLEY, *Of Counsel.*

171 COMMONWEALTH OF MASSACHUSETTS.

Suffolk, ss:

SEPTEMBER 1, 1908.

Then personally appeared the above named J. W. Farley, and made oath that he was personally familiar with the matters of fact stated in the foregoing motion and that the same were true to the best of his knowledge, information and belief, before me,—

BURTON E. EAMES,
Justice of the Peace.

Supplemental Answer of the Defendant.

And now comes the defendant, Albert S. Bigelow, in the above-entitled cause, and files this further and supplemental answer to the bill of complaint and says:—

That, on or about January 6, 1903, the plaintiff exhibited its bill of complaint in the Circuit Court of the United States for the Southern District of New York against Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, as Executors of the last will and testament of Leonard Lewisohn, deceased; that said Leonard Lewisohn is the same person referred to by the plaintiff in the bill of complaint in the above entitled cause; that the allegations set forth in said bill of complaint in the Circuit Court of the United States for the Southern District of New York were, in the first instance, identical mutatis mutandis with the allegations in the bill of complaint in the above entitled cause, except in so far as the prayers of said bill of complaint in said Circuit Court relate to one part of an entire transaction and the prayers of the bill of complaint in the above entitled cause relate to another inseparable part of the same entire transaction; that said bill of complaint in said Circuit Court was thereafter twice amended by the
172 plaintiff, but said allegations remained substantially the same and throughout said bill of complaint stated and relied upon the same acts, matters and transactions as those set forth in the bill of complaint in and as shown by the evidence in the above entitled cause, and the contracts, acts, matters and transactions in which it is alleged in the bill of complaint in the above entitled cause that the defendant Bigelow and said Lewisohn participated, are the same contracts, acts, matters and transactions in which it is alleged in the bill of complaint in said Circuit Court that the defendant Bigelow and said Lewisohn participated. Said contracts, acts, matters and transactions as a result of which it was claimed that the respective defendants were liable to the plaintiff, were non-severable parts of one entire transaction, the relation of the defendant and said Lewisohn to the plaintiff in said transaction was the same, and the basis of their respective alleged liabilities to the plaintiff was identical and solely based on the determination of the validity of the said contracts, acts, matters and transactions. A copy of said bill of complaint, together with the amendments thereto, is hereto annexed and marked "Exhibit A."

That the said defendants, Lewisohn's executors, appeared and interposed two (2) demurrers to the plaintiff's bill, one of which was stated to be a demurrer to the whole bill and the other of which was stated to be a demurrer to a part of the bill. Copies of said two (2) demurrers are hereto annexed and marked, respectively, "Exhibit B" and "Exhibit B'"; that, after hearing, a decree was entered in said Circuit Court of the United States for the Southern District of New York on or about March 24, 1905, sustaining the said demurrers to so much of said bill of complaint as

sought rescission and allowing the plaintiff thirty (30)
173 days in which to file an amended bill. A copy of said decree is hereto annexed and marked "Exhibit C," and a copy of the opinion of Judge Lacombe ordering said decree is hereto annexed and marked "Exhibit C'." Thereafter the plaintiff filed an amended bill of complaint in said Circuit Court, a copy of which is hereto annexed and marked "Exhibit D." Thereafter two (2) demurrers were duly filed by the defendants therein, the said Lewisohn's executors, one being a demurrer to the whole bill and the other being a demurrer to a part of the bill. Copies of said two (2) demurrers are hereto annexed and marked, respectively, "Exhibit E" and "Exhibit E'." Thereafter, upon hearing, a decree was entered by said Circuit Court on or about November 18, 1905, by which it was ordered by the Court that the demurrer to the whole of said amended bill of complaint be sustained for want of equity, and that the bill of complaint be dismissed. A copy of said decree is hereto annexed and marked "Exhibit F." Thereafter, on or about December 6, 1905, a final and formal decree was entered, dismissing the bill of complaint, a copy of which is hereto annexed and marked "Exhibit G." Thereafter, on or about January 3, 1906, the plaintiff filed his petition in said Circuit Court for an appeal to the United States Circuit Court of Appeals for the Second Circuit from the decree of said Circuit Court dismissing the plaintiff's bill. A copy of said petition for appeal and a copy of the assignment of errors on which said appeal was based are hereto annexed and marked, respectively, "Exhibit H" and "Exhibit I." Thereafter, on or about January 3, 1906, the plaintiff's petition for appeal having been duly allowed, the plaintiff, in accordance with the Statutes of the United States, in such cases made and provided, duly filed its bond to answer for
all damages and costs on account of said appeal, and there-
174 upon said appeal and bond, under the Statutes of the United States in such cases made and provided, operated as a writ of supersedeas and vacated said decree. A copy of said bond is hereto annexed and marked "Exhibit J" and a copy of said Statutes of the United States is hereto annexed and marked "Exhibit J'." Thereafter, on or about December 4, 1906, the said United States Circuit Court of Appeals for the Second Circuit, after hearing, rendered an opinion, affirming the decree of the Court below. A copy of said opinion is hereto annexed and marked "Exhibit K." Thereafter, on or about December 17, 1906, a decree was entered in said cause by the United States Circuit Court of Appeals for the Second Circuit, affirming the decree of the Circuit Court of the United States for the Southern District of New York. A copy of said decree is hereto annexed and marked "Exhibit L." Under the law of the United States and of the State of New York governing the procedure in the United States Circuit Court of Appeals for the Second Circuit and in the Circuit Court of the United States for the Southern District of New York said decree of the United States Circuit Court of Appeals for the Second Circuit was entered only for the purpose of authorizing and was operative only to authorize a mandate to the Circuit Court of the United States for the Southern District of New York. Thereafter on or about January 15, 1907, the plaintiff ap-

plied to the Supreme Court of the United States, by motion, for a review of said cause of the Old Dominion Copper Mining & Smelting Company v. Lewisohn theretofore pending in the United States Circuit Court for the Southern District of New York and in the United States Circuit Court of Appeals for the Second Circuit, and therewith filed in the Supreme Court of the United States its petition for a writ of certiorari to be issued in said cause to the United States Circuit Court of Appeals for the Second Circuit. A copy of
175 said petition is annexed hereto and marked "Exhibit M." Thereafter, on or about February 27, 1907, a writ of certiorari issued on said petition, a copy of which writ is hereto annexed and marked "Exhibit N." Thereafter, due return having been made to said writ and the entire record hereinbefore described in said cause being before the Supreme Court of the United States for review and after full hearing thereon, the Supreme Court of the United States rendered its decision of said cause, affirming the decree of the Court below. A copy of the opinion of Mr. Justice Holmes is hereto annexed and marked "Exhibit O." Thereafter, on May 18, 1908, a mandate was duly issued, remanding the cause to the Circuit Court of the United States for the Southern District of New York. A copy of said mandate is hereto annexed and marked "Exhibit P." Thereafter, on or about July 23, 1908, pursuant to said mandate, a final judgment and decree, in favor of the defendants in said cause, was duly entered in the Circuit Court of the United States for the Southern District of New York. A copy of said final judgment and decree is hereto annexed and marked "Exhibit Q." And the defendant says that there was no final decree reflecting a final and binding adjudication of the issues in said cause or binding upon the parties thereto between January 3, 1906 (the time when the decree of the Circuit Court for the Southern District of New York was vacated by the appeal to the United States Circuit Court of Appeals for the Second Circuit) and July 23, 1908 (when said Circuit Court entered its final decree aforesaid, pursuant to the mandate ordering the same. Copies of certain additional papers constituting a part of the record in said case in said Circuit Court are hereto annexed and together marked Exhibit R. And the defendant says that the said final judgment and decree entered by the United States Circuit Court
176 for the Southern District of New York and the entire proceedings of said Courts and each of them prior thereto proceeded on the merits of the controversy between the complainant and the defendants therein, and not on any technical or formal ground; said controversy put in issue the validity of all the contracts, acts and transactions in which it is alleged in the bill of complaint in the above entitled cause or shown by the evidence herein that the defendant participated and put in issue all questions as to the liability of this defendant and said Lewisohn as to said contracts, acts and transactions which have been or are raised in the above entitled cause. Except as to the relief sought, the issues in the said controversy in said Circuit Court were the same issues which are or have been raised in the above entitled cause and the contracts, acts and transactions complained of in the bill of complaint in said Circuit Court, the validity of which was put in issue in said controversy in said Circuit

Court, were identically the same contracts, acts and transactions set forth in the plaintiff's bill in the above entitled cause or shown by the evidence herein; and the defendant says that the said Lewisohn and the defendants in said action in said Circuit Court were, in the acts, matters and transactions complained of therein and in the acts, matters and transactions complained of or in issue herein, the trustees, representatives and agents of this defendant; and this defendant says that he would have been a proper party and was, in fact, a privy to said action and that he participated in the actual defence of said action in the Circuit Court and assumed, with said Lewisohn's Executors, the joint defence thereof, and the defendant, both through his agents and counsel, has, by large expenditure of time and money, contributed to and joined in and taken part in the defence of said action as privy thereto, with the knowledge of the plaintiff,
177 throughout the entire pendency of the aforesaid action in the Circuit Court of the United States for the Southern District of New York, including the defence thereof on appeal and on certiorari and including all matters and proceedings in connection therewith; and the defendant further says that said final judgment and decree of said Circuit Court of July 23, 1908, are in full force and effect and said proceedings have been at all times within the jurisdiction of said Courts and have been carried on in conformity with and according to the due course of law there established and then in force governing the same in the State of New York and in the United States; and the defendant further says that the effect of said decree, under the law and usages of the State of New York, is to make the same final and conclusive against the plaintiff upon the contracts, matters and transactions there set forth, as the basis of the cause of action set forth in said bill of complaint in said Circuit Court and that said decree is, under the law and usages of the State of New York, effectual to estop and forever bar the plaintiff in any action against the defendant herein upon said contracts, matters and transactions and upon the cause of action set forth in the bill of complaint in this cause or as shown by the evidence herein, and said decree of said Circuit Court is a final judicial determination that the plaintiff has no cause of action against this defendant, on account of the contracts, matters, transactions and causes of action set forth in the plaintiff's bill of complaint in this cause or shown by the evidence herein, and that all the contracts, matters and things complained of in said bill of complaint or shown by said evidence are rendered res adjudicata by said decree, as between the plaintiff and the defendant herein; and this defendant further claims, in connection with the matters hereinbefore set forth, the benefit of
178 Article I, Section 10, Article IV, Sections I and II, of the Constitution of the United States, and Section I of the Fourteenth Amendment to the Constitution of the United States, and of all Acts of Congress enacted pursuant to, under the authority of and for the purpose of carrying into effect the foregoing provisions of the Federal Constitution; and this defendant expressly claims that he is entitled to have said decree of July 23, 1908, of said Circuit Court of the United States for the Southern District of New York given that full faith and credit in this cause which it

would have by law or custom in the State of New York, and the defendant says that, by the law of the State of New York, said decree would be a final bar and an estoppel against the plaintiff from proceeding with any action or suit at law or in equity to enforce against the defendant the cause of action in issue herein; and this defendant further says that, if said decree is given that full faith and credit to which the same is entitled under the said provisions of the United States Constitution and Acts of Congress, the contracts, matters, transactions and cause of action in issue upon the pleadings and evidence in the above entitled cause are res adjudicata, and the defendant further says that if said decree is given such full faith and credit, it is res adjudicata that the law of New York governed said contracts, matters, transactions and cause of action, and that such contracts, matters and transactions were valid and legal transactions in the State of New York, and cannot be here complained of by the plaintiff against this defendant.

The defendant further says that the plaintiff in its bill of complaint in said Circuit Court of the United States for the Southern District of New York did not allege that the contracts, mat-
179 ters and transactions there complained of and in issue upon the pleadings and evidence in this cause were governed by any law other than the law of the State of New York, but, on the contrary, the plaintiff in said action in said Circuit Court proceeded on the sole and exclusive ground that the causes of action there sought to be enforced and the contracts, matters and transactions there complained of were governed by the laws of the State of New York; and the defendant further says that the plaintiff having prosecuted said cause in said Circuit Court to a final decree on said ground that said contracts, matters and transactions were governed by the law of the State of New York is now estopped from setting up or claiming against the defendant that said contracts, matters and transactions were governed by the laws of Massachusetts or any law other than the law of the State of New York.

And this defendant further says that said decree of said Circuit Court of New York is a bar and estoppel in the above entitled cause, in that the contracts, matters and transactions set forth or complained of in the plaintiff's bill in said Circuit Court in New York and complained of in the plaintiff's bill in this cause or shown by the evidence herein were governed by the law of the State of New York, and that at the time, when the acts complained of were done and the contracts complained of were made, it was the law of the State of New York, as shown by the express decisions of the highest Court of that State, that the contract between the plaintiff, on the one side, and the said Lewisohn and your defendant, on the other, and the transactions resulting from the carrying out of the same were legal contracts and transactions in the State of New York and such as not to subject this defendant or the said Lewisohn to any liability to the plaintiff on account thereof; and the defendant says that the decision of the Supreme Court of the United States in said cause in the Circuit Court of the United
180 States for the Southern District of New York was a final adjudication and application of the law of New York to the

contracts, matters and transactions set forth or complained of in the plaintiff's bill in said Circuit Court and (except as to relief sought) in issue upon the pleadings and evidence in this cause; and this defendant expressly claims, in connection with the matters herein set forth, the benefit of all privileges and immunities granted to him by Section X of Article I, Sections I and II of Article IV, of the Constitution of the United States, and Section I of the Fourteenth Amendment to the Constitution of the United States, and, also, under the Acts of Congress enacted pursuant to, under the authority of and for the purpose of carrying into effect the foregoing provisions of the Federal Constitution.

And, without limitation or waiver of the foregoing, the defendant expressly says:

(1) That to deny that said final decree and judgment of July 23, 1908, of said Circuit Court is a final bar to the cause of action in issue in the above entitled cause is to deny to said decree full faith and credit under Section I of Article IV of the Constitution of the United States and the Acts of Congress enacted pursuant thereto.

(2) That to deny that said final decree and judgment of July 23, 1908, of said Circuit Court rendered res adjudicata between the plaintiff and this defendant all contracts, matters and transactions and the alleged cause of action resulting therefrom, in issue in the above entitled cause is to deny to said decree full faith and credit under Section I of Article IV of the Constitution of the United States and the Acts of Congress enacted pursuant thereto.

(3) That to deny that said final decree and judgment of July 23, 1908, of said Circuit Court is an estoppel upon the plain-
181 tiff from prosecuting the above entitled cause is to deny to said decree full faith and credit under Section I of Article IV of the Constitution of the United States and the Acts of Congress enacted pursuant thereto.

(4) That to deny that the law of New York governed the validity of the contracts, matters and transactions in issue in the above entitled cause is to deny to this defendant the due process of law and the equal protection of the laws under Section I of the Fourteenth Amendment to the Constitution of the United States and the Acts of Congress enacted pursuant thereto.

(5) That to deny that the law of New York governing the validity of said contracts, matters and transactions in issue in the above entitled cause is not finally determined by said decision of the Supreme Court of the United States is to deny to said decision full faith and credit under Section I of Article IV of the Constitution of the United States and the Acts of Congress enacted pursuant thereto.

(6) That to determine or find the law of New York governing the validity of the contracts, matters and transactions in issue in the above entitled cause differently from the law of New York, as expressly enunciated by its highest Court prior to the making of said contracts and the execution of said matters and transactions, and to apply such law as so determined or found thereto so as to render such contracts, matters and transactions invalid or voidable

when the same were valid and unassailable by the law of New York theretofore enunciated is to impair the obligation of said contracts under Section X of Article I of the Constitution of the United
182 States and under Section I of the Fourteenth Amendment to the Constitution of the United States and under the Acts of Congress enacted pursuant thereto.

(7) That to deny that the law of New York governed the validity of the contracts, matters and transactions in issue in the above entitled cause, after the plaintiff on the sole ground that the law of New York did govern the same, prosecuted to final decree an action based on the same contracts, matters and transactions and cause of action and thereby released and discharged the estate of said Lewisohn from all liability on account thereof either to the plaintiff or by way of contribution to this defendant is a denial to this defendant of the due process of law, the equal protection of the laws and is an impairment of the obligation of said contracts under Section X of Article I of the Constitution of the United States and under Section I of the Fourteenth Amendment to the Constitution of the United States and the Acts of Congress enacted pursuant thereto.

By His Solicitors, ALFRED HEMENWAY.
J. W. FARLEY.

——— ———, *Of Counsel.*

EXHIBIT A.

Circuit Court of the United States, Southern District of New York.

No. 2.

OLD DOMINION COPPER MINING & SMELTING CO.
v.
FREDERICK LEWISOHN et al.

Amendment to Bill of Complaint.

183 Now comes the complainant in the above entitled cause before the Rule Day on which the subpœna issued in said cause is returnable and prays to amend the bill of complaint therein as follows:

First. By striking out in the eighth paragraph of said bill of complaint the words "the respondent" between the words " to wit" and the words "Jesse Lewisohn."

Second. By substituting in paragraph nineteen of the said bill of complaint for the words and figures "thirty-six hundred and nineteen (3619)" the words and figures "thirty-six thousand one hundred and ninety (36190)."

(Signed) BRANDEIS, DUNBAR & NUTTER,
Solicitors for Plaintiff.

LOUIS D. BRANDEIS,
Of Counsel.

(Signed) CARTER, HUGHES & DWIGHT,
Solicitors for Complainant, 96 Broadway, New York.

CHARLES E. HUGHES,
Of Counsel.

Circuit Court of the United States, Southern District of New York.

In Equity.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
v.
FREDERICK LEWISOHN et al.

Bill of Complaint.

184 To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York:

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY, a Corporation Duly Organized Under the Laws of the State of New Jersey, and a Citizen of Said State Residing at Jersey City in the Said State and in the District of New Jersey, Complainant,

Against

FREDERICK LEWISOHN, WALTER LEWISOHN, ALBERT LEWISOHN and Philip S. Henry, all Citizens of the State of New York, Residing in the Borough of Manhattan, in the City of New York, in the State of New York, and in the Southern District of New York, as Executors of the Last Will of Leonard Lewisohn, Who, at the Time of His Death, was a Citizen of Said State, Residing in Said Borough of Manhattan, Respondents.

And thereupon your orator complains and says:

First. The complainant, the Old Dominion Copper Mining and Smelting Company, is a corporation duly organized under the laws of the State of New Jersey, and having a usual place of business at Boston, in the County of Suffolk and Commonwealth of Massachusetts, and a citizen of New Jersey, residing at Jersey City, in said State and in the District of New Jersey. Said corporation is the owner of copper mines and smelting works in the Territory of Arizona, and is carrying on the business of mining, smelting and selling copper.

Second. On and prior to March 24, 1895, there existed a certain corporation called the Old Dominion Copper Company, of Baltimore City (hereinafter called the Baltimore Old Dominion Company) organized under the laws of the State of Maryland, and having
185 a usual place of business in said Baltimore. Said Baltimore Old Dominion Company was then the owner of mines and mining claims in Arizona. It had a capital stock of five hundred thousand ($500,000) dollars, divided into twenty-five thousand (25,000) shares of the par value of twenty (20) dollars each. Of said shares there were then owned by the executors of the will of Michael H. Simpson, late of said Boston, deceased, about seventeen thousand eight hundred and fifty-seven (17857) shares and the balance of said shares were then owned by one William Keyser, of Baltimore, in the State of Maryland, and others. Said Keyser also

then held the title in his own name to certain mines and mining claims known as the Old Dominion Mine, the New York Mine, the Chicago Mine, the Keystone Mine, and a certain parcel of land near the Bloody tanks, so-called, all in said Arizona, but whether said Keyser held said property solely in his own right or in trust, wholly or in part for others or for said corporation, the complainant is ignorant.

Third. At some time prior to May 24, 1895, one Albert S. Bigelow, of said Boston, and said Leonard Lewisohn, deceased, formed the plan of acquiring all the stock of said Baltimore Old Dominion Company and all said real estate, title to which then stood in the name of said Keyser, as aforesaid, and of organizing a new corporation to acquire and of selling to such new corporation at a large advance in price, all the property of said Baltimore Old Dominion Company and all the real estate held by said Keyser, as aforesaid, and putting upon the market and selling to such of the public as might be induced to buy the same a large number of the shares of such new corporation in order to provide the same with a working capital, and make necessary improvements in the plant, and acquire additional min-
186 ing claims, and of thereby securing for themselves and such persons as they might associate with them a large profit from the purchase and resale to said new corporation to be organized by them of said property; and said Bigelow and said Leonard Lewisohn thereupon conspired together to carry out said plan and thereby to injure said corporation to be formed as aforesaid and the future stockholders in said corporation, and to secure for themselves as promoters and organizers thereof a large secret profit.

Fourth. Pursuant to said plan and conspiracy said Bigelow in conjunction with said Leonard Lewisohn, at some time prior to May 24, 1895, procured a number of persons whose names are to the complainant unknown, to subscribe to the Old Dominion Syndicate, so-called; said syndicate was formed for the purpose of raising about one million (1,000,000) dollars, or so much thereof as was necessary to carry out said plan and conspiracy of said Bigelow and said Leonard Lewisohn above described for the benefit of the members of the syndicate. The terms of said subscription were that the subscribers should pay in fourteen (14) per cent. of the amount of their respective subscriptions on May 27, 1895, twenty-eight and two-thirds ($28\frac{2}{3}$) per cent. on July 26, 1895, twenty-eight and two-thirds ($28\frac{2}{3}$) per cent. on August 26, 1895, and twenty-eight and two-thirds ($28\frac{2}{3}$) per cent. on September 24, 1895, and with each of said last three instalments five (5) per cent. interest thereon from May 27, 1895; and that the amount so subscribed and paid in should be used so far as required for the purpose of acquiring the property or all the capital stock of said Baltimore Old Dominion Company, and that the subscribers to said syndicate should receive in cash or in stock of the new corporation to be formed to purchase said property from said syndicate two million ($2,000,000) dollars to be dis-
tributed pro rata according to their several subscriptions. The
187 precise terms of said syndicate agreement are to the complainant unknown, and the complainant has no copy thereof

which it can attach hereto, but said respondent well know the terms of said agreement and have a copy or the original thereof in their possession or control.

Fifth. Thereafter, to wit, on or about May 24, 1895, said Bigelow in conjunction with said Leonard Lewisohn received the first instalment payable by the subscribers to said syndicate amounting to about one hundred and forty thousand ($140,000) dollars. At some time on or about May 2, 1895, said Bigelow in conjunction with said Leonard Lewisohn, for the purpose of carrying out said plan and conspiracy and the purposes of said syndicate, made an agreement with the executors of the will of said Michael H. Simpson for the purchase from said executors of seventeen thousand eight hundred and fifty-seven (17,857) shares of the capital stock of said Baltimore Old Dominion Company, being five-sevenths (5-7) of the total capital stock of said corporation, at a price not exceeding six hundred and thirteen thousand one hundred and thirty-seven dollars and thirty-nine cents ($613,137.39). The complainant is ignorant of the precise terms of said agreement, but is informed and believes, and therefore charges, that said agreement was in the form of an option for which a sum not exceeding one hundred thousand ($100,000) dollars was paid, under which option said Bigelow and said Leonard Lewisohn were entitled to acquire said stock at the price aforesaid by making further payments at a future time or times.

Sixth. At some time prior to July 1, 1895, said Bigelow, in conjunction with said Leonard Lewisohn, for the purpose of carrying out said plan and conspiracy and for the purposes of said syndicate, made an agreement with said William Keyser and with other persons to the complainant unknown by which said Bigelow and said
188 Lewisohn acquired the remaining two-sevenths (2-7) of all the capital stock of said Baltimore and Old Dominion Company, to wit, seven thousand one hundred and forty-three (7143) shares at a price not exceeding one hundred and seventy-five thousand one hundred and eighty-two dollars and eleven cents ($175,182.11). The complainant is unable to state more particularly the terms of said purchase, but the terms thereof are well known to the respondents.

Seventh. At about the time of the purchase from the said Keyser and others of said seven thousand one hundred and forty-three (7143) shares of stock in said Baltimore Old Dominion Company said Bigelow and said Lewisohn for their common benefit acquired from said Keyser for the same consideration paid for seven thousand one hundred and forty-three (7143) shares, but, as they claimed, for their own benefit and not for the benefit of said Old Dominion Syndicate, the parcels of real estate in Arizona, title to which then stood in the name of said Keyser, as above set forth, to wit, the four mining claims known as said Old Dominion Mine, said New York Mine, said Keystone Mine, and said Chicago Mine, and said parcel of land near the Bloody Tanks. All said real estate was acquired in the name of and was conveyed by said Keyser to said Leonard Lewisohn, but for the common benefits of said Lewisohn and said Bigelow.

as hereafter set forth, and pursuant to and as a part of the plan and conspiracy and for the purposes hereinafter set forth.

Eighth. On or about July 8, 1895, said Bigelow in conjunction with said Leonard Lewisohn, in pursuance of said plan and conspiracy and for the purpose of carrying out the same for the benefit of themselves and of the subscribers to said Old Dominion Syndicate, so-called, caused the Old Dominion Copper Mining
189 and Smelting Company, the complainant herein, to be organized under the general corporation laws of the State of New Jersey. Said corporation was formed by seven persons selected and employed for the purpose by said Bigelow and said Leonard Lewisohn, to wit, the respondent, Jesse Lewisohn, Allen W. Evarts, Edgar Buffam, Charles W. Welch, Sidney Riddlestorffer, William V. Rowe and William R. Montgomery. None of said several persons, except said Jesse Lewisohn, who was a son of said Leonard Lewisohn, had any actual interest in said corporation or acted in the formation thereof otherwise than as the representative and agent of said Bigelow and said Leonard Lewisohn. Each of said individuals nominally subscribed and paid for four (4) shares of the capital stock of said corporation except said Jesse Lewisohn who subscribed and paid for sixteen (16) shares; but in fact all said subscriptions were made for the benefit and at the request of said Bigelow and said Leonard Lewisohn, and each subscription was paid for by said defendant and said Leonard Lewisohn or one of them.

Ninth. On July 9, 1895, the first meeting of said corporation, organized as aforesaid, was held in Jersey City and all of the said incorporators were then present. By-laws were adopted and upon an election of directors by ballot said seven incorporators above named were duly chosen directors, and it was further voted to increase the capital stock to three million seven hundred and fifty thousand ($3,750,000) dollars divided into one hundred and fifty thousand (150,000) shares of twenty-five ($25) dollars each. A recess was taken by said meeting, and thereupon said seven directors met and organized and elected officers, to wit, said Allen W. Evarts, president, and said Sidney Riddlestorffer, vice-president, said Jesse
190 Lewisohn, treasurer, and said Edgar Buffam, secretary. Said meeting of directors confirmed the action of the prior meeting of incorporators increasing the capital stock as above set forth. The organization of said corporation and the proceedings of said meetings of incorporators and directors were duly had according to the laws of the State of New Jersey, and the by-laws adopted, as aforesaid, and thereby the complainant became duly organized as a corporation and the individuals above named became the lawful officers of the corporation, holding respectively the offices above named.

Tenth. A meeting of the directors of said complainant corporation, organized as aforesaid, was duly held on July 11, 1895, at the office in New York City of the firm of Lewisohn Brothers, of which firm said Leonard Lewisohn was a member; all of the directors except said Montgomery were present. Pursuant to instructions from said Bigelow and said Leonard Lewisohn, the resignation of said Montgomery as a director was presented and duly accepted, and said Bige-

low was thereupon chosen a director in his place. Thereupon, pursuant to instructions from said Bigelow and said Leonard Lewisohn, the successive resignations of said Rowe as a director, of said Welch as a director, of said Jesse Lewisohn as treasurer and as director, of said Evarts as president, and of said Riddlestorffer as Vice-President and as director were presented and duly accepted, and said Leonard Lewisohn, one Henry M. Whitney, one Thomas Nelson, and one Joseph G. Ray were successively duly chosen directors, and said Thomas Nelson was duly chosen treasurer, and said Bigelow was duly chosen president of said corporation. Said Bigelow and said Leonard Lewisohn were present at said meeting, and upon their respective elections as directors took their places in said meeting. All said resignations were duly received and acted on and said elections
191 to fill the vacancies caused by said resignations were duly had pursuant to the laws of the State of New Jersey and the by-laws of said corporation.

Eleventh. At some time prior to July 11, 1895, to-wit, on or about July 8, 1895, said Bigelow and said Leonard Lewisohn, in pursuance of said plan and conspiracy, completed the purchase of all said shares of stock in said Baltimore Old Dominion Company upon the terms of the agreement with the executors of the will of Michael H. Simpson and with William Keyser and others hereinbefore referred to, and all said stock was delivered and transferred to said Bigelow and said Leonard Lewisohn, or to persons designated by them, and the directors and officers of the said Baltimore Old Dominion Company resigned and new directors nominated by said Bigelow and said Leonard Lewisohn were duly chosen and said Bigelow was duly chosen president and said Allen W. Evarts secretary of said corporation. At the same time, to-wit, on or about July 8, 1895, and prior to July 11, 1895, said Keyser, pursuant to said agreement, conveyed to said Leonard Lewisohn said real estate in Arizona above referred to, to-wit, the Old Dominion Mine, New York Mine, Chicago Mine, Keystone Mine, and parcel of land near the Bloody Tanks, so-called, and the legal title to said real estate became vested in said Leonard Lewisohn.

Twelfth. At said meeting of the directors of the complainant corporation on July 11, 1895, above referred to, after the several changes of directors and other officers by resignation above set forth, and after said Bigelow had been elected President of said corporation, there remained present four directors, to-wit, said Bigelow, said Leonard Lewisohn, said Evarts, and said Buffam. Said Evarts
192 was the attorney employed by said Bigelow and said Lewisohn to attend to the incorporation of the complainant corporation and to carry out their said plan and conspiracy; said Buffam was a person selected by them and employed by them to act as director, and assist them in carrying out said plan and conspiracy. The remaining directors were said Thomas Nelson, Henry M. Whitney, and Joseph G. Ray, no one of them was present and each of whom was a subscriber to said Old Dominion Syndicate and interested to assist said Bigelow and said Leonard Lewisohn in their plan to sell said property to the complainant and in the success of said plan and conspiracy.

Thirteenth. At said meeting of the directors of the complainant company on July 11, 1895, after the change of directors and officers above set forth and after said Bigelow had been chosen president as aforesaid, said Bigelow through said Evarts presented to said Board of directors of the complainant an offer to the complainant to sell and convey substantially all the property of said Baltimore Old Dominion Company, except the cash assets, to the complainant for one hundred thousand (100,000) shares of the capital stock of the complainant corporation to be issued to said Baltimore Old Dominion Company or its nominees. Said offer was signed by said Bigelow as president of and by said Evarts as secretary of said Baltimore Old Dominion Company. A copy of said offer and of the schedule therein referred to is hereto annexed and marked "A" and made a part of this bill of complaint. Upon presentation of said offer, on motion of said Leonard Lewisohn, seconded by said Evarts, it was unanimously voted to accept said offer and to issue one hundred thousand (100,000) shares of the capital stock in payment of said property, and said Bigelow and said Nelson were appointed a committee
193 to supervise and carry out the details.

Fourteenth. Immediately after the passage of the vote last above refered to at said meeting of the directors of the complainant on July 11, 1898, said Leonard Lewisohn presented to said Board of Directors of the complainant a proposition to sell and convey to the complainant said real estate in Arizona acquired by said Leonard Lewisohn from said Keyser as above set forth, to-wit, said Old Dominion Mine, said New York Mine, said Chicago Mine, said Keystone Mine, and said parcel of land near the Bloody Tanks, so-called, for thirty thousand (30,000) shares of the capital stock of the complainant to be issued to said Leonard Lewisohn or his nominees accompanied with a request to issue said shares to said Bigelow and said Leonard Lewisohn. A copy of said proposition is hereto annexed and marked "B" and made a part of this bill of complaint. Upon presentation of said proposition said Bigelow and said Leonard Lewisohn caused the directors of the complainant corporation unanimously to vote to accept said proposition and to issue thirty thousand (30,000) shares of the capital stock in payment of said property, and said Bigelow and said Nelson were appointed a committee to supervise and carry out the details.

Fifteenth. Thereafter said Bigelow and said Leonard Lewisohn, pursuant to the original plan and conspiracy, and for the purpose of furnishing the complainant corporation, promoted by them as aforesaid, with working capital and with funds required to develop its plants and other properties, caused to be offered twenty thousand (20,000) shares of the capital stock of the complainant corporation, not theretofore disposed of, for public subscription and sale at the price of twenty-five (25) dollars per share; and all of said shares were so subscribed for and sold and the price therefor paid by said subscribers to the complainant. Said subscribers and purchasers of said shares were ignorant at the time said shares were offered for subscription and at the time they severally subscribed and paid
194 therefor and received their shares, as hereinafter set forth, of the facts hereinbefore set forth as to the promotion and or-

ganization of the complainant corporation by said Bigelow and said Leonard Lewisohn, and the large profit to be made by said Bigelow and said Leonard Lewisohn and by the other members of said Old Dominion Syndicate therefrom.

Sixteenth. Thereafter the sale and conveyance of the property of said Baltimore Old Dominion Company, included in the offer marked Exhibit "A" and the schedule thereto annexed, was consummated by the transfer of said property to this corporation, and the sale and conveyance of the property included in the proposition of said Leonard Lewisohn marked Exhibit "B" was consummated by the transfer of said property to this corporation. Thereafter, to-wit, on or about September 18, 1895, the Board of Directors of the complainant corporation at a meeting duly called voted at the request of said Baltimore Old Dominion Mining Company to issue one hundred thousand (100,000) shares of the capital stock of this complainant to one Philip K. Dumaresq, as representing said corporation as and for the price of said property so transferred and conveyed, and said shares were duly issued pursuant to said vote. And said board of directors of this corporation at said meeting further voted to issue thirty thousand (30,000) shares of the capital stock of this corporation to said Bigelow and said Leonard Lewisohn as and for the price of said property transferred and conveyed by the latter to this corporation as above set forth, and said shares were thereupon duly issued pursuant to said vote. And said board of directors of this corporation at the same meeting voted to issue twenty thousand (20,000) shares of the capital stock thereof to persons who had subscribed
195 therefor, as above set forth upon receiving payment of twenty-five ($25) dollars per share therefor.

Seventeenth. Said property conveyed to the complainant by said Baltimore Old Dominion Company was at the time of such conveyance fairly worth not more than one million (1,000,000) dollars. Said parcels of real estate sold and conveyed by said Leonard Lewisohn to the complainant as aforesaid, to-wit, said several mining claims known as Old Dominion Mine, New York Mine, Chicago Mine, and Keystone Mine respectively, and said parcel of land near the Bloody Tanks so-called, were at the time of such conveyance fairly worth not more than five thousand dollars ($5,000). Said Leonard Lewisohn and said Bigelow knew when they acquired the stock of said Baltimore Old Dominion Company and said Leonard Lewisohn acquired title to said parcels of real estate, and when said offers to sell to the complainant were made by said Baltimore Old Dominion Company and by said Leonard Lewisohn, respectively, that the value of the property referred to in said offers respectively was not in excess of the amounts above specified. The stock of said Baltimore Old Dominion Company and said parcels of real estate were acquired in the manner aforesaid with intent on the part of said Leonard Lewisohn and of said Bigelow to sell said property of said Baltimore Old Dominion Company and said parcels of real estate for a large price. No disclosure was at any time made to the complainant corporation of the fact that said property and said real estate was not of more than the value above given respectively, and by reason of the control

by said Bigelow and said Leonard Lewisohn of the complainant corporation and its board of directors, as above set forth, said purchase was made without any disclosure to or injury by complainant
196 corporation as to the reasonable value of said properties; and no disclosure was ever made to any of the persons who subscribed for or afterwards purchased shares of stock in the complainant corporation or to any other person of the facts as to the purchase of said properties or as to the reasonable value thereof, and said facts were not known to any of said persons or to any of the members of said Old Dominion Syndicate, except said Bigelow and said Leonard Lewisohn.

Eighteenth. By the transactions above set forth, said Bigelow and said Leonard Lewisohn carried out their said plan and conspiracy, and having, for the purpose of promoting a corporation and selling to such corporation, at a price much in excess of the cost thereof, the property of said Baltimore Old Dominion Mining Company and the property so conveyed to said Leonard Lewisohn, acquired all the capital stock of said Baltimore Old Dominion Company for the sum of less than eight hundred thousand ($800,000) dollars, and acquired without making any further payment, but for themselves as they claimed, all the property conveyed by said Leonard Lewisohn to the complainant, and having promoted the complainant corporation and caused the same to be organized, thereupon did sell to it the property of said Baltimore Old Dominion Company for one hundred thousand (100,000) shares of the capital stock of this corporation of the par value of twenty-five ($25) dollars each, to-wit, the aggregate par value of two million five hundred thousand ($2,500,000) dollars, and also sold to it all the property conveyed to said Leonard Lewisohn for thirty thousand (30,000) shares of said stock of the aggregate par value of seven hundred and fifty thousand ($750,000) dollars. And for the purpose of providing the corporation so promoted and formed by them pursuant to and in execution of said plan and con-
197 spiracy, to-wit, the complainant corporation with working and other capital, said Bigelow and said Leonard Lewisohn in further execution and performance of said plan and conspiracy, sold to the public twenty thousand (20,000) shares of the capital stock of said corporation so formed as aforesaid, to-wit, this corporation. The shares of this corporation so issued in payment of the property sold to it as aforesaid were at the time of the fair market value of twenty-five ($25) dollars each, and continued for a long time thereafter to be of such or greater value, and said Bigelow and said Leonard Lewisohn thus made for themselves and their associates in said syndicate from the sale of the property conveyed by the Baltimore Old Dominion Company to the complainant a profit of more than one million five hundred thousand ($1,500,000) dollars, and in addition thereto made for themselves alone on the property conveyed by said Leonard Lewisohn to the complainant a profit of over seven hundred and fifty thousand ($750,000) dollars.

Nineteenth. The subscribers to said Old Dominion Syndicate so-called were entitled by the terms of the agreement forming said syndicate to receive each his proportionate share of two million

(2,000,000) dollars in repayment of his original advance and his share of profits. To effect this division each member of said Syndicate was permitted to apply for shares of this corporation at par to the amount so payable to him, and said shares were thereupon issued to such applicant in lieu of his proportionate share of said sum. All or substantially all the subscribers to said Syndicate availed themselves of this privilege, and so far as such privilege was not availed of the money required was advanced by said Bigelow or others interested, and the corresponding number of shares was issued to the person so advancing the money. Of the one hundred thousand (100,000) shares of the capital stock of this
198 corporation issued to Philip K. Dumaresq as above set forth, upon and as consideration for the conveyance of all the property of said Baltimore Old Dominion Company as aforesaid, eighty thousand shares were thus distributed to and among the members of said Old Dominion Syndicate, so-called, or persons exercising the privilege of such members in the manner above set forth. And of this amount more than one-half was a profit made in the manner above described, and said syndicate thereby made a profit of not less than one million ($1,000,000) dollars. Of the eighty thousand (80,000) shares thus divided said Bigelow received as his proportion four thousand (4000) shares, and said Leonard Lewisohn received thirty-six hundred and nineteen (3619) shares. Not less than one-half of the shares so issued direct to said Bigelow and to said Leonard Lewisohn represented and was a profit to them respectively as members of said syndicate from the purchase of the stock of said Baltimore Old Dominion Company and the sale of its property aforesaid, to this corporation, pursuant to the plan and conspiracy formed by said Bigelow and said Leonard Lewisohn as hereinbefore set forth.

Twentieth. Said Bigelow and said Leonard Lewisohn by agreement between themselves, and as the complainant is informed and believes without the knowledge or assent of the other members of said Old Dominion Syndicate, took from the one hundred thousand (100,000) shares issued to Philip K. Dumaresq, as above set forth, ostensibly in payment of expenses and their own services in connection with the matter, the twenty thousand (20,000) shares remaining after dividing eighty thousand (80,000) shares among the members of said Syndicate, as above set forth. The expenses actually incurred by them did not exceed six thousand (6000) dollars. These twenty thousand (20,000) shares were divided
199 between said Bigelow and said Leonard Lewisohn, said Bigelow receiving ten thousand nine hundred and forty (10,940) shares as his proportion thereof, and said Leonard Lewisohn nine thousand and sixty (9060) shares as his proportion thereof. Said thirty thousand (30,000) shares issued to said Bigelow and said Leonard Lewisohn from said conveyance of real estate by said Leonard Lewisohn were also divided between said Bigelow and said Leonard Lewisohn, said Bigelow receiving sixteen thousand four hundred and ten (16,410) shares thereof, and said Leonard Lewisohn thirteen thousand five hundred and ninety (13,590) shares.

Twenty-first. Prior to the formation of said Old Dominion Syndi-

cate, so-called, and prior to making the several agreements hereinbefore referred to for the acquisition of the stock of said Baltimore Old Dominion Company and for the acquisition by said Leonard Lewisohn of said several parcels of real estate in Arizona conveyed to him by said Keyser as aforesaid, said Bigelow and said Leonard Lewisohn had formed the plan and intention of organizing a corporation to acquire the property of said Baltimore Old Dominion Company and to acquire said several parcels of real estate; and had formed the plan and intention of selling said property and said real estate to such new corporation at a large advance in price and of thereby acquiring and obtaining for themselves and such persons as they might associate with them a large profit from such sale to said corporation so to be formed, and of selling to the public a sufficient number of shares in the corporation so formed to provide said corporation with a working capital. And said Bigelow and said Lewisohn formed said Old Dominion Syndicate, so-called, and purchased said stock of said Baltimore Old Dominion Company and said real estate conveyed to said Leonard Lewisohn as aforesaid, for
the purpose and with the intent of carrying out the prior plan
200 and intention so formed by them as aforesaid, and of selling
the property so conveyed to said Leonard Lewisohn to the complainant corporation when the same should be formed, at a large advance in price; and said Bigelow and said Leonard Lewisohn caused the complainant corporation to be organized and to acquire the property of said Baltimore Old Dominion Company and to acquire the real estate conveyed by said Keyser to said Leonard Lewisohn, and caused said corporation to offer for sale and to sell to the public sufficient shares, to wit, twenty thousand (20,000) shares to provide it with working and other capital, in the manner aforesaid in further execution and performance of said plan and intention. When said offer was made by said Baltimore Old Dominion Company to the complainant corporation and when said proposition was made by said Leonard Lewisohn to the complainant corporation, and when said offer and proposition was accepted, said Bigelow and said Leonard Lewisohn were in absolute control of the complainant corporation through the ownership by them and their associates of all stock in said complainant corporation then outstanding, and through the selection of a Board of Directors and other officers chosen by them and selected for the purpose of enabling them to carry out said plan, and consisting of themselves, their employees and associates, all of whom were expressly chosen for the purpose of carrying out said plan and intention, and had expressly undertaken to do so; and said offer of said Baltimore Old Dominion Company and said proposition of said Leonard Lewisohn were accepted by the complainant corporation through its board of directors as above set forth, by the direction of said Bigelow and said Leonard Lewisohn, and the other directors in acting thereon acted solely at the direction
of and pursuant to previous agreement with said Bigelow and
201 said Leonard Lewisohn, and for the express purpose of
carrying out the said plan and intention of said Bigelow and said Leonard Lewisohn, and all of said action was taken and was

intended by the individuals who took part therein to carry out said plan and intention and to enable said Bigelow and said Leonard Lewisohn and such persons as they had associated with them to make a large profit by the sale of said property of the Baltimore Old Dominion Company and of said real estate to the complainant corporation at a price greatly in excess of the cost to said Bigelow and to said Leonard Lewisohn and their associates of all the stock of said Baltimore Old Dominion Company and of said real estate. And when said twenty thousand (20,000) shares of stock were offered to and were sold to the public, as above set forth, said Bigelow and said Leonard Lewisohn were in absolute control of the complainant corporation, as aforesaid, and said shares were so offered for sale and sold to carry out said plan and conspiracy of said Bigelow and said Leonard Lewisohn aforesaid.

Twenty-second. From July 11, 1895, when said purchase in behalf of the complainant corporation of the property of said Baltimore Old Dominion Company and of said real estate from said Leonard Lewisohn was consummated, as above set forth, until April 4, 1902, said Bigelow was continuously the president and chief executive officer of the complainant corporation; throughout said period the board of directors of the complainant corporation was continuously composed of persons selected by said Bigelow and said Leonard Lewisohn and at all times until April 4, 1902, a large majority of the persons so acting as directors were personal friends of said Bigelow and of said Lewisohn, and had been interested with said Bigelow and said Leonard Lewisohn in the transactions above set
202 forth and had received some share in the profits thereof, and the remaining directors took no active part in the management of the complainant corporation, and were ignorant of the facts hereinbefore set forth. No disclosure was at any time made to any of the subscribers for or to any purchasers of the capital stock of the complainant corporation not disposed of to said Bigelow or said Leonard Lewisohn, or to any purchaser thereof from them or either of them of the profit made by said Bigelow and said Leonard Lewisohn, as above set forth, as promoters of the complainant corporation or of any part thereof, and no disclosure was made to those persons other than said Bigelow and said Leonard Lewisohn who shared in the distribution of eighty thousand (80,000) shares of stock distributed to the members of said Old Dominion Syndicate of the profit made by said Bigelow and by said Leonard Lewisohn in the division between them of said additional twenty thousand (20,000) shares derived from the sale of the property formerly held by the Baltimore Old Dominion Company or of the thirty thousand (30,000) shares derived from the sale of the property conveyed by said Leonard Lewisohn, as above set forth, in the proportion of twenty-seven thousand three hundred and fifty (27,350) to said Bigelow and twenty-two thousand six hundred and fifty (22,650) to said Leonard Lewisohn. This complainant had not until after April 4, 1902, any knowledge or information of any of the facts hereinbefore set forth as to the profit derived by said Bigelow or by said Leonard Lewisohn in the manner above stated as promoters of this corporation or of any profit having been derived by them, or either

of them or by any other person interested or participating in the promotion and organization of this corporation, and immediately upon receiving information relating thereto, the complainant
203 investigated the same and thereupon promptly made demand upon said Bigelow and upon the defendants.

Twenty-third. The property conveyed to the complainant by the Baltimore Old Dominion Company, as above set forth, consists mainly of the copper mine which was then and ever since has been in active operation, and from which large amounts of ore have since been taken, and upon which large expenditures have been made in the development and establishment of the necessary plant. All the property as conveyed at the time it was sold to the complainant as above set forth was worth not over one million (1,000,000) dollars. The property conveyed to the complainant by Leonard Lewisohn as above stated consists merely of mining claims and a parcel of land for a mill site, all of which property has since said conveyance remained undeveloped and is now in substantially the same condition that it was at the time of the conveyance by said Lewisohn to the complainant. Said property so conveyed was at the time of such conveyance fairly worth not more than five thousand (5000) dollars.

Twenty-fourth. Said Leonard Lewisohn died on March 5, 1902, and was at the time of his death a citizen of the State of New York and a resident of the Borough of Manhattan in the City, County and State of New York. On or about April 4, 1902, the last will and testament of said Leonard Lewisohn was duly admitted to probate in the Surrogates' Court for said County of New York, and on or about April 5, 1902, the respondents herein were duly appointed executors of said will, and letters testamentary were duly issued to them as such by said Surrogates' Court, and they are now such executors and duly qualified and acting as such. All said respondents are citizens of the State of New York and reside in said Borough of Manhattan in the City of New York and State of New York in
204 the Southern District of New York.

Twenty-fifth. After April 4, 1902, and prior to July 24, 1902, the complainant made investigations as to the matters above set forth. In the course of such investigations it applied to said Bigelow for information and access to papers. This information was, as the complainant is informed and believes, referred to the respondents, and said Bigelow subsequently notified this complainant that the respondents were unwilling to permit information or access to papers relating to said matters to be given to the complainant. Thereafter, to wit, on or about July 24, 1902, the complainant by its counsel notified the respondents that the complainant had a claim for a very large amount against them as executors as aforesaid to recover the profits made by said Leonard Lewisohn as above set forth. Thereafter, to wit, on or about August 1, 1902, said respondents informed the complainant's counsel that they believed the claim of the complainant to be absolutely unfounded. Thereafter, to wit, on or about September 12, 1902, the complainant offered to said Bigelow and to the respondents to rescind the sale and conveyance to it from said Leonard Lewisohn of said parcels of real estate in Arizona, to wit, the parcels known as The Old Dominion Mine,

New York Mine, Chicago Mine, Keystone Mine, and parcel of real estate near the Bloody Tanks, so-called.

Thereafter, to wit, on or about September 18, 1902, said complainant submitted to the counsel for the respondents a full statement of the claim contained in the bill of complaint, and on September 26, 1902, said counsel for the respondents notified the complainant that after a full investigation, the respondents believe, and counsel had so advised them that the claims made upon them were not valid.

Twenty-sixth. The complainant desires to rescind the sale
205 of said parcels of real estate conveyed to it by said Leonard Lewisohn, as hereinbefore set forth, and has offered to convey all of said parcels of real estate conveyed to it by said Leonard Lewisohn, to wit, said parcels known as the Old Dominion Mine, New York Mine, Chicago Mine, Keystone Mine, and parcel of land near the Bloody Tanks, so-called, to said respondents or to such person as they might name upon receiving from them the consideration paid by this complainant for the conveyance thereof to it, to wit, thirty thousand (30,000) shares of its capital stock, or upon a proper accounting for said shares, but said respondents have refused to make any such restitution or accounting; and the complainant is still ready and willing, and hereby offers, to convey said last named parcels of real estate to such person as this Honorable Court may direct. Said Bigelow is a citizen and resident of Boston in the Commonwealth of Massachusetts and cannot be served with process in this district or in the State of New York.

Twenty-seventh. The complainant says that the shares which it seeks to recover are of great value, to wit, greatly in excess of two thousand (2000) dollars, and that the sum recoverable upon an accounting therefor is very large, to wit, greatly in excess of two thousand (2000) dollars, exclusive in each case of interest and costs.

Wherefore the Complainant Prays:

1. That this Honorable Court will declare said sale of said parcels of real estate conveyed by said Leonard Lewisohn to the complainant, as hereinbefore set forth, rescinded, and will direct this complainant upon the return to it of or a proper accounting to it for the consideration for said sale and conveyance, to execute such reconveyance, if any, of said several parcels of real estate to such person or persons as this Honorable Court shall think proper.

206 2. That said respondents, in their capacity of executors of the will of said Leonard Lewisohn, be required to return to the complainant the consideration paid by this complainant for said conveyance, to wit, thirty thousand (30,000) shares of its capital stock, or if, and so far as said shares are no longer in their control, to account to the complainant therefor.

3. In the alternative, in case this Honorable Court shall deem that the complainant has not rescinded and is not entitled to rescind said sale or conveyance of said parcels of real estate conveyed by said Leonard Lewisohn to the complainant as above set forth, that this Honorable Court will ascertain the amount of damages suffered by the complainant by reason of the sale of said parcels of real estate as above set forth, and will by its decree establish the right of the complainant to recover said amount and order said respondents, in

their capacity of executors of the will of the said Leonard Lewisohn, to pay said amount to it.

4. For such other relief as to this Honorable Court shall seem meet.

And may it please your Honors to grant unto the complainant a writ of subpœna ad respondendum directed to said respondents Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn, and Philip S. Henry, commanding them each to be and appear in this Honorable Court on a day certain therein to be named to answer this bill of complaint, but not under oath, an answer under oath being specially waived, and to abide by and perform such orders and decrees as may be made herein.

(Signed) OLD DOMINION COPPER MINING & SMELTING CO.
By BRANDEIS, DUNBAR & NUTTER,
207 *(Its Solicitors)*,
220 Devonshire Street, Boston, Mass.
CARTER, HUGHES & DWIGHT,
Solicitors for Plaintiff,
106 Broadway.

LOUIS D. BRANDEIS,
Of Counsel for Plaintiff:
CHARLES E. HUGHES,
Counsel for Plaintiff.

A.

To the Old Dominion Copper Mining & Smelting Company, a Corporation Organized and Existing Under the Laws of the State of New Jersey:

The Old Dominion Copper Company of Baltimore City, a corporation organized and existing under the Laws of the State of Maryland being the owner of certain mines and mining properties at Globe in the territory of Arizona described in the annexed schedule and of machinery, lumber, wood, tools, implements and other personal property for use for and in connection with the operation and maintenance thereof, hereby makes the following proposition. To convey, assign and transfer all its property, both real and personal of every kind and nature whatsoever and wheresoever situated, by good and sufficient deeds and instruments properly executed so as to convey absolute title thereto to the Old Dominion Copper Mining and Smelting Company upon receiving from said Company one hundred thousand shares of its capital stock to be issued to the said Old Dominion Copper Company or to its nominees.

It being understood that the Old Dominion Copper Mining & Smelting Company shall assume all obligations of the Old
208 Dominion Copper Company of Baltimore City incurred since the first day of June, 1895, and shall be entitled to all earnings and profits of said Company since that date.

July eleventh, 1895.

A. B. BIGELOW, *President*.
A. W. EVARTS, *Secretary*.

Schedule.

First. The Globe Mine patented by the United States Government to W. B. Reagan on the 18th day of October, 1881, by patent recorded in the office of the Recorder of Pinal County, Territory of Arizona, on the 19th day of November, 1881, to which record reference is made for a fuller description of said mine.

Second. The Globe ledge mine patented by the United States Government to Benjamin W. Reagan, on the eighteenth day of October, 1881, by patent recorded in the office of the Recorder of Pinal County, Territory of Arizona on the nineteenth day of November, 1881, to which record reference is made for a fuller description of said mine.

Third. The Copper Jack Mill site of which the location is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Record of Mines, at page 311, and to which record reference is hereby made for a fuller description of said mill site upon which the smelting works formerly owned by the Old Dominion Copper Company are situated.

Fourth. The Globe Mill site of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Record of Mines at page 311, to which record reference is hereby made for a fuller description of said mill site.

209 Fifth. The Globe Ledge Mill site of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Record of Mines at page 310, to which record reference is hereby made for a description of said mill site.

Sixth. The South East Globe Mine of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Record of Mines, page 312, and reference is hereby made to said record for a fuller description of said mine.

Seventh. All of the certain mining claim known as the Interloper in Globe District Record on page- 116, 117, in Book 3, reference to which will more fully show being the same property conveyed to William Keyser by Thomas H. Mason by deed bearing date January 3rd, 1887, and recorded at page 586, Book 2, Record of Deeds to Mines Gila County Arizona Territory.

Eighth. The Fraction Mine of which the location notice is recorded in the office of the Recorder of Gila County Arizona in Book 2 of Record of Mines at page 569, to which record reference is hereby made for a fuller description of said mine.

Ninth. The Alice Mine or Lode located October 10th, 1875, by A. R. Hammond and J. W. Reed and notice of location recorded in Book 1, page 131, Globe District Mining Records (now a part of the records of Gila County), and located February 28, 1879, notice of location recorded in Book 5, Globe District Mining record (now a part of the records of Gila County), on pages 184 and 185, said mine or lode being more particularly described in the last mentioned notice of location as follows, to wit:

Commencing at this monument of stone in a gulch being the

centre of southwest end of claim and upon which this notice is posted, thence southeast 300 feet to a monument of stones, thence northeast 1400 feet to a monument of stones, thence northwest 300 feet to a monument of stones, being the centre of the northeast end of claim; thence northwest 300 feet to a monument of stones; thence southwest 1400 feet to a monument of stones under a tree; thence southeast 300 feet to the place of beginning, being the same mining claim conveyed to Michael H. Simpson, deceased, by deed of the Globe City Mining Company, dated July 1st, 1884, and recorded with Gila County Deeds to Mines, Book 2, page 227, etc.

Tenth. The mining claim called and known as the Hypathia Mine, situate, lying and being in Globe Mining District, Gila County, Territory of Arizona and more particularly described in the notice of location recorded at page 55, Book 2 Record of Mines, Gila County Records to which record reference is made for a more definite description of said mine. Said mine was formerly known as the Southwest Alice Mine, being the same mining claim conveyed to said Michael H. Simpson, lately deceased, by deed of William H. Cook dated November 18th, 1884, and recorded with Gila County Deeds, Book 2, page 305.

B.

To the Old Dominion Copper Mining and Smelting Company:

I hereby offer to convey the following described property now owned and held by me upon receiving thirty thousand shares of the capital stock of the Old Dominion Copper Mining & Smelting Company to be issued to me or to my nominees.

First. The Old Dominion Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land Office at Tucson, Arizona, entry number 267, Lot 45, situated in Globe Mining District Gila County, Arizona.

Second. The New York Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, at the United States Land Office at Tucson, Arizona, entry 268, lot 46, in Globe Mining District in Gila County, Arizona.

Third. The Chicago Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land Office of Tucson, Arizona, entry 269, lot 51, in Globe Mining District, Gila County, Arizona.

Fourth. The Keystone Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1885, in the United States Land Office at Tucson, Arizona, entry 384, Lot 54, in Globe Mining District, Gila County, Arizona.

Fifth. A lot or parcel of land situated near the Bloody Tanks and deeded by E. A. Saxe to the Old Dominion Copper Mining Company, deed recorded in Book 1 of Deeds to Real Estate at page 126 and 127, in the office of the Recorder of Gila County, Arizona, and reference is hereby made to said record for a fuller description of said parcel of land.

New York, July 11, 1895.

LEONARD LEWISOHN.

Please issue said thirty thousand shares of stock to Mr. A. S. Bigelow and myself.

LEONARD LEWISOHN.

EXHIBIT B.

Circuit Court of the United States, Southern District of New York.

In Equity.

OLD DOMINION COPPER MINING & SMELTING CO.
v.
FREDERICK LEWISOHN et al.

212 *Defendants' Demurrer to the Whole Bill.*

The Joint and Several Demurrer of Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, as Executors of the Last Will of Leonard Lewisohn, the Defendants Above Named.

These defendants respectively by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill to be true, in such manner and form as the same are therein set forth and alleged, demur thereto, and for cause of demurrer show that it appears by said bill that the same sets up against the defendants different and distinct causes which are inconsistent with each other and cannot properly be joined; that different reliefs inconsistent with each other are prayed for, and that the said bill is altogether multifarious.

Wherefore, and for divers other good causes of demurrer appearing in the said bill these defendants respectively demur thereto and humbly demand the judgment of this Court whether they shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with their costs and charges in this behalf wrongfully sustained.

HOADLY, LAUTERBACH & JOHNSON,
Solicitors for Defendants.

STATE OF NEW YORK,
County of New York, ss:

Frederick Lewisohn makes solemn oath, and says, that he is one of the above named defendants, and that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

FREDERICK LEWISOHN.

Subscribed and sworn to before me this 5th day of March, 1903.

213

[L. S.]

MORRIS MAYER,
Notary Public, N. Y. County.

I hereby certify That in my opinion the foregoing demurrer is well founded in point of law.

EDWARD LAUTERBACH,
Of Counsel for Defendants.

EXHIBIT B'.

Circuit Court of the United States, Southern District of New York.

In Equity.

OLD DOMINION COPPER MINING & SMELTING COMPANY
v.
FREDERICK LEWISOHN et al.

Defendants' Demurrer to a Part of the Bill.

The defendants by protestation not confessing or acknowledging all or any of the matters and things in the plaintiff's bill of complaint to be true in such manner and form as the same are therein set forth and alleged, and not waiving *his* demurrer to the whole bill, but insisting and relying thereon, further demur to so much of said bill as seeks to have the sale of certain parcels of real estate . . conveyed to the plaintiff by Leonard Lewisohn rescinded, and to have the defendants ordered to return to the plaintiff the consideration paid by the plaintiff for said conveyance; and for causes of demurrer the defendants show:

1. That the plaintiff has not, in and by said bill, stated such a case as entitled it to the aforesaid relief against the de-
214 fendants.

2. That it appears by said bill that one Albert S. Bigelow herein referred to is an indispensable party defendant to said bill so far as it seeks the rescission of the aforesaid sale, but that he has not been made a party defendant.

Wherefore, the defendants demur to so much of the complainants bill as is above specified, and demands judgment of this court, whether *he* shall make any further or other answer to such part of said bill as is so demurred unto as aforesaid, and prays to be hence dismissed with their costs in this behalf sustained.

HOADLY, LAUTERBACH & JOHNSON,
Solicitors for the Defendants.

STATE OF NEW YORK,
County of New York, ss:

Frederick Lewisohn makes solemn oath, and says, that he is one of the above-named defendants, and that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

FREDERICK LEWISOHN.

Subscribed and sworn to before me this 5th day of March, 1903.
[L. S.] MORRIS MEYERS,
Notary Public, New York County.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

EDWARD LAUTERBACH,
Of Counsel for Defendants.

215 EXHIBIT C.

At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, Held at the United States Court House, in the Borough of Manhattan, City of New York, on ——, the Twenty-Fourth Day of March, 1905, in the Year of Our Lord One Thousand Nine Hundred and Five.

Present, Hon. E. Henry Lacombe, Circuit Judge.

In Equity. No.8333.

OLD DOMINION COPPER MINING & SMELTING COMPANY,
Complainant,
against
FREDERICK LEWISOHN et al., Defendants.

The demurrer of the defendants to a part of the bill of complaint, and the demurrer of the defendants to the whole of the bill of complaint having come duly on for hearing, and after hearing Eugene Treadwell, Esq., of counsel for the defendants, in support of the demurrer to a part of the bill of complaint, and Louis D. Brandeis, Esq., of counsel for the complainant, in opposition thereto, and the consideration by the Court of the demurrer to the whole bill of complaint at this time having been waived in open Court by the Counsel for the respective parties, and the premises having been duly considered, it is

Ordered by the Court, that the demurrer to so much of said bill as seeks rescission be and the same is hereby sustained, with leave to complainant to serve an amended bill of complaint within thirty days from the entry of this order, and the defendants to
216 have leave within thirty days of the service of such amended complaint to answer, plead, demur or take such other proceeding as they may deem advisable. It is

Further Ordered, that the defendants do recover against the said complaint their costs and charges by them upon the said demurrer to be taxed, such costs to abide the event of this suit.

Further Ordered, that in event of the complainant's failure to serve an amended complaint within thirty days from the date of the entry of this order, as above provided, the bill of complaint be dismissed and defendants have execution for costs thereon.

E. M. LACOMBE,
U. S. Circuit Judge.

March 24, 1905.

Approved as to form.
LOUIS D. BRANDEIS,
Counsel for Complainant.
HOADLY, LAUTERBACH & JOHNSON,
Solicitors for Defendants.

EXHIBIT C'.

In Equity.

OLD DOMINION COPPER MINING CO.
v.
LEWISOHN et al.

On Demurrer to a Bill of Complaint against the Executors of Leonard Lewisohn, Deceased.

Edward Lauterbach, in support of demurrer.
Louis D. Brandeis, opposed.

LACOMBE, *Circuit Judge:*

It was conceded by complainant upon the argument that the bill prayed no relief except recission of a contract for the sale of
217 certain mining rights and a parcel of real estate in Arizona. Irrespective of such concession, the court would be inclined so to construe the bill. Therefore the objection that it is multifarious cannot be sustained.

The demurrer asserts that the complainant has not by the bill stated such a case as entitles it to have such contract and sale rescinded. This sufficiently challenges the equity of the bill. The facts as averred in the bill are as follows: The deceased, Leonard Lewisohn, and one Albert S. Bigelow were the promoters of the complainant company, and caused it to be organized under the laws of New Jersey on July 8, 1895, by seven persons selected and employed for said purpose, none of whom had any actual interest in the corporation, or acted in the formation thereof other than as the representative and agent of the promoters. Forty shares were nominally subscribed and paid for by these persons, but in fact all of said subscriptions were made for the benefit and at the request of Bigelow and Lewisohn, and each subscription was paid for by them. The company having been organized, elections for officers and directors ensued, as a result of which, on July 11, 1895, Bigelow and Lewisohn both became directors, and Bigelow the president of the company. Prior to July 11th they had become the owners of several mining claims and a parcel of real estate in Arizona, which were worth on that day, as the bill alleges, not more than $5000. On that day, at a directors' meeting attended by themselves and two of their dummy directors, they sold and conveyed to the corporation the said mining claims and real estate for 30,000 shares of the capital stock of the par value of $25 a share. Thereafter, at times not specified, additional shares of capital stock (to the amount
218 of 20,000) were from time to time offered and sold to the public at par, to obtain working capital. The bill also alleges a similar sale, for stock, on July 11th, of a mine owned by the promoters, at an excessive valuation, but no relief is prayed as to that transaction. The prayer of the bill is that the sale of the

mining claims and real estate be rescinded, the property reconveyed, and the shares of stock returned or accounting had therefor, or, in the alternative of rescission, that the court will ascertain the amount of damages suffered by the complainant, and decree therefor.

Whether the contract for the sale of the real estate was voidable, so as to give the corporation the right to rescind or to demand damages, must be determined under the conditions which existed when it was made. Ordinarily, when a director or promoter contracts to sell property to his corporation, the corporation not being independently represented, it may rescind the contract, upon the theory, of course, that the relation between the parties is fiduciary, and that the other stockholders and subscribers to the stock are to be protected against an abuse of trust. But where there are no other stockholders nor subscribers, there is no one who is deceived, no stockholder or subscriber who is defrauded, since all the profit put into one pocket by the "faithless" directors is taken out of their other pocket as the sole stockholders. This principle is abundantly established by decisions controlling here, so it will be unnecessary to cite numerous authorities from other courts. In Foster v. Seymour (C. C.), 23 Fed. 65, which was decided in this court (Wallace, J.), the facts were very similar, except that the sale was for scrip, the stock not having yet been issued. The court said:

219 "There was no fraud on the corporation. At the time the scrip was exchanged for the mining property, the trustees were all there were of the corporation. There were no stockholders unless they were stockholders. What was done was done by the corporation. By the exchange the corporation got the mining property, and gave it back again to those from whom it got it, divided into 100,000 shares of the nominal value of $100 each."

And it held that whether or not a subsequent purchaser of stock could recover against those who had misled him—against the corporation or the trustees—"the corporation has no cause of action against the trustees." Subsequently the same question came before the Court of Appeals in this circuit (McCracken v. Robinson, 57 Fed. 375, 6 C. C. A. 400), where as the court expressed it—

"When they entered into the contracts they owned the corporation and all its stock, and represented only themselves. While directors in fact, they were principals in name."

It was held that in such a case the rule prohibiting persons in a fiduciary relation from contracting for their own advantage in the name of their beneficiaries had no application.

This demurrer to the bill is well taken, and it is therefore unnecessary to discuss the special demurrer as to defect of parties. The bill is dismissed, with costs.

Exhibit D.

Circuit Court of the United States, Southern District of New York.

In Equity. No. 8333.

220 Old Dominion Copper Mining and Smelting Company
v.
Frederick Lewisohn et al.

Amended Bill of Complaint.

To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York:

The Old Dominion Copper Mining and Smelting Company, a corporation duly organized under the laws of the State of New Jersey, and a citizen of said State, residing at Jersey City, in said State, and in the district of New Jersey, complainant, against Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, all citizens of the State of New York, residing in the Borough of Manhattan, in the City of New York, in the state of New York, and in the Southern District of New York, as executors of the last will of Leonard Lewisohn, who, at the time of his death, was a citizen of said State, residing in said Borough of Manhattan, respondents.

And thereupon your orator complains and says:

First. The complainant, the Old Dominion Copper Mining and Smelting Company, is a corporation duly organized under the laws of the State of New Jersey, and having a usual place of business at Boston, in the County of Suffolk and Commonwealth of Massachusetts, and a citizen of New Jersey, residing at Jersey City, in said State and in the District of New Jersey. Said corporation is the owner of copper mines and smelting works in the Territory of Arizona, and is carrying on the business of mining, smelting and selling copper.

Second. On and prior to April 30, 1895, there existed a certain corporation called the Old Dominion Copper Company of
221 Baltimore City (hereinafter called the Baltimore Old Dominion Company), organized under the laws of the State of Maryland, and having a usual place of business in said Baltimore. Said Baltimore Old Dominion Company was then the owner of mines and mining claims in Arizona. It had a capital stock of five hundred thousand ($500,000) dollars divided into twenty-five thousand (25,000) shares of the par value of twenty (20) dollars each. Of said shares there were then owned by the executors of the will of Michael H. Simpson, late of said Boston, deceased, about seventeen thousand eight hundred and fifty-seven (17,857) shares and the balance of said shares were then owned by one William Keyser of Baltimore, in the State of Maryland. Said Keyser also then held the title in his own name to certain mining claims known as the Old Dominion Mine, the New York Mine, the Chicago Mine,

the Keystone Mine, and a certain parcel of land near the Bloody Tanks, so-called, all in said Arizona. Said Keyser held said property for the benefit of himself and of the estate of said Michael H. Simpson.

Third. At some time prior to May 4, 1895, said Leonard Lewisohn, deceased, and one Albert S. Bigelow, of said Boston, formed the plan of acquiring all the stock of said Baltimore Old Dominion Company, as aforesaid, and of organizing a new corporation to acquire and of selling to such new corporation at a large advance in price all the property of said Baltimore Old Dominion Company, and in order to provide the same with a working capital of causing said new corporation to offer for subscription for cash to such of the public as might be induced to subscribe for the same a large number of the shares of such new corporation not previously issued in payment for said property, and of thereby securing for themselves and such persons as they might associate with them a large
222 profit by such persons and the subsequent sale to said new corporation to be organized by them of said property, and of obtaining from the subscribers for shares to be issued for cash the means of operating said mines; and said Leonard Lewisohn and said Bigelow thereupon conspired together to carry out said plan and thereby to injure said corporation to be formed as aforesaid and the future stockholders in said corporation and to secure for themselves as the promoters and organizers thereof a large secret profit.

Fourth. Thereafter, pursuant to said plan and conspiracy, said Leonard Lewisohn and said Bigelow at some time prior to May 24, 1895, procured an option to purchase from the executors of the will of said Michael H. Simpson said seventeen thousand eight hundred and fifty-seven (17,857) shares for seven hundred and fourteen thousand two hundred and eighty-five (714,285) dollars, and formed a syndicate known as the Old Dominion Syndicate, for the purpose of raising the money necessary to purchase said shares. Said syndicate was formed in order, by purchasing said shares pursuant to said option, to carry out the plan and conspiracy of said Leonard Lewisohn and said Bigelow above described for the benefit of themselves and of such persons as might become members of said syndicate. Said Leonard Lewisohn and Bigelow, pursuant to said plan and conspiracy prior to May 24, 1895, induced a large number of persons to subscribe to and join said syndicate, upon the terms that the members of the syndicate should pay in fourteen (14) per cent. of the amount of their respective subscriptions or interests therein on May 27, 1895, twenty-eight and two-thirds (28 2/3) per cent. on July 26, 1895, twenty-eight and two-thirds (28 2/3) per cent. on August 25, 1895, and twenty-eight and two-thirds (28 2/3) per cent. on September 24, 1895, and with each of said last three instalments five (5) per cent. interest thereon from May 27, 1895.
223 It was understood and agreed between the members of said syndicate and said Leonard Lewisohn and Bigelow, and the intention in forming said syndicate was that the amounts so subscribed and paid in should be used so far as required for the purpose of acquiring the property or all or the greater part of the capital stock of said Baltimore Old Dominion Company and disposing of

said property to a new corporation at a large advance in price and that the members of said syndicate should receive in cash or in stock of the new corporation to be formed to purchase said property as aforesaid the profit made by such sale to a new corporation pro rata according to their several subscriptions or interests.

Fifth. Thereafter, to wit, on or about May 27, 1895, said Leonard Lewisohn and said Bigelow received the first instalment, payable by the persons who up to that time had become members of said syndicate, amounting to about one hundred thousand (100,000) dollars. On or about May 28, 1895, said Bigelow, in behalf of himself and of said Leonard Lewisohn and of their associates in said Old Dominion Syndicate, and of such persons as might thereafter become associated with them in said syndicate paid, in large part from the funds received from members of said syndicate other than said Bigelow and said Lewisohn, to the executors of the will of said Michael H. Simpson, in accordance with the terms of said option for the purchase of said seventeen thousand eight hundred and fifty-seven (17,857) shares of stock in said Baltimore Old Dominion Company the sum of one hundred thousand (100,000) dollars, and delivered to said executors three notes each for two hundred and four thousand seven hundred and sixty-one and 66-100 (204,761.66) dollars, all dated May 28, 1895, and payable sixty (60), ninety (90) and one hundred and twenty (120) days after date, respectively, made
224 by said Leonard Lewisohn and endorsed by said Bigelow and by Lewisohn Brothers, a corporation. Said payment was made and said notes were made, endorsed and delivered in pursuance of and for the purpose of carrying out said original plan and conspiracy. Upon said payment and delivery of said notes all said shares of stock were deposited with the Old Colony Trust Company in said Boston, to be by it delivered upon payment of all said notes.

Sixth. On or about June 13, 1895, said Leonard Lewisohn and Bigelow, for the purpose of carrying out said plan and conspiracy, and for the purposes aforesaid of said syndicate, made an agreement with said William Keyser, whereby said Keyser undertook to sell to said Leonard Lewisohn and his associates seven thousand one hundred and forty-three (7,143) shares of stock in said Baltimore Old Dominion Company, being all the remainder of the stock in said Baltimore Old Dominion Company, for two hundred and eighty-five thousand seven hundred and fifteen (285,715) dollars, payable forty thousand (40,000) dollars on June 20, 1895, and the balance by three promissory notes each for eighty-one thousand nine hundred and five (81,905) dollars, payable thirty (30), sixty (60) and ninety (90) days after date, respectively, with the privilege of anticipating any payments. Said Keyser further agreed on payment of said cash and delivery of said notes to deposit all of said shares with the Old Colony Trust Company in said Boston, to be delivered upon final payment of all said notes. By said agreement said Keyser further undertook to convey to said Leonard Lewisohn or his order without any further consideration than the purchase of said stock all the interest of said Keyser, alleged to be one-half, in said Old Dominion Mine, Keystone Mine, New York Mine and Chicago Mine.

Said agreement was made with the intention of providing the
225 means for paying for said stock from the sums to be paid by subscribers to said Old Dominion Syndicate and of dealing with said stock in the same manner as with the stock of the Baltimore Old Dominion Company purchased from said executors. Thereafter, to provide the means of paying said Keyser for said stock, said Leonard Lewisohn and Bigelow induced a number of additional persons to subscribe to said syndicate and receive from such subscribers to said syndicate further large sums for the first instalment payable on such subscriptions, and said Bigelow on or about June 20, 1895, in behalf of himself and of said Leonard Lewisohn and of their associates in said Old Dominion Syndicate and of such persons as might thereafter become associated with them in said syndicate, paid, in large part from the funds received from subscribers to said syndicate other than himself and said Leonard Lewisohn, said sum of forty thousand (40,000) dollars and a further sum in anticipation of the first of said notes and delivered two other notes in conformity with said agreement, and said stock was deposited with said Old Colony Trust Company to be delivered as aforesaid. Said payment was made and said notes were made and delivered in pursuance of and for the purpose of carrying out said original plan and conspiracy.

Seventh. When said Leonard Lewisohn and Bigelow first obtained said agreement for the sale by the executors of the will of said Michael H. Simpson, they did not know that said four mining claims and said parcel of real estate were owned by said Keyser for the benefit of himself and said executors. Thereafter and on or about June 13th they learned that such was the case and formed the plan of securing said claims and parcel of real estate without the payment of any additional consideration and of selling the same for a large profit to the corporation to be formed to acquire the property of the Bal-
226 timore Old Dominion Company as above set forth. In pursuance of this plan and conspiracy they required said Keyser to undertake to convey said claims and real estate to them without payment of any additional consideration upon said executors assenting thereto. Thereafter, on or about June 14, 1895, they induced said executors to and said executors did agree that all interest of theirs in said four mining claims known as the Old Dominion, Keystone, New York and Chicago Mines and said parcel of land near the Bloody Tanks, legal title to all of which was then in said Keyser as above set forth, should be transferred without any further consideration than the purchase of said shares of stock from said executors.

Eighth. On or about June 20, 1895, a meeting of the directors of the Baltimore Old Dominion Company was duly held at Baltimore. At said meeting two of the five directors of said corporation and the president and treasurer thereof resigned and their resignations were duly accepted. Said Bigelow and said Leonard Lewisohn were thereupon duly elected directors and duly elected president and treasurer, respectively, of said corporation, and the then remaining old directors tendered their resignations to take effect when desired by said Leonard Lewisohn and Bigelow. One Allen W. Evarts, an attorney employed by said Leonard Lewisohn and Bigelow, was also duly

elected secretary of said corporation. At the same time, to wit, on or about June 20, 1895, said William Keyser, pursuant to his said agreement and the agreement of the executors of the will of said Michael H. Simpson and without the payment of any consideration other than the payment for the stock in said Baltimore Old Dominion Company purchased as aforesaid, conveyed and transferred to said Leonard Lewisohn said four mining claims known as the Old
227 Dominion Mine, Keystone Mine, Chicago Mine and New York Mine, and said parcel of land near the Bloody Tanks, so-called. Said conveyance was made to said Leonard Lewisohn and the title to said property was acquired by him for the common benefit of himself and said Bigelow, as hereinafter set forth, and as a part of the plan and conspiracy hereinbefore set forth.

Ninth. On or about July 8, 1895, said Leonard Lewisohn, in conjunction with said Bigelow, in pursuance of said plan and conspiracy and for the purpose of carrying out the same for the benefit of themselves and of the subscribers to said Old Dominion Syndicate, so-called, caused the Old Dominion Copper Mining and Smelting Company, the complainant herein, to be organized under the general corporation laws of the State of New Jersey. Said corporation was formed by seven persons selected and employed for the purpose by said Leonard Lewisohn and said Bigelow, to wit, Jesse Lewisohn, Allen W. Evarts, Edgar Buffam, Charles W. Welch, Sidney Riddlestorffer, William V. Rowe, and William R. Montgomery. None of said seven persons except said Jesse Lewisohn, who was a son of said Leonard Lewisohn, had any actual interest in said corporation or acted in the formation thereof otherwise than as the representative and agent of said Leonard Lewisohn and said Bigelow. Each of said individuals nominally subscribed and paid for four (4) shares of the capital stock of said corporation except said Jesse Lewisohn, who subscribed and paid for sixteen (16) shares; but in fact all said subscriptions were made for the benefit and at the request of said Leonard Lewisohn and said Bigelow, and each subscription was paid for by said Leonard Lewisohn and said Bigelow or by one of them.

Tenth. On July 9, 1895, the first meeting of said corpora-
228 tion, organized as aforesaid, was held in Jersey City, and all of said incorporators were then present. By-laws were adopted, and upon an election of directors by ballot said seven incorporators above named were duly chosen directors. At said meeting it was further voted to increase the capital stock to three million seven hundred and fifty thousand (3,750,000) dollars, divided into one hundred and fifty thousand (150,000) shares of twenty-five (25) dollars each. A recess was taken by said meeting, and thereupon said seven directors met and organized and elected officers, to wit: Said Allen W. Evarts, president; said Sidney Riddlestorffer, vice-president; said Jesse Lewisohn, treasurer; and said Edgar Buffam, secretary. Said meeting of directors confirmed the action of the prior meeting of incorporators increasing the capital stock, as above set forth. The organization of said corporation and the proceedings of said meetings of incorporators and directors were duly had according to the laws of the State of New Jersey, and the by-laws adopted, as aforesaid, and

thereby the complainant became duly organized as a corporation and the individuals above named became the lawful officers of the corporation holding respectively the offices above named.

Eleventh. A meeting of the directors of said complainant corporation, organized as aforesaid, was duly held on July 11, 1895, at the office in New York City, of the corporation known as Lewisohn Brothers, of which corporation said Leonard Lewisohn was general manager; all of the directors except Montgomery were present. Pursuant to instructions from said Leonard Lewisohn and said Bigelow, the resignation of said Montgomery as a director was presented and duly accepted, and said Bigelow was thereupon chosen a director in his place. Thereupon, pursuant to instructions from said Leon-
229 ard Lewisohn and said Bigelow, the successive resignations of said Rowe as a director, of said Welch as a director, of said Jesse Lewisohn as treasurer and director, of said Evarts as president, and of said Riddlestorffer as vice-president and as director were presented and duly accepted, and said Leonard Lewisohn, one Henry M. Whitney, one Thomas Nelson, and one Joseph G. Ray, were successively duly chosen directors, and said Thomas Nelson was duly chosen treasurer, and said Bigelow was duly chosen president of said corporation. Said Leonard Lewisohn and said Bigelow were present at said meeting, and upon their respective elections as directors took their places in said meeting. All said resignations were duly received and acted on and said elections to fill the vacancies caused by said resignations were duly had pursuant to the laws of the State of New Jersey and the by-laws of said corporation.

Twelfth. At said meeting of the directors of the complainant corporation on July 11, 1895, above referred to, and after the several changes of directors and other officers by resignation above set forth, and after said Bigelow had been elected president of said corporation, there remained present four directors, to wit, said Leonard Lewisohn, said Bigelow, said Evarts and said Buffam. Said Evarts was the attorney employed by said Leonard Lewisohn and said Bigelow to attend to the incorporation of the complainant corporation and to carry out their said plan and conspiracy; said Buffam was a person selected by them and employed by them to act as director and assist them in carrying out said plan and conspiracy. The remaining directors were said Thomas Nelson, Henry M. Whitney and Joseph G. Ray, no one of whom was present and each of whom was a subscriber to said Old Dominion Syndicate and interested to assist said Leonard Lewisohn and said Bigelow in their plan to sell said property
230 to the complainant and in the success of said plan and conspiracy, and had been selected by them to fill said positions.

Thirteenth. On or about July 11, 1895, a meeting of the directors of the Baltimore Old Dominion Company was held at the office of said Lewisohn Brothers, in New York City. There were present said Leonard Lewisohn, said Bigelow and one E. Brent Keyser. On motion of said Leonard Lewisohn it was voted to make the complainant corporation the offer, a copy of which is marked "A" and attached to and made a part of this bill of complaint. Said Keyser acted at said meeting merely as a representative of said Leonard

Lewisohn and said Bigelow, and voted in favor of making said offer at their request and by their instructions. At said meeting of the directors of the complainant corporation on July 11, 1895, after the change of directors and officers above set forth and after said Bigelow had been chosen president and said Leonard Lewisohn treasurer as aforesaid, said Bigelow through Evarts presented to said Board of Directors of the complainant said offer by the Baltimore Old Dominion Company to sell and convey to the complainant substantially all the property of said Baltimore Old Dominion Company, except the cash assets, for one hundred thousand (100,000) shares of the capital stock of the complainant corporation to be issued to said Baltimore Old Dominion Company or its nominees. Said offer was signed by said Bigelow as president of, and by said Evarts as secretary of said Baltimore Old Dominion Company. Upon presentation of said offer, on motion of said Leonard Lewisohn, seconded by said Evarts, it was unanimously voted to accept said offer and to issue one hundred thousand (100,000) shares of the capital stock in payment for said property, and said Bigelow and said Nelson were appointed a
231 committee to supervise and carry out the details.

Fourteenth. Immediately after the passage of the vote last above referred to at said meeting of directors of the complainant on July 11, 1895, said Leonard Lewisohn presented to said Board of Directors of the complainant a proposition to sell and convey to the complainant said real estate in Arizona acquired by said Leonard Lewisohn from said William Keyser as above set forth, to wit, said Old Dominion Mine, said New York Mine, said Chicago Mine, said Keystone Mine, and said parcel of land near the Bloody Tank, so called, for thirty thousand (30,000) shares of the capital stock of the complainant to be issued to said Leonard Lewisohn or his nominees, accompanied with a request to issue said shares to said Bigelow and said Leonard Lewisohn. A copy of said proposition is hereto annexed and marked "B" and made a part of this bill of complaint. Upon presentation of said proposition said Leonard Lewisohn and said Bigelow caused the directors of the complainant corporation then present unanimously to vote to accept said proposition and to issue thirty thousand (30,000) shares of the capital stock in payment for said property, and said Bigelow and said Nelson were appointed a committee to supervise and carry out the details.

Fifteenth. Thereafter, to wit, on or about July 18, 1895, said Leonard Lewisohn and said Bigelow, pursuant to the original plan and conspiracy, and for the purpose of furnishing the complainant corporation, promoted by them as aforesaid, with working capital and with funds required to develop its plants and other properties, caused said complainant corporation to offer for subscription and sale
at the price of twenty-five (25) dollars per share twenty thou-
232 sand (20,000) shares of capital stock of the complainant corporation remaining unissued and which had not been issued to or appropriated by said Leonard Lewisohn and Bigelow and their associates as payment for said properties. All of said twenty thousand (20,000) shares were so subscribed for and sold and the price of twenty-five (25) dollars per share paid therefor to the complainant

by said subscribers. Said subscribers for said shares were ignorant at the time said shares were offered for subscription and at the time they severally subscribed and paid therefor and received their shares, as hereinafter set forth of the facts hereinbefore set forth as to the promotion and organization of the complainant corporation by said Leonard Lewisohn and said Bigelow, and the large profit to be made by said Leonard Lewisohn and said Bigelow and by the other members of said Old Dominion Syndicate therefrom and of the facts hereinbefore set forth concerning the acquisition of said four mining claims and parcel of real estate by said Leonard Lewisohn for the benefit of himself and of said Bigelow, and the acquisition thereof by said corporation and the issue of thirty thousand (30,000) shares of its capital stock therefor.

Sixteenth. The total subscriptions to the Old Dominion Syndicate amounted to one million (1,000,000) dollars, of which amount said Leonard Lewisohn contributed for his personal account about one hundred ninety-eight thousand and nine hundred and twenty and fifty-five hundredths (198,920.55) dollars, and said Bigelow contributed for his personal account about fifty thousand (50,000) dollars. Payments of the deferred instalments on the subscriptions to said Syndicate were largely anticipated. The three notes payable to the executors of the will of Michael H. Simpson were paid—the note due July 27th on June 20th, the note due
233 August 26th on July 1st, 1895, and the note due September 25th on July 8th, 1895. The two notes payable to William Keyser were paid—the note due August 25th, on July 1st, 1895, and the note due September 25th on July 8th, 1895. All of these payments were made from the funds contributed by the members of said Syndicate or in part from such funds and in part from money advanced by said Lewisohn Brothers or by said Leonard Lewisohn for the purpose, and repaid from the funds of said Syndicate. On or about July 12th, 1895, possession of all of said mining property of said Baltimore Old Dominion Company, included in the offer marked Exhibit "A" and schedule thereto annexed, and of said four mining claims and said parcel of real estate included in the proposition of said Leonard Lewisohn, marked Exhibit "B," was delivered to the complainant corporation, and thereafter said sales were consummated by delivery of deeds of conveyance of said several properties. Thereafter, to wit, on or about September 18, 1895, said Leonard Lewisohn and Bigelow caused the Board of Directors of the complainant corporation, at a meeting duly called, to vote to issue one hundred thousand (100,000) shares of the capital stock of this complainant to one Philip K. Dumaresq, the nominee of said Baltimore Old Dominion Company, as and for the price of said property so transferred and conveyed, and said shares were duly issued pursuant to said vote. And said Leonard Lewisohn and said Bigelow further caused said Board of Directors of this corporation at said meeting to vote to issue thirty thousand (30,000) shares of the capital stock of this corporation to said Leonard Lewisohn and said Bigelow as and for the price of said property transferred and conveyed by the latter to this corporation, as above

set forth, and said shares were thereupon duly issued pursuant to said vote. And said Leonard Lewisohn and said Bigelow
234 further caused said Board of Directors of this corporation at the same meeting to vote to issue the remaining twenty thousand (20,000) shares of the capital stock thereof to persons who had subscribed therefor, as above set forth, upon receiving payment of twenty-five (25) dollars per share therefor, and said shares were thereafter duly issued to said persons and paid for by them.

Seventeenth. Said property conveyed to the complainant by said Baltimore Old Dominion Company was at the time of such conveyance fairly worth not more than one million (1,000,000) dollars. Said parcels of real estate sold and conveyed by said Leonard Lewisohn to the complainant as aforesaid, to wit, said several mining claims known as the Old Dominion Mine, New York Mine, Chicago Mine and Keystone Mine, respectively, and said parcel of land near the Bloody Tanks, so-called, were at the time of such conveyance together fairly worth not more than five thousand (5000) dollars. Said Leonard Lewisohn and said Bigelow knew when they acquired the stock of said Baltimore Old Dominion Company as above set forth, and when the title to said parcels of real estate was conveyed to said Leonard Lewisohn as aforesaid, and when said offers to sell to the complainant were made in the name of said Baltimore Old Dominion Company and by said Leonard Lewisohn, respectively, that the value of the property referred to in said offers respectively was not in excess of the amounts above specified. The stock of said Baltimore Old Dominion Company and said parcels of real estate were acquired in the manner aforesaid with intent on the part of said Leonard Lewisohn and of said Bigelow to sell said property of said Baltimore Old Dominion Company and said parcels of real estate for a much larger price than the cost thereof to them. No disclosure was at any time
235 made to the complainant corporation of the fact that said property and said real estate were of the values not greater than the values above given respectively, and by reason of the control by said Leonard Lewisohn and said Bigelow of the complainant corporation and of its Board of Directors, as above set forth, said purchases were made without any disclosure to or inquiry by the complainant corporation as to the reasonable value of said properties, and no disclosure was ever made to any of the persons who subscribed for or afterwards purchased shares of stock in the complainant corporation or to any other persons of the facts as to acquisition of said properties by said Leonard Lewisohn and said Bigelow and the purchase of said properties by the complainant corporation or as to the reasonable value thereof, and said facts were not known to any of said persons or to any of the members of said Old Dominion Syndicate, except said Leonard Lewisohn and said Bigelow.

Eighteenth. By the transactions above set forth said Leonard Lewisohn and said Bigelow carried out their said plan and conspiracy, and having for the purpose of promoting a corporation

and selling to such corporation at a price much in excess of the cost thereof, the property of said Baltimore Old Dominion Company and the property so conveyed to said Leonard Lewisohn, acquired all the capital stock of said Baltimore Old Dominion Company for the sum of one million (1,000,000) dollars, and acquired for the same consideration and without making any further payment, but for themselves, as they claimed, all the property conveyed by said Leonard Lewisohn to the complainant, and having promoted the complainant corporation and caused the same to be organized, thereupon did sell to it the property of said Baltimore Old Dominion Company for one hundred thousand (100,000) shares of the capital stock of this corporation of the par value of twenty-five (25)
236 dollars each, to wit, the aggregate par value of two million five hundred thousand (2,500,000) dollars, and also sold to it all the property conveyed to said Leonard Lewisohn for thirty thousand (30,000) shares of said stock of the aggregate par value of seven hundred and fifty thousand (750,000) dollars. And for the purpose of providing the corporation so promoted and formed by them pursuant to and in execution of said plan and conspiracy, to wit, the complainant corporation, with working and other capital, said Leonard Lewisohn and said Bigelow in further execution and performance of said plan and conspiracy, caused the corporation so formed, to wit, the complainant corporation, immediately to offer the twenty thousand (20,000) shares of its capital stock then remaining unissued as aforesaid for subscription at twenty-five (25) dollars per share, and caused said corporation to issue said twenty thousand (20,000) shares to subscribers who were ignorant at the time they subscribed and at the time they paid therefor of the facts above set forth. The shares of this corporation so issued in payment for the property sold to it as aforesaid were at the time of the fair market value of twenty-five (25) dollars each, and continued for a long time thereafter to be of such or greater value, and said Leonard Lewisohn and said Bigelow thus made at the expense of the complainant corporation from the sale of the property conveyed by the Baltimore Old Dominion Company to the complainant a profit of more than one million five hundred thousand (1,500,000) dollars and in addition thereto made from the property conveyed by said Leonard Lewisohn to the complainant a profit of over seven hundred and fifty thousand (750,000) dollars.

Nineteenth. Said Leonard Lewisohn and said Bigelow allotted as a bonus or profit to the subscribers to said Old Dominion Syndicate to be divided among them in proportion to their re-
237 spective subscription forty thousand (40,000) shares of the stock of the complainant corporation part of the one hundred thousand (100,000) shares received as payment for the property conveyed by the Baltimore Old Dominion Company, and further offered to each member of said syndicate the option of receiving without further payment a like number of additional shares part of said one hundred thousand (100,000) shares or the repayment in money of the amount of his original subscription. Substantially all the subscribers to said syndicate availed themselves of

the option to take additional shares and such shares, together with the shares first allotted to them, were transferred to them accordingly from said shares issued to said Dumaresq. To such few as elected to receive back in cash the amount of their subscription said Leonard Lewisohn and said Bigelow caused the complainant corporation to pay such amount in cash from the funds of the complainant corporation and the corresponding shares not taken were transferred to persons who paid cash therefor to the corporation to the amount of the par value thereof. Of the one hundred thousand (100,000) shares of the capital stock of this corporation issued to said Dumaresq, as above set forth, upon and as consideration for the conveyance of all the property of said Baltimore Old Dominion Company, as afresaid, eighty thousand (80,000) shares were thus distributed to and among or for the account of the members of said Old Dominion Syndicate, so called. Of this amount one-half was a profit made in the manner above described, and said syndicate thereby made a profit of not less than one million ($1,000,000) dollars. Of the eighty thousand (80,000) shares thus divided said Bigelow received as his proportion four thousand (4000) shares and said Leonard Lewisohn for himself and other members of the syndicate operating through him received thirty-six
238 thousand one hundred and ninety (36,190) shares, of which about sixteen thousand (16,000) were retained for his personal account. Not less than one-half of the shares so issued direct to said Bigelow and of the shares issued to and retained by said Leonard Lewisohn represented and was a profit to them respectively as members of said syndicate from the purchase of the stock of said Baltimore Old Dominion Company and the sale of its property as aforesaid, to this corporation pursuant to the plan and conspiracy formed by said Bigelow and said Leonard Lewisohn as hereinbefore set forth.

Twentieth. Said Leonard Lewisohn and said Bigelow by agreement between themselves, and as the complainant is informed and believes, without the knowledge or assent of the other members of said Old Dominion Syndicate, or of the subscribers for the twenty thousand (20,000) shares of stock issued by the complainant corporation, took from the one hundred thousand (100,000) shares issued to said Dumaresq, as above set forth, and ostensibly in payment of expenses and their own services in connection with the transaction, the twenty thousand (20,000) shares remaining after dividing eighty thousand (80,000) shares among the members of said syndicate, as above set forth. The expenses actually incurred by them did not exceed six thousand (6000) dollars. These twenty thousand (20,000) shares were divided between said Lewisohn and said Bigelow, said Bigelow receiving ten thousand nine hundred and forty (10,940) shares as his proportion thereof, and said Leonard Lewisohn nine thousand and sixty (9060) shares as his proportion thereof. Said thirty thousand (30,000) shares issued to said Leonard Lewisohn and said Bigelow for said conveyance of real estate by said Leonard Lewisohn were also divided between said Leonard Lewisohn and said Bigelow, said Bigelow receiving sixteen thousand four hun-

dred and ten (16,410) shares thereof, and said Leonard
239 Lewisohn thirteen thousand five hundred and ninety (13,590) shares.

Twenty-first. Prior to the formation of said Old Dominion Syndicate, so-called, and prior to obtaining said option for and making the several agreements hereinbefore referred to for the acquisition of the stock of said Baltimore Old Dominion Company, said Leonard Lewisohn and said Bigelow had formed the plan and intention of organizing a corporation to acquire the property of said Baltimore Old Dominion Company, and had formed the plan and intention of selling said property to such new corporation at a large advance in price, and of thereby acquiring and obtaining for themselves and such persons as they might associate with them a large profit from such sale to said corporation so to be formed, and of causing said corporation to retain and forthwith to offer for subscription to persons who might be willing to subscribe and pay therefor, a sufficient number of shares in the corporation so formed to provide said corporation with a working capital. And said Lewisohn and said Bigelow formed said Old Dominion Syndicate, so-called, in order to provide the money with which to carry out said plans, and purchased said stock of said Baltimore Old Dominion Company, for the purpose and with the intent of carrying out the prior plan and intention so formed by them as aforesaid, and of selling to the complainant corporation when the same should be formed the property of said Baltimore Old Dominion Company at a large advance in price; and said Leonard Lewisohn, and said Bigelow made this agreement for the acquisition and for the conveyance to said Leonard Lewisohn of said four mining claims and parcel of real estate with the purpose and intention of selling said mining claims and parcel of real estate to a corporation to be formed by them for the purposes above set forth, and of taking to themselves a large profit from
240 such sale and with the intention of causing such corporation to retain and offer for subscription as above set forth a large number of shares of its stock; and said Leonard Lewisohn and said Bigelow caused the complainant corporation to be organized and to acquire the property of said Baltimore Old Dominion Company, and to acquire the mining claims and real estate conveyed by said Keyser to said Leonard Lewisohn as above set forth, and caused said corporation immediately to offer the twenty thousand (20,000) shares of its capital stock remaining unissued after said purchases as aforesaid for subscription to persons who might be willing to subscribe and pay therefor, in order to provide said corporation with working capital, in the manner aforesaid, all in further execution and performance of said plans and intentions. When said offer was made by said Baltimore Old Dominion Company to the complainant corporation, and when said proposition was made by said Leonard Lewisohn to the complainant corporation, and when said offer and propositions were accepted, said Leonard Lewisohn and said Bigelow were in absolute control of the complainant corporation through the ownership by them and their associates of all stock in said complainant corporation then outstanding, and through the selection

of a board of directors and other officers chosen by them and selected for the purpose of enabling them to carry out said plan, and consisting of themselves, their employees and associates, all of whom were expressly chosen for the purpose of carrying out said plan and intention, and had expressly undertaken to do so; and said offer of said Baltimore Old Dominion Company and said proposition of said Leonard Lewisohn were accepted by the complainant corporation through its Board of Directors, as above set forth, by the direction of said Leonard Lewisohn and said Bigelow, and the other directors in acting thereon acted solely at the direction of and pur-
241 suant to previous agreement with said Leonard Lewisohn and said Bigelow, and for the express purpose of carrying out the said plan and intention of said Leonard Lewisohn and said Bigelow, and all of said action was taken and was intended by the individuals who took part therein to carry out said plan and intention and to enable said Leonard Lewisohn and said Bigelow and such persons as they had associated with them to make a large profit by the sale of said property of the Baltimore Old Dominion Company, and of said mining claims and real estate to the complainant corporation at a price greatly in excess of the cost to said Leonard Lewisohn and to said Bigelow and their associates of all the stock of said Baltimore Old Dominion Company and of said mining claims and real estate. And when said twenty thousand (20,000) shares of stock remaining unissued after said purchases as aforesaid were offered for subscription as aforesaid and were issued and sold to the subscribers therefor, as above set forth, said Leonard Lewisohn and said Bigelow were in absolute control of the complainant corporation, as aforesaid, and said shares were so offered for subscription and issued and sold in order to carry out said plan and conspiracy of said Leonard Lewisohn and said Bigelow aforesaid.

Twenty-second. From July 11, 1895, when said purchase in behalf of the complainant corporation of the property of said Baltimore Old Dominion Company and of said mining claims and real estate from said Leonard Lewisohn was consummated, as above set forth, until April 4, 1902, said Bigelow was continuously the president and chief executive officer of the complainant corporation; throughout said period the Board of Directors of the complainant corporation was continuously composed of persons selected by said Leonard Lewisohn and said Bigelow, and at all times until April 4, 1902, a large majority of the persons so acting as directors were
242 personal friends of said Leonard Lewisohn and said Bigelow, and had been interested with said Leonard Lewisohn and said Bigelow in the transactions above set forth and had received some share in the profits thereof, and the remaining directors took no active part in the management of the complainant corporation and were ignorant of the facts hereinbefore set forth. No disclosure was at any time made to any of the subscribers for the twenty thousand (20,000) shares of the capital stock offered for subscription as aforesaid or to any purchasers of said shares of the capital stock of the complainant corporation or to the other members of the Old Dominion Syndicate or to any subsequent purchasers of the shares

issued to said Dumaresq or to said Leonard Lewisohn and said Bigelow, and none of said persons in fact knew of the profits made by said Leonard Lewisohn and said Bigelow, from the division between them of said additional twenty thousand (20,000) shares part of the one hundred thousand (100,000) shares issued for the purchase of the property formerly held by the Baltimore Old Dominion Company from the division between them of the thirty thousand (30,000) shares derived from the sale of the property conveyed by said Leonard Lewisohn, as above set forth. This complainant had not until after April 4, 1902, any knowledge or information of any of the facts hereinbefore set forth as to the profit derived by said Leonard Lewisohn and said Bigelow or said Leonard Lewisohn in the manner above stated as promoters of this corporation, or of any profit having been derived by them, or either of them, or by any other person interested or participating in the promotion and organization of this corporation, and immediately upon receiving information relating thereto, the complainant investigated the same, and thereupon promptly made demand upon said Bigelow and upon the defendants.

243 Twenty-third. The property conveyed to the complainant by the Baltimore Old Dominion Company, as above set forth, consists mainly of the copper mine which was then and ever since has been in active operation, and from which large amounts of ore have since been taken, and upon which large expenditures have been made in the development and establishment of the necessary plant. All the property so conveyed at the time it was sold to the complainant as above set forth was worth not over one million (1,000,000) dollars. The property conveyed to the complainant by Leonard Lewisohn as above set forth consisted merely of mining claims and a parcel of land for a mill site, all of which property has since said conveyance remained undeveloped and is now in substantially the same condition that it was in at the time of the conveyance by said Lewisohn to the complainant. Said property so conveyed was at the time of such conveyance fairly worth not more than five thousand ($5,000) dollars.

Twenty-fourth. Said Leonard Lewisohn died on March 5, 1902, and was at the time of his death a citizen of the State of New York and a resident of the Borough of Manhattan in the City, County and State of New York. On or about April 4, 1902, the last will and testament of said Leonard Lewisohn was duly admitted to probate in the Surrogate's Court for said County of New York, and on or about April 5, 1902, the respondents herein were duly appointed executors of said will, and letters testamentary were duly issued to them as such by said Surrogate's Court, and they are now such executors and duly qualified and acting as such. All said respondents are citizens of the State of New York and reside in the Borough of Manhattan in the City of New York and State of New York and in the Southern District of New York.

Twenty-fifth. After April 4, 1902, and prior to July 21,
244 1902, the complainant made investigation as to the matters above set forth. In the course of such investigation it applied

to said Bigelow for information and access to papers. This information was, as the complainant is informed and believes, referred to the respondents, and said Bigelow subsequently notified this complainant that the respondents were unwilling to permit information or access to papers relating to said matters to be given to the complainant. Thereafter, to wit, on or about July 24, 1902, the complainant by its counsel notified the respondents that the complainant had a claim for a very large amount against them as executors as aforesaid to recover the profits made by said Leonard Lewisohn as above set forth. Thereafter, to wit, on or about August 1, 1902, said respondents informed the complainant's counsel that they believed the claim of the complainant to be absolutely unfounded.

Thereafter, to wit, on or about September 12, 1902, the complainant offered to said Bigelow and to the respondents to rescind the sale and conveyance to it from said Leonard Lewisohn of said parcels of real estate in Arizona, to wit, the parcels known as The Old Dominion Mine, New York Mine, Chicago Mine, Keystone Mine and parcel of real estate near the Bloody Tanks, so-called.

Thereafter, to wit, on or about September 18, 1902, said complainant submitted to the counsel for the respondents a full statement of the claim contained in the bill of complaint, and on September 26, 1902, said counsel for the respondents notified the complainant that after a full investigation the respondents believed, and counsel had so advised them, that the claims made upon them were not valid.

Twenty-sixth. The complainant desires to rescind the sale of said parcels of real estate conveyed to it by said Leonard Lewis-
245 ohn as hereinbefore set forth, and has offered to convey all said parcels of real estate conveyed to it by said Leonard Lewisohn, to wit, said parcels known as the Old Dominion Mine, New York Mine, Chicago Mine, Keystone Mine and parcel of land near the Bloody Tanks, so-called, to said respondents or to such persons as they might name upon receiving from them the consideration paid by this complainant for the conveyance thereof to it, to wit, thirty thousand (30,000) shares of its capital stock, or upon a proper accounting for said shares, but said respondents have refused to make any such restitution or accounting; and the complainant is still ready and willing, and hereby offers to convey said last named parcels of real estate to such persons as this Honorable Court may direct. Said Bigelow is a citizen and resident of Boston in the Commonwealth of Massachusetts and cannot be served with process in this District or in the State of New York. The complainant does not in this suit seek any relief as to sale to it of the property of the Baltimore Old Dominion Company of the issue of one hundred thousand (100,000) shares of its capital stock in payment therefor as above set forth or as to any profit made by said Leonard Lewisohn and by said Bigelow or by any other person from such sale, and disclaims all right to any such relief in this suit, having brought a separate suit for the purpose of obtaining such relief.

Twenty-seventh. The complainant says that the shares which it seeks to recover are of great value, to wit, greatly in excess of two thousand (2000) dollars, and that the sum recoverable upon an ac-

counting therefor is very large, to wit, greatly in excess of two thousand (2000) dollars, exclusive in each case of interest and costs.

Wherefore the complainant prays:

246 1. That this Honorable Court will declare said sale of said parcels of real estate conveyed by said Leonard Lewisohn to the complainant as hereinbefore set forth, rescinded, and will direct this complainant upon the return to it of or a proper accounting to it for the consideration for said sale and conveyance, to execute such reconveyance, if any, of said several parcels of real estate to such person or persons as this Honorable Court shall think proper.

2. That said respondents in their capacity of executors of the will of said Leonard Lewisohn be required to return to the complainant the consideration paid by this complainant for said conveyance, to wit, thirty thousand (30,000) shares of its capital stock, or if, and so far as said shares are no longer in their control, to account to the complainant therefor.

3. In the alternative, in case this Honorable Court shall deem that the complainant has not rescinded and is not entitled to rescind said sale or conveyance of said parcels of real estate conveyed by said Leonard Lewisohn to the complainant as above set forth, that this Honorable Court will ascertain the amount of damages suffered by the complainant by reason of the sale of said parcels of real estate as above set forth, and will by its decree establish the right of the complainant to recover said amount and order said respondents in their capacity of executors of the will of the said Leonard Lewisohn to pay said amount to it.

4. And may it please your Honors to grant unto the complainant a writ of subpœna ad respondendum directed to said respondents Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn, and Philip S. Henry, commanding them each to be and appear in this Honorable Court on a day certain therein to be named to answer this bill of complaint but not under oath, an answer under oath being

247 specially waived, and to abide by and perform such orders and decrees as may be made herein.

OLD DOMINION COPPER MINING AND SMELTING COMPANY,
By BRANDEIS, DUNBAR & NUTTER,
Its Solicitors.

LOUIS D. BRANDEIS.
CHARLES E. HUGHES.

(EXHIBIT)

Schedule.

First. The Globe Mine, patented by the United States Government to B. W. Reagan on the 18th day of October, 1881, by patent recorded in the office of the Recorder of Pinal County, Territory of Arizona, of the 19th day of November, 1881, to which record reference is made for a fuller description of said mine.

Second. The Globe Ledge Mine, patented by the United States Government to Benjamin W. Reagan on the eighteenth day of Oc-

tober, 1881, by patent recorded in the office of the Recorder of Pinal County, Territory of Arizona, on the nineteenth day of November 1881, to which record reference is made for a fuller description of said Mine.

Third. The Copper Jack Mill site of which the location is recorded in the office of the Recorder of Gila County, Arizona, in Book 2, of the Record of Mines at page 311, and to which reference is hereby made for a fuller description of said Mill Site, and upon which the Smelting Works formerly owned by the Old Dominion Copper Mining Co., are situated.

Fourth. The Globe Mill site, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona,
248 in Book 2 of Records of Mines at page 311, to which record reference is hereby made for a fuller description of said Mill Site.

Fifth. The Globe Ledge Mill Site, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 310, to which record reference is hereby made for a description of said Mill Site.

Sixth. The Southeast Globe Mine, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines, at page 312, and reference is hereby made to said report for a fuller description of said Mine.

Seventh. All of the certain Mining claim known as the Interloper in Globe District Records on pages 116 and 117 in Book 3, reference to which will more fully show, being the same property conveyed to William Keyser by Thomas H. Mason, by deed bearing date January 3rd, 1887, and recorded at page 586, Book 2, record of deeds to Mines, Gila County, Arizona Territory.

Eighth. The Fraction Mine of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2, of Records of Mines at page 569, to which record reference is hereby made for a fuller description of said mine.

Ninth. The Alice Mine or lode, located October 10th, 1875, by A. R. Hammond and J. W. Reed and notice of location recorded in Book 1, page 131, Globe District Mining Records (now part of the records of Gila County) and relocated February 28th, 1879, and notice of location recorded in Book 5, Globe District Mining Records (now a part of the records of Gila County) on pages 184 and 185, said Mine or Lode being more particularly described in the last mentioned notice of location as follows, to wit: Commencing at this monument of stones in a gulch, being the centre of southwest end of claim, and upon which this notice is posted, thence
249 southeast 300 feet to a monument of stones, thence northeast, 1400 feet to a monument of stones, thence northwest 300 feet to a monument of stones, being the centre of the northeast end of claim, thence northwest 300 feet to a monument of stones, thence southwest 1400 feet to a monument of stones, under a tree, thence southeast 300 feet to the place of beginning, being the same mining claim conveyed to Michael H. Simpson, deceased, by deed of the Globe City Mining Company dated July 1st, 1884, and recorded with Gila County Deeds to Mines, Book 2, page 227 et seq.

Tenth. The Mining Claim called and known as Hypathia Mine, situated, lying and being in Globe Mining District, Gila County, Territory of Arizona, and more particularly described in the notice of location recorded at page 66, Book 2, Records of Mines, Gila County, records, to which record reference is made for a more definite description of said mine. Said mine was formerly known as the Southwest Alice Mine, being the same mining claim conveyed to said Michael H. Simpson, lately deceased, by deed of William H. Cook, dated November 18th, 1884, and recorded with Gila County Deeds, Book 2, page 305.

(EXHIBIT.)

A.

To the Old Dominion Copper Mining & Smelting Company, a Corporation, Organized and Existing Under the Laws of the State of New Jersey:

The Old Dominion Copper Company of Baltimore City, a corporation organized and existing under the laws of the State of Maryland being the owner of certain mines and mining properties at Globe in the Territory of Arizona, described in the annexed schedule and of machinery, lumber, wood, tools, implements and other personal property for use for and in connection with the operation and
250 maintenance thereof hereby makes the following proposition.

To convey, assign and transfer all its property, both real and personal of every kind and nature whatsoever and wheresoever situated by good and sufficient deeds and instruments properly executed so as to confer absolute title thereto to the Old Dominion Copper Mining and Smelting Company upon receiving from said Company one hundred thousand shares of its capital stock to be issued to said Old Dominion Copper Company or to its nominees.

It being understood that the Old Dominion Copper Mining and Smelting Company shall assume all obligations of The Old Dominion Copper Company of Baltimore City incurred since the first day of June, 1895, and shall be entitled to all earnings and profits of said Company since that date.

A. S. BIGELOW, *President.*

July 11th, 1895.

A. W. EVARTS, *Secretary.*

B.

To the Old Dominion Copper Mining and Smelting Company:

I hereby offer to convey the following described property now owned and held by me upon receiving thirty thousand shares of the capital stock of the Old Dominion Copper Mining and Smelting Company to be issued to me or to my nominees.

(EXHIBIT.)

First. The Old Dominion Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land Office at Tucson, Arizona, Entry No. 267, Lot 45, situated in Globe Mining District, Gila County, Arizona.

Second. The New York Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the
251 United States Land Office at Tucson, Arizona, Entry 268, Lot 46, in Globe Mining District in Gila County, Arizona.

Third. The Chicago Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land Office at Tucson, Arizona, Entry 269, Lot 51, in Globe Mining District, Gila County, Arizona.

Fourth. The Keystone Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land Office at Tucson, Arizona, Entry 384, Lot 54, in Globe Mining District, Gila County, of Arizona.

Fifth. A lot or parcel of land situated near the Bloody Tanks, and deeded by E. A. Saxe to the Old Dominion Copper Mining Co., deed recorded in Book 1 of Deeds to real estate at Arizona, and reference is hereby made to said record for a fuller description of said parcel of land.

New York, July 11, 1895.

LEONARD LEWISOHN.

Please issue said thirty thousand shares of stock to Mr. A. S. Bigelow and myself.

LEONARD LEWISOHN.

EXHIBIT E.

Circuit Court of the United States, Southern District of New York.

In Equity.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
v.
FREDERICK LEWISOHN et al.

252 *Defendant's Demurrer to the Whole Bill.*

The Joint and Several Demurrer of Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, as Executors of the Last Will of Leonard Lewisohn, the Defendants Above Named.

These defendants respectively by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill to be true, in such manner and form as the same are therein set forth and alleged, demur thereto, and for cause of demurrer show:

1. That the complainant has not, in and by said bill, stated such a case as entitled it to any relief against the defendants.

2. That it appears by said bill that the same sets up against the defendants different and distinct causes which are inconsistent with each other and cannot properly be joined; that different reliefs, inconsistent with each other are prayed for, and that the said bill is altogether multifarious.

Wherefore and for divers other good causes of demurrer appearing in the said bill these defendants respectively demur thereto and humbly demand the judgment of this Court whether they shall be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their costs and charges in this behalf wrongfully sustained.

HOADLEY, LAUTERBACH & JOHNSON,
Solicitors for the Defendants.

STATE OF NEW YORK,
County of New York, ss:

Frederick Lewisohn makes solemn oath, and says, that he is one of the above named defendants, and that the foregoing de-
253 murrer is not interposed for delay, and that the same is true in point of fact.

FREDERICK LEWISOHN.

Subscribed and sworn to before me this 5th day of May, 1905.

ERNEST W. BROWN,
[SEAL.] *Notary Public, N. Y. County.*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

EDWARD LAUTERBACH,
Of Counsel for Defendants.

EXHIBIT E'.

Circuit Court of the United States, Southern District of New York.

In Equity.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
v.
FREDERICK LEWISOHN et al.

Defendants' Demurrer to a Part of the Bill.

The defendants by protestation, not confessing or acknowledging all or any of the matters and things in the plaintiff's bill of complaint to be true in such manner and form as the same as are therein set therein set forth and alleged, and not waiving his demurrer to the whole bill, but insisting and relying thereon, further de-
254 mur to so much of said bill as seeks to have the sale of certain parcels of real estate conveyed to the plaintiff by Leonard

Lewisohn rescinded, and to have the defendants ordered to return to the plaintiff the consideration paid by the plaintiff for said conveyance; and for causes of demurrer the defendants show:

I. That the complainant has not, in and by said bill, stated such a case as entitles it to the aforesaid relief against the defendants.

II. That it appears by said bill that one Albert S. Bigelow therein referred to is an indispensable party defendant to said bill so far as it seeks the rescission of the aforesaid sale, but that he has not been made a party defendant.

Wherefore, the defendants demur to so much of the complainant's bill as is above specified, and demand judgment of this court, whether he shall make any further or other answer to such part of said bill as is so demurred unto as aforesaid, and prays to be hence dismissed with their costs in this behalf sustained.

HOADLY, LAUTERBACH & JOHNSON,
Solicitors for the Defendants.

STATE OF NEW YORK,
County of New York, ss:

Frederick Lewisohn makes solemn oath, and says, that he is one of the above-named defendants, and that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

FREDERICK LEWISOHN.

Subscribed and sworn to before me this 5th day of May, 1905.

ERNEST W. BROWN,
[SEAL.] *Notary Public, N. Y. County.*

255 I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

EDWARD LAUTERBACH,
Of Counsel for Defendants.

EXHIBIT F.

At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, Held at the United States Court Rooms, in the Borough of Manhattan, City of New York, on the 18th Day of November, in the Year of Our Lord One Thousand Nine Hundred and Five.

Present: Hon. George C. Holt, Judge.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY,
Complainant,
against
FREDERICK LEWISOHN et al., Defendants.

The demurrers of the defendants to a part of the amended bill of complaint, and to the whole of the amended bill of complaint, having duly come on for hearing, and after hearing Eugene Treadwell, Esq., of counsel for the defendants, in support of the demurrers,

and William H. Dunbar, Esq., and Louis D. Brandeis, Esq., of counsel for the complainant, in opposition thereto, and the premises having been duly considered, it is

Ordered by the Court, that the demurrer to the whole of said amended bill of complaint for want of equity, be, and the same is hereby, sustained, and the complainant having heretofore been permitted to amend the bill of complaint to meet the prior
256 decision of this Court sustaining a demurrer herein and dismissing the bill of complaint, it is

Further ordered by the Court, that the said bill of complaint be, and the same hereby is dismissed; and it is further ordered that the defendants do recover against the said complainant their costs and charges by them incurred upon the said demurrer, to be taxed, and that the said defendants have execution therefor.

GEO. C. HOLT, *J.*

(Endorsed:) United States Circuit Court, Southern Dist. of New York. The Old Dominion Copper Mining and Smelting Company, Complainant, v. Frederick Lewisohn, et al. Def'ts. Order. Hoadly, Lauterbach & Johnson, Sol'rs for Def'ts, 22 William Street, New York City. Copy Received Nov. 13, 1905. Carter, Hughes & Dwight. U. S. Circuit Court, Southern District of New York. Filed Nov. 18, 1905. John A. Shields, Clerk.

Exhibit G.

United States Circuit Court, Southern District of New York.

The Old Dominion Copper Mining and Smelting Company, Complainant,
against
Frederick Lewisohn et al., Defendants.

This cause having been regularly brought on for trial upon the issues of law formed by complainant's amended complaint, and the demurrers of the defendant to a part of the amended bill of complaint, and to the whole of the amended bill of complaint, at a Term of this Court, held by the Hon. George C. Holt, one of the
257 Judges of this Court, who, having heard the parties by their counsel, and after due deliberation, has duly made and filed his decision, and an order having been duly made and entered herein and filed in the office of the Clerk of this Court on the 18th day of November, 1905, directing that the demurrer to the whole of said amended bill of complaint for want of equity be sustained and that the bill of complaint herein be dismissed, the complainant having heretofore been permitted to amend the bill of complaint to meet the prior decision of this Court, and further directing that the defendants recover against the complainant their costs and charges incurred upon the said demurrer, to be taxed, and that the said costs and charges having been duly adjusted by the Clerk of this Court upon notice to the complainant at the sum of Two hundred

and twenty-seven dollars (227), now, upon motion of Hoadly, Lauterbach & Johnson, attorneys for the defendants, it is

Adjudged and decreed, that the said amended bill of complaint herein be and the same hereby is dismissed, and that the defendants recover of the complainant the sum of Two hundred and twenty-seven dollars ($227); their costs and charges as taxed, and that the defendants have execution therefor.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) United States Circuit Court, Southern District of New York. The Old Dominion Copper Mining and Smelting Co., Pltf, v. Frederick Lewisohn, et al., Deft. Judgment. Hoadly, Lauterbach & Johnson, Attorneys for Defendants, 22 William St., New York City. U. S. Circuit Court, Southern District of New York. Filed Dec. 6, 1905. John A. Shields, Clerk.

258 EXHIBIT H.

Circuit Court of the United States, Southern District of New York.

In Equity. No. 8333.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
v.
FREDERICK LEWISOHN et al

Petition for Appeal.

The Old Dominion Copper Mining and Smelting Company, the complainant in the above entitled cause, conceives itself to be aggrieved by the decree made and entered on the eighteenth day of November, 1905, in the above entitled cause, dismissing the amended bill of complaint therein, and hereby appeals from said decree to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

BRANDEIS, DUNBAR & NUTTER,
HUGHES, ROUNDS & SHURMAN,
Solicitors for Appellants.

Appeal allowed.
E. H. LACOMBE,
U. S. Circuit Judge.

259 (Endorsed:) Circuit Court of the United States, Southern District of New York. In Equity. No. 8333. Old Dominion Copper Mining and Smelting Company v. Frederick Lewisohn, et al. Petition for Appeal. Brandeis, Dunbar & Nutter, 161 Devon-

shire Street, Boston, Mass., and Hughes, Rounds & Schurman, 96 Broadway, New York City, Solicitors for Complainant. A copy this day received. Jan. 3, 1906. Hoadly, Lauterbach & Johnson, U. S. Circuit Court, Southern District of New York. Filed Jan. 3, 1906. John A. Shields, Clerk.

Exhibit I.

Circuit Court of the United States, Southern District of New York.

In Equity. No. 8333.

Old Dominion Copper Mining and Smelting Company
v.
Frederick Lewisohn et al.

Assignment of Errors.

Now comes the Old Dominion Copper Mining and Smelting Company, the complainant in the above entitled cause, and says that the final decree of said court in said cause, sustaining the demurrer of the respondents to the amended bill of complaint therein, is erroneous and against the just rights of said complainant for the following reasons:

First. The court erred in holding that the amended bill of complaint did not state a case entitling the complainant to any
260 relief in equity.

Second. The court erred in holding that the facts alleged in the amended bill of complaint and admitted by the demurrer did not entitle the complainant to rescind the sale complained of and recover from the respondents the consideration paid or in the alternative to recover from the respondents the damages suffered by the complainant by reason of such sale.

Third. The court erred in holding that upon the facts alleged in the amended bill of complaint and admitted by the demurrer there was any consent to the sale complained of such as to disable the complainant from rescinding the same or having other relief in respect thereof.

Fourth. The court erred in not holding that upon the facts alleged in the amended bill of complaint and admitted by the demurrer the respondents' testator Leonard Lewisohn was a promoter of the plaintiff corporation and by reason thereof upon the facts so alleged and admitted liable to account to the complainant upon a rescission or offer of rescission by it of said sale complained of for the consideration received for said sale, or to restore to the complainant the profits made by him from such sale, or compensate the complainant for the damages suffered by it by reason of such sale, and in not holding that the respondents as executors of the will of said Leonard Lewisohn are in their representative capacity in like manner liable.

Fifth. The court erred in not overruling the demurrer to the amended bill of complaint and in ordering the amended bill of complaint to be dismissed.

BRANDEIS, DUNBAR & NUTTER,
HUGHES, ROUNDS & SCHURMAN,
Solicitors for Appellants.

261 (Endorsed:) Circuit Court of the United States, Southern District of New York. In Equity. No. 8333. Old Dominion Copper Mining and Smelting Company vs. Frederick Lewisohn et al. Assignment of Errors. U. S. Circuit Court, Southern District of New York. Filed Jan. 2, 1906. John A. Shields, Clerk.

EXHIBIT J.

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
v.
FREDERICK LEWISOHN, WALTER LEWISOHN, ALBERT LEWISOHN and PHILIP S. HENRY as Executors of the Will of Leonard Lewisohn, Late of New York, Deceased.

Bond for Damages and Costs.

Know all men by these Presents, that we, Old Dominion Copper Mining and Smelting Company, a corporation duly organized under the laws of New Jersey, as principal, and American Surety Company of New York, a corporation duly organized under the laws of New York as surety are held and firmly bound unto the above-named Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, executors of the will of Leonard Lewisohn, late of New York, deceased, obligees, in the sum of five hundred (500) dollars, to be paid to the said obligees for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our successors and assigns, jointly and severally, firmly by
262 these presents. Sealed with our seals and dated the twenty-third day of December in the year of our Lord one thousand nine hundred and five.

Whereas, the above-named Old Dominion Copper Mining and Smelting Company has prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit to reverse the decree rendered in the above-entitled suit by the Judge of the Circuit Court of the United States, for the Southern District of New York;

Now, therefore, the condition of this obligation is such, that if the above-named Old Dominion Copper Mining and Smelting Company shall prosecute said appeal to effect and answer all damages and costs, if it shall fail to make said plea good, then this obligation shall

be void, otherwise the same shall be and remain in full force and virtue.

OLD DOMINION COPPER MINING AND SMELTING COMPANY. [SEAL.]
CHARLES S. SMITH, *Prest.*,
CHARLES H. ALTWILLER, *Treas.*

[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK.
By ELIPHALET F. PHILBRICK,
Resident Vice-President.

Attest:
FRED L. ROBERTS,
Res. Asst. Secretary.

Sealed and delivered and taken and acknowledged this 22nd day of December, 1905, before me.

ROBERT W. SAWYER JR.,
Notary Public.

(Endorsed:) U. S. Circuit Court, Southern District of New York. Old Dominion Copper Mining and Smelting Company v. Frederick Lewisohn et al. Bond for Damages and Costs on Appeal. 263 We hereby approve of the form and sufficiency of the within Undertaking. Hoadly Lauterbach & Johnson, Solicitors for Defendants. Brandeis, Dunbar & Nutter, Hughes, Rounds & Schurman, Solicitors for Complainant. E. H. Lacombe, U. S. C. J. U. S. Circuit Court, Southern District of New York. Filed Jan. 3, 1906. John A. Shields, Clerk.

EXHIBIT J'.

U. S. Compiled Statutes 1901, Vol. 1–Section 1000.

Bond in Error and on Appeal.

Every justice or judge signing a citation on any writ of error shall, except in cases brought up by the United States or by direction of any Department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid.

Act Sept. 24, 1789, c. 20, sec. 22, 1 Stat. 84.
Act Dec. 12, 1794, c. 3, 1 Stat. 404.
Act Feb. 21, 1863, c. 50, 12 Stat. 657.
Act July 27, 1868, c. 255, sec. 1, 15 Stat. 226.

Section 1012.

Appeals from Circuit Courts to Supreme Court.

Appeals from the circuit courts and district courts acting as circuit courts, and from district courts in prize causes, shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error.

264 Act March 3, 1803, c. 40, sec. 2, 2 St. 244.
Act June 30, 1864, c. 174, sec. 13, 13 Stat. 310.

EXHIBIT K.

United States Circuit Court of Appeals for the Second Circuit.

No. 64, October Term, 1906.

Argued November 19, 1906; Decided December 4, 1906.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY
Complainant-Appellant,
v.
FREDERICK LEWISOHN et al., Defendants-Appellees.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Before Judges Wallace, Townsend, and Coxe.

On appeal from a decree of the Circuit Court for the Southern District of New York sustaining a demurrer to an amended bill of complaint and dismissing the bill for want of equity.

The opinion of the Circuit Court sustaining the demurrer to the original bill is reported in 136 Fed. Rep. 915.

The Court held upon the hearing of the demurrer to the amended bill that there was no substantial difference between it and the original bill and followed the former decision. Final decree was thereupon entered and the complainant appeals.

The facts sufficiently appear in the opinion of the Circuit Court sustaining the demurrer to the original bill, 136 Fed. Rep. 915, and are stated in full in Old Dominion C. M. & S. Co. v. Bigelow

265 (188 Mass. 315).

Per Curiam.—The bill prays for relief as follows:

First. That the sale of the mining claims to the complainant by Leonard Lewisohn—the defendants' testator—and Albert S. Bigelow—a citizen of Massachusetts and not a party to this action, be rescinded and the real estate reconveyed to the defendants upon receipt by the complainant of the consideration paid therefor.

Second. That defendants return to the complainant the consideration paid by complainant for said property, namely, 30,000 shares of its capital stock, or account therefor.

Third. That if the court shall decide that the complainant is not entitled to rescind the sale of said real estate to it, then, and in that event, that the court ascertain the amount of damages sustained by complainant and direct the defendants as executors to pay the amount to complainant.

We are unable to perceive how this relief or any part thereof can be granted the complainant upon the facts alleged in the bill.

The fundamental difficulty with the bill is that it fails to state any facts showing that the complainant was in any way injured or defrauded by the transactions complained of. At the time of the transfer by Bigelow and Lewisohn to the company Bigelow and Lewisohn and their representatives owned the entire issue of stock of the corporation. The sale by them to the corporation was in effect a sale by them to Bigelow and Lewisohn. A corporation can only act through the human beings who compose it; it cannot be deceived or defrauded unless its stockholders and directors are deceived or defrauded. The corporation knew all that Bigelow and Lewisohn knew and no one of the original parties to the transfer was defrauded by the exchange of the stock controlled by
266 Bigelow and Lewisohn for the real estate controlled by them.

It may be that such a large over-capitalization as is alleged in the bill might mislead and deceive careless and credulous purchasers of the stock, but we are not now dealing with the case of a stockholder alleging concealment, fraud and misrepresentation. The stockholders, apparently, have no complaint; at least they have not propounded any.

Indeed, it is not easy how a purchaser, who paid $25 per share, could be defrauded in view of the allegation of the bill that "The shares of this corporation so issued in payment for the property sold to it as aforesaid were at the time of the fair market value of twenty-five (25) dollars each, and continued for a long time thereafter to be of such or greater value." It is enough, however, that this is not a stockholders' action.

The subscribers for the 20,000 shares subsequently issued were not deceived; they asked for no statement and received none; they got what they purchased and are not complainants here.

A protracted discussion is unnecessary for the reason that this court and the Circuit Court of the Southern District have decided the question adversely to the complainant's contention.

Foster v. Seymour (23 Fed. Rep. 65);
McCracken v. Robinson (57 id. 375).

To the same effect are the decisions of the New York Court of Appeals.

Barr v. N. Y., L. E. & W. R. Co. (125 N. Y. 263);
Blum v. Whitney (185 N. Y. 232).

It is true that the Supreme Court of Massachusetts (188 Mass. 315) has taken a different view, but we feel constrained to adhere to the prior adjudication of this circuit.

The decree is affirmed with costs.

267 Louis Brandeis, for the Appellant.
Eugene Treadwell, for the Appellees.

Exhibit L.

At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms, in the Post-Office Building, in the City of New York, on the 14th Day of December, One Thousand Nine Hundred and Six.

Present: Hon. William J. Wallace, Hon. William K. Townsend, Hon. Alfred C. Coxe, Circuit Judges.

Old Dominion Copper Mining and Smelting Company,
Complainant-Appellant,
v.
Frederick Lewisohn et al., Defendant-Appellees.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said Circuit Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

W. J. W.
W. K. T.

(Endorsed:) United States Circuit Court of Appeals. Second Circuit. Old Dominion Copper Co. v. F. Lewisohn. Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed Dec. 17, 1906. William Parkin, Clerk.

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Exhibit M.

Supreme Court of the United States, October Term, 1906.

The Old Dominion Copper Mining and Smelting Company,
Petitioner,
v.
Frederick Lewisohn and Others, Executors, Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable the Justices of the Supreme Court of the United States:

Your petitioner, the Old Dominion Copper Mining and Smelting Company, respectfully represents:

First. Your petitioner is and at all times hereinafter mentioned was a corporation duly organized under the laws of the State of New Jersey.

The respondents are the executors duly appointed and qualified of one Leonard Lewisohn, late of New York, deceased.

Second. On or about October 7, 1902, the petitioner filed a bill of complaint in the Supreme Judicial Court for the County of Suffolk in the Commonwealth of Massachusetts against one Albert S. Bigelow, a citizen of Massachusetts, seeking to recover a secret profit made by him in conjunction with said Leonard Lewisohn out of a sale of property to the petitioner, while they were acting as promoters
269 in the organization of the petitioner. The respondents were not joined in this suit owing to the impossibility of obtaining jurisdiction over them in Massachusetts. Bigelow demurred to the bill of complaint so filed against him on the ground of multifariousness and to so much of the bill as asked for a rescission of the sale and return of the consideration for want of equity and want of parties.

Third. On January 6, 1903, the petitioner filed in the Circuit Court of the United States for the Southern District of New York a bill of complaint against the present respondents. The bill was upon the same cause of action set forth in the bill filed in Massachusetts against Bigelow and was identical with the latter bill except such verbal changes and additions as were made necessary by the differences in the parties defendant. Bigelow was not joined as a defendant because of the impossibility of obtaining jurisdiction over him in New York. The respondents, to the bill filed against them in the Circuit Court, interposed demurrers identical with the demurrers filed by Bigelow in the suit in Massachusetts.

Fourth. On February 20, 1905, the suit brought in the Circuit Court in New York was heard upon the demurrers; the Court treated the demurrers as general and ordered the bill dismissed for want of equity but with leave to amend (136 F. R. 945). The petitioner filed an amended bill. On December 7, 1904, the suit brought against Bigelow was heard upon demurrer before the full bench of the Supreme Judicial Court of Massachusetts, and on June 19, 1905, by a unanimous opinion, the demurrer was overruled (188 Mass. 315). A copy of this report is printed as an appendix to this petition. The Court carefully considered and disapproved the decision of the Circuit Court for the Southern District of New York in the present case. To the amended bill filed in the Circuit Court
270 in the present case the respondents demurred as before; the suit was heard upon the demurrers; the Court held, without expressing any opinion on the merits, that the amended bill was substantially the same as the original bill and that for this reason the demurrers should be sustained and the bill dismissed (Rec., p. 23). From this decision the petitioner duly appealed to the Circuit Court of Appeals.

Fifth. The appeal was heard before the Circuit Court of Appeals, and on December 4, 1906, that Court, by a decision rendered per curiam, upheld the decision of the Circuit Court on the ground that

the case was governed by decisions of the Circuit Court for the Southern District of New York and of Circuit Court of Appeals for the Second Circuit, and by decisions of the New York Court of Appeals. Of the decision in the Massachusetts case against Bigelow, the Court said only:

"It is true that the Supreme Court of Massachusetts (188 Mass. 315) has taken a different view, but we feel constrained to adhere to the prior adjudication of this Circuit" (Rec., p. 31).

Sixth. The amended bill of complaint alleges the following material facts:

On April 30, 1895, the Old Dominion Copper Company of Baltimore (hereinafter called the Baltimore Old Dominion Company) owned and was operating a copper mine in Arizona; it had a capital stock of five hundred thousand dollars divided into twenty-five thousand twenty dollar shares, of which five-sevenths belonged to the executors of the will of Michael Simpson, of Boston, and two-sevenths belonged to William Keyser, of Baltimore.

At some time prior to May 4, 1895, Leonard Lewisohn and Albert S. Bigelow formed the plan of acquiring all the stock of
271 the Baltimore Old Dominion Company, forming a new corporation to take over the mining property, selling the mining property to the new corporation at a large profit and contemporaneously having the new corporation offer for subscription by the public enough of its stock to provide a working capital. To carry out this plan Lewisohn and Bigelow obtained an option to purchase the Simpson stock at forty dollars a share, and formed the Old Dominion Syndicate, so-called, to provide money for the purchase of this stock and the Keyser stock. The members of the Old Dominion Syndicate subscribed a fund of one million dollars, payable in installments, upon the terms that the fund should be used to acquire the property or capital stock of the Baltimore Old Dominion Company, with a view to resale, and that the subscribers should receive the profit made in proportion to their several subscriptions.

On May 27, 1895, the first payment under the Simpson option fell due and was made from the funds of the syndicate. On June 13, 1895, Lewisohn and Bigelow secured an option on the Keyser stock, also at forty dollars per share, and on June 20 made, from the funds of the syndicate, the first payment under that option. On the same day Keyser, without the payment of any further consideration, conveyed to Lewisohn, for the benefit of the latter and Bigelow, certain mining claims, title to which stood in the name of Keyser. At this time, or shortly after, all the stock in the Baltimore Old Dominion Company was transferred to Lewisohn and Bigelow, or their nominees, the directors and other officers resigned, new directors selected by Lewisohn and Bigelow were chosen and Bigelow was chosen president.

On July 8, 1895, Lewisohn and Bigelow had the Old Dominion Copper Mining and Smelting Company, the present petitioner, organized under the laws of New Jersey, selecting for the pur-
272 pose seven incorporators who subscribed for forty shares of stock, Lewisohn and Bigelow paying the subscriptions. On

the following day the authorized capital was increased to three million seven hundred and fifty thousand dollars, in shares of twenty-five dollars each, and officers were chosen from among the incorporators. On July 11, 1895, five of the directors, and the president and treasurer resigned, by instruction of Lewisohn and Bigelow, and the vacancies were filled with their nominees. As a result the new board of directors consisted of Lewisohn, Bigelow, their attorney, Allen W. Evarts, one Edgar Buffam, employed by them for the purpose, and three other persons interested in the Old Dominion Syndicate; Bigelow was chosen president of the corporation.

Immediately after these changes a meeting of directors was held, at which were present Lewisohn, Bigelow, their attorney, Evarts, and their employee, Buffam. At this meeting Bigelow presented an offer of the Baltimore Old Dominion Company, signed by him as its president, to sell all its property, except the cash assets, to the new company for one hundred thousand shares of stock. Lewisohn and Bigelow caused this offer to be accepted. Lewisohn then presented an offer to sell to the corporation the mining claims transferred to him by Keyser for thirty thousand shares of stock. Lewisohn and Bigelow caused this offer to be accepted.

On July 18, 1895, Lewisohn and Bigelow, pursuant to their original plan, caused the directors of this corporation to offer twenty thousand shares of stock to the public in order to furnish working capital. This stock was all subscribed for at par.

The property of the Baltimore Old Dominion Company and the mining claims were subsequently conveyed to this corporation, and on September 18, 1895, Lewisohn and Bigelow caused all the stock to be issued and certificates delivered, one hundred thou-
273 sand shares to their nominee for the Baltimore Old Dominion Company, on account of its property, thirty thousand shares to themselves jointly on account of the mining claims, and twenty thousand shares to the subscribers on account of their cash subscriptions. Of the one hundred thousand shares, eighty thousand were distributed to the members of the Old Dominion Syndicate, and the remaining twenty thousand were held by Lewisohn and Bigelow, ostensibly for their expenses. The thirty thousand shares were divided between Lewisohn and Bigelow.

The entire transaction was pursuant to a plan formed by Lewisohn and Bigelow before they acquired any option to buy the stock of the Baltimore Old Dominion Company or acquired the mining claims, and all the steps taken were by their direction and with this plan in view. The mining claims transferred to this corporation for thirty thousand shares of its stock of the par value, and at that time and subsequently of the market value of twenty-five dollars per share, were worth not more than five thousand dollars, and they are now in the same condition as when so transferred. None of the members of the Old Dominion Syndicate, except Lewisohn and Bigelow themselves, and none of the persons who subscribed for the twenty thousand shares offered to the public had any knowledge of the profits taken by Lewisohn and Bigelow through the sale of these mining

claims. The corporation remained under the control of Lewisohn and Bigelow until April, 1902; then upon a change of management the matter was investigated and shortly after this suit and the suit against Bigelow were brought.

The present bill asks relief only in respect to the transfer of the mining claims. The prayer of the bill is for a rescission of that sale and recovery of the shares issued as consideration therefor or
274 in the alternative for an accounting by the defendants for those shares and their proceeds, or for recovery of the damage suffered.

Seventh. The demurrers filed to the amended bill of complaint were: first, to the whole bill for multifariousness, on the ground that the bill sets up different and inconsistent cases, and prays for different and inconsistent relief; second, to so much of the bill as seeks a rescission for want of equity and for want of parties in that Bigelow is not joined as a defendant.

Eighth. Your petitioner is advised that the decision of the Circuit Court of Appeals affirming the decree of the Circuit Court dismissing said amended bill of complaint for want of equity is erroneous, and your petitioner submits that the decision should be reviewed by this Court.

1. Because the decision of the Circuit Court of Appeals and the decision of the Supreme Judicial Court of Massachusetts are directly opposed in identical cases arising out of a single transaction.

2. Because the decision of the Circuit Court of Appeals is inconsistent with the principles laid down in the decision of Circuit Court of Appeals for the Sixth Circuit in the case of Yeiser v. United States Board and Paper Co., 107 F. R. 340.

3. Because the decision involves a question of importance and general interest, namely,—whether a corporation can recover, by rescission or by an accounting, a secret profit made by promoters in selling property to it, notwithstanding the approval of the transaction by the promoters and their agents as holders of a nominal amount of stock all at the time outstanding, given in anticipation of an issue of stock offered and intended to be offered to the public as part of the promotion of the corporation.

Your petitioner submits herewith a certified copy of
275 the record in said Circuit Court of Appeals of the decree of reversal and of the opinion of said Court and a brief in support of this petition.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court for the Second Circuit, requiring said Court to certify and send to this Honorable Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in said case, entitled therein Old Dominion Copper Mining and Smelting Company v. Frederick Lewisohn and others, No. 64, to the end that said case may be reviewed and determined by this Honorable Court as provided by law, and that your petitioner may

have such other and further relief or remedy in the premises as to this Honorable Court may seem meet.

OLD DOMINION COPPER MINING AND SMELTING COMPANY,
By LOUIS D. BRANDEIS,
WILLIAM H. DUNBAR,
Its Solicitors.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

William H. Dunbar, Being duly sworn, says that he is one of the counsel for the Old Dominion Copper Mining and Smelting Company, the above named petitioner, that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

WILLIAM H. DUNBAR.

Subscribed and sworn to before me by William H. Dunbar this twelfth day of January, A. D. 1907. My commission expires
276 September 20, A. D. 1912.

ROBERT W. SAWYER, JR.,
[NOTARIAL SEAL.] *Notary Public.*

Appendix. (Here follows the opinion in the case of Old Dominion Copper Mining & Smelting Company v. Albert S. Bigelow as reported in 188 Mass., page 315.

EXHIBIT N.

UNITED STATES OF AMERICA, *ss:*

(Seal of the Supreme Court of the United States.)

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Old Dominion Copper Mining & Smelting Company is appellant and Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn, and Philip S. Henry, Executors of Leonard Lewisohn, deceased, are appellees, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the Circuit Court of the United States for the Southern District of New York, and we be- willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 27th day of February, in the year of our
277 Lord one thousand nine hundred and seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

EXHIBIT O.

Supreme Court of the United States. October Term, 1907.

No. 206.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY, Petitioner,
v.
FREDERICK LEWISOHN et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Opinion.

(May 18, 1908.)

Mr. Justice Holmes delivered the opinion of the Court:

This is a bill in equity brought by the petitioner to rescind a sale to it of certain mining rights and land by the defendants' testator, or, in the alternative, to recover damages for the sale. The bill was demurred to, and the demurrer was sustained. (136 Fed. Rep. 915.) Then the bill was amended, and again demurred to, and again the demurrer was sustained, and the bill was dismissed. This decree was affirmed by the Circuit Court of Appeals. (148 Fed. Rep. 1020, 79 C. C. A. 534.) The ground of the petitioner's case is that Lew-
278 isohn, the deceased, and one Bigelow, as promoters, formed the petitioner that they might sell certain properties to it at a profit; that they made their sale while they owned all the stock issued, but in contemplation of a large further issue to the public, without disclosure of their profit, and that such an issue in fact was made. The Supreme Judicial Court of Massachusetts has held the plaintiff entitled to recover from Bigelow upon a substantially similar bill. (188 Mass. 315.)

The facts alleged are as follows: The property embraced in the plan was the mining property of the Old Dominion Copper Company of Baltimore, and also the mining rights and land now in question, the latter being held by one Keyser, for the benefit of himself and of the executors of one Simpson, who, with Keyser, owned the stock of the Baltimore Company. Bigelow and Lewisohn, in May and June, 1895, obtained options from Simpson's executors and Keyser for the purchase of the stock and the property now in question. They also formed a syndicate to carry out their plan, with the agreement that the money subscribed by the members should be used for the purchase and the sale to a new corporation, at a large advance, and that the members, in the proportion of their subscriptions, should receive in cash, or in stock of the new corporation, the profit made by the sale. On May 28, 1895, Bigelow paid Simpson's executors for their stock on behalf of the syndicate in cash and notes of himself and Lewisohn, and in June Keyser was paid in the same way.

On July 8, 1895, Bigelow and Lewisohn started the plaintiff corporation, the seven members being their nominees and tools. The next day the stock of the company was increased to 150,000 shares of twenty-five dollars each, officers were elected, and the corporation became duly organized. July 11, pursuant to instructions, some of the officers resigned, and Bigelow and Lewisohn and three
279 other absent members of the syndicate came in. Thereupon an offer was received from the Baltimore Company, the stock of which had been bought, as stated, by Bigelow and Lewisohn, to sell substantially all its property for 100,000 shares of the plaintiff company. The offer was accepted, and then Lewisohn offered to sell the real estate now in question, obtained from Keyser, for 30,000 shares, to be issued to Bigelow and himself. This also was accepted, and possession of all the mining property was delivered the next day. The sales "were consummated" by delivery of deeds, and afterwards, on July 18, to raise working capital, it was voted to offer the remaining 20,000 shares to the public at par, and they were taken by subscribers who did not know of the profit made by Bigelow and Lewisohn and the syndicate. On September 18 the 100,000 and 30,000 shares were issued, and it was voted to issue the 20,000 when paid for. The bill alleges that the property of the Baltimore company was not worth more than $1,000,000, the sum paid for its stock, and the property here concerned not over $5,000, as Bigelow and Lewisohn knew. The market value of the petitioner's stock was not less than par, so that the price paid was $2,500,000, it is said, for the Baltimore company's property and $750,000 for that here concerned. Whether this view of the price paid is correct, it is unnecessary to decide.

Of the stock in the petitioner received by Bigelow and Lewisohn, or their Baltimore corporation, 40,000 shares went to the syndicate as profit, and the members had their choice of receiving a like additional number of shares or the repaying of their original subscription. As pretty nearly all took the stock, the syndicate received about 80,000 shares. The remaining 20,000 of the stock paid to the Baltimore company, Bigelow and Lewisohn divided, the plaintiff believes, without the knowledge of the syndicate. The 30,-
280 000 shares received for the property now in question they also divided. Thus the plans of Bigelow and Lewisohn were carried out.

The argument for the petitioner is that all would admit that the promoters (assuming the English phrase to be well applied) stood in a fiduciary relation to it, if, when the transaction took place, there were members who were not informed of the profits made and who did not acquiesce, and that the same obligation of good faith extends down to the time of the later subscriptions, which it was the promoters' plan to obtain. It is an argument that has commanded the assent of at least one Court, and is stated at length in the decision. But the Courts do not agree. There is no authority binding upon us and in point. The general observations in Dickerman v. Northern Trust Co., 176 U. S. 181, were obiter, and do not dispose of the case. Without spending time upon the many dicta that were quoted to us, we shall endeavor to weigh the considerations on one side and the other afresh.

The difficulty that meets the petitioner at the out-set is that it has assented to the transaction with the full knowledge of the facts. It is said, to be sure, that on September 18, when the shares were issued to the sellers, there were already subscribers to the 20,000 shares that the public took. But this does not appear from the bill, unless it should be inferred from the ambiguous statement that on that day it was voted to issue those shares "to persons who had subscribed therefor," upon receiving payment, and that the shares "were thereafter duly issued to said persons," etc. The words "had subscribed" may refer to the time of issue and be equivalent to "should have subscribed" or may refer to an already past event. But that hardly matters. The contract had been made and the property delivered on July 11 and 12, when Bigelow, Lewi-
281 sohn, and some other members of the syndicate held all the outstanding stock, and it is alleged in terms that the sales were consummated before the vote of July 18 to offer stock to the public had been passed.

At the time of the sale to the plaintiff, then, there was no wrong done to any one. Bigelow, Lewisohn, and their syndicate were on both sides of the bargain, and they might issue to themselves as much stock in their corporation as they liked in exchange for their conveyance of their land. Salomon v. Salomon & Co. (1897) A. C. 22. Blum v. Whitney, 185 N. Y. 232. Tompkins v. Sperry, 96 Md. 750. If there was a wrong it was when the innocent public subscribed. But what one would expect to find, if a wrong happened then, would not be that the sale became a breach of duty to the corporation time pro tunc, but that the invitation to the public without disclosure, when acted upon, became a fraud upon the subscribers from an equitable point of view, accompanied by what they might treat as damage. For it is only by virtue of the innocent subscribers' position and the promoters' invitation that the corporation has any pretence for a standing in court. If the promoters, after starting their scheme, had sold their stock before any subscriptions were taken, and then the purchasers of their stock with notice had invited the public to come in, and it did, we do not see how the company could maintain this suit. If it could not then, we do not see how it can now.

But it is said that from a business point of view the agreement was not made merely to bind the corporation as it then was, with only 40 shares issued, but to bind the corporation when it should have a capital of $3,750,000; and the implication is that practically this was a new and different corporation. Of course, legally speak-
ing, a corporation does not change its identity by adding a
282 cubit to its stature. The nominal capital of the corporation was the same when the contract was made, and after the public had subscribed. Therefore, what must be meant is, as we have said, that the corporation got a new right from the fact that new men, who did not know what it had done, had put in their money and had become members. It is assumed in argument that the new members had no ground for a suit in their own names, but it is assumed also that their position changed that of the corporation, and thus that the indirect effect of their acts was greater than the

direct; that facts that gave them no claim gave one to the corporation because of them, notwithstanding its assent. We shall not consider whether the new members had a personal claim of any kind, and therefore we deal with the case without prejudice to that question, and without taking advantage of what we understand the petitioner to concede.

But, if we are to leave technical law on one side and approach the case from what is supposed to be a business point of view, there are new matters to be taken into account. If the corporation recovers, all the stockholders, guilty as well as innocent, get the benefit. It is answered that the corporation is not precluded from recovering for a fraud upon it, because the party committing the fraud is a stockholder. Old Dominion Copper Mining and Smelting Co. v. Bigelow, 188 Mass. 315, 327. If there had been innocent members at the time of the sale, the fact that there were also guilty ones would not prevent a recovery, and even might not be a sufficient reason for requiring all the guilty members to be joined as defendants in order to avoid a manifest injustice. Stockton v. Anderson, 40 N. J. Eq. 486. The same principle is thought to apply when innocent members are brought in later under a scheme. But it is
283 obvious that this answer falls back upon the technical diversity between the corporation and its members, which the business point of view is supposed to transcend, as it must, in order to avoid the objection that the corporation has assented to the sale with full notice of the facts. It is mainly on this diversity that the answer to the objection of injustice is based in New Sombrero Phosphate Co. v. Erlanger, 5 Ch. D. 73, 114, 122.

Let us look at the business aspect alone. The syndicate was a party to the scheme to make a profit out of the corporation. Whether or not there was a subordinate fraud committed by Bigelow and Lewisohn on the agreement with them, as the petitioner believes, is immaterial to the corporation. The issue of the stock was apparent, we presume, on the books, so that it is difficult to suppose that at least some members of the syndicate, representing an adverse interest, did not know what was done. But all the members were engaged in the plan of buying for less and selling to the corporation for more, and were subject to whatever equity the corporation has against Bigelow and the estate of Lewisohn. There was some argument to the contrary, but this seems to us the fair meaning of the bill. Bigelow and Lewisohn, it is true, divided the stock received for the real estate now in question. But that was a matter between them and the syndicate. The real estate was bought from Keyser by the syndicate along with his stock in the Baltimore company, and was sold by the syndicate to the petitioner along with the Baltimore company's property, as part of the scheme. The syndicate was paid for it, whoever received the stock. And this means that two-fifteenths of the stock of the corporation, the 20,000 shares sold to the public, are to be allowed to use the name of the corporation to assert rights against Lewisohn's estate that will enure to the benefit of thirteen-fifteenths of the stock that are totally
284 without claim. It seems to us that the practical objection is as strong as that arising if we adhere to the law.

Let us take the business point of view for a moment longer. To the lay mind it would make little or no difference whether the 20,000 shares sold to the public were sold on an original subscription to the articles of incorporation or were issued under the scheme to some of the syndicate and sold by them. Yet it is admitted, in accordance with the decisions, that in the latter case the innocent purchasers would have no claim against any one. If we are to seek what is called substantial justice in disregard of even peremptory rules of law, it would seem desirable to get a rule that would cover both of the almost equally possible cases of what is deemed a wrong. It might be said that if the stock really was taken as a preliminary to selling to the public, the subscribers would show a certain confidence in the enterprise and give at least that security for good faith. But the syndicate believed in the enterprise, notwithstanding all the profits that they made it pay. They preferred to take stock at par rather than cash. Moreover, it would have been possible to issue the whole stock in payment for the property purchased, with an understanding as to 20,000 shares.

Of course it is competent for legislators, but not, we think, for judges, except by a quasi-legislative declaration, to establish that a corporation shall not be bound by its assent in a transaction of this kind, when the parties contemplate an invitation to the public to come in and join as original subscribers for any portion of the shares. It may be said that the corporation cannot be bound until the contemplated adverse interest is represented, or it may be said that promoters cannot strip themselves of the character of
285 trustees until that moment. But it seems to us a strictly legislative determination. It is difficult, without inventing new and qualifying established doctrines, to go behind the fact that the corporation remains one and the same after once it really exists. When, as here, after it really exists, it consents, we, at least, shall require stronger equities than are shown by this bill, to allow it to renew its claim at a later date, because its internal constitution has changed.

To sum up: In our opinion, on the one hand, the plaintiff cannot recover without departing from the fundamental conception embodied in the law that created it; the conception that a corporation remains unchanged and unaffected in its identity by changes in its members. Donnell v. Herring-Hall-Marvin Safe Co., 208 U. S., 267, 273. Salomon v. Salomon & Co., (1897), A. C. 22, 30. On the other hand, if we should undertake to look through fiction to facts, it appears to us that substantial justice would not be accomplished, but rather a great injustice done, if the corporation were allowed to disregard its previous assent in order to charge a single member with the whole results of a transaction to which thirteen-fifteenths of its stock were parties, for the benefit of the guilty, if there was guilt in any one, and the innocent alike. We decide only what is necessary. We express no opinions as to whether the defendant properly is called a promoter, or whether the plaintiff has not been guilty of laches, or whether a remedy can be had for a part of a single transaction in the form in which it is sought, or

whether there was any personal claim on the part of the innocent subscribers, or as to any other question than that which we have discussed.

The English case chiefly relied upon, Erlanger v. New Sombrero Phosphate Co., 3 App. Cas. 1218, affirming s. c. 5 Ch. D. 73, seems to us far from establishing a different doctrine for that juris-
286 diction. There, to be sure, a syndicate had made an agreement to sell, at a profit, to a company to be got up by the sellers. But the company, at the first stage, was made up mainly of outsiders, some of them instruments of the sellers, but innocent instruments, and, according to Lord Cairns, the contract was provisional on the shares being taken and the company formed (p. 1239). There never was a moment when the company had assented with knowledge of the facts. The shares, with perhaps one exception, all were taken by subscribers ignorant of the facts, 5 Ch. D. 113, and the contract seems to have reached forward to the moment when they subscribed. As it is put in 2 Morawetz, Corp. (2d ed.), sec. 292, there was really no company till the shares were issued. Here thirteen-fifteenths of the stock had been taken by the syndicate, the corporation was in full life and had assented to the sale with knowledge of the facts before an outsider joined. There most of the syndicate were strangers to the corporation, yet all were joined as defendants (p. 1222). Here the members of the syndicate, although members of the corporation, are not joined, and it is sought to throw the burden of their act upon a single one. Gluckstein v. Barnes (1900), A. C. 240, certainly is no stronger for the plaintiff, and in Yeiser v. United States Board & Paper Co., 107 Fed. Rep. 340, another case that was relied upon, the transaction equally was carried through after innocent subscribers had paid for stock.

Decree affirmed.

True copy.
Attest:
[SEAL.]

JAMES H. McKENNEY,
Clerk Supreme Court U. S.

287 EXHIBIT P.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Circuit Court of the United States for the Southern District of New York, Greeting:

Whereas, lately in the United States Circuit Court of Appeals for the Second Circuit, in a case between Old Dominion Copper Mining & Smelting Company, appellant, and Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, Executors of Leonard Lewisohn, deceased, appellees, wherein the decree of the said Circuit Court of Appeals, entered in said cause on the 17th day of December, A. D. 1906, is in the following words, viz:

"This cause came on to be heard on the transcript of record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of the said Circuit Court be and it hereby is affirmed with costs.

It is further ordered that a mandate issue to the said Circuit Court in accordance with this decree.

W. J. W.
W. K. T."

as by the inspection of the transcript of the record of the said United States Circuit Court of Appeals which was brought into the Supreme Court of the United States by virtue of a writ of certiorari, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And Whereas, in the present term of October, in the year of our Lord one thousand nine hundred and seven, the said cause came on
to be heard before the said Supreme Court, on the said tran-
288 script of record, and was argued by counsel:

On consideration whereof, it is here ordered, adjudged and decreed by this Court that the decree of the said United States Circuit Court of Appeals in this case be, and the same is hereby, affirmed with costs; and that the said appellees, Frederick Lewisohn et al., Executors, etc., recover against the said appellant, Twenty dollars for their costs herein expended and have execution therefor.

And it is further ordered, That this cause be, and the same is hereby, remanded to the Circuit Court of the United States for the Southern District of New York.

MAY 18, 1908.

You, therefore, are hereby commanded that such execution and proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of July, in the year of our Lord one thousand nine hundred and eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Costs of Appellees:

Clerk Printing record, paid.	
Attorney.....	$20.00
	$20.00

289 EXHIBIT Q.

United States Circuit Court, Southern District of New York.

Action No. 2.

In Equity. No. 8333.

OLD DOMINION COPPER MINING & SMELTING COMPANY, Complainant,
against
FREDERICK LEWISOHN, WALTER LEWISOHN, ALBERT LEWISOHN and Philip S. Henry, Executors of Leonard Lewisohn, Deceased, Defendants.

A judgment in this action in favor of the defendants and against the plaintiff having been rendered in this Court on the 6th day of December, 1905, adjudging that the amended bill of complaint herein be dismissed and that the defendants recover of the complainant the sum of Two hundred and twenty-seven dollars ($227) their costs and charges as taxed and that the defendants have execution therefor; and the complainant having appealed from said judgment to the United States Circuit Court of Appeals for the Second Circuit and the said judgment having been affirmed in all things by said United States Circuit Court of Appeals for the Second Circuit and a decree of the said Circuit Court of Appeals affirming said judgment was entered in this cause on the 17th day of December, 1906; and the complainant thereafter having obtained a writ of certiorari from the Supreme Court of the United States agreeably to the Act of Congress in such case made and provided; and said cause coming on
290 to be heard before the said Supreme Court of the United States on transcript of record and the decree of the said United States Circuit Court of Appeals, after such hearing, was in all things affirmed with costs by the said Supreme Court of the United States; and the mandate of said United States Supreme Court, dated May 18th, 1908, adjudged that the decree of the said United States Circuit Court of Appeals in this case be and the same hereby is affirmed with costs and that the said appellees, Frederick Lewisohn et al., Executors, etc., recover against the said appellant Twenty Dollars ($20) for their costs herein expended and have execution therefor, and further directing that the cause be remanded to the Circuit Court of the United States for the Southern District of New York, and an order having been duly entered herein, upon notice to the complainant, in the office of the Clerk of the United States Circuit Court for the Southern District of New York, on the 11th day of July, 1908, directing that the said mandate issued by the Supreme Court of the United States be filed and the decision and judgment of said Supreme Court of the United States be made the decision and judgment of said United States Circuit Court for the Southern District of New York, and that said decree of the United

States Circuit Court of Appeals for the Second Circuit in the above-mentioned cause, entered on the 17th day of December, 1906, affirming the decree of the Circuit Court of the United States for the Southern District of New York be affirmed, and that the defendants recover of the plaintiff the sum of Twenty dollars ($20) costs, as appears by said mandate, and that they have execution therefor, and further directing that judgment be entered accordingly.

Now, upon motion of Hoadley, Lauterbach & Johnson, attorneys for the defendants, it is

291 Adjudged and Decreed that the decision and judgment of the said Supreme Court of the United States be and the same hereby is made the decision and judgment of this Court, and that said decree of the said Circuit Court of Appeals for the Second Circuit in the above entitled cause, entered on the 17th day of December, 1905, affirming the decree of the United States Circuit Court for the Southern District of New York, entered on the 6th day of December, 1905, be and the same hereby is affirmed, and that the defendants recover of the plaintiff the sum of Twenty dollars ($20), their costs of said appeal, and that said defendants have execution therefor.

Judgment signed and entered this 23rd day of July, 1908.

[SEAL.] JOHN A. SHIELD, *Clerk.*

"EXHIBIT R."

Præcipe for Subpœna.

Circuit Court of the United States for the Southern District of New York.

In Equity. No. 2.

OLD DOMINION COPPER MINING & SMELTING COMPANY
v.
FREDERICK LEWISOHN et al.

John A. Shields, Clerk Circuit Court U. S. Southern District of N. Y.:

You will please issue a subpœna to the defendant in the above-entitled action, returnable on the first Monday of February, 1903.

BRANDEIS, DUNBAR & NUTTER,
292 CARTER, HUGHES & DWIGHT,
Solicitors for Complainant.

New York, Jan. 6th, 1903.

(Endorsed:) Circuit Court U. S. Southern District of N. Y. In Equity. Old Dominion Copper Mining and Smelting Co., vs. No. 2. Frederick Lewisohn, et al. Præcipe for Subpœna. Brandeis, Dunbar & Nutter, Carter, Hughes & Dwight, Solicitors for Complainant. U. S. Circuit Court, Southern District of New York. Filed Jan. 6, 1903, John A. Shields, Clerk.

Subpœna.

The President of the United States of America to Frederick Lewisohn, Walter (L. S.) Lewisohn, Albert Lewisohn and Philip S. Henry, Greeting:

You are hereby commanded that you and each of you personally appear before the Judges of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, in Equity, on the first Monday of February, A. D. 1903, wherever the said Court shall then be, to answer a bill of complaint exhibited against you in the said Court by The Old Dominion Copper Mining and Smelting Company and do further and receive what the said Court shall have considered in that behalf. And this you are not to omit under the penalty on you and each of you of Two Hundred and Fifty Dollars.

Witness, The Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the City of New York, on the 6th day of January, in the year of our Lord one thousand nine hundred and three and of the Independence of the United States of America, the one hundred and twenty-seventh.

293 JOHN A. SHIELDS, *Clerk.*

BRANDEIS, DUNBAR & NUTTER,
CARTER, HUGHES & DWIGHT,
Solicitors for Complainant.

The Defendants are required to enter appearance in the above cause, in the Clerk's office of this Court, on or before the first Monday of February, 1903, or the bill will be taken pro confesso against them.

J. A. S., *Clerk.*

(Endorsed:) I hereby certify that on the 6th day of January, 1903, at the City of New York in my District, I personally served the within Subpœna in Equity upon the within-named defendants Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, by exhibiting to each of them the within original and at the same time leaving with each of them a copy thereof. Wm. Henkel, United States Marshal, Southern District of New York. Dated, Jan. 6, 1903. U. S. Circuit Court, Southern District of New York. Filed Jan. 6, 1903, John A. Shields, Clerk.

Appearance.

Circuit Court of the United States of America, Southern District of New York.

In Equity. Action No. 2.

THE OLD DOMINION COPPER MINING & SMELTING COMPANY, Plaintiff,
against
FREDERICK LEWISOHN, WALTER LEWISOHN, ALBERT LEWISOHN and PHILIP S. HENRY.

294 To the Clerk:

We hereby enter our appearance as solicitors and counsel for the defendants Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, in the above entitled action. Dated N. Y., February 2nd, 1903.

HOADLEY, LAUTERBACH & JOHNSON,
Solicitors and Counsel for Defendants.

Office and Post Office Address, 22 William Street, Borough of Manhattan, City of New York.

(Endorsed:) U. S. Circuit Court. The Old Dominion Copper Mining and Smelting Co., vs. Frederick Lewisohn & ors., Action No. 2. Notice of Appearance. Hoadley, Lauterbach & Johnson, Solicitors and Counsel for Deft. 22 Williams Street, New York City. U. S. Circuit Court, Southern District of New York. Filed Feb. 2, 1903. John A. Shields, Clerk.

Consent for Extension of Time for Answer, Demurrer, etc.

Circuit Court of the United States, Southern District of New York.

Action No. 2.

OLD DOMINION COPPER MINING AND SMELTING COMPANY, Plaintiff,
against
FREDERICK LEWISOHN et al., Defendants.

295 It is Hereby Consented that the time of the defendants in the above entitled action within which to answer, demur to the complaint herein, or make any motion, be extended to March 6th, 1903. Dated, New York City, March 2, 1903.

BRANDEIS, DUNBAR & NUTTER,
CARTER, HUGHES & DWIGHT,
Solicitors for Plaintiff.

HOADLEY, LAUTERBACH & JOHNSON,
Solicitors for Defendants.

(Endorsed:) U. S. Circuit Court. Old Dominion Copper Mining & Smelting Co. vs. Frederick Lewisohn, et al. Action No. H. Stipulation. Hoadley, Lauterbach & Johnson, 22 Williams Street, New York City. U. S. Circuit Court, Southern District of New York. Filed Mar 2, 1903, John A. Shields, Clerk.

Agreement as to Time for Hearing Demurrer.

Circuit Court of the United States, Southern District of New York.

In Equity.

OLD DOMINION COPPER MINING & SMELTING COMPANY, Plaintiff,
against
FREDERICK LEWISOHN et al., Defendants.

It is Hereby Stipulated and Agreed by and between the solicitors for the respective parties hereto that the hearing of the issues raised by the demurrer interposed herein on behalf of defendants be
296 placed on the Calendar for the session of this Court commencing on the 20th day of February, 1905.

Dated, New York, January 14th, 1905.

BRANDEIS, DUNBAR & NUTTER,
CARTER, HUGHES & DWIGHT,
Solicitors for Complainant.
HOADLEY, LAUTERBACH & JOHNSON,
Solicitors for Defendants.

Ordered Accordingly.
WM. F. TOWNSEND,
U. S. Circuit Judge.

(Endorsed:) U. S. Circuit Court, Southern District of New York. Filed Jan. 14, 1905, John A. Shields, Clerk.

Agreement Relating to Use of Depositions and Waiver of Formal Proof as to Certain Matters.

Circuit Court of the United States, Southern District of New York.

In Equity. No. 8333.

OLD DOMINION COPPER MINING & SMELTING COMPANY
v.
FREDERICK LEWISOHN et al.

In the above-entitled cause it is stipulated and agreed between the parties:

That copies certified to by Willoughby L. Webb, Commis-
297 sioner, of the deposition of Walter Lewisohn, Ferdinand L. Rahaeuser, Adolph Lewisohn, Frederick Lewisohn, Albert Lewisohn, Jess- Lewisohn and Edward C. Westervelt, taken in the

case of Old Dominion Copper Mining and Smelting Company v. Bigelow, No. 8099 Equity, pending in the Supreme Judicial Court of Suffolk County, Massachusetts, may when completed be filed in the above entitled cause by the complainant at any time before the taking of testimony therein is closed, and may be read and used in evidence in this cause by either party with the same effect as if the same had been regularly taken in said cause before an examiner:

And it is further stipulated and agreed that the depositions of Albert S. Bigelow, Godfrey M. Hyams, Joseph A. Coram, Caleb L. Stone, and Charles H. Altmiller, taken before Howland Twombly, Esq., Notary Public, for use in the suit of Old Dominion Copper Mining and Smelting Company v. Lewisohn et al., No. — Equity, pending in this Court, may be filed in the above entitled cause by the complainant at any time before the taking of the complainant's testimony in chief therein is closed, and may be read and used in evidence in this cause by either party with the same effect as if the same had been regularly taken in said cause before an examiner.

And the respondents hereby waive any further or formal proof of the records of the plaintiff corporation, of the entries in the books of account and check books of the plaintiff corporation testified to by Mr. Altmiller, of the contents of the stock certificate book of the corporation testified to by Mr. Altmiller, of the stock certificates of the plaintiff corporation testified to by Mr. Altmiller, and of the letters and other documents produced by Mr. Altmiller, and stipulate
298 and agree that Mr. Altmiller's deposition and the exhibits thereto annexed setting out the contents of the record book, extracts from the books of account, check book, stock certificate books, and transfer book, and certain certificates of stock, letters and other documents produced by him, may be read in evidence and used in like manner and with the same effect in all respects as if full and formal proof of the same had been made, reserving, however, to each party all rights to object to the relevancy, competency and materiality of any of said depositions, or documents, and to any of the interrogatories or answers therein contained and reserving the right of the respondent to cross-examine Charles H. Altmiller, one of said witnesses, if he be again called to testify by either party.

Said waiver being made conditionally upon the production of any and all of the original documents that the respondents shall notify complainant to produce and the complainant hereby stipulates and agrees to produce any and all of the original documents upon receiving notice requiring the production thereof.

HOADLEY, LAUTERBACH & JOHNSON,
Solicitors for Respondent.

BRANDEIS, DUNBAR & NUTTER,
Solicitors for Complainants.

(Endorsed:) U. S. Circuit Court, Southern District of New York. Filed Feb. 18, 1905, John A. Shields, Clerk.

Agreement Relating to Use of Massachusetts Depositions in the New York Case.

Circuit Court of the United States, Southern District of New York.

In Equity.

299 OLD DOMINION COPPER MINING AND SMELTING COMPANY
vs.
FREDERICK LEWISOHN et al.

In the above entitled cause it is stipulated and agreed between the parties:

That copies certified by Willoughby L. Webb, Commissioner of the depositions of Walter Lewisohn, Ferdinand L. Rahaeuser, Adolph Lewisohn, Frederick Lewisohn, Albert Lewisohn, Jesse Lewisohn and Edward C. Westervelt, taken in the case of Old Dominion Copper Mining and Smelting Company v. Bigelow, No. 8099, Equity, pending in the Supreme Judicial Court for Suffolk County, Massachusetts, may when completed be filed in the above entitled cause by the complainant at any time before the taking of testimony therein is closed, and may be read and used in evidence in this cause by either party with the same effect as if the same had been regularly taken in said cause before an examiner:

And it is further stipulated and agreed that the depositions of Albert S. Bigelow, Godfrey M. Hyams, Joseph A. Coram, Galen L. Stone and Charles H. Altmiller, taken before Howard Twombly, Esq., Notary Public, for use in the suit of Old Dominion Copper Mining & Smelting Company v. Lewisohn et al., No. — Equity, pending in this Court, may be filed in the above entitled cause by the complainant at any time before the taking of the complainant's testimony in chief therein is closed, and may be read and used in evidence in this cause by either party with the same effect as if the same had been regularly taken in said cause before an examiner. Reserving, however, to each party all rights to object to the relevancy, competency, and materiality of any of said depositions or the documents therein referred to, and to any of the interrogatories or answers therein contained and reserving the right of the respondents to cross-examine Charles H. Altmiller, one of said witnesses, if he be again called to testify by either party.

300

HOADLEY, LAUTERBACH & JOHNSON,
Solicitors for Respondents.
BRANDEIS, DUNBAR & NUTTER,
Solicitors for Complainants.

(Endorsed:) U. S. Circuit Court, Southern District of New York, filed Feb. 18, 1905, John A. Shields, Clerk.

Stipulation Relating to Cross-examination of Charles H. Altmiller and Use of His Deposition.

Circuit Court of the United States, Southern District of New York.

In Equity.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
v.
FREDERICK LEWISOHN, *et al.*

Stipulation.

The respondents hereby reserve the right of cross examination of Charles H. Altmiller, if he be again called to testify, by either party, and waive any further or formal proof of the records of the plaintiff corporation, of the entries in the books of account and
301 check books of the plaintiff corporation testified to by Mr. Altmiller, and of the letters and other documents produced by Mr. Altmiller, and stipulate and agree that Mr. Altmiller's deposition and the exhibits thereto annexed setting out the contents of the record book, extracts from the books of account, check book, stock certificate books, and stock transfer book, and certain certificates of stock, letters and other documents produced by him, may be read in evidence and used in like manner and with the same effect in all respects as if full and formal proof of the same had been made, reserving, however, all rights to object to the relevancy, competency and materiality of the interrogatories and answers and of the matters testified to by said deponent and of the said exhibits.

Said waiver being made conditionally upon the production of any and all of said original document that the respondents shall notify complainant to produce, and the complainant hereby stipulates and agrees to produce any and all of said original documents upon receiving notice requiring the production thereof.

BRANDEIS, DUNBAR & NUTTER,
Solicitors for Complainants.
HOADLEY, LAUTERBACH & JOHNSON,
Solicitors for Respondents.

(Endorsed:) U. S. Circuit Court, Southern District of New York. Filed Feb. 18, 1905, John A. Shields, Clerk.

Opinion of Circuit Court on Demurrer to Amended Bill per Holt, J.

United States Circuit Court, Southern District of New York.

302 THE OLD DOMINION COPPER MINING AND SMELTING COMPANY, Complainant,
against
FREDERICK LEWISOHN et al., Defendants.

Carter, Hughes & Dwight and Brandeis, Dunbar & Nutter, (Louis D. Brandeis, Charles E. Hughes and William H. Dunbar, of counsel), for plaintiff.

Hoadley, Lauterbach & Johnson, (Edward Lauterbach, Eugene Treadwell, and Henry Siegrist, Jr., of counsel), for defendants.

HOLT, *J.*:

Orderly practice requires that a decision made by a Judge in a case should be followed by another judge, upon any question arising in that case, unless the facts presented are different. Judge Lacombe having held that the original complaint in this action was bad on demurrer, the question whether the amended complaint is bad on demurrer depends upon the question whether it presents a different case. The complainant's counsel claim that a substantial change has been made in the bill by amendments alleging more clearly than was alleged in the original bill that the 20,000 shares of stock sold to the subscribers for cash were sold by the corporation, and not by Bigelow and Lewisohn. But, in my opinion, the original bill clearly alleged that fact in paragraphs 15 and 21, and in other parts of the bill. Under these circumstances, I can see no substantial difference between the amended bill and the original bill, and, without expressing any opinion on the question in respect to which it is claimed that Judge Lacombe and the Supreme Court of Massachusetts differ, I think that, as the amended bill alleges substantially
303 the same cause of action as the original bill, Judge Lacombe's decision governs the case.

My conclusion is that the demurrer should be sustained, with costs; and, as the complainant has been permitted to amend the bill to meet the precise point of objection stated in Judge Lacombe's decision, I think that final judgment should be ordered on the demurrer for the defendants.

Nov. 11, 1905.

(Endorsed:) United States Circuit Court, Southern District of New York. The Old Dominion Copper Mining and Smelting Company, Complainant, against Frederick Lewisohn, et al., Defendant. Memorandum. Holt, J., U. S. Circuit Court, Southern District of New York. Filed Nov. 11, 1905. John A. Shields, Clerk.

Notice Relating to Entry of Order of the United States Circuit Court.

United States Circuit Court, Southern District of New York.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY, Complainant,
against
FREDERICK LEWISOHN et al., Defendants.

SIRS: Please take Notice, that an order, of which the within is a copy, will be presented to the Hon. George C. Holt, one of the Judges of this Court, at Room 78 in the Post Office Building, Borough of Manhattan, City of New York, on the 18th day of
304 November, 1905, at eleven o'clock in the forenoon, for settlement.

Dated, November 13th, 1905.

Yours, &c.,

HOADLEY, LAUTERBACH & JOHNSON,
Solicitors for Defendants.

Office & P. O. Address, No. 22 William Street, Borough of Manhattan, City of New York.

To Messrs. Brandeis, Dunbar & Nutter, Carter, Hughes & Dwight, Solicitors for Complainant, No. 96 Broadway, Borough of Manhattan, New York City.

Notice Relating to Costs and Bill of Costs.

United States Circuit Court, Southern District of New York.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY, Plaintiff,
against
FREDERICK LEWISOHN et al., Defendants.

SIRS: Please take notice that the within bill of costs will be taxed by the Clerk of this Court at his office in the Post Office Building, Borough of Manhattan, City of New York, on the 25th day of November, 1905, at 10.30 o'clock in the forenoon.

Dated, New York, November 22nd, 1905.

305 Yours, &c.,
HOADLEY, LAUTERBACH & JOHNSON,
Attorneys for Defendants.

Office & Post Office Address, No. 22 William Street, Borough of Manhattan, New York City.

To Messrs. Brandeis, Dunbar & Nutter, Messrs. Carter, Hughes & Dwight, Solicitor- for Complainant, 96 Broadway, New York.

United States Circuit Court, Southern District of New York.

THE OLD DOMINION COPPER MINING AND SMELTING CO., Plaintiff,
against
FREDERICK LEWISOHN et al., Defendants.

Bill of Costs.

Costs on First Demurrer	$20.00
Costs on Second Demurrer	20.00
Disbursements.	
Printing Demurrer Book	41.75
Printing Brief on Demurrer	35.60
Printing Demurrer Book	41.50
Printing Brief on Demurrer	71.90
Filing of Note of Issue	2.00
Filing Orders and obtaining Certified copies	1.60
306 Clerk for Entering Judgment	$32.40
	$266.75
Off	39.75
	$227.00

COUNTY OF NEW YORK, *ss:*

Andrew R. McLaren, being duly sworn, deposes and says: that he is the Managing Clerk in the office of Hoadley, Lauterbach & Johnson, the attorneys for the defendants; that the foregoing disbursements have been made or necessarily incurred in this action and are reasonable in amount and that the copies of documents or papers as charged herein were actually and necessarily obtained for use.

ANDREW R. McLAREN.

Sworn to before me this 23d day of November, 1905.

ISAAC A. LEVY,
Notary Public, New York County.

(Endorsed:) United States Circuit Court, Southern District of New York. The Old Dominion Copper Mining and Smelting Co., Pl'ff against Frederick Lewisohn, et al., Defendants. Bill of costs and notice of adjustment. Hoadley, Lauterbach & Johnson, 22 William Street, New York City. Copy received, Nov. 23d. 1905, Carter, Hughes & Dwight. U. S. Circuit Court, Southern District of New York. Filed Dec. 6, 1905. John A. Shields, Clerk.

Citation on Appeal.

Circuit Court of the United States, Southern District of New York.

In Equity. 8333.

307 OLD DOMINION COPPER MINING & SMELTING COMPANY
against
FREDERICK LEWISOHN et al.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

To Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, Greeting:

You are hereby cited and admonished to be and appear at a Term of the United States Circuit Court of Appeals for the Second Circuit to be held at the Post Office Building, Borough of Manhattan, City of New York, on the 31st day of January, 1906, pursuant to an appeal filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York, wherein the Old Dominion Copper Mining & Smelting Company is appellant, and Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry are respondents, to show cause, if any there be, why the judgment herein as mentioned in said petition for appeal should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness, Hon. Melville W. Fuller, Chief Justice of the United States, this 29th day of December, 1905.

E. H. LACOMBE,
Circuit Judge.

(Endorsed:) Circuit Court of the United States, Southern District of New York. Old Dominion Copper Mining & Smelting Company against Frederick Lewisohn, et al. In Equity. No. 8333. Citation on Appeal —Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass. and Hughes, Rounds & Schurman, 96 Broad-
308 way, New York City, Solicitors for Complainant. A copy this day received, Jan. 3, 1906, Hoadley, Lauterbach & Johnson. U. S. Circuit Court, Southern District of New York. Filed Jan. 3, 1906. John A. Shields, Clerk.

Mandate of United States Circuit Court of Appeals.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable, the Judges of the Circuit Court of the United States for the Southern District of New York, Greeting:

Whereas, lately in the Circuit Court of the United States for the Southern District of New York, before you, or some of you, in a cause between Old Dominion Copper Mining & Smelting Company and Frederick Lewisohn, et al., a decree was entered in the office of the Clerk of said Court on the 6th day of December, 1905, in the words and figures following, to wit:—

"This cause having been regularly brought on for trial upon the issues of law formed by complainants amended complaint and the demurrers of the defendants to part of the amended bill of complaint, and to the whole of the amended bill of complaint at a term of this Court, held by the Honorable George C. Holt, one of the Judges of this Court, who having heard the parties by their counsel, and after due deliberation, has duly made and filed his decision and an order having been duly made and entered herein and filed in the office of the Clerk of this Court on the 18th day of November, 1905, directing that the demurrer to the whole of said amended bill of complaint for want of equity be sustained and that the bill of complaint herein be dismissed the complainant having heretofore been permitted to amend the bill of complaint to meet the
309 prior decision of this Court, and further directing that the defendants recover against the complainant their costs and charges incurred upon the said demurrer to be taxed and that the said costs and charges having been duly adjusted by the Clerk of this Court upon notice to the complainant at the sum of two hundred and twenty-seven dollars ($227) now upon motion of Hoadley, Lauterbach & Johnson, attorneys for defendants, it is

Adjudged and Decreed that the said amended bill of complaint herein be and the same hereby is dismissed, and that the defendants recover of the complainant the sum of two hundred and twenty-seven dollars ($227) their costs and charges as taxed, and that the defendants have execution therefor.

JOHN A. SHIELDS, *Clerk.*"

as by the inspection of the transcript of the record of the said Court, which was brought into the United States Circuit Court of Appeals for the Second Circuit, by virtue of an appeal agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and six, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Second Circuit, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is hereby

Ordered, Adjudged and Decreed, That the decree of said Circuit Court be and it hereby is affirmed with costs taxed at the sum of $36.70.

You therefore, are hereby commanded that such further proceedings be had in said cause, in accordance with the decision
310 of this Court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of December, in the year of our Lord one thousand nine hundred and six.

Costs of Appellee:

Clerk	$16.70
Printing Record	$ ....
Attorney	$20.00
	$36.70

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

Costs of Appellee in No. 64:

19–, October Term—Docketing cause and filing record, $5.00; entering appearance, .25; filing papers, —; filing motion, .25; entering order .25; cost of printing record, $—; filing copies printed record, $2.25; transfer to calendar, $1.00; filing brief, $5.00; entering order for mandate, $1.00; taxing costs and copy, .45; issuing mandate, $5.00; attorney's docket fee, $20.00	.25 10.00 6.45 20.00
	$36.70

Test:

WM. PARKIN,
Clerk U. S. Circuit Court of Appeals, Second Circuit.

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit. No. 64. October Term, 1906. Old Dominion C. M. & S. Co. v. F. Lewisohn, et al. Mandate. U. S. Circuit Court, Southern District of New York. Filed Dec. 31, 1906. John A. Shields, Clerk.

311 *Notice Relating to Entry of Order of United States Circuit Court, Pursuant to Mandate of Circuit Court of Appeals.*

United States Circuit Court, Southern District of New York.

THE OLD DOMINION COPPER MINING & SMELTING COMPANY,
Complainant,
against
FREDERICK LEWISOHN et al., Defendants.

Please take Notice that the mandate of the United States Circuit Court of Appeals for the Second Circuit in the above entitled case having been issued, we shall before his Hon. —— ——, at the Court Rooms of this Court, in the Post Office Building, in the Borough of Manhattan, City of New York, on the 31st day of December, 1906, at the opening of Court on that day, or as soon thereafter as counsel can be heard, move that the annexed proposed order, a copy of which is herewith served upon you, be signed and entered.

Dated, December 28th, 1906.

HOADLEY, LAUTERBACH & JOHNSON,
Solicitors for Defendants.

To Messrs. Hughes, Rounds & Schurman, Brandeis, Dunbar & Nutter, Solicitors for Complainant.

Order of United States Circuit Court, Pursuant to Mandate of United States Circuit Court of Appeals.

At a Stated Term of the Circuit Court of the United States for the Southern District of New York, held in the United States
312 Court Rooms, in the Post Office Building, Borough of Manhattan, City of New York, on the — day of ——.

Present: Hon. —— ——, Circuit Judge.

In Equity.

THE OLD DOMINION COPPER MINING & SMELTING COMPANY,
Complainant,
against
FREDERICK LEWISOHN et al., Defendants.

This cause having been brought on upon the mandate herein sent down from the United States Circuit Court of Appeals for the Second Circuit, and now on file in this Court by which mandate it appears that an appeal was taken by complainant from the decree of this Court, entered herein on the 6th day of December, 1905, to the United States Circuit Court of Appeals for the Second Circuit, and that a decree has been entered by said United States Circuit Court of Appeals affirming the decree of this Court (with cost of appeal taxed at the sum of thirty-six and 70/100 dollars), said

mandate also directing that such further proceedings be had in said cause in accordance with the opinion of the United States Circuit Court of Appeals for the Second Circuit, as, according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Now, Therefore, in compliance with said mandate, it is, on motion of Hoadley, Lauterbach & Johnson, defendants' solicitors,

Ordered, Adjudged and Decreed that the judgment and decree of the United States Circuit Court of Appeals for the Second Circuit be, and the same is hereby made the judgment and decree of this Court, and that the bill of complaint herein be and is hereby dismissed; and it is

313 Further Ordered, Adjudged and Decreed that the said defendants do recover from the said complainant the further sum of Thirty-six dollars and seventy cents, the costs and disbursements of the defendants upon said appeal as taxed in said United States Circuit Court of Appeals for the Second Circuit, and that the said defendants have judgment and execution therefor.

E. HENRY LACOMBE,
U. S. Circuit Judge.

(Endorsed:) United States Circuit Court, Southern District of N. Y., The Old Dominion Copper Mining & Smelting Co., Complainant, vs. Frederick Lewisohn, et al., Defts. Notice & Order. Hoadley, Lauterbach & Johnson, Solrs. for defendants, 22 Williams Street, New York City. Copy received, Dec. 23, 1906, Hughes, Rounds & Schurman, U. S. Circuit Court, Southern District of New York, Filed Dec. 31, 1906, John A. Shields, Clerk.

Notice of Petition for Stay of Execution and Petition for Stay.

Circuit Court of the United States, Southern District of New York.

OLD DOMINION COPPER MINING & SMELTING COMPANY,
Complainant,
against
LEWISOHN et al., Defendants.

SIRS: Please take Notice that upon the annexed petition signed by Brandeis, Dunbar & Nutter, Solicitors for the complainant herein, the undersigned will move this Honorable Court on Friday,

314 the 4th day of January, 1907, at 10.30 o'clock in the forenoon or as soon thereafter as counsel can be heard, that execution in this cause be stayed for thirty days from date of such motion.

Yours, etc.,

HUGHES, ROUNDS & SCHURMAN,
Solicitors for Complainant.

Office and P. O. Address, 96 Broadway, Borough of Manhattan, New York City.

Dated, New York, December 31, 1906.

To Messrs. Hoadly, Lauterbach & Johnson, Solicitors for Defendants, 22 William Street, New York City.

Circuit Court of the United States, Southern District of New York.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
vs.
LEWISOHN et al.

Petition for Stay of Execution.

To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York respectfully represents the Old Dominion Copper Mining and Smelting Company:

1. On December 4, 1906, the Circuit Court of Appeals for the Second Circuit decided adversely to your petitioner on appeal taken in the above entitled cause from the decision of this Honor-
315 able Court, dismissing the bill of complaint in said cause, and on December 17th, 1906, a final order was made in said Circuit Court of Appeals sustaining the decision of this Honorable Court, and on December 26th, 1906, a mandate was issued by said Circuit Court of Appeals directing that the decree of this Honorable Court be affirmed and the bill be dismissed with costs.

2. Your petitioner is desirous of applying to the Supreme Court of the United States for a writ of certiorari to review said decision of the Circuit Court of Appeals and is diligently engaged in preparing such petition and a brief in support thereof, and expects to file such petition within the next thirty days.

Wherefore, your petitioner prays that execution may be stayed in said cause for thirty days, in order to enable it to file and present said petition.

By Its Solicitors, BRANDEIS, DUNBAR & NUTTER.

(Endorsed:) Old Dominion Copper Mining & Smelting Company, vs. Lewisohn, et al. Petition for Stay of Execution with Notice of Motion. Copy received Dec. 31, 1906, Hoadley, Lauterbach & Johnson—Granted, Jan. 4, 1907, E. H. Lacombe, U. S. Circuit Court, Southern District of New York, Filed Jan. 4, 1907, John A. Shields, Clerk.

Order Staying Execution.

At a Stated Term of the Circuit Court of the United States Held in and for the Second Circuit, Southern District of New York, at the Post Office Building in the Borough of Manhattan, City of New York, on the 5th Day of January, 1907.

Present: Hon. E. Henry Lacombe, Justice.

316 Old Dominion Copper Mining & Smelting Company,
Complainant,
against
Frederick Lewisohn et al., Defendants.

A motion having been duly made in this action for a stay of execution under the judgment herein, pending the application to the Supreme Court of the United States by the Solicitors for the complainant for a writ of certiorari to review the decision of the Circuit Court of Appeals herein, sustaining the decision of this Honorable Court,

Now upon reading and filing the petition for stay of execution in the above entitled action of Brandeis, Dunbar & Nutter, solicitors for the complainant, in support of said motion, and the affidavit of Eugene Treadwell, verified the 3rd day of January, 1907, in opposition thereto, and after hearing Herbert K. Stockton, Esq., in support of said motion and Eugene Treadwell in opposition thereto, and due deliberation having been had, it is

Ordered that execution under the judgment in this cause be and the same hereby is stayed for thirty days.

E. H. LACOMBE,
U. S. Circuit Judge.

Approved as to form:
HOADLEY, LAUTERBACH & JOHNSON,
Sol'rs for Defendants.

317 Circuit Court of the United States, Southern District of New York.

Old Dominion Copper Mining and Smelting Company
vs.
Lewisohn et al.

Petition for Stay of Execution.

To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York respectfully represents the Old Dominion Copper Mining and Smelting Company.

1. On December 4, 1906, the Circuit Court of Appeals for the Second Circuit decided adversely to your petitioner on appeal taken in the above entitled cause from the decision of this Honorable Court,

dismissing the bill of complaint in said cause, and on December 17th, 1906, a final order was made in said Circuit Court of Appeals sustaining the decision of this Honorable Court, and on December 26th, 1906, a mandate was issued by said Circuit Court of Appeals directing that the decree of this Honorable Court be affirmed and the bill dismissed with costs.

2. Your petitioner is desirous of applying to the Supreme Court of the United States for a writ of certiorari to review said decision of the Circuit Court of Appeals and is diligently engaged in preparing such petition and a brief in support thereof, and expects to file such petition within the next thirty days.

Wherefore your petitioner prays that execution may be stayed in said cause for thirty days, in order to enable it to file and present said petition.

By Its Solicitors, BRANDEIS, DUNBAR & NUTTER.

318 *Affidavit of Eugene Treadwell on Petition to Stay Execution.*

Circuit Court of the United States, Southern District of New York.

OLD DOMINION COPPER MINING & SMELTING COMPANY,
Complainant,
against
FREDERICK LEWISOHN et al., Defendants.

UNITED STATES OF AMERICA,
State and County of New York, ss:

Eugene Treadwell, being duly sworn, says:

That he has had charge of the above entitled cause on behalf of defendants and is thoroughly familiar with the same.

That there is and has been pending in the Supreme Court of the State of Massachusetts two suits in Equity, wherein the above named complainant is complainant and Albert S. Bigelow is defendant. That the claim of the complainant therein has been secured by attachment.

Deponent further says that the cause involved in said suits against the said Bigelow is the same as involved in the present action. That, therefore, the complainant, even if unsuccessful in the present action in this Court, will have full and ample remedy in the said actions in the Massachusetts Court if successful therein.

That this Court should not delay its stay of execution herein to afford the complainant an opportunity to apply to the Supreme Court for writ of certiorari to review the decision of this court, except upon condition that the complainant shall stipulate that in event of the granting of said writ of certiorari and subsequent affirmance
319 by the Supreme Court of the United States of the judgment herein, the complainant shall forthwith discontinue the said suits in equity above mentioned against the said Bigelow now pending in the State Court of Massachusetts, as aforesaid.

EUGENE TREADWELL.

Sworn to before me this 3d day of January, 1907.
[SEAL.] GEO. T. VAN VALKENBURGH,
Notary Public, N. Y. Co.

(Endorsed:) United States Circuit Court, Southern District of New York. Old Dominion Copper Mining and Smelting Company against Frederick Lewisohn, et al. Order staying Execution. Hughes, Rounds & Schurman, Solicitors for Complainant, 96 Broadway, Borough of Manhattan, New York City. U. S. Circuit Court, Southern District of New York, Filed Jan. 5, 1907, John A. Shields, Clerk.

Notice Relating to Entry of Order of United States Circuit Court.

United States Circuit Court, Southern District of New York.

Action No. 2.

In Equity. No. 8333.

OLD DOMINION COPPER MINING & SMELTING COMPANY, Plaintiff,
against
FREDERICK LEWISOHN, WALTER LEWISOHN, ALBERT LEWISOHN, and Philip S. Henry, Executors of Leonard Lewisohn, Deceased, Defendants.

SIRS: Please take Notice, that an order of which the annexed is a copy will be presented for signature and entry to
320 one of the Justices of the Circuit Court of the United States for the Southern District of New York, at the Court Rooms thereof, held in the Post Office Building, Borough of Manhattan, City of New York, on the 8th day of July 1908, at 11 o'clock in the forenoon or as soon thereafter as counsel can be heard.

Dated, New York, July 6th, 1908.

Yours, etc.,

HOADLEY, LAUTERBACH & JOHNSON,
Attorneys for Defendant-.

Office and Post Office address, No. 22 William Street, Borough of Manhattan, City of New York.

To Messrs. Brandeis, Dunbar & Nutter, and Messrs. Carter, Hughes & Dwight, Attorneys for Plaintiff, 96 Broadway, N. Y. City.

Order of United States Circuit Court Directing that the Mandate of the Supreme Court of the United States be Filed and Judgment Entered Accordingly.

United States Circuit Court, Southern District of New York

OLD DOMINION COPPER MINING & SMELTING COMPANY, Plaintiff,
against
FREDERICK LEWISOHN, WALTER LEWISOHN, ALBERT LEWISOHN, and Philip S. Henry, Executors of Leonard Lewisohn, Deceased, Defendants.

321 The above named plaintiff having appealed to the Supreme Court of the United States from the Decree of the United States Circuit Court of Appeals for the Second Circuit entered in said cause on the 17th day of December, 1906, affirming the Decree of the Circuit Court of the United States for the Southern District of New York, entered in the above entitled cause, and said appeal having been duly argued, and the said Supreme Court of the United States having, as appeared by its mandate, duly affirmed the said decree with costs taxed by it at twenty dollars ($20.), and due notice of the application for this order having been given:

Now, on motion of Hoadley, Lauterbach & Johnson, the attorneys for the defendant, it is

Ordered that the mandate issued by the Supreme Court of the United States herein be filed, and the Decision and Judgment of the said Supreme Court of the United States be, and the same hereby is, made the Decision and Judgment of this Court, and that said Decree of the United States Circuit Court of Appeals for the Second Circuit in the above entitled cause, entered on the 17th day of December, 1906, affirming the decree of the Circuit Court of the United States for the Southern District of New York, be, and the same hereby is, affirmed, and that the defendants recover of the plaintiff the sum of twenty dollars ($20.) their costs on said appeal, as appeared by said mandate, and that said defendants have execution therefor.

Let judgment be entered accordingly.

Dated, New York, July 11, 1908.

E. H. LACOMBE,
U. S. C. J.

322 (Endorsed:) United States Circuit Court, Southern District of New York. Old Dominion Copper Mining & Smelting Co., Plff. vs. Frederick Lewisohn, et al., Executors of Leonard Lewisohn, deceased, defts. Order and notice of settlement. Hoadley, Lauterbach & Johnson, Attorneys for ——, 22 William-Street, New York City. United States Circuit Court, Southern District N. Y. Filed July 11th, 1908, John A. Shields, Clerk. Service of a copy of within is hereby admitted, dated July 6, 1908, Carter, Hughes & Dwight. W. L.

Docket Entries in United States Circuit Court,

E. 8333.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
v.
FREDERICK LEWISOHN, WALTER LEWISOHN, ALBERT LEWISOHN and PHILIP S. HENRY.

Brandeis, Dunbar & Nutter,
220 Devonshire Street, Boston,
Carter, Hughes & Dwight.

1903.
Jan'y 6. Filed bill and præcipe issued subpœna.
6. " subpœna personally served all defts.
23. " Amendment to Bill of Complaint.
Feb. 2. " & Entered Appearance defts. by Hoadley, Lauterbach & Johnson, Solrs.
M'ch 2. " Stipulation & rule extending time to answer to Mch. 6. 1903.
6. " Demurrer to a part of the Bill.
6. " Demurrer to the whole Bill.
323
1905
Jan'y 14. Filed Stipulation and order placing Demurrer on Calendar commencing Feb. 20, 1905.
Feb. 18. " Stipulation as to deps. etc.
18. " Stipulation as to deps. etc.
18. " Stipulation as to cross exm. of Athmiller, etc.
24. " Opinion (Lacombe, J.) Bill dismissed, etc.
M'ch 24. " Order sustaining demurrer, etc.
Ap'l 20. " Amended bill of complaint.
May 11. " Demurrer to a part of the Bill.
11. " Demurrer to the whole Bill.
Nov. 11. " Opinion (Holt, J). Demurrer sustained.
18. " Order sustaining demurrer, etc.
Dec. 6. " Judgment (7318).
1906.
Dec. 31. " Mandate U. S. C. C. A. Affirmance & Order of Mandate (7614).
1907.
Jan'y 5. " Order staying Execution.
4. " Petition to stay Execution (Endorsed Lacombe, J. Jany. 4. 1907 Granted).
1908.
July 23. " Judgment (8144).

[SEAL.]

JOHN A. SHIELDS, *Clerk.*

Order Extending Time of Appellant to File Transcript of Record on Appeal.

At a stated term of the Circuit Court of the United States of America, for the Southern District of New York, in the
324 Second Circuit, held at the United States Court Rooms, in the Borough of Manhattan in the City of New York on Wednesday the 31st day of January in the year of our Lord one thousand nine hundred and six.

Present: The Honorable E. Henry Lacombe, Circuit Judge.

OLD DOMINION COPPER CO.
vs.
LEWISOHN et al.

Ordered that the time of the appellant in the above entitled cause in which to file the transcript of record on appeal be and the same is hereby extended to and including the 28th day of February, 1906.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) E. & A. C., 2377. Old Dominion Copper Mining & Smelting Co. vs. Frederick Lewisohn et al. Extension. United States Circuit Court of Appeals Second Circuit. Filed Feb. 19, 1906. William Parkin, Clerk.

Appearance for Appellees in United States Circuit Court of Appeals.

United States Circuit Court of Appeals for the Second Circuit, October Term.

No. 190.

325 OLD DOMINION COPPER MINING AND SMELTING COMPANY,
vs.
FREDERICK LEWISOHN et al., Appellees.

The Clerk will enter my appearance as Counsel for the Appellees.

EUGENE TREADWELL.

N. B. This must be signed by a member of the Bar of this Court. Individual, and not firm names, must be signed.

(Endorsed:) United States Circuit Court of Appeals, Second Circuit. No. — October Term 190–. Old Dominion Co. vs. Lewisohn. Appearance ——. Council for ——. United States Circuit Court of Appeals Second Circuit. Filed Oct. 25, 1906. William Parkin, Clerk.

Stipulation and Order for Substituting Briefs.

United States Circuit Court of Appeals, Second Circuit.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
vs.
FREDERICK LEWISOHN et al.

Stipulation.

It is hereby stipulated and agreed in the above entitled cause that ten corrected copies of brief filed by the appellant with the Clerk of the Court on October 20th, 1906 may be substituted for ten copies of brief filed on October 10th, 1906.

326 BRANDEIS, DUNBAR & NUTTER,
Counsel for Appellant.
HOADLEY, LAUTERBACH & JOHNSON,
Counsel for Appellees.

So ordered,
W. K. TOWNSEND,
U. S. C. J.

(Endorsed:) Old Dominion Co. vs. Lewisohn. Order substituting briefs. United States Circuit Court of Appeals Second Circuit. Filed Oct. 25, 1906. William Parkin, Clerk.

Motion for Stay of Mandate of the United States Circuit Court of Appeals and Denial of Motion.

United States Circuit Court of Appeals, Second Circuit.

OLD DOMINION COPPER MINING AND SMELTING COMPANY,
Appellant,
vs.
FREDERICK LEWISOHN et al., Appellees.

Motion for Stay of Mandate.

Now comes the appellant in the above entitled cause and respectfully represents that on December 4th, 1906 this Honorable Court handed down a decision, affirming the decree of the Circuit Court in the above entitled cause; that the appellant desires to petition the Supreme Court of the United States for a writ of certiorari to review the decision of this Honorable Court and is diligently engaged
327 in preparing such petition and a brief in support thereof.

Wherefore the appellant prays that the issue of a mandate pursuant to the opinion of this Honorable Court and the final decree to be entered in accordance therewith be stayed for a reasonable time to enable the appellant to prepare and file such petition.

By its Attorneys, BRANDEIS, DUNBAR & NUTTER.

(Endorsed:) Old Dominion Copper Mining and Smelting Company Appellant vs. Frederick Lewisohn et al., Appellees. Motion for stay of mandate. United States Circuit Court of Appeals. Second Circuit. Filed Dec. 12, 1906. William Parkin, Clerk.

(Extract from the Minutes.)

MONDAY, *Dec.* 7, 1906.

Before Wallace, Lacombe and Townsend, JJ.

W. & T.

Motions:—

OLD DOMINION COPPER CO.
vs.
LEWISOHN.

Motion to stay mandate. Denied.

Decree of the United States Circuit Court of Appeals and Order for Mandate.

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 14th Day of December, One Thousand Nine Hundred and Six.

328 Present: Hon. William J. Wallace, Hon. William K. Townsend, Hon. Alfred C. Coxe, Circuit Judges.

OLD DOMINION COPPER MINING AND SMELTING COMPANY,
Complainant-Appellant,
vs.
FREDERICK LEWISOHN et al., Defendants-Appellees.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged and decreed that the decree of said Circuit Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

W. J. W.
W. K. T.

(Endorsed:) United States Circuit Court of Appeals Second Circuit. Old Dominion Copper Co. vs. F. Lewisohn. Order for Mandate. United States Circuit Court of Appeals. Second Circuit. Filed Dec. 17, 1906. William Parkin, Clerk.

329 *Bill of Costs.*

United States Circuit Court of Appeals, Second Circuit.

Bill of Costs Taxed in Favor of Appellee, in No. 64. October Term, 1906.

OLD DOMINION CO. v. LEWISOHN.

1906. October Term.			
Docketing Cause and Filing Record.....	$5.00		
Entering Appearance	.25	.25	
Filing Papers			
Filing Motion	.25		
Entering Order	.25		
Cost of Printing Record			
Filing Copies of Printed Record	2.25		
Transfer to Calendar	1.00		
Filing Brief (2)		5.00	10.00
Entering Order for Mandate	1.00	1.00	
Taxing Costs and Copy	.45	.45	
Issuing Mandate	5.00	5.00	
Attorney's Docket Fee	20.00	20.00	$36.70
Taxed at the Sum of		$36.70	

WM. PARKIN, *Clerk.*

(Endorsed:) United States Circuit Court of Appeals. Second Circuit. Old Dominion Co. vs. Lewisohn. Bill of Costs. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 17, 1906. William Parkin, Clerk.

330 *Stipulation Relating to Transcript of Record Filed in the Supreme Court of the United States.*

United States Circuit Court of Appeals for the Second Circuit.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
vs.
FREDERICK LEWISOHN et al.

It is hereby stipulated that the transcript already filed in the Clerk's office of the Supreme Court of the United States with the

petition for the writ of certiorari be taken as a return to said writ dated the twenty seventh day of February A. D. 1907.

EUGENE TREADWELL,
HOADLEY, LAUTERBACH & JOHNSON,
Solicitors for Respondent;
LOUIS D. BRANDEIS,
WILLIAM H. DUNBAR,
BRANDEIS, DUNBAR & NUTTER,
Solicitors for Appellants.

(Endorsed:) Old Dominion Copper Mining and Smelting Company v. Frederick Lewisohn. Stipulation. Brandeis, Dunbar & Nutter, counsellors at law, 161 Devonshire St., Boston. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 4, 1907. William Parkin, Clerk.

Decree of the Supreme Court of the United States and Order Remanding to the Circuit Court of the United States for the
331 *Southern District of New York.*

Supreme Court of the United States.

No. 203. October Term, 1907.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY, Petitioner,
vs.
FREDERICK LEWISOHN et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

This cause came on to be heard on the transcript of the record from the United States Circuit Court of Appeals for the Second Circuit and was argued by counsel.

On consideration whereof it is now here ordered, adjudged and decreed by this Court that the decree of the said United States Circuit Court of Appeals in this cause, be and the same is hereby affirmed with costs; and that this cause be and the same is hereby remanded to the Circuit Court of the United States for the Southern District of New York.

May 18, 1908.

[SEAL.]
A true copy.
Test:
JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

(Endorsed:) File No. 20,538. Supreme Court of the United States No. 206, October Term 1907. Decree. Filed May 18, 1908. United States Circuit Court of Appeals, Second Circuit. Filed
332 Jul. 2, 1908. William Parkin, Clerk.

Docket Entries for Circuit Court of Appeals.

(Docket Entries.)

Circuit, So., N. Y.

No. 2631.

OLD DOMINION COPPER MINING & SMELTING COMPANY, Complainant-Appellant,
vs.
FREDERICK LEWISOHN et al., Defendants-Appellees.

Hughes, Rounds & Schurman.
Hoadley, Lauterbach & Johnson.

1906.
Feb. 19. Filed transcript of record.
" 19. " order extending time.
Ap'l 13. " 9 copies record.
Oct. 10. Filed brief, appellant.
" 25. " appearance appellee by E. Treadwell.
" 25. " order substituting new brief.
Nov. 5. " brief, appellee.
" 19. " " appellant, reply.
" 19. " " appellee, do.
Dec. 4. Decree affirmed, Coxe, C. J.
" 12. Filed not to motion to stay mandate.
" 17. Motion denied.
" 17. Filed order for mandate.
" 17. " Bill of costs.
" 20. Certified copy of record to B. D. & N.
" 26. Issued mandate.

333

1907.
M'ch 4. Certified return to certiorari on stipulation.
1908.
July 2. Filed copy decree of Supreme Court.

And on the said sixteenth day of September, the matter of the allowances of the motion to file the supplemental answer was reported for the consideration and determination of the Full Court, said report being in the words following, to wit:

Reservation.

After rescripts from the full court, the defendant asked leave to file supplemental answers and having fully heard the parties, it seemed to me just upon the allegations of the answers and statements of counsel in support of them that the amendment should be allowed and I entered an order accordingly. The plaintiff, instead

of taking an appeal, then requested me to report my action to the full court. In accordance with this request I now do so. If my action is reviewable, then if the allowance of the amendment was wrong the order is to be reversed, otherwise it is to stand.

September 16, 1908.

HENRY K. BRALEY,
Justice Supreme Judicial Court.

And on the twenty-second day of said September the defendant filed his claim of appeal from the order dated August 14, 1908, said claim of appeal being in the words following, to wit:

334 *Defendant's Claim of Appeal.*

And now comes the defendant, Albert S. Bigelow, and appeals to the Full Court from—

(1) The order denying the application of the defendant to modify the decree of August 14, 1908, and the injunction issued thereon.

(2) The order denying the application of the defendant to vacate the decree of August 14, 1908, and to dissolve the injunction issued thereon.

(3) The order denying the application of the defendant to modify the decree of August 14, 1908, and the injunction issued thereon by reason of indefiniteness.

By His Solicitors, ALFRED HEMENWAY.
J. W. FARLEY.

And on the ninth day of October, A. D. 1908, the said case was reserved for the consideration and determination of the Full Court, said reservation being in the words following, to wit:

Reservation.

This case came on to be heard upon the evidence relating to the matters set forth in the supplemental answer filed by the defendant September 4th, 1908, and evidence introduced on behalf of the defendant and on behalf of the plaintiff, as more fully appears in the commissioner's report thereof, and after the hearing of said evidence, a decree in the form of the original decree in said case was ordered, but the question of whether or not said order
335 should be modified or reversed by reason of said supplemental answer and the evidence in support thereof is reserved for the consideration of the full court; and this case including the entire record and the commissioner's reports of the evidence is now reserved for the consideration of the full court as if upon the original appeals from the final decree of December 10, 1907, and for such further modification, if any, as should be made therein by reason of the evidence bearing upon said supplemental answer, and also upon the reservation concerning the order permitting the filing of said supplemental answer, and also upon the appeal of the defendant from the decree entered August 14, 1908, granting an injunction; and also upon the appeals of the defendant from the

orders entered August 28th, 1908, refusing to modify or vacate said decree of August 14th, 1908; and for such final decree and order upon this reservation as justice and equity require. The foregoing is made as a reservation and not as a decree.

October 9, 1908.

JOHN W. HAMMOND,
Justice Supreme Judicial Court.

And thereafterwards on the fifteenth day of September, A. D. 1909, it was ordered by the Supreme Judicial Court for the Commonwealth, by its Rescript, that the Clerk of this Court for the County of Suffolk make the following entry under this case in the docket of the Court, viz:

"The decree is to be so modified as to include the costs of appeal, with interest from Sept. 8, 1895, to this date, on the principal sum, and as so modified is affirmed."

336 And on the twenty-sixth day of October, A. D. 1909, the following Final Decree was entered by the Court, to wit:

Final Decree.

This cause came on to be heard this twenty-sixth day of October, 1909, at this sitting, pursuant to the rescript therein, and was argued by counsel and considered by the Court, and thereupon upon consideration thereof it is

Ordered, adjudged and decreed that the complainant, Old Dominion Copper Mining & Smelting Company, recover of the respondent, Albert S. Bigelow, the sum of four hundred and eighty thousand (480,000) dollars and interest thereon from September 18, 1895, amounting to four hundred and six thousand two hundred forty (406,240) dollars, being the total sum of eight hundred and eighty-six thousand two hundred and forty (886,240) dollars, and the costs taxed by the clerk at four thousand one hundred and thirteen one-hundredths (4,100.13) dollars, and that execution issue for said total sum and costs in common form in favor of said Old Dominion Copper Mining & Smelting Company against said Albert S. Bigelow.

By the Court:

WALTER F. FREDERICK, *Clerk.*

October 26, 1909.

337 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof, we have caused the seal of our said Court to be hereunto affixed.

Witness, Marcus Perrin Knowlton, Esquire, Chief Justice of our said Supreme Judicial Court, at Boston in said County of Suffolk, this fourth day of December in the year of our Lord one thousand nine hundred and nine.

[Nulli Vendemus Nulli Negabimus Justitiam.]

WALTER F. FREDERICK, *Clerk.*

1 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court, Suffolk County.

No. 8098. In Equity.

OLD DOMINION COPPER MINING & SMELTING COMPANY
v.
ALBERT S. BIGELOW.

No. 8099.

SAME
v.
SAME.

Sheldon, J.

Appearances:

L. D. Brandeis, Esq., E. F. McClennen, Esq., for Complainant.
Alfred Hemenway, Esq., Eugene Treadwell, Esq., J. Wells Farley, Esq., for Defendant.

Order Appointing Commissioner.

In the above-entitled cases, at the hearing of the same before Mr. Justice Sheldon, it is ordered, under the provisions of Chancery Rules No. XXXV, at the request of both parties, that George C. Burpee be, and he hereby is, appointed commissioner to take the evidence in said cases to be reported to the full court.

By the Court:

WALTER F. FREDERICK,
Assistant Clerk.

November 6, 1907.

2 BOSTON, *November* 6, 1907.

Evidence.

[George C. Burpee was appointed and sworn as stenographer.]

Deposition of Albert S. Bigelow.

MR. MCCLENNEN: I will offer the deposition of Albert S. Bigelow, beginning March 24, 1903.

[Reading the deposition down to the first objection.]

I will not read the objections except as you renew them, Mr. Hemenway.

MR. HEMENWAY: I will agree, in regard to that, that unless I make objection the testimony may be admitted de bene. That will save a great deal of time.

[Mr. McClennen continued to read the deposition of Mr. Bigelow and the exhibits accompanying it until 4 P. M., at which time the court adjourned until Thursday, November 7.]

THURSDAY, *November* 7, 1907.

Deposition of Albert S. Bigelow Resumed.

[Mr. McClennen continued to read the Bigelow deposition and exhibits down to and including Exhibit 10.]

SHELDON, J.: Do those names [on Exhibit 10] include the names of persons of which you have already read a list? I mean, subscribers to the stock of the company, not subscribers to the syndicate, who were warned that their subscriptions might be cut down.

Mr. MCCLENNEN: They include those names, and they also include the names of the syndicate members who wrote that they would take stock.

Mr. HEMENWAY: The subscription is over 72,000 shares.

Mr. MCCLENNEN: The total is 72,120 shares. Perhaps this is an appropriate time to say this; it takes a good deal of mathematics to work it out, but I believe it works out. In the case of the syndicate subscribers, with very few exceptions, I think it appears that the number of shares here put against their names is just half of what they ultimately received. That is, they were put down here by reason of the sums of money which they had put in at $25 per share. Then the other half they received without its being noted on this paper, as indicating their election to take stock instead of their money back. In the case of persons who were not members of the syndicate, the number of shares appearing here is generally the same as the amount of the checks that they paid into the treasury, as will appear later by the number of shares which they received.

Mr. HEMENWAY: This is simply the statement of counsel.

SHELDON, J.: Yes, I so understand it.

Mr. HEMENWAY: Of course it is not part of the record.

Mr. MCCLENNEN: I think it might be desirable to have that list.

[Mr. Treadwell produced the original of Exhibit 10, a copy of which is attached to the Bigelow deposition.]

Mr. MCCLENNEN [referring to original Exhibit 10]: That 5000 shares does read 500 on the original,—that Albert O. Smith, we spoke of.

This I may as well call to your Honor's attention now as at any time. You will recall that the Lewisohn interest was about 18,000 shares that was to be obtained. Lewisohn Brothers, 10,000; Leonard Lewisohn, 4000; Hyams, 4000. Then A. S. Bigelow, 4000; A. S. Bigelow, again, 4000; Nelson is 12; Coram is 16, Luce is 20. Those all appear on the Boston underwriting syndicate. And the proportion that would come to Boston for the twenty-three forty-seconds would be 22,000. Then follow along these names.

SHELDON, J.: This is set out in the evidence, so you do not care

names of the subscribers to the syndicate agreement and of new subscribers to the stock?

Mr. McCLENNEN: Both.

Mr. BRANDEIS: Your Honor will note at the bottom the amount in all underwritten.

SHELDON, J.: The amounts specified in the names of certain subscribers are the amounts that they took in stock instead of taking back their cash. They did not include the amount of stock they were going to take anyway.

Mr. McCLENNEN: Not in that case. In some instances those same persons subscribed to the syndicate and also took some of the other stock; then the amount is set opposite their names.

Mr. HEMENWAY: This is what we call a memorandum, not a subscription list.

SHELDON, J.: This is set out in the evidence, so you do not care to have the stenographer mark it?

Mr. McCLENNEN: Yes. I assume your Honor understands that any of these originals are before your Honor, should your
4 Honor care to look at them. They have all been copied for convenience.

[Mr. McClennen continued to read the deposition of Mr. Bigelow, down to Exhibits 14 and 15.]

Mr. HEMENWAY: If your Honor please, in regard to that report [Exhibit 14] it is a report in some month for the year 1901. I specifically objected to the admission of the report. I also object to what was done at the mine later.

SHELDON, J.: It may be taken de bene, and the stenographer will minute that it is taken de bene.

[Mr. McClennen continues to read from the report Exhibit 14.]

Mr. HEMENWAY: No part of that stock [referred to in Exhibit 14] has ever been issued,—of that 50,000 shares.

Mr. BRANDEIS: No part of that had been issued up to last May.

Mr. HEMENWAY: We had nothing to do with that, so that that has nothing to do with this case,—the issuing of new stock.

Mr. BRANDEIS: The issuing of new stock raises no question. As a matter of fact, a certificate of stock was issued which stood in the name of Nelson as treasurer, but it was never issued to the public.

Mr. McCLENNEN: I do not at the moment recall anything in this second report that is of any significance, so, unless Mr. Hemenway wants me to read some part of it, I will pass that by.

Mr. HEMENWAY: It is just as important, and a little more important, than the one already read.

Mr. McCLENNEN: Then I will read it.

[Mr. McClennen read Exhibit 15 down to the statement of assets and liabilities, when the court took a recess; upon the return of the court at 2 P. M., Mr. McClennen read the schedule of assets and liabilities.]

SHELDON, J.: Do you care for the superintendent's report, Mr. Hemenway?

Mr. HEMENWAY: I do not think it is necessary.

SHELDON, J.: Unless you care for it——

Mr. HEMENWAY: Of course I have objected to both of those reports.

SHELDON, J.: Oh, yes; it is taken de bene.

5 [Mr. McClennen continued the reading of the deposition of Mr. Bigelow, summarizing Exhibits 16 and 17, showing receipts and expenditures.]

SHELDON, J.: Am I in error that the summing up of this part of it in testimony is that, disregarding for the moment the division between Bigelow and Lewisohn, and disregarding the question of whether 20,000 shares or $500,000 went to the new subscribers from Bigelow and Lewisohn, or whether it went to them from the company, the effect of the thing was that Bigelow and Lewisohn got in stock at par $3,000,000 for the $1,000,000 which they put in, and disregarding the underwriting syndicate and the members' subscription syndicate, they received $2,000,000?

Mr. McCLENNEN: They got $3,250,000.

SHELDON, J.: Oh, I should have said $3,000,000. Then it was $3,750,000; so that, to go a little further, they got $3,250,000, disregarding the underwriting they gave to the members of the syndicate, two for one?

Mr. McCLENNEN: Yes.

SHELDON, J.: They themselves paid all the expenses, however,—all the incidental expenses.

Mr. McCLENNEN: I should say that with this qualification, that there was an accounting, as will appear later, between the corporation and the syndicate on the matter of expense, incidental expenses, which would leave out any question whether they did pay all of the incidental expenses.

SHELDON, J.: I put the question so that I may be sure I understand the evidence as it goes in.

Mr. McCLENNEN: Well, that is undoubtedly an accurate statement that leaves the subdivision in this wise with 20,000 producing cash.

SHELDON, J.: I am not concerning myself with any disputed questions.

[Mr. McClennen continued the reading of the Bigelow deposition, with exhibits, up to page 206, when the court adjourned till Friday, November 8.]

FRIDAY, *November* 8, 1907.

Deposition of Albert S. Bigelow, Resumed.

[Mr. McClennen resumed the reading of the deposition of A. S. Bigelow, at page 206, and continued.]

SHELDON, J.: Is there to be any change in the testimony of Mr. Bigelow or in the exhibits that these Keyser claims were held half for the benefit of the Baltimore Company and half for the Simpson estate.

6 Mr. McCLENNEN: I had not supposed there would be until I saw in the freshly prepared answer that the claim is still maintained that they were not.

[Mr. McClennen continued reading the Bigelow deposition and exhibits, and finished at 10.30 A. M.]

Deposition of Godfrey M. Hyams.

Mr. McCLENNEN: I will offer the deposition of Godfrey M. Hyams that was taken March 27, 1903, begun that day, that is, after the first day of Mr. Bigelow's testimony.

[Mr. McClennen read the deposition of Hyams, with exhibits, down to certificate 73.]

SHELDON, J.: That is certificate 73?

Mr. McCLENNEN: Certificate 73. Those come out of Nelson. Now in that list the name, I think, of no underwriter appears, or any name of Lewisohn or Bigelow. In that list there are three entries of this kind: "Bartholomew, S. B., 100."

Mr. HEMENWAY: I think you had better read the names that are there without drawing your inferences at the present time.

SHELDON, J.: I do not think it is worth while to read all the names. I do not think there was any inference; he was reading one of the entries.

Mr. HEMENWAY: It was before that,—as to whom these people were. I do not agree to that; it is not true.

SHELDON, J.: Well, that is Mr. McClennen's statement, and it is not agreed to. But it is not worth while to read all the names.

Mr. HEMENWAY: Oh, I don't care about that, only I do not want conclusions made.

SHELDON, J.: That is a question that may have some bearing, and may have some importance.

Mr. McCLENNEN: The only way in which I can bring to your Honor's attention, in connection with putting in the evidence, that those names do not appear is to read the list.

SHELDON, J.: You say your claim is that those men——

Mr. McCLENNEN: Are not signers of the underwriters' agreement.

7 SHELDON, J.: There are some of the syndicate?

Mr. McCLENNEN: Mr. Hemenway claims that they did include some of the syndicate.

SHELDON, J.: Whichever one of you is correct, it would include the names of some of the syndicate, of course, because some of the members of the syndicate subscribed for a part of the 20,000 shares.

Mr. HEMENWAY: That is just what they did not do. They did not subscribe for any of the 20,000. They simply said they would take.

SHELDON, J.: Well, there is at present some evidence that they did; whether they took them from the company or from Bigelow and Lewisohn is another and very different question.

Mr. HEMENWAY: Well, there is no evidence that the subscription was offered as to the 20,000 certificate or the 100,000 certificate or the 30,000 certificate; that is, without subscription to any other papers. There was no subscription to any part of the 20,000.

SHELDON, J.: Well, there was subscription for a larger amount

than they could get unless it was taken out of the shares represented by the 20,000 share certificate?

Mr. HEMENWAY: No, your Honor.

SHELDON, J.: Well, at any rate, if I am in error, it is not worth while to spend time on it.

Mr. HEMENWAY: I do not think it is, but it is one of the things on which I wish your Honor to keep your Honor's mind open.

SHELDON, J.: I intend to do so. I realize it is a question of some importance.

Mr. MCCLENNEN: If Hemenway does not object to my drawing the inference, I should say that I think your Honor has correctly stated the evidence thus far.

SHELDON, J.: Well, you need not bother about that.

[Mr McClennen continued and finised reading the deposition of Mr. Hyams and the exhibits accompanying it.]

Deposition of J. Morris Meredith.

Mr. MCCLENNEN: I offer the deposition of J. Morris Meredith, taken May 22, 1906.

[Reading the Meredith deposition, without interruption, and finishing at 2.45 P. M.]

8 *Deposition of Walter Lewisohn.*

Mr. MCCLENNEN: I will offer the deposition of Walter Lewisohn, taken February 4, 1903. This is the first of all the depositions.

[Mr. McClennen read the deposition of Walter Lewisohn so far as it was taken on February 4, 1903.

[Then a letter dated February 4, 1903, Brandeis to Lauterbach.

[Then the deposition of Walter Lewisohn, so far as it was taken on February 10, 1903.]

Deposition of Adolph Lewisohn.

Mr. MCCLENNEN: I will read the deposition of Adolph Lewisohn.

[Mr. McClennen read the deposition of Adolph Lewisohn; also the original offer of the Baltimore Company to the meeting of July 11, 1895.]

Deposition of John Stanton.

Mr. MCCLENNEN: I will offer the deposition of John Stanton. This was taken on written interrogatories [reading the deposition.]

Deposition of Joseph A. Coram.

Mr. MCCLENNEN: I will offer the deposition of Joseph A. Coram, taken on June 15, 1904 [reading the deposition.]

[Adjourned to Monday, November 11, 1907.]

Deposition of Frederick Lewisohn.

Mr. McCLENNEN: I am going to read the deposition of Frederick Lewisohn, taken February 11, 1903.

[Mr. McClennen read the deposition of Frederick Lewisohn.]

Deposition of Albert Lewisohn.

Mr. McCLENNEN: The next one here is the deposition of Albert Lewisohn. For physical reasons merely I will not read it, because I do not see that it adds anything. Unless Mr. Hemenway desires to have me read it—I will read it, if he desires.

Mr. HEMENWAY: I think Albert Lewisohn's deposition explains about this examination. If they claim there was not any such search, it should be read.

Mr. McCLENNEN: Well, we do make the claim.

[Reads deposition of Albert Lewisohn, taken February 11, 1903.]

Deposition of Ferdinand Roghauser.

Mr. McCLENNEN: I will now read the deposition of Ferdinand Roghauser, the taking of which was commenced on February 10, 1903 [reading].

That, I believe, concludes the testimony taken up to February 24.

It is noted at the end of the Albert Lewisohn deposition that the exhibits marked for identification run from 1 to 161.

Now on February 24 Mr. Lauterbach produced another batch of letters, which were marked for identification 162 to 230, both inclusive.

[Mr. McClennen then read the further deposition of Ferdinand Roghauser, taken on February 24, 1903, up to the point where the further taking of it was suspended.]

Deposition of Edward C. Westerveldt.

Mr. McCLENNEN: I will now read the deposition of Edward C. Westerveldt, taken February 24, 1903.

[Reading the deposition of Westerveldt up to the time the taking of it was suspended.]

Deposition of Jesse Lewisohn.

Mr. McCLENNEN: On the same day the deposition of Jesse Lewisohn was taken [reading the deposition].

It is noted that the last exhibit identified is No. 233.

I will now read the further deposition of Jesse Lewisohn, taken on February 25, 1903.

[Mr. McClennen proceeded to read the deposition of Jesse
10 Lewisohn, taken on February 25, 1903, and commenced to read Exhibit 231, which accompanies the deposition.]

Mr. HEMENWAY: This goes in de bene.

SHELDON, J.: Does that appear upon the face of the record?

Mr. BRANDEIS: They were introduced as evidence.

SHELDON, J.: Mr. Hemenway says they go in de bene. I asked if they did go in de bene.

Mr. HEMENWAY: I made my objection at the time.

SHELDON, J.: This is Exhibit 231?

Mr. MCCLENNEN: Exhibits 231, 232, and 233 [exhibiting and explaining to the court the exhibits, counsel being present at the bench].

[Mr. McClennen then finished reading the deposition of Jesse Lewisohn as taken on February 25, 1903, until it was suspended.]

Deposition of Edward C. Westervelt Resumed.

[Mr. McClennen read the deposition of Edward C. Westervelt, resumed on March 3, 1903, until the examination was suspended.]

Deposition of Ferdinand Royhauser Resumed.

[Mr. McClennen read the deposition of Ferdinand Royhauser, resumed, to the close of the deposition.]

Deposition of W. A. S. Chrimes.

Mr. MCCLENNEN: I will offer the deposition of W. A. S. Chrimes, commenced July 19, 1905, and resumed on October 27, 1905.

[Mr. McClennen read the deposition of Chrimes, also Altmiller Exhibit 6.]

Deposition of Samuel N. Brown.

Mr. MCCLENNEN: I will offer the deposition of Samuel N. Brown, taken July 19, 1905 [reading the deposition].

Mr. MCCLENNEN: I would like to put in a bit or oral testimony.

11 *Oral Testimony.*

CHARLES H. ALTMILLER sworn.

(By Mr. MCCLENNEN:)

Q. Your name is Charles H. Altmiller?

A. Yes.

Q. You are treasurer of the Old Dominion Copper Mining & Smelting Company?

A. Yes, sir.

Q. And became such in April, 1902?
A. Yes, sir.
Q. Prior to that time do you recollect the fact of a vote increasing the capital stock by 50,000 shares?
A. I do.
Q. It is a fact that up to the time of your becoming treasurer that stock had never been actually issued?
A. Yes, sir.
Q. In what way was that stock treated on the books of the company?

Mr. HEMENWAY: One moment. The books will show.

Q. Is this certificate which I show you the certificate representing that stock?
A. Yes.

Mr. HEMENWAY: I pray your Honor's judgment. I object to the testimony.
SHELDON, J.: Well, it may be taken de bene.
A. *Yes.*
Mr. McCLENNEN: That certificate I will offer [exhibiting the certificate to Mr. Hemenway].
Mr. HEMENWAY: I think the better way would be to put the vote in evidence, first, in regard to the increase of the capital stock.
Mr. McCLENNEN: That will appear soon in the typewritten testimony.
This certificate which is offered is No. 5070, for 50,000 shares.

"Registered. Atlas National Bank. J. L. Foster, Cashier

This certifies that William J. Ladd, Treasurer of the Old Dominion Copper Mining and Smelting Company is entitled to 50,000 shares of the capital stock of the Old Dominion Copper Mining and Smelting Co. transferable only on the books of said company by the holders hereof in person or by attorney on surrender of this certificate.
Boston, Mass., September 1, 1899.

C. H. BISSELL,
Assistant President.
P. K. DUMARESQ,
Assistant Treasurer."

The certificate recites that the capital stock is $3,750,000, in shares of $25 each, and bears the stamp upon it "Capital stock increased June 15, 1899, to 200,000 shares by $1,000,000."
12 SHELDON, J.: You do not claim that this stock was issued irregularly?
Mr. McCLENNEN: No, there is no such claim. Our only interest in this is that it is a further demonstration of what appears elsewhere in the testimony, that it was the practice of this company to carry unissued stock in the form of a certificate in the name of the treasurer.

Mr. TREADWELL: That is what I want to call your Honor's attention to. The purpose of this, it is stated now, is to show——

SHELDON, J.: I do not think it is worth while to spend time on it now. It is only admitted de bene. The objection that is made will have to be carefully considered before the evidence is received, if I were to receive it for any purpose. But it is taken only de bene. If the case should go to the full court, it may be considered or not as they deem proper.

Mr. TREADWELL: I was not making objection; I was only saying that so much evidence comes in here in this way that we may or we may not be called upon to take up your Honor's time with when we feel it is clearly irrelevant so far as the issues of this case are concerned, and I should want to have an idea how much it is proposed to receive in order that we, on our part, may know how much of the time of the court we are to take up in considering it.

[The certificate was received in evidence de bene, and marked "Exhibit 500, Nov. 14, 1907, G. C. B."]

Mr. HEMENWAY: If your Honor please, there are some questions I shall want to ask in cross-examination, but there are so many things in evidence that cross-examination will be clearer after your Honor has heard it that I should like to reserve my right then to cross-examine.

Mr. BRANDEIS: If you will let us know when you want him, we will endeavor to have Mr. Altmiller here.

Mr. HEMENWAY: Of course I have already notified Mr. Altmiller and Mr. Smith I should want all of these papers.

Mr. MCCLENNEN: I think everything is in these bundles.

Mr. BRANDEIS: Do you want the books, Mr. Hemenway?

Mr. HEMENWAY: No, I do not want the books this afternoon. Mr. Chrimes also may go. I think I may say that this testimony was taken in all four cases generally, but we have the right to put in oral testimony also; it saves a great deal of time. Of course, much of this is in reply.

13 *Deposition of Charles H. Altmiller.*

Mr. MCCLENNEN: Next is the deposition of Charles H. Altmiller, the taking of which began October 11, 1904.

[Mr. McClennen read from the Altmiller deposition and accompanying exhibits until the hour of adjournment.]

[Adjourned to Tuesday, November 12, 1907.]

TUESDAY, *November* 12, 1907.

Deposition of Charles H. Altmiller Resumed.

Mr. MCCLENNEN: I had just concluded the reading of the record of the meeting of July 9, which terminated a general adjournment.

SHELDON, J.: You are still on the deposition of Mr. Altmiller?

Mr. MCCLENNEN: I am still on the deposition of Mr. Altmiller.

[Mr. McClennen continued to read the Altmiller deposition and the accompanying exhibits, exhibiting and explaining some of them, to the end.]

Mr. McCLENNEN: Do you want to cross-examine Mr. Altmiller now?

Mr. HEMENWAY: No; I prefer to wait.

[Mr. McClennen read, without interruption, the depositions of William H. Reed, Charles R. Batt, R. F. Bolles, W. B. Mossman, C. L. Davenport, Homer V. Snow, Arthur W. Hale, Samuel B. Capen, and Henry Wood.]

New York Correspondence.

Mr. McCLENNEN: I think I will vary the character of this evidence for a while, going to something else. Of the letters marked, in connection with the New York depositions, Nos. 1 to 494, except Nos. 230, 231, and 233, I offer Exhibit 4, which is not in any record as yet [reading]:

"MAY 6TH, 1895.

Mr. G. M. Hyams, Boston, Mass.

DEAR SIR: We have today remitted two thousand dollars to J. Morris Meredith in accordance with the agreement.

Yours very truly,

LEWISOHN BROTHERS,

J. L. *General Manager.*"

11 Mr. McCLENNEN: No. 5, from Lewisohn Brothers to Charles C. Beaman.

Mr. HEMENWAY: This, of course, goes in de bene.

[Mr. McClennen read the following:]

"MAY 6TH, 1895.

Mr. Charles C. Beaman, c/o Evarts, Choate & Beaman, New York City.

DEAR SIR: We wish to advise you that we have today received word over the telephone that Mr. Smith, the third executor of the Simpson estate, has signed the agreement this morning. We are waiting to hear from Mr. Butler as to what the outcome of his meeting with Mr. Keyser was, which we expect to receive by tomorrow.

Yours very truly,

LEWISOHN BROTHERS,

J. L. *General Manager.*"

Mr. McCLENNEN: Exhibit 15, a letter from Lewisohn Brothers to G. M. Hyams [reading]:

"MAY 16TH, 1895.

Mr. G. M. Hyams, Post Office, Globe, Arizona.

DEAR SIR: We hope you received our other letters sent you yesterday with copies of different documents we received from Mr. Keyser.

The writer while at Mr. Beaman's office saw a letter from Mr. Meredith to Mr. Beaman wherein Mr. Meredith stated that his commission was to be 10 per cent and asking for Mr. Beaman's professional opinion as to the validity of his memorandum of this matter—which was from Mr. Simpson—and which he thought would be all right, but which he wanted Mr. Beaman's legal advice upon. He also stated in the letter to Mr. Beaman that the only chance of a slip up might be that Simpson might say, on presentation of our notes in payment of the property, that the endorsements were not satisfactory and stated that he thought it best for Mr. Beaman to be cautious on this point so that nothing could happen to prevent the matter going through. In other words, he was carefully looking out for his own interests, solely that he might not be done out of his beautiful commission.

15 The matter as regards the point of refusing to accept the endorsements we will arrange, as we spoke to Mr. Bigelow who will see the Old Colony Trust Company and have that matter easily settled, as they will accept endorsements which he will propose; and, any way, he will do this beforehand so that no question of this nature may arise.

As mentioned above, regarding the commission, we would like you to telegraph as to whether you think it advisable we should approach Mr. Meredith, either through Bigelow or direct, or, if you will do so, to ask him for half of the commission. We certainly think he should allow us half—$50,000—and we await your telegraphic opinion as regards this.

We would also mention that in this letter which Beaman had from Meredith it stated he should not say anything to Lewisohns about this commission matter unless they asked, but the writer happened to take this letter up with his own letters which were on Mr. Beaman's desk and therefore read the whole matter over in our office here. We have, however, returned the letter to Mr. Beaman.

In case you deem it best to ask Meredith yourself about this, you had better be cautious not to know too much about it—as to the amount of his commission—on the above grounds; as we naturally do not want to give away the fact that we saw the letter.

We await your telegraphic reply and meanwhile remain

Very truly yours,

LEWISOHN BROTHERS."

Mr. McCLENNEN: Exhibit 289, August 6, 1895, Lewisohn Brothers to C. S. Henry & Company [reading]:

"AUG. 6, 1895.

Messrs. C. S. Henry & Co., London.

DEAR SIRS: If you have not already done so, we think it would be well for you to see Messrs. Long & Teutsch, and perhaps you can interest them in the Old Dominion enterprise; that is, that they buy some of the shares at about the market price ruling at the time you see them. If they think well of it and wish to know where they could get a lot of these shares, please cable us, and we will then give

you particulars. We believe that the shares will go much higher. It is a good enterprise, as you know, and will no doubt pay dividends within a reasonable time after we commence production on
16 a larger scale. The shares are dealt in in Boston, and $34 was bid yesterday; but we would prefer not to sell any in the Boston market at present. Enclosed we hand you memorandum of some particulars which you can give to parties inquiring about Old Dominion, if you think best.

Yours very truly,

LEWISOHN BROTHERS,

Enc. *General Manager.*"

Mr. McCLENNEN: Now I will read the following letters already copied into the record, introduced on May 12, 1906, at page 176 (our page 1020), [reading the following described letters]:—

Ex. 18, Lewisohn Bros. to Wm. Keyser, June 3, 1895.
Ex. 20, Lewisohn Bros. to Bigelow, June 4, 1895.
Ex. 38, Wm. Keyser to Leonard Lewisohn, June 13, 1895.
Ex. 39, Leonard Lewisohn, per Jesse Lewisohn, to A. S. Bigelow, June 13, 1895.
Ex. 43, Form of agreement to form Old Dominion Syndicate, June 13, 1895.
Ex. 45, Lewisohn Bros. to A. S. Bigelow, June 17, 1895.
Ex. 67, Leonard Lewisohn to C. C. Beaman, June 28, 1895.
Ex. 81, Leonard Lewisohn to Allen W. Evarts, July 5, 1895.
Ex. 134, Simon H. Stern to Lewisohn Bros., Sept. 20, 1895.
Ex. 135, Same to same, Oct. 4, 1895.
Ex. 136, Lewisohn Bros. to John Stanton, Oct. 4, 1895.
Ex. 137, Lewisohn Bros. to Simon H. Stern, Oct. 4, 1895.
Ex. 138, Exrs. of will of A. W. Spencer, by W. A. Gaston, to Lewisohn Bros., Oct. 5, 1895.
Ex. 152, Simon H. Stern to Jesse Lewisohn, Dec. 4, 1895.
Ex. 162, Leonard Lewisohn to J. M. Meredith, April 29, 1895.
E. 174, Leonard Lewisohn to A. W. Spencer, June 21, 1895.
Ex. 187, Letter to Simon H. Stern, July 24, 1895.
Ex. 231, Already shown to court.
Ex. 232, Already shown to court.
Ex. 233, Already shown to court.
Ex. 258, Lewisohn Bros. to Charles J. Brooker, June 25, 1895.
Ex. 267, Leonard Lewisohn to Jacob Schiff, July 12, 1895.
Ex. 273, to Charles J. Brooker, July 24, 1895.
17 Ex. 276, to E. Hawley, July 25, 1895.
Ex. 288, Leonard Lewisohn to L. Berrion, Aug. 6, 1895.
Ex. 296, Lewisohn Bros. to C. S. Henry & Co., Aug. 20, 1895.
Ex. 305, Same to same, Aug. 26, 1895.
Ex. 315, Lewisohn Bros. to Sally Mains, Sept. 12, 1895.
Ex. 335, Lewisohn Bros. to W. S. Perry, Oct. 1, 1895.
Ex. 363, Lewisohn Bros. to A. Iselin & Bros., Oct. 10, 1895.

I will also read these additional letters introduced by Mr. Treadwell from the same New York files [reading]:

Ex. 22, Lewisohn Bros. to J. W. Belches, June 5, 1895.
Ex. 181, J. W. Belches & Co. to Lewisohn Bros., July 15, 1895.
Ex. 158, Account, Old Dominion Copper Co. with Baltimore Copper Smelting & R. Co.
E. 142, Wm. Keyser to Leonard Lewisohn, Nov. 2, 1895.
Ex. 143, Same to same, Nov. 6, 1895.
Ex. 60, Same to same, June 20, 1895.
Ex. 124, Lewisohn Bros. to R. Brent Keyser, Aug. 12, 1895.
Ex. 172, Lewisohn Bros. to John Stanton, June 5, 1895.
Ex. 136, Same to same, Oct. 4, 1895.
Ex. 183, Leonard Lewisohn to John Stanton, July 19, 1895.
Ex. 364, Chas. F. Brooker to Lewisohn Bros., Oct. 10, 1895.
Ex. 356, Lewisohn Bros. to Charles F. Brooker, Oct. 5, 1895.
Ex. 258, Same to same, June 25, 1895.
Ex. 273, to Charles J. Brooker, July 24, 1895.
[Adjourned to November 13, 1907.]

WEDNESDAY, *November* 13, 1907.

New York Correspondence, Resumed.

Mr. MCCLENNEN: I was reading from the New York letters introduced by Mr. Hemenway, and the last one was Ex. 273. I will now read,—

Ex. 275, Lewisohn Bros. to H. Wallerstein, July 25, 1895.
Ex. 291, Same to same, Aug. 6, 1895.
Ex. 134, Simon E. Stern to Lewisohn Bros., Sept. 20, 1895.
18 Ex. 94, A. W. Evarts to Leonard Lewisohn, July 12, 1895.
Ex. 95, to A. W. Evarts (unsigned), July 12, 1895.
Ex. 276, to E. Hawley (unsigned), July 25, 1895.
Ex. 244, Lewisohn Bros. to Adolph Lewisohn, May 24, 1895.

Mr. MCCLENNEN: I will also read Exhibit 256, which has not yet been put into the record [reading]:

"JUNE 21ST, 1895.

Mr. William Garland, President, Gila Valley, Globe & Northern Railway Co., Bowie, Arizona Territory.

DEAR SIR: We have your letter of June 14th. It is quite evident to us that you misunderstand our situation completely.

We have purchased the Old Dominion property with a view to utilizing the low grade ores by means of cheap coke and cheap freight out on copper.

To do this we must compete with similar low grade ores now mined at Bisbee and Clifton, as well as in Montana.

If it were a question of paying $28.00 per ton, or even one-half of this sum for freight, as you say your road is now willing to do, we should never have taken the properties.

Your proposition to reduce the rate 2.00 for every 20 miles of road would really mean a minimum rate of about $9.00 on your

road. This we are frank to say is utterly out of the question and would never receive a moment's consideration from us.

We do not desire at any rate to smelt our ores until the railroad is completed into Globe; and in order to assure you of our good faith in the matter, as promised you by Mr. Hyams we are perfectly willing to make any guarantee that you require, in reason, to begin smelting as soon as the road is completed.

The matter resolves itself into this: As at present constructed, your road is practically valueless, and you naturally desire to complete it in order to obtain traffic.

We on our side are naturally desirous of having it completed in order to operate our properties; and, if you will tell us what guarantees you wish in order that you may at once start work and press it to completion, we will see whether we can meet your views.

19 As far as your rates go, there would have to be a radical change in your views, otherwise we do not see how we can start work.

It does seem to us that the situation is important enough for you to have come east to settle the question; but as you do not seem disposed to regard it in that light, we of course do not care to force you or to appear anxious in the matter, as it might place us in a false position.

In conclusion we wish to repeat that with proper rates we intend to operate the property on a much larger scale than it had ever been handled on before, but that until we obtain such rates we shall be obliged to keep it closed down, or see if other arrangements cannot be made.

Very truly yours,

LEWISOHN BROTHERS.

G. M. HYAMS,
General Manager."

Additional Depositions.

Mr. McClennen read the depositions of the following-named persons:—

Stephen N. Crosby, E. M. Dodd, William A. Rust, Edwin C. Swift, David N. Anthony, George Mandell Preston, James F. Ormond, Josiah Grout, Frank E. Stocker, Fred B. Stocker, Angus H. McLoud, Walter P. Smith, John Stanton, Charles S. Smith, Joseph S. Bigelow, Clarence H. Bissell, William J. Ladd, Eugene V. R. Thayer, Henry A. Root, Simon H. Stern, Charles F. Brooker, Galen L. Stone.

[Plaintiff rests.]

WEDNESDAY, *November* 13, 1907.

CHARLES H. ALTMILLER, sworn:

(By Mr. HEMENWAY.)

Q. Will you take your certificates and your certificate stub book?

A. [The witness produces the certificates and the certificate stub book.]

(By SHELDON, J.)

Q. Is this the miscellaneous certificate book?

A. The miscellaneous certificate book.

(By Mr. HEMENWAY.)

Q. No. 1 of this certificate book issued 16 shares to Jesse Lewisohn, July 9, 1895, "For articles of association;" No. 2, A. W. Evarts, July 9, 1895, and No. 3, Edgar Buffum, July 9, 1895, "For articles of association;" No. 4, C. W. Welch, July 9, 1895, "For articles of association;" No. 5, Ferdinand Riddlesdorfer, July 9, 1895, "For articles of association;" No. 6, W. B. Rowe, July 9, 1895, "For articles of association;" No. 7, W. R. Montgomery, 4 shares, July 9, 1895 [exhibiting to court the form of certificate stub].

Q. That is 40 shares in all. Now take your check book, please.

SHELDON, J.: Is there any real question as to those 40 shares? They were issued and cash was received for them? They were issued for the purpose of carrying through the organization of the company and the amount of money so received was deposited by the treasurer in the treasury of the company, and the amount was afterwards paid back to Mr. Lewisohn, and the shares were otherwise disposed of?

Mr. HEMENWAY: No, but what I wish to show, if your Honor please, is that those shares were paid for by this check of $1000.

SHELDON, J.: Has not that already been fully brought out?

Mr. HEMENWAY: It has already appeared, but it is necessary in order to ask the next question.

SHELDON, J.: Then why not go right to the next question? It fully appears that they were paid for by this $1000 check.

Q. Now won't you turn to the record and tell us when there was a record made as to the issuing of those shares; whether before or after the payment? I want to see the first vote in regard to those.

A. The minutes of the first meeting, held at the office of the New Jersey corporation agent, at 243 Washington street, Jersey City, on the 9th day of July, 1895, at 3 o'clock: "It was voted that the amount with which the said company will commence business is one thousand dollars divided into forty shares of a par value of twenty-five dollars each."

Q. Now the next vote in regard to this specific number of shares. That does not, of course, refer to this specific number of shares; it is part of the charter.

A. That is referred to in the meeting held in the office of the New Jersey corporation agent, 243 Washington street, Jersey City, on the 9th day of July, 1895: "Resolved that certificates of stock be duly issued to the original subscribers for the amount of their subscriptions as follows; one certificate of 16 shares to Mr. Jesse Lewisohn, and one for 4 shares each to Messrs. Evarts, Buffum, Welch, Riddlesdorfer, Rowe and Montgomery."

Q. That was at what time?

A. That was July 9, 1895.

Q. They were paid for before that vote was passed, according to the records?

A. No,—July 12 they were paid for.

Q. No, but you referred to it in that meeting.

A. July 12 we received a check for them. The meeting is July 9.

21 Q. Well, don't you find a minute here in regard to Lewisohn, saying that he had the money?

A. Yes.

Q. Now read that.

A. "Mr. Lewisohn reported that he had received the sum of $100 in money each from Messrs. Evarts, Buffum, Welch, Riddlesdorfer, Rowe and Montgomery for their subscriptions to the stock of the company and had in hand the sum of $400, his own subscription thereto, and now held the total amount thereof, $1000, for the use of the company, and he was authorized and by resolution duly passed requested to turn over said amount to the treasurer of the company when elected."

Q. Now what was the date of that?

A. The 9th day of July, 1895.

Q. Well, now this $1000 was paid on the 9th for the stock of the company, and then the vote which you have read later was to issue this stock, the stock that had already been paid for?

SHELDON, J: It appears it had been paid to Mr. Lewisohn; that is, that $600 of it had been paid to Mr. Lewisohn, and he had set aside $400 more, but it does not appear it had been paid to the company. He was instructed to pay it to the treasurer of the company when elected. According to the records, he did pay it to the treasurer of the company on the 12th day of July, three days later. It had been paid for; but it had been paid for, not to the company, but to Mr. Lewisohn, and Mr. Lewisohn held it, so to speak, in escrow; but he did deliver it to the company July 12.

Mr. HEMENWAY: According to the record.

SHELDON, J: According to the record; and I understand that the witness is testifying solely from the records and without personal knowledge.

Mr. HEMENWAY: So that the vote was subsequent to the actual payment to the company.

SHELDON, J: The vote was July 9, the actual payment to the company was July 12.

Mr. HEMENWAY: No. At the organization of the corporation they had $1000; they then elected officers and turned it over to the treasurer; but it was in the company before that time.

SHELDON, J: Lewisohn was one of the intended incorporators, but the incorporation was not complete when the money was paid to him. When it left him we don't know.

Mr. HEMENWAY: I would offer this certified copy of the certificate of incorporation of the Old Dominion Copper Mining & Smelting Company, which shows it began July 8. It contains the same provision, which says:—

22 "The amount with which said company will commence business is one thousand dollars, divided into forty shares of the par value of twenty five dollars each."

SHELDON, J: That is sworn to on the 9th of July, is it?

Mr. HEMENWAY: On the 8th of July.

SHELDON, J: Sworn to the day before the meeting? The meeting was the 9th of July.

Mr. HEMENWAY: But the incorporation was before.

SHELDON, J: Oh, you mean those are the articles of association? It is not a certificate of the meeting? I thought you meant a certificate of the meeting.

Mr. HEMENWAY: Oh, no.

SHELDON, J: I see.

[Certified copy of certificate of incorporation of the Old Dominion Copper Mining & Smelting Company is marked "Exhibit 501, Nov. 13, 1907, G. C. B."]

Q. Now read on page 12.

A. "Mr. Jesse Lewisohn as treasurer reported that he had the sum of one thousand dollars heretofore received by him for account of the subscription of the original stockholders named in the certificate of organization and held the same as the treasurer for account of the company."

Q. That is on what date?

A. July 9.

Mr. HEMENWAY: It is entered here on the 12th. I wish to call attention to the fact of issuing stock when the money was already in the treasury. That is simply some evidence, although I do not think it of any consequence as to the method.

SHELDON, J: I think you can go on.

Q. Now will you turn to certificates No. 71, No. 72, No. 73, and No. 74, and also the stubs? Prior to No. 71, how many certificates were canceled?

A. Fifty-seven.

Q. That is, from 15 to 71?

A. To 70.

[Mr. Hemenway exhibited to the court the canceled certificate stubs.]

Q. Now, anywhere, have you a certificate of the whole capital stock being issued to the treasurer at any time prior to this one which stood in the name of Nelson? There is no such certificate?

A. No.

Mr. HEMENWAY: No. 71; we have already said that was for 100,000 shares, although it appears to be for 100 shares.

23 (By Mr. MCCLENNEN.)

Q. That is the Dumaresq certificate?

A. Yes.

(By Mr. HEMENWAY.)

Q. Let me see that certificate, will you?
A. [Certificate produced.]

Mr. HEMENWAY [exhibiting certificate to court]: That is dated the 18th of September.

Q. Well, now this is said to be issued to sundries?
A. Yes.
Q. Haven't you stated in your deposition somewhere that "sundries" meant that where it was issued to several people,—that that was what you meant?
A. That is correct; that is what the word "sundries" means.
Q. But it does not mean it in that instance?
A. No.
Q. That should be Dumaresq?
A. Yes.
Q. And it is for 100,000 shares instead of 100?
A. Yes.
Q. Now No. 72, to A. S. Bigelow, is canceled?
A. Yes, sir.
Q. Let me see that?
A. [Certificate produced.]
Q. Now that is canceled without any assignment, or anything of the kind?
A. Yes.
Q. Lay that one side. Now No. 73.
A. [Certificate produced.]
Mr. HEMENWAY [to the court]: No. 72, which is canceled, "For vote of Syn."—that was canceled, 20,000.
This is dated September 19, 1895. "Thomas Nelson, Treasurer." This is No. 73, for 20,000 shares, issued to Thomas Nelson, September 18, 1895, "For vote of Syn."—20,000 shares.
Q. Now No. 74, A. S. Bigelow.
A. [Certificate produced.]
Mr. HEMENWAY [to the court]: That is for 30,000 shares. "No. 74, Leonard Lewisohn 2650"—
Q. Is that a mistake? 2650; is not that 22,650?
A. No, sir; "Leonard Lewisohn, 2650."
Mr. HEMENWAY: That is right.
Q. Now after the issue of No. 74 there follow issues of stock certificates to those people that are marked "Cancelled" prior to No. 71, do there not?
A. Yes.
Q. [Producing a cardboard covered book.] On this corrected list of Old Dominion Copper Mining & Smelting Company, I wish you would look at those names.
Mr. BRANDEIS: What is this?
Mr. HEMENWAY: A corrected list.
Mr. BRANDEIS: Where did the book come from?
Mr. HEMENWAY: It came from Mr. Bigelow.

24 Mr. BRANDEIS: Has it just come?

Mr. HEMENWAY: Not now. It was down in your office for days; it is one of the books Mr. Hyams presented.

Mr. BRANDEIS: I never saw it before.

Mr. HEMENWAY: It has been there time and again.

Mr. BRANDEIS: It does not appear in the evidence.

Q. Didn't you produce that book?

A. I don't remember.

Q. Just look at the book, and see if you haven't seen it before.

A. I have seen it at Mr. Bigelow's office; not since then.

Q. Didn't you see it a long time ago?

A. I do not remember.

Q. You would not say that you did not?

A. No, not if I did; I don't remember, really; I saw so many things at that time.

Q. Now won't you look at that list—they are all arranged alphabetically—and tell me if the 60,000 shares of stock that were allotted were not issued in pursuance of this list? And if you cannot tell offhand, just look at the stockholders' list of certificates.

Mr. MCCLENNEN: If we can have an opportunity to look at this, we can tell whether we desire any identification of it, or not.

Mr. HEMENWAY: You may look at it.

SHELDON, J: If I understand the question, however, I think it does already appear, if this list is what he states it is, a list of subscribers to the issue of stock, it includes 60,000 shares,—40,000 of shares for the syndicate, and 20,000 being not issued.

Mr. MCCLENNEN: If I correctly gather the question, I think there is no difference between us in any way.

Mr. HEMENWAY: This is the allotment made out of a subscription of over 70,000 shares.

[Mr. McClennen and Mr. Brandeis examined the book; the question is read and is not objected to.]

A. Yes, sir.

Q. And that was a book that was in the office at the time this allotment was made?

A. Yes, sir.

Mr. HEMENWAY: I produce the book, if your Honor please.

SHELDON, J: Do you put the book in evidence?

25 Mr. HEMENWAY: Yes.

[Book marked "Exhibit 502, Nov. 13, 1907, G. C. B."]

Q. Now the records have been read, and there is nothing in the records—I wish you would notice this question—there is nothing in the records to show any order to pay these different sums to Luce and others, amounting to $19,500? That is correct?

A. No.

Q. What?

A. That is correct.

Q. Now is there any paper in your possession, or anything showing authority on the part of the company to pay out that money?

A. I do not know, I am sure. I did not have charge of that part of the transaction.

Q. Well, you don't know of any authority?

A. No, I do not.

Q. You don't know of any authority in the votes; it simply was paid?

A. That is all, yes.

Q. Are there any votes, to your knowledge, other than those that have been recorded in the books of the company,—any that had not been recorded?

A. No.

Q. You don't know of any such?

A. I don't know of any such.

Q. Now, prior to the 18th day of September, is there any paper in your office—and by "your office" I mean the office of the company—from the beginning—authorizing in any way the opening of a subscription for the stock of the company?

A. Not that I know of.

Q. There is none? Do you know of any subscription list, other than that which has been put in here and called the subscription list of July 18, that was ever sent out by the company?

A. No.

Q. In whose possession have these books been since April, 1902?

A. In mine.

Q. So far as you know, that stock certificate book—stubs—is in the condition it was always?

A. Yes, sir.

Q. And that "For vote of Syn." has always been there, so far as you know, from the day when it was entered?

A. Yes.

Q. In both cases?

A. Yes.

Mr. HEMENWAY: That is all. One moment. I will offer one of those letters that was produced by you or to you.

[Mr. Hemenway confers with Mr. Brandeis.]

Mr. HEMENWAY: I state this: That it is one of the papers that Mr. Hyams produced for you to read and you read it and you
26 did not put it in. Now Mr. Hyams will testify that, you can take my word for it.

Mr. MCCLENNEN: If it may be assumed that he would so testify, then we have no objection to its going in.

SHELDON, J.: It goes in on the ground it was produced by Mr. Hyams, at your request, and examined by you.

Mr. BRANDEIS: We have no objection. If it is such a letter, we do not object to its competency.

SHELDON, J.: I understand that statement is accepted?

Mr. MCCLENNEN: Yes, your Honor.

SHELDON, J.: Then you may put it in.

Mr. HEMENWAY (reading):

"SEARS BUILDING, BOSTON, MASS., *Aug.* 23, 1895.

You are hereby notified that at the request of Mr. Matthew Luce [crossed out in pencil] you have been allotted 100 shares of Old Dominion Copper Mining & Smelting Company at $25 per share. Notice will be sent in due course when payment for this shall be made and also time when stock will be ready for delivery.

A. S. BIGELOW."

Mr. BRANDEIS: It does not appear to be addressed.

Mr. HEMENWAY: What do you mean?

Mr. BRANDEIS: There is no form of address on it.

[Letter marked "Exhibit 503, Nov. 13, 1907, G. C. B."]

Mr. HEMENWAY: I do not think it will be necessary to make a formal opening in this case, because the opening would be substantially a repetition of the testimony. I shall require some considerable time for argument, because the testimony has been brought out in an irregular way by the plaintiffs. By "irregular" I mean not consecutively, as you would put in a case for yourself.

ALLEN W. EVARTS, sworn:

By Mr. TREADWELL:

Q. What is your full name?
A. Allen W. Evarts.
Q. Your residence?
A. The city of New York.
Q. Your occupation?
A. Lawyer.
Q. What is your present firm, if any?
A. Evarts, Tracy & Sherman.
27 Q. In the year 1895 what was your firm?
A. I was a member of the firm of Evarts, Choate & Beaman.
Q. How was that firm then constituted?
A. There were seven members of the firm. Do you wish me to give you the names of them all?
Q. If you please.
A. Mr. William M. Evarts, Joseph H. Choate, Mr. Charles C. Beaman, Mr. J. Evarts Tracy, Mr. Treadwell of Cleveland, Mr. Prescott Hall Butler, and myself.
Q. In the year 1895 were you—was your firm—professionally employed as counsel for the Lewisohns, or Lewisohn Brothers, in New York?
A. They were clients of the firm at that time.
Q. Do you recollect having any business with Lewisohn Brothers in that year in connection with the company known as the Baltimore Old Dominion Company?
A. I do.
Q. About what time in the year?
A. In June.
Q. What business—what came under your knowledge in that con-

nection? What transactions did you take part in with the Messrs. Lewisohn, or either of them?

A. With respect only to the Baltimore Company?

Q. I refer to the Baltimore Company?

A. Personally I went over to Baltimore with Mr. Leonard Lewisohn to take over the control of the Baltimore Company, the stock of which had been acquired by him and his associates.

Q. Can you fix the date when you went over with Mr. Lewisohn?

A. I went over on the 19th of June, and was present in Baltimore on the 20th.

Q. Was there a meeting of the Baltimore Company at that time, on the 20th?

A. There was a meeting of the board of directors of the Baltimore Company on the 20th of June.

Q. At that time was the control taken in the interest of the Messrs. Lewisohn and their associates?

A. It was.

Q. Do you know whether or not, prior to that time, the Messrs. Lewisohn and their associates had acquired the capital stock of that company; and do you recollect what the division was in fractions of the amount they acquired, and the form of the interests they acquired?

A. I knew that they did acquire a certain interest from the Simpson estate and a certain interest from Mr. Keyser of Baltimore.

Q. Do you remember the ratio of the interests?

A. The Simpson estate, I recall, owned five sevenths, and Mr. Keyser two sevenths, of the Baltimore Company.

Q. Prior to going to Baltimore had you heard anything about any outside claims which were not vested in the Baltimore Old Dominion Company?

28 A. Yes, I had been informed that there were certain claims supposed to be in the interest of the Baltimore Company to which the Baltimore Company had not the title.

Q. Who had title to those claims?

A. William—I think his name was William—William Keyser.

Q. Had that property been acquired by the Lewisohns and others in their interest at the time you went over to Baltimore?

A. I should state that it had been acquired, but that the deed, as I recall, was given on the 20th of June; I am very sure of that.

Q. The contract or agreement with Mr. Keyser had been completed?

A. It had been completed before; and the deed was executed, I think, that day in Baltimore.

Q. The date of your going to Baltimore you fix as June 20. At or about that time had you in mind, or before going to Baltimore, the formation of any new company on behalf of Lewisohn Brothers?

Mr. McClennen: Just one moment. That particular question seems to be objectionable.

Sheldon, J.: I think I will have to receive it.

Q. [Question repeated.]

A. At or about that time.

Q. Are you able to fix the date?

Mr. McCLENNEN: Just a moment. He has not completed his answer.

The WITNESS: No, I had not finished. I had not, as I now recall, any knowledge of the formation of a company at the time I was employed to go over to Baltimore to take over this company. That is the best answer I can give.

Q. A letter has been put in evidence by the plaintiff, dated June 28, 1895, which reads as follows:

"C. C. BEAMAN, Esq., Messrs. Evarts, Choate & Beaman, 52 Wall Street.

DEAR SIR: We merely desire to confirm our messages both by wire and on the telephone this afternoon that Mr. Leonard Lewisohn would like to hear from you at your convenience whether it would be best to reorganize the Old Dominion Copper Company under the laws of Arizona or whether it would be more advantageous to do so under the laws of some other State.

Very truly yours,
LEWISOHN BROTHERS."

Now does that letter in any way refresh your mind as to when, if ever, the question of forming a new corporation arose?

A. What is the date of the letter?

29 Q. June 28, 1895.

A. I should say that I had information of the intention to form a new corporation after my visit to Baltimore and after the time of that letter; yes, that is my impression.

Q. Did you make any investigation into the laws of Arizona?

A. I did examine the laws of Arizona.

Q. What was the result of that investigation?

A. The result of that examination was that our clients were advised that there was no special advantage, in our opinion, in forming a corporation under the laws of the state of Arizona over that of forming a corporation under the laws of the state of New Jersey.

Q. Was it then contemplated to form a corporation under the laws of the state of New Jersey?

A. We were instructed to incorporate under the laws of the state of New Jersey after that.

Q. And for what amount of capital?

A. 150,000 shares at $25 each, equivalent to $3,750,000 capital.

Q. For what was capital to be issued?

A. For the property of the——

Mr. McCLENNEN: It appears definitely for what it was issued.

Mr. TREADWELL: Perhaps I will withdraw the question in that form.

Q. For what was that amount of capital fixed?

Mr. McCLENNEN: Again it seems that involves practically the same objection. What was done speaks for itself.

SHELDON, J.: What you wish for is what information he received from Mr. Lewisohn or Mr. Lewisohn's associates, and the conclusions to which they came. If you desire to put that directly, you may.

Mr. TREADWELL: Well, that is what I am getting at. Of course, Mr. Lewisohn is dead and Mr. Beaman is dead.

Mr. HEMENWAY: The court rules you may ask it.

SHELDON J.: What took place between the witness, Mr. Lewisohn, Mr. Bigelow, and their associates?

The WITNESS: May I go on in my own way and state my instructions and what was done?

Mr. HEMENWAY: Certainly, if your way is within the rules of the court.

Mr. McCLENNEN: I should be glad to have Mr. Evarts do it in that way, if I may ask to have it stricken out if it is objectionable.

SHELDON, J.: I should not allow it to be stricken out if I allow it to be taken de bene, as the other testimony has been.

Mr. McCLENNEN: But the only way to save this de bene objection is by calling your Honor's attention.

SHELDON, J.: I realize that, and you may save it in that way.

The WITNESS: Our instructions were——

(By SHELDON, J.:)

Q. That is, instructions from Mr. Lewisohn?

A. From Mr. Lewisohn. If I may preface this, as it is taken in this way, as I have never been a witness before, and as I know the difficulties of being a witness—Mr. Beaman was the responsible counsel in charge of this matter. What I did, I did under instructions from Mr. Beaman and Mr. Lewisohn. And the instructions received were to form a corporation in New Jersey under the New Jersey law for the purpose of taking over from Mr. Lewisohn and his associates the properties relating to the Old Dominion Company of Baltimore which they had acquired, and the sum of $500,000 cash which was paid in for working capital.

(By Mr. TREADWELL:)

Q. Did those properties include not only the Baltimore Old Dominion Company of which they held title, but also the so-called Keyser claims?

A. They did.

Q. Was there any distinction made in those properties, or were they then considered as alike?

SHELDON, J.: You were to ask what was said.

Mr. TREADWELL: I will withdraw the question.

Q. Subsequently, and after the formation of that corporation, did you attend to the meetings and the organization?

A. I attended to all the detail work of organizing the corporation, of attending the corporation organization meeting and the subsequent meeting of July 11, when the book was written up and sent on to Boston; I also attended afterwards to the preparation of the deeds and other papers necessary to carry out the contracts which were made at those meetings.

Q. The minutes of the corporation which are in evidence show the holding of a meeting at 243 Washington street in Jersey City on the 9th day of July, 1895, and you were present at that meeting?

A. I was.

Q. The minutes of the meeting of July 11, which are in evidence, recite yourself as being present. That meeting appears to have been held at 81 Fulton street in the city of New York. You were present on that occasion?

A. I was.

Q. Mr. Montgomery appears to have been one of the directors at that meeting who was not then present. Who was Mr. Montgomery, or what was he at that time, as you remember?

A. He was a clerk in the office of my firm.

Q. Had he been notified by you to attend that meeting?

A. He had.

31 Q. Have you any recollection whether Mr. Bigelow was present at that meeting?

A. I think Mr. Bigelow was present, but I was not personally acquainted with Mr. Bigelow, and I could not at this late day swear to any independent recollection of his presence. I think he was there.

Q. And it is your present recollection that the statement in these minutes that he was present, and, being present, took his seat, was correct?

A. I have no doubt of it.

Q. At that time it is recited in these minutes that two offers were submitted. I hand you plaintiff's Exhibits 1 and 2, and ask whether they bear your signature?

A. Exhibit 2 is signed by me as secretary of the Old Dominion Company of Baltimore.

Q. In whose handwriting is the interlineation, or are the words written in, in the first blank, "one hundred thousand"?

A. The blank filled in with the words "one hundred thousand" is in my handwriting.

Q. And the blank filled in on the last line, the date?

A. The word "first" is in my handwriting.

Q. Referring to plaintiff's Exhibit No. 1, being the offer of the Keyser claims, state in whose handwriting the blanks, if any, are filled in, in there.

A. The blank filled in with the words "thirty thousand" is filled in by me, in my handwriting, and the date "11th" is in my handwriting.

Q. What can you say of the words "Please issue said stock, thirty thousand shares of stock, to Mr. A. S. Bigelow, and myself"?

A. Those words at the foot of the offer marked "Exhibit 1" were written by me.

Q. And signed by whom?

A. Signed by Mr. Leonard Lewisohn.

Q. Mr. Lewisohn was present on that day, was he not?

A. He was.

Q. You have stated that the entire property of the Baltimore

Old Dominion Company was to be turned over to the New Jersey corporation: for how much stock.—the entire property of the old company was to be turned over to the New Jersey company for how much of its stock?

A. I thought I had stated that: 130,000 shares. The stock of the company was to be 150,000 shares at $25. It was to receive the Baltimore Company's property and $500,000 cash from Mr. Lewisohn and his associates. That would make 130,000 shares for the Baltimore Company's property, and 20,000 shares for the cash.

Q. These properties seem to have been offered in two parcels: can you explain why those offers were made separately?

Mr. McCLENNEN: I wish to save an objection to this.

SHELDON, J.: This is taken de bene. Of course the question involves what was said between him and Mr. Lewisohn.

32 Mr. TREADWELL: Both their own ideas as counsel and the ideas of the parties.

SHELDON, J.: The ideas of counsel, so far as they were spoken to Mr. Lewisohn,—anything that was said to Mr. Lewisohn.

A. I cannot recall at this date exact conversations, but I had conferences with Mr. Beaman and with Mr. Leonard Lewisohn, at which this question of the Baltimore Company's properties was considered, and with reference to these two propositions. As the result of those conferences those two propositions were drawn by me and presented—executed and presented.

Q. Was the title at that time in such a position that it could have been transferred by the Baltimore Company?

SHELDON, J.: Do you care to put that question? It already appears that it had been in the Keysers and was now in the Lewisohns.

Mr. TREADWELL: I only wanted to cut out the possibility that it had been transferred. I did not want to leave any misunderstanding on that subject.

Q. How was the amount fixed in those offers as to the number of shares which each parcel was offered for?

A. It was an arbitrary division of the 130,000 shares.

Q. Were the properties known as the Keyser claims supposed to have absolute value at that time, or was there any doubt at that time as to their exact value?

A. I can only testify as to what I learned at those conferences between my partner and our client.

Q. That is all I am referring to.

A. The outlying properties, as I call them, the title to which was in Mr. Keyser, were then to us represented, or by Mr. Keyser, to be of little or no value, and were always represented to us, as I learned at that time, to be held by him for the beneficial interest of himself and the Simpson estate. They were turned over, as I think must appear, without any consideration further than the purchase of the stock, and were regarded by Mr. Lewisohn, by himself, and his associates, as a part of the acquisition of the property of the Baltimore Company. They were not admittedly, as I was informed at the time, of no value; they were old mining claims, I am sure, at

least one, and mining claims, one that had not been worked for some years, and its real, actual value in any state uncertain, but they were regarded as one property. The titles, the legal titles, were in different hands. The Baltimore Company had title to this main property, and Mr. Lewisohn had acquired for himself and his associates the legal title from Mr. Keyser of the outlying property, all of which we were instructed to put into this corporation, and it was a
33 matter of indifference as to what valuations should be put upon them, but it was, as I have said, an arbitrary distribution of the amount of shares.

Q. Mr. Evarts, had you become interested or had you rather taken an interest in the so-called Old Dominion Syndicate?

A. Well, had I? I do not remember I had. Yes, I did have an interest before the company was—I don't know when—I did have a subscription to the syndicate.

Q. Do you remember the amount of that interest?

A. $2000.

Q. From whom did you take that interest?

A. From Leonard Lewisohn.

Q. At the time you took that interest was there any agreement made as to any particular profit that you were to receive therefrom?

A. No.

Q. Was anything said as to whether you should receive more or less stock therefrom?

A. No, nothing was said on that subject.

Q. How much stock did you ultimately receive?

A. Well, I suppose it was,—a $2000 interest, that was 40 shares,—I don't really remember.

[Recess until 2 p. m. and resumed.]

Q. I was asking you just before recess how many shares of stock you received under your agreement with Lewisohn Brothers?

A. 160 shares.

Q. Now, Mr. Evarts, I understand you to have testified that the Old Dominion Company of New Jersey, the present corporation,—that you were instructed to form the Old Dominion Company, the present corporation, with a capital of 150,000 shares or $3,750,000, all of which was to be issued to Lewisohn and Bigelow, for all the properties of the Old Dominion Company and $500,000 in cash.

Mr. McClennen: Just a moment. The witness' own version, I think should not be affected by such a leading form of question.

Mr. Treadwell: This is simply a preliminary question.

Sheldon, J.: I do not see how I can admit it, even as a preliminary question.

Q. Well, whom were you told were to pay that cash?

A. Mr. Lewisohn and Mr. Bigelow.

Q. What were you told they were to do?

A. I cannot remember the exact words, but I was told by Mr. Lewisohn that he and Mr. Bigelow would assume the obligation of that payment.

Cross-examined.

(By Mr. McCLENNEN:)

Q. It has appeared, Mr. Evarts, that the firm of Evarts, Choate & Beaman, or perhaps Mr. Beaman of that firm, had been consulted with reference to the option on this matter as early as or prior to the 4th of May, 1895, and in some various matters concerning it thereafter. What was the first part of the service of the firm that was performed by you, personally?

34

A. Going to Baltimore.

Q. How long before your going to Baltimore had the matter first been called to your attention as requiring any consideration by you?

A. Not at all. I assume you mean professional consideration, because I knew that Mr. Beaman was employed, but I was not called upon for any professional service.

Q. But prior to that time you may have known that that matter was in the office?

A. I may or may not; I presume I did.

Q. When you were asked to go to Baltimore, by whom specifically were you asked, if you recall?

A. By Mr. Beaman. I remember of being asked by Mrs. Beaman.

Q. Did you personally make the investigation or supervise the making of the investigation of the Arizona law, made in consequence of the letter of June 28?

A. I looked up the Arizona statutes and conferred with Mr. Beaman on the subject.

Q. Was that as the result of receiving that letter or of a conference with Mr. Beaman after he had received that letter?

A. Well, I do not remember, but I should suppose after conference with Mr. Beaman, but I have no independent recollection. I think the letter speaks something about telephonic communication, doesn't it? I don't remember.

SHELDON, J.: Previous communication by telephone.

Q. Have you any recollection or any means of being of assistance in determining whether this letter or telephonic conversation that that letter referred to was the first that had been said by Mr. Lewisohn with reference to the possibility of using Arizona as the state for incorporating?

A. No, I think not.

Q. Have you any recollection that would assist you in saying whether or not your investigations of the law of Arizona had, in fact, gone before or after that particular?

A. No. What was the date of it?

Q. June 28.

A. No, not absolutely. There is a circumstance which, perhaps, might fix it in my mind, if you want that.

Q. If you will refer to that circumstance and let me have your statement.

A. Well, it could not have been many days before; it must have been almost immediately before.

Q. Almost immediately before the 28th?

A. If it was not after, it must have been immediately before; I have a reason for fixing that.

Q. After you had completed the work of the Baltimore
35 meeting on June 20, do you recall whether there was anything pending requiring your personal attention?

A. I do not quite understand the purport of your question.

Q. I mean, do you recall when you had concluded the specific work of seeing that the transfer of June 20 was made properly in Baltimore; was there then anything for you to do in the matter?

A. No.

Q. Or did you then await further instructions?

A. I should say no, from the same circumstance.

Q. Do you recall whether or not you personally had heard of the question of the new corporation before the question of the Arizona law was called to your attention?

A. I do not recall.

Q. Do you keep a diary?

A. I keep a personal diary.

Q. Have you that handy?

A. I have not brought it here.

Q. Have you consulted it at all?

A. Yes, I have looked at it.

Q. Were you continuously in the office at about this time?

A. I found—is that what you want me to say?

Q. Yes, I want to find out just what your career was at that time.

A. I wanted to see if I could find anything. I do not keep a complete diary, by any means, but when I leave town I usually put it in. I found, on consulting this diary, that I left on the 19th for Baltimore on the 3:20 train and came back the next day at 5 o'clock, and that I went to Vermont the next day or the day following, and was there for about a week, so I did not get back to New York until about this time.

Q. Up to the time of your return from Vermont had your connection with the matter been such that the question of what was to be done next would naturally have come to your attention?

A. I don't know whether to say no or yes.

Q. [Question read.]

A. I should say no.

Q. Then, to put it in another form, is it accurate to say that, barring the one matter of attention to the Baltimore meeting, your first connection with this matter was with reference to the formation of a new corporation?

A. Yes, that is right.

Q. Was the division of labor in your office such that the formation of a corporation in Mr. Beaman's larger matters would have come to you personally to attend to?

A. It was.

Q. Have you in your office any papers relating to this matter?

A. I have.

Q. Have you consulted them recently?

A. I have.
Q. Have you brought them with you?
A. I have brought some.
Q. Is there among them any that sheds any light upon
36 the date when the subject of the reorganization of this company first came to the attention of the office?
A. Not any definite date.
Q. Have you the correspondence from Mr. Lewisohn to Mr. Beaman?
A. I have not looked at it. We have it in the office, but I have not looked it up in connection with this matter at all.
Q. What, in general, are the papers that you have inspected recently in connection with this matter?
A. Why, they are mostly drafts; there is scarcely anything else except drafts. There is a letter, I think that same letter that is here, I think I have that letter; there are one or two letters and the drafts of this incorporation and minutes.
Q. Did the subject of a corporation with a capital stock of $2,500,000 or 100,000 shares of $25 each ever come to your attention in connection with this matter?
A. $2,500,000?
Q. $2,500,000.
A. I think not.
Q. Who gave you the information as to who was to contribute the $500,000 cash?
A. Mr. Lewisohn and Mr. Beaman.
Q. Was it in conference?
A. It was in conference with them.
Q. Was your attention called to the fact that stock was to be put upon the market?
A. No.
Q. That stock of the new company was to be put upon the market?
A. No.
Q. You personally were not aware of the existence of the intention, if it did exist, of obtaining $500,000 from outsiders?
A. On the contrary, I understood it was not to be obtained from outsiders.
Q. That is, you acted at this time supposing or understanding that the corporation was to remain held by Mr. Lewisohn and Mr. Bigelow and his associates?
A. Not forever.
Q. Well, as far as anything——
A. As far as the formation was concerned, yes.
Q. As far as the formation was concerned?
A. Yes, I did so understand.
Q. You were not apprised of the intention to open or prepare a subscription list substantially immediately?
A. No, I understood that was not the intention. That was my understanding.
Q. You spoke of the property having been acquired by Mr. Lewi-

sohn, Mr. Bigelow, and his associates—their associates, as I understood you?

A. No, I think I said Mr. Lewisohn and his associates. I was not personally acquainted with Mr. Bigelow at that time.

37 Q. Pardon me. Whom did you intend by the term "associates"?

A. I meant Mr. Bigelow, whom I had met at that time.

Q. Were you sufficiently informed of the details of the matter so that you knew that, as far as the payments had been made up to, we will say, the 1st of July, the major part of the money had been furnished by persons other than Mr. Lewisohn and Mr. Bigelow?

A. I did not know it.

Mr. HEMENWAY: That is not in evidence, nor understood to be the fact.

SHELDON, J.: I think there is evidence from which that fact might be inferred, that the greater part of what money had been furnished had been furnished by others.

Mr. MCCLENNEN: Now I will put my question again, or if the stenographer will read it——

[Question read.]

Mr. MCCLENNEN: Perhaps I will reframe it. I did not understand there was any difference between us.

Q. Were you sufficiently familiar with the details of this matter to have been informed of the fact, if it was a fact, that up to the first of July such payments as had been made for this property had been with money the major part of which had been furnished by persons other than Mr. Bigelow and Mr. Lewisohn?

A. I think not.

Q. Had you been informed by Mr. Lewisohn or Mr. Bigelow, up to the 11th of July, that you were in fact acting as attorneys for the Old Dominion Syndicate, if such was the fact?

A. I do not recall.

Q. Did you have anything to do with the preparation of the bill for services in this matter rendered by Evarts, Choate & Beaman?

A. No, I don't think I ever saw it until within the last two or three days.

Q. Do you know whose was the selection of the name "Old Dominion Syndicate," as the person or combination of persons who were charged for your services?

A. I can only say it must have been Mr. Beaman.

Q. And Mr. Beaman's connection with the matter, as you have already indicated, was very much more intimate than your own?

A. Yes.

Q. Would it be a fair characterization of your connection with the matter to say that it was at all times confined to the carrying out of specific portions of the matter called to your attention by Mr. Beaman, either alone or in conjunction with Mr. Lewisohn?

A. It would, except so far as I might be called upon in carrying those out, to give some advice as to some detail.

38 Mr. MCCLENNEN: I am very much obliged to you.

Redirect examination.

(By Mr. TREADWELL:)

Q. One question, Mr. Evarts. Was the matter of the existence of the outside claims which Keyser held known to you when you went to Baltimore with Mr. Lewisohn?

A. Yes. The deed, I think, was executed there that day.

Q. Well, had the existence of those claims been discussed, or had the matter been brought to your attention, that there was an effort to get those claims into the ownership of Bigelow and Lewisohn?

A. Yes. I knew there were those claims. The deed, I think, was drawn by me, and executed in Baltimore on the 20th, if I am right in my recollection.

Q. The deeds from the Baltimore Old Dominion Company of the property that was sold: were they prepared by you?

A. The deeds from——

Q. The Baltimore Old Dominion Company.

A. To the new?

Q. Yes,

A. Yes.

Q. How long was it, if you remember, before they were completed?

A. Oh, it took some months. There was a great deal of detail work, and it took a great deal of time—I think December or January.

EDWARD C. PERKINS, sworn.

(By Mr. FARLEY:)

Q. Your full name is Edward C. Perkins?

A. Edward C. Perkins.

Q. You live in Milton?

A. In Milton.

Q. Your are a counsellor at law, practicing in Boston?

A. Yes.

Q. With an office in the Sears building?

A. In the Sears building.

Q. What, in 1895 and prior thereto and thereafter, was the general character of your practice?

A. Well, from the beginning, mainly, I began as a clerk and student with George S. Hale and afterwards was his partner, and his business was largely corporations. He was counsel for the Boston & Albany and for the Western Union here in Boston. Then, I was with him until 1879,—with General Walcott, we had a partnership; then I went to Colorado on account of my deafness. Before I went I was for two years attorney for the Bell Telephone Company at the beginning of their starting here, that is, their local attorney, not their patent attorney, but their local attorney. I gave that up and had to go West in the latter part of 1878. I was West for about five years; then I came back in 1883, and I took an office
39 in the spring of 1884 in the Sears building, and then the first practice that I had after that was that I was attorney for the Chicago, Burlington & Northern when that was organized, and

I was also attorney for the Chicago, Burlington & Quincy. Then after that I had a good many corporations, mainly those that Mr. Bigelow was president of, besides the two railroad corporations, so that my practice has been substantially, outside of trust matters, a corporation lawyer, as I have never been able to go to court on account of my deafness.

Q. Were you, in 1895, consulted about the Baltimore Old Dominion Company, the Old Dominion Copper Company of New Jersey?

A. Well, I was consulted about the Old Dominion Company, the one that was organized, I think, in New York, by Evarts, Choate & Beaman, if my memory serves me. I was local attorney here.

Mr. FARLEY: Now if you will produce that bill.

Mr. MCCLENNEN: It is not here.

Mr. HEMENWAY: Of course the original would be preferable to help a man's memory.

Mr. BRANDEIS: It will be here shortly.

Q. Do you recollect whether or not you sent a bill for services rendered to that company, or for that company?

A. Yes, I sent a bill for the year 1895.

Mr. FARLEY: Understanding that the original will be here later, I will ask him to refer to his letterpress copy.

Q. Have you a copy of that bill?

A. I have a press copy here in my book.

Q. Will you find it, please?

A. This is rendered the 1st of January, 1896, for the year from the 1st of January, 1895.

Mr. FARLEY: I will later call your Honor's attention to this, but merely state that is one of the plaintiff's exhibits, the original of which will be here.

SHELDON, J.: Yes. I think it was read.

Q. In connection with the matters for which this bill was rendered, were you consulted with regard to the status of certain stock; and, if so, by whom?

A. I was consulted by Mr. Nelson in regard to stock that stood in his name.

Q. And, if you recollect, about when?

A. I could not fix anything except by—in a very general way, it was during that year.

Q. Will you read from this copy of your bill the next to the last item?

A. "Consultation with Mr. Nelson in regard to stock standing in his name on the company's books and advice in regard thereto."

Q. Will you read the item preceding that?

40 A. "Consultation with Mr. Nelson and Mr. Bissell in regard to meeting of directors and meeting of stockholders in regard to what votes should be passed at such meeting and preparation of votes to be passed."

Q. As I understand, that bill was rendered January 1, 1896?
A. Yes. I will not swear it was turned in that day.
Q. But somewhere thereabouts?
A. It covered until that date.
Q. Now it appears from the records of the company that a meeting was held of the Old Dominion Copper Company's directors September 18, and that subsequent to that meeting a general approval of the stockholders of the company was appended to the records, and that the next meeting thereafter was not until November 24, 1897. Refreshing your recollection by referring to those records, and noticing that Thomas Nelson, "Treas." signed the approval of stockholders, can you state what Nelson consulted you about, what he said, and, so far as you can, what you advised?

Mr. McClennen: I object.
Sheldon, J.: This is taken de bene. Go on.

A. I can say this: I was consulted in a general way about all of the affairs of the company and prepared papers for them, and either drew or redrew by-laws; I do not remember whether I drew the original set or whether they were afterwards changed by me. Mr. Nelson consulted me about stock standing in his name as treasurer, and he told me that that was not treasury of the Old Dominion Company, and on that I advised him that he could vote it.
Q. Did he state anything further in regard to the stock?
A. Not that I can remember. He did say that it was not treasury stock of the Old Dominion Company, and on that I told him he could vote it. It was held by him as an outside party, just as if he had been treasurer of the Boston & Albany Railroad, or anything else.
Q. Well, beyond that, do you remember whether he stated anything as to whether or not the Old Dominion Copper Mining & Smelting Company had any interest in the stock?
A. He said it was distinctly outside of the Old Dominion Company.
Q. Was it on that statement of Mr. Nelson's that you based the advice?
A. Certainly.
Q. Now if you will again state what that advice was?
A. My advice was to him that he could vote that stock, as it did not belong to the Old Dominion Company, but that if it was Old Dominion Company's stock, and stood in his name as treasurer, then they could not vote it. That is, that an officer could not vote treasury stock.
Q. Was it pursuant to that advice, if you know, that these records were made?
41 A. I have not a shadow of doubt, although I will not say I remember absolutely, but seeing them here and knowing from our bill that this whole thing was prepared by me, supervised from the beginning, because my bill shows a charge for it.
Q. Will you now read the last paragraph of those records aloud, and see if that further refreshes your recollection?

A. "The undersigned stockholders of the Old Dominion Copper Mining & Smelting Company do hereby approve the action of the directors shown by the above record of meeting held on the 18th day of September, 1895: Leonard Lewisohn, A. S. Bigelow, Thomas Nelson, Philip A. Dumaresq." No, it does not refresh it in any way.

Q. Do you know who Leonard Lewisohn was?

A. Yes, very well.

Q. Who was he?

A. He was a New York merchant who dealt very largely in coppers of all kinds. I met him a good many times.

Q. Had he, if you know, been associated with Mr. Bigelow?

A. Oh, yes, I had seen him with Mr. Bigelow, and they called me down when Mr. Lewisohn — there about several things.

Q. Mr. Bigelow, as you understand, is president of different companies?

A. Yes, I am told so.

Q. Thomas Nelson, did you know?

A. I knew him very well indeed.

Q. And Mr. Dumaresq?

A. Yes, for fifty years.

Q. Who was Mr. Dumaresq?

A. Who was he? He was the son-in-law of Captain——

Q. No, I mean what was his position with Mr. Bigelow?

A. That I would not say from memory, but he was transfer agent for a good many of the companies for a long time; I would not say from memory whether he was at that time particularly. The way he came into it at first was because he was a connection of Tom Nelson's.

Q. Mr. Perkins, it appears by the stub of certificate No. 73, which was a certificate issued to Thomas Nelson, treasurer, for 20,000 shares, as expressed by the stub, that that was for the vote of the syndicate?

A. Yes.

Q. Will you state whether or not that was in accordance with what Mr. Nelson told you?

[Objected to.]

A. That I cannot say.

SHELDON, J.: I do not think I could take it even to put it on the record.

Mr. FARLEY: In that case I think I will ask no more questions.

Q. Have you that bill yet?

Mr. BRANDEIS: No, it has not come.

42 Cross-examination.

(By Mr. McCLENNEN:)

Q. Have you any way of stating, Mr. Perkins, when this conversation with Mr. Nelson occurred?

A. No, there was no conversation.
Q. Have you any way of stating when the particular interview curred in which he told you that he did not hold that stock in his me as treasurer of the company?
A. You mean the date?
Q. Yes.
A. No, not the slightest.
Q. Could you by reference to these records in any way fix the te on which that conversation took place?
A. I could not any more than I see the date of the record, that all. I could say it was probably some time before that.
Q. That is, it was before the meeting at which those votes were be passed that you gave him this advice?
A. Let me understand what meeting it is. Yes, probably where e by-laws came in; yes, because I prepared the by-laws.
Q. It was in connection with preparing those by-laws that you d this conversation?
A. No, sir; I had general consultation about all that kind of thing, pecially about that one particular thing of the stock. I remem-r that, you see. That stood "treasurer," and that brought up the estion because I had an opinion that he could not vote the treasury ck if it belonged to the company. That brought up the whole scussion.
Q. Was this discussion as to his right to vote treasury stock at e time that you were discussing the passing of these new by-laws?
A. Well, probably that went over lots of days. I didn't make by-ws in an hour. We were at this thing for days.
Q. What was the vote which you advised him that he could vote on if he did not hold for the company, and could not vote upon if e did hold for the company?
A. Any vote that was presented.
Q. Do you now recall what votes were under consideration?
A. Nothing more than by reference back to the things; I see what there.
Q. Well, will you read through those records, beginning, if you ease, with the record of the meeting of the 11th of July, and going rough all those of September?
A. Read them to myself?
Q. Read them to yourself, if you will.
A. Is this the one?
Q. This is the meeting of July 11. If you will, read that and e one of July 24 and the one of September 18 that run along to-ether, and see if they will refresh your recollection as to the votes out which there was a question.
A. You don't want me to read this schedule of mining properties t in the West, do you?
Q. I don't think that would do you any good at all.
A. [Having perused the record.] No I don't. My advice was simply that he could vote that stock like any other stock-holder; that is all.
Q. And that reading of the record does not enable you

to state when that advice was given, on what particular vote, or anything else?

A. He simply wanted to know if he could vote that stock, and he had told me it was not the property of the Old Dominion Company; and I said certainly he could vote it, as any other stockholder could.

Q. Do you recall anything about how much stock there was standing in his name at the time of this advice?

A. No, I could not remember that from memory at all, only that there was stock standing in his name as treasurer, and he explained the matter to me that it was not as treasurer of that company. Dealing, as I was, with that question all the time with corporations, I had told them, time and again, they could not vote treasury stock; and that brought up the question instantly.

Q. Did you inspect the records at the time you gave him that advice?

A. The previous records? I cannot say.

Q. Were you aware whether or not, at the time of that advice, the corporation had passed any vote authorizing the issue of any stock to Thomas Nelson?

A. I cannot say; my memory will not let me.

Mr. FARLEY: At what time?

Mr. MCCLENNEN: At the time that he gave that advice.

Q. Was this a directors' or a stockholders' meeting about which he was asking your advice?

A. He was not asking specially about any meeting; he was asking my advice all along the line. These by-laws and everything were coming up all the time; we were weeks on it.

Q. Was there more than one occasion on which he asked your advice on this particular subject?

A. That I could not answer you certainly, but I think so.

Q. You think there was more than one?

A. I think so. I talked it over with him; I talked with him—I think with Mr. Bigelow; I think also with Mr. Bigelow, but I am not absolutely certain.

Q. And on each of those occasions he informed you that this stock stood in his name as treasurer?

A. I don't think he took the trouble to tell me that; he told me once, and he thought I would understand.

Q. I am trying to get it as specifically as I can.

A. Of course it was twelve years ago and what not; and as for dates, I do not pretend to remember them. I know I looked over my office papers I have got, and things come back to me; and I remember it distinctly, because it was a curious case, that I advised him to vote stock which apparently stood in his name as treasurer.

44 Q. He was treasurer of a number of Mr. Bigelow's companies?

A. Oh, lots of companies.

Q. And held stock in his name as treasurer in those various companies?

A. I do not remember.

Q. You don't know about that?

A. No, I don't remember whether he did or not. Whether he owned any treasury stock or not, I do not know.

Q. And the curious thing about that case at that time was that stock standing in the name of a man as treasurer on the books of the company should not belong to the company?

A. Not on the books of the company; I did not say that. When I saw the certificate of the treasurer I inquired, I think, of Bissell first, and then I talked with Nelson, and I was informed that it was not treasury stock of the Old Dominion; that the Old Dominion had nothing to do with it.

Q. Would this certificate No. 73 bring back anything to your mind?

A. Not the slightest; not the remotest.

Q. But when he advised with you there was a certificate already in his name?

A. That is my impression.

Q. Then would the fact that the certificate is dated the 18th of September, and that the stock went out of his name on the 19th of September, assist you at all in fixing the time of the conference?

A. No; the stock must have been, the certificate must have been made out. I cannot remember about that.

Q. Then I think I misunderstood you on that. Didn't you say that he showed you the certificate?

A. I don't know that. I said he told me he had stock. He may have showed me a certificate. I don't think I said anything of that kind, because I am not intending to tie myself down to that statement. I understood he had stock simply in his name as treasurer.

Q. You were counsel for Mr. Nelson in other companies, were you?

A. Yes, I was acting for most all of the companies at that time.

Q. Acting for Mr. Bigelow?

A. Well, Mr. Bigelow was president and Mr. Nelson was treasurer. I was acting for most of the companies.

(By Mr. FARLEY:)

Q. Have you any doubt, in spite of the fact that Mr. Nelson consulted you on other matters and so forth, that this advice for which you have charged, about which you have testified, was in relation to the Old Dominion Copper Company?

A. No, not the slightest.

45 [Following is a copy of the book called the corrected list, referred to in the testimony of Altmiller, and marked "Exhibit 502."]

[Outside cover:]

CORRECTED LIST.

OLD DOMINION COPPER MINING AND SMELTING COMPANY.

EXHIBIT 502. Nov. 13, 1907. G. C. B.

46

[Inside cover:]

OLD DOMINION COPPER MINING AND SMELTING COMPANY.

40,000
40,000

80,000
20,000

100,000

47	Shs. Total.	$ Orig.	$ July 18.	Shs. List.	Bonus. Rights.	Scaled.	Allot.	Cash.
A	1,225	11,000	22,500	900	240	680	545	5,000
			305,500	12,240	4,980	1,560	1,460	.....
B	11,220	122,500	306,500	12,260	4,860	1,500	1,500	.....
C	6,170	54,000	168,500	6,740	2,160	2,140	1,850	.....
D	970	10,000	4,250	170	400	170	170	.....
E	500	5,000	2,500	100	200	100	100	.....
F	800	7,500	7,500	300	300	200	200	.....
G	2,110	2,000	51,250	2,050	80	2,050	1,950	.....
H	6,905	52,619	222,500	8,900	2,025	3,235	2,775	2,000
J	700	10,000	10,000	400	300	.....	.....	.....
K	600	10,000	5,000	200	200	.....	.....	5,000
L	36,860	458,881	459,000	18,360	18,355	100	100	.....
M	8,000	82,500	67,500	2,700	3,300	2,000	1,400	.....
N	150	.....	103,750	4,150	.....	150	150	.....
O	210	2,000	3,250	130	80	50	50	.....
P	2,980	21,000	52,500	2,100	840	1,500	1,300	.....
R	3,030	21,000	58,500	2,340	840	1,500	1,350	.....
S	7,040	40,500	154,250	6,170	1,620	4,450	3,800	.....
T	1,100	2,500	37,500	1,500	100	900	900	.....
W	9,440	88,000	75,000	3,000	3,520	2,400	2,400	.....
	99,360	1,001,000	1,811,750	72,470	39,520	23,225	20,440	12,000
N. Y. D.	40		1,810,750	72,450	39,420	23,185	20,540	480
	100,000				39,460		20,500	
				100,000				
Allottes		20,440		20,540				20,500
N. Y. Directors		40		40	20,000 a 25			40
		20,480		20,580	40,000 "			20,540
		39,520		39,420	60,000			39,460
		60,000		60,000				60,000

Headings in ink; rest in pencil.

c/o E. C. Swift, Ames Bldg. Boston		15.
New Bedford, Mass.		16.
99 Bedford St.		17.
Fall River, Mass.		
	A. 1	18.
40 State St.	A. 2. B. 1.	19 for 20. 65 for 10.
19 Kilby St.		
40 State St.		20
36 India St.		21
66 Franklin St.		
Traveller Office		
79 Milk St.		22
92 State St.		
Springfield, Mass.	A. 3.	110
Boston News Bureau	A. 4	
Nat. Security Bank		23
Second Nat. Bank		
		24
Equitable Bldg.		25
92 State St.		26
350 Washington St.		
557 Boylston St.		27
		28
18 P. O. Square		

			Sub. Orig.	List.	July 18.	Rights.	To be Scaled.	Allotment.	Cash.
Altmiller, Chas. H.	O	185	$500	$5,000	200	20	180	145	.....
Anthony, D. M.	O	600	5,000	12,500	500	200	300	200	.....
Abbe, Edw. P.	O	200	.....	5,000	200	.....	200	200	.....
Alline, Jno. W.	O	40	500	.....	.....	20	.....	.....	.....
Anthony, H. H.	O	200	5,000	.....	.....	.....	.....	.....	$5,000
		1,225	11,000	22,500	900	240	680	545	.....
Bissell, Clarence H.		100	.....	2,500	100	.....	100	100	.....
Beal, Jos. S.		200	.....	5,000	200	.....	200	200	.....
Bazeley, Wm. A. L.		220	500	5,000	200	20	180	180	.....
Ball, Geo. H.		1,600	20,000	20,000	800	800	.....	.....	.....
Bolles, Richard F.		740	6,000	12,500	500	240	260	260	.....
Belches & Co., J. W.		1,300	10,000	22,500	900	400	500	500	.....
Burnett, Harry		*800	10,000	10,000	400	400	.....	.....	.....
Billings, Robt. C.		800	10,000	12,500	500	400	100	.....	.....
Bond, Chas. P.		20	.....	500	20	.....	20	20	.....
Brown, Sam'l N.		800	10,000	10,000	400	400	.....	.....	.....
Bradley, Peter B.		100	.....	2,500	100	.....	100	100	.....
Bartholomew, S. B.		100	.....	2,500	100	.....	100	100	.....
Barron, C. W.		40	1,000	[1,000]†	[40]†	40	[40]†	[40]†	.....
Bigelow, A. S.		4,000	50,000	200,000	8,000	2,000	.....	.....	.....
Batt, Chas. R.		200	2,500	.....	.....	100	.....	.....	.....
Beal, Thos. P.		200	2,500	.....	.....	100	.....	.....	.....
		11,220	121,500	306,500	12,260	4,860	1,600	1,500	.....
			122,500	305,500	12,240	4,900	1,560	1,460	.....
Chrimes, W. A. S.		180	500	5,000	200	20	180	140	.....
Cole, Jr., Chas. H.		260	1,500	5,000	200	60	140	140	.....
Clark, Ward & Co.		1,250	.....	37,500	1,500	.....	1,500	1,250	.....
Cole, Chas. H.		400	5,000	5,000	200	200	.....	.....	.....
Coe, Henry T.		920	8,000	15,000	600	320	280	280	Paid
			600	.....	.....	.....	.....	.....	.....
Cheever, David W.		25	.....	625	25	.....	25	25	Paid
Coram, Jos. A.		1,520	19,000	100,000	4,000	760	.....	.....	.....
Crosby, Stephen M.		1,600	20,000	.....	.....	800	.....	.....	.....

* Wanted in ctf. of 100 shs. ea.

[† Figures enclosed in brackets erased in copy.]

50

24 State St., New York, N. Y.
620 Atlantic Ave. 29
170 State St. B. 2.
19 Congress St. 30

11 Oak Grove Terrace, Roxbury, Notices c/o Price & Co. A. 5.
35 Congress St.

48 Congress St. A. 6.
c/o Chas. H. Cole A. 7.
Summer St.

Houghton, Mich. 31.
St. Johnsbury, Vt. 32.
41 Devonshire St. 33
Houghton, Mich. 34
20 North St. B. 3.

53 State St.
" " 35.
87 Milk St. A. 8
Daniellsonville, Conn. 36
Houghton, Mich. also $6.00 37
Springfield, Mass.
c/o Leland, Towle & Co. A. 9
38

28 High St.
301 Congress St.

		Orig. Sub.	List.	July 18.	Rights.	Scaled.	Allotment.	Cash.
Cammann	.....	.....	.....	.....	.....	.....	.....	.....
Cousman, Oswald N.	15	.....	8375	15	.....	15	15	Paid
	6,170	854,000	168,500	6,740	2,160	2,140	1,850	.....
Dodd, Edw. M.	50	.....	1,250	50	.....	50	50	.....
Davenport, C. L.	120	.....	3,000	120	.....	120	120	.....
Denmon, Dan'l L.	800	10,000	.....	.....	400	.....	.....	*[$10,000]
	970	10,000	4,250	170	400	170	170	.....
Eldredge, A.	100	.....	2,500	100	.....	100	100	.....
Ely & Co.	400	5,000	.....	.....	200	.....	.....	.....
	500	5,000	2,500	100	200	100	100	.....
Fitzgerald, Wm. F.	100	.....	2,500	100	.....	100	100	.....
Foote & French	100	.....	2,500	100	.....	100	100	2,500
Field, R. M.	200	2,500	2,500	100	100	.....	.....	.....
Fenno, Isaac	400	5,000	.....	.....	200	.....	.....	.....
	800	7,500	7,500	300	300	200	200	.....
Gray, Dewey & Co.	400	.....	12,500	500	.....	500	400	.....
Goodell, Rufus R.	300	.....	7,500	300	.....	300	300	.....
Grout, W. W.	1,000	.....	25,000	1,000	.....	1,000	1,000	.....
Greenleaf, E. D.	200	.....	5,000	200	.....	200	200	.....
Goodell, H. S.	50	.....	1,250	50	.....	50	50	.....
Goodenough, H. B.	160	2,000	.....	.....	80	.....	.....	.....
	2,110	2,000	51,250	2,050	80	2,050	1,950	.....
Head & Co., Chas.	1,080	3,500	27,500	1,100	140	960	800	.....
Head, Chas.	900	10,000	12,500	500	400	100	100	.....
Hayden, Stone & Co.	2,400	10,000	50,000	2,000	400	1,600	1,300	.....
Hopkins, Timothy E.	825	8,119	12,500	500	325	175	175	4,384
Hodge, Chas. J.	†800	10,000	10,000	400	400	.....	.....	.....
Herrick, Jos. T.	100	.....	2,500	100	.....	100	100	.....
Howe, Jno. L.	300	.....	7,500	300	.....	300	300	.....
Hyams, Godfrey M.	.....	.....	100,000	4,000	.....	.....	.....	.....
Hollingsworth, Z. T.	400	5,000	.....	.....	200	.....	.....	.....
Harding, Albt. E.	80	2,000	.....	.....	.....	.....	.....	2,000

* Figures enclosed in brackets erased in copy.
† Make in 100 sh. ctf. & hold subject to his order.

52

20 North St.
20 North St.

66 Franklin St.
50 State St.
53 State St. A. 10.

Exchange Place
138 Federal St. 39
c/o C. H. Cole 40
c/o R. H. Stearns & Co. A. 11.
Franklin, Mass. 41
15 Congress St.
813 Ashland Block, Chicago
138 Federal St.
112 Federal St.
Providence, R. I.
40 State St.
130 Summer St.

Columbian Nat. Bank
262 Purchase St. B 4.
A. 12.

		Orig. Sub.	List.	July 18.	Rights.	Sealed.	Allotment.	Cash.
Hollis, N. E.	160	2,000	.....	.....	80	.....	.....	.....
Hollis, Geo. W.	160	2,000	.....	.....	80	.....	.....	.....
	6,905	52,619	222,500	8,000	2,025	3,235	2,775	.....
	.....	.....	.....	.....	100	.....	.....	.....
	500	.....	.....	.....	[300]*	.....	.....	.....
Jones, Mrs. Mary L.	[800]*	10,000	10,000	400	[400]*	.....	.....	.....
Sawyer	100	} deducted.						
Miss Anthony	100							
Miss Manning	100							
Kendall, J. S.	600	10,000	5,000	200	200	.....	.....	5,000
Lewisohn Bros.	.....	.....	250,000	10,000	.....	.....	.....	.....
Leland, Towle & Co.	320	4,000	4,000	160	160	.....	.....	.....
Lyman, Geo. H.	200	2,500	2,500	100	100	.....	.....	.....
Lundberg, Gustav	100	.....	2,500	100	.....	100	100	.....
Lewisohn, Leonard	36,190	452,381	100,000	4,000	18,095	.....	.....	.....
Luce, Matthew	.....	.....	100,000	4,000	.....	.....	.....	.....
	36,810	460,881	459,000	18,360	18,355	100	100	.....
Mead & Co., F. S.	1,200	10,000	25,000	1,000	400	600	400	.....
Manning, Mrs. Abby H.	900	5,000	25,000	1,000	200	800	500	.....
Messervy, Benj. F.	200	2,500	2,500	100	100	.....	.....	.....
Mosman, Walter B.	100	.....	2,500	100	.....	100	100	.....
Makenzie, Chas. J.	400	.....	12,500	500	.....	500	400	.....
Meredith, J. Morris.	2,000	25,000	.....	.....	1,000	.....	.....	.....
Maltman, A. S.	800	10,000	.....	.....	400	.....	.....	.....
Manning, F. H.	800	10,000	.....	.....	400	.....	.....	.....
Moses, H. C.	240	3,000	.....	.....	120	.....	.....	.....
Metcalf, Stephen O.	400	5,000	.....	.....	200	.....	.....	.....
Moseley, Chas. W.	800	†10,000	.....	.....	400	.....	.....	.....
Mawhinney, H. H.	160	2,000	.....	.....	80	.....	.....	.....
	8,000	82,500	67,500	2,700	3,300	2,000	1,400	.....
Newhall, Horatio	50	.....	1,250	50	.....	50	50	1,250
Newhall, Geo. E.	100	.....	2,500	100	.....	100	100	.....

* Figures enclosed in brackets erased in copy.
† Wanted in ctf. of 100 shs.

54

31 Bromfield St.
Tremont House Carriage Stand — B. 5.

Lincoln, Mass. — 42.
43
44

66 Franklin St.
56 State St.
New Bedford, Mass. — 45
54 Devonshire St. — A. 13
68 Devonshire St.

40 Water St.
Kidder, Peabody & Co. — 46.
305 Beacon St.
157 Federal St.
Franklin, Mass. — 47
48
c/o Leland, Towle & Co. — 49

20 Davis St., Providence, R. I. — 50
Ames Bldg. — 51
40 State St.

Lincoln, Mass. — 52
Houghton, Mich. — A. 14
Providence, R. I. — 53
66

No. Andover, Mass. — 55
55 High St.
5 Park St.

		Orig. Sub.	List.	July 18.	Rights.	Scaled.	Allotment.	Cash.
Nelson, Thos.	.....	.....	100,000	4,000	.....	.....	.....	.....
	150	.....	103,750	4,150	.....	150	150	.....
O'Connor, John	160	2,000	2,000	80	80	.....	.....	.....
Ormond, James	50	.....	1,250	50	.....	50	50	.....
	210	2,000	3,250	130	80	50	50	.....
Pierce, John H.	1,000	10,000	15,000	600	400	200	200	.....
Putnam & Co., C. A.	400	.....	12,500	500	.....	500	400	.....
Price & Co.	400	.....	12,500	500	.....	500	400	.....
Preston, Geo. M.	400	5,000	5,000	200	200	.....	.....	.....
Prendergast, Jas. M.	200	.....	5,000	200	.....	200	200	.....
Pierce, Otis N.	100	.....	2,500	100	.....	100	100	.....
Prince, Gordon	400	5,000	.....	.....	200	.....	.....	.....
Perkins, Thos. H.	80	1,000	.....	.....	40	.....	.....	.....
	2,980	21,000	52,500	2,100	840	1,500	1,300	.....
Richardson, Agt., S. W.	800	10,000	10,000	400	400	.....	.....	.....
Remick, F. W.	200	.....	5,000	200	.....	200	200	.....
Rust, Nancy E.	80	1,000	1,000	40	40	.....	.....	.....
Reed, Wm. H.	600	5,000	10,000	400	200	200	200	.....
Ray, Jos. G.	1,100	5,000	25,000	1,000	200	800	700	.....
Richards, J. J.	250	.....	7,500	300	.....	300	250	.....
	3,030	21,000	58,500	2,340	840	1,500	1,350	.....
Smith, Albt. W.	500	.....	12,500	500	.....	500	500	.....
Swift, E. C.	1,800	10,000	50,000	2,000	400	1,600	1,000	.....
Stevens, Horace H.	400	5,000	5,000	200	200	.....	.....	.....
Sears, Geo. O.	200	.....	5,000	200	.....	200	200	.....
Smith, F. & C. S.	100	.....	2,500	100	.....	100	100	.....
Sturgis, Jas. B.	1,000	.....	26,250	1,050	.....	1,050	1,000	.....
Sack, A. Albert	200	.....	5,000	200	.....	200	200	.....
	.....	.....	.....	.....	.....	.....	500	.....
Snow, Homer N.	500	.....	12,500	500	.....	500	.....	.....
Stevens, Moses T.	800	10,000	25,000	1,000	400	.....	.....	.....
Smith, Albt. O.	400	5,000	3,000	120	200	.....	.....	.....
Somers, F. D.	400	5,000	.....	.....	200	.....	.....	.....

56

40 State St.
472 Delaware Ave., Buffalo, N. Y. 56

c/o Tower, Giddings & Co. 57
50 State St. 58
c/o Leland, Towle & Co.
c/o Leland, Towle & Co. 59
60

40 State St. A. 15.
81 Milk St. A. 16.
2033 G St., Washington, D. C. 61
ctf. 5 of 200 ea. & 2 of 100 ea.
"The Warren," Roxbury A. 17
105 Federal St. 62.
Kidder, Peabody & Co. 63
33 Summer St. 64
Nat. Union Bank B. 6.
B. 7.
A. 18

528 Beacon St.
130 Main St., Worcester.
87 Milk St.

		Orig. Sub.	List.	July 18.	Rights.	Scaled.	Allotment.	Cash.
Stevens, Sam'l S.	200	2,500	.....	.....	100	.....	.....	.....
Spaulding, S. S.	240	3,000	.....	.....	120	.....	.....	.....
Stackpole, Henry	300	.....	7,500	300	.....	300	300	.....
	7,040	40,500	154,250	6,170	1,620	4,450	3,700	.....
			.....	.....	.....	.....	3,800	.....
Tower, Wm. A.	300	.....	7,500	300	.....	300	300	.....
Thayer, E. V. R.	500	.....	25,000	1,000	.....	500	500	.....
Towle, John F.	200	2,500	2,500	100	100	.....	.....	.....
Towle, B. N.	60	.....	1,500	60	.....	60	60	.....
Towle, Amos	40	.....	1,000	40	.....	40	40	.....
	1,100	2,500	37,500	1,500	100	900	900	.....
Wainwright & Co., H. V.	100	.....	2,500	100	.....	100	100	.....
Woods, Henry F.	100	.....	2,500	100	.....	100	100	.....
Woodhull, Max.	1,800	15,000	15,000	600	600	600	600	.....
Wood, Henry	100	.....	2,500	100	.....	100	100	.....
Williams, Jere	800	5,000	15,000	600	200	400	400	.....
Webster, F. G.	300	.....	7,500	300	.....	300	300	.....
Woods, Henry	1,400	10,000	**25,000**	**1,000**	**400**	**600**	**600**	.....
Whitney, Geo.	50	.....	1,250	50	.....	50	50	.....
Winsor, W. P.	50	.....	1,250	50	.....	50	50	.....
Wetherbee, J. Otis	100	.....	2,500	100	.....	100	100	.....
Williams, Harold	400	5,000	.....	.....	200	.....	.....	.....
Wheeler, Leonard	240	3,000	.....	.....	120	.....	.....	.....
Whitney, Henry M.	4,000	50,000	.....	.....	2,000	.....	.....	.....
	9,440	88,000	75,000	3,000	3,520	2,400	2,400	.....

58 *Deposition of Cleveland H. Dodge.*

Mr. FARLEY: I will read the deposition of Cleveland H. Dodge, taken in behalf of the defendant, under the same conditions as the others [reading down to the first objection].

Mr. MCCLENNEN: We should like to save an objection from now on.

SHELDON, J.: Very well, the rest of the deposition is taken de bene.

[Mr. Farley finished reading the deposition.]

Deposition of Joseph F. Costello.

Mr. FARLEY: This is another deposition taken on behalf of the defendant, pursuant to the same stipulation and agreement [reading down to the first quotation].

Mr. MCCLENNEN: I should like to make objection to the admission of these articles from the "News Bureau."

SHELDON, J.: I think I ought to follow the usual course, Mr. McClennen. They are all spread out on the deposition. If I exclude them, in case of an appeal they might not go up. I think it is better I should receive them de bene as I have the rest, even if it does protract the hearing.

Mr. FARLEY: Mr. Hemenway suggests that the evidence is offered for the purpose of showing the publicity of this transaction.

SHELDON, J.: It does not make any difference what the purpose is.

[Mr. Farley completed the reading of the deposition.]

Deposition of Thomas H. O'Neil.

Mr. FARLEY: I will read the deposition of Thomas H. O'Neil, taken under the same conditions.

Mr. MCCLENNEN: I would like to save the same objection.

SHELDON, J.: This is taken de bene.

Mr. FARLEY: This evidence is offered simply for the sake of showing the publicity of the transaction [reading the deposition].

Mr. HEMENWAY: Does that complete the reading of the testimony that was taken?

Mr. MCCLENNEN: Yes, I believe that is everything.

Mr. HEMENWAY: Of course I could not check it off.

59 *Statutes and Citations.*

Mr. TREADWELL: We offer in evidence the record of the Court of Appeals in the state of New York in the case of Blum v. Whitney et al., which may be found reported on page 232, volume 185, of the New York reports, together with the printed copy of the papers on appeal.

Mr. HEMENWAY: I do not think it is necessary to go into those.

Mr. MCCLENNEN: I object generally to the New York law.

SHELDON, J.: The New York law is taken de bene.

Mr. MCCLENNEN: I had supposed, anyway, that the particular

record of a case that is not carried forward into the printed reports was in no way admissible. I should like to make further objection to that.

Mr. HEMENWAY: It is my impression that the record of a case may be read, any part that is admissible, in order to understand the opinion.

SHELDON, J.: The record of a case, so far as reported in the volume of reports, is competent, of course. I suppose a printed copy of the papers of appeal does not go in, but it may be put in de bene.

Mr. TREADWELL: There is a printed report of the Circuit Court of Appeals in many of the large libraries of the various states, which contains the whole record of the decision, and that is sent out by the Court of Appeals, and in that form I have cited it on my brief. But we have here for convenience what I have offered, a printed copy of the record which I happened to have, and which I assumed the other side would permit the use of for the purpose of saving the trouble of going to the volume.

SHELDON, J.: And as that is not available, as I understand it, in any law library, it had better be marked as an exhibit.

Mr. TREADWELL: I think it is available. There is certainly one in New York, one at Washington, and, I think, one in Boston.

SHELDON, J.: I think it will be safer to put it in. If I have to pass upon the law I shall want everything there is put in evidence.

Mr. TREADWELL: I will state, if I may, that there were no questions of fact. It went up to the Court of Appeals purely on questions of law.

SHELDON, J.: Well, you may have it marked as an exhibit if you desire.

[The pamphlet "Papers on Appeal," in Blum v. Whitney et al., was marked "Exhibit 501, Nov. 13, 1907, G. C. B."]

Mr. TREADWELL: I wish also to offer in evidence the two cases in the federal court for the circuit of New York——

60 SHELDON, J.: Are those, being under the law of New York, admissible under our statutes?

Mr. TREADWELL: We contend that as adjudications in New York they are admissible.

SHELDON, J.: It is a foreign court, of course.

Mr. FARLEY: Just as to their effect upon the determination we make no contention; as to the fact that they do represent the law in that jurisdiction, whatever its effect——

SHELDON, J.: Well, they may come in de bene; the two cases being——

Mr. TREADWELL: Old Dominion Copper Mining & Smelting Co. v. Lewisohn, in the 148th Federal Reporter, 136, one being the case in the Circuit Court and the other being the case on appeal.

SHELDON, J.: May I consider it agreed, as stated by the plaintiff, that an appeal from the last decision is now pending at Washington?

Mr. TREADWELL: Not an appeal, but a certiorari.

Mr. FARLEY: I would also offer—I will not put in the volumes—

McCracken v. Robinson, 57 Fed. Rep. 375.

Barr et al. v. N. Y. & C. R. R., 125 N. Y. 263.

Seymour v. Spring Forest Assoc., 144 N. Y. 333.

Mr. HEMENWAY: Our evidence is somewhat more brief than we expected. We expected to occupy the time until adjournment. It is possible that in the morning I may want to put on another witness.

SHELDON, J.: Have you any other witness here, or any other testimony?

Mr. HEMENWAY: No, your Honor.

SHELDON, J.: Will there be anything in rebuttal?

Mr. MCCLENNEN: There are two or three things we can put right in now without asking Mr. Hemenway to rest.

SHELDON, J.: Very well.

Mr. MCCLENNEN: I should like to put in evidence, without waiving my objection to the New York law, the following:—

Gettey v. Devlin, 54 N. Y. 403.
Brewster v. Hatch, 122 N. Y. 349.
Sage v. Culver, 147 N. Y. 241.
Coulton Improvement Co. v. Richter, 55 N. Y. Supp. 486.

61 SHELDON, J.: That, I suppose, might be open to the same objection as some of the other citations put in.

Mr. MCCLENNEN: I had assumed that the decision of any court of the state of New York, however inferior in character, was admissible——

SHELDON, J.: Well, that may be.

Mr. MCCLENNEN: —and that the objection went merely to its weight rather than to its admissibility. But I did think the federal decisions were not admissible in any respect.

SHELDON, J.: I must confess my own opinion is that a decision of the federal court, it being entirely a foreign court, is not competent, but I prefer to take them de bene.

Mr. MCCLENNEN: I should like to offer from the files of the Old Dominion Company a letter from C. W. Barron to Thomas Nelson, dated October 22, 1895.

Mr. HEMENWAY: Note my exception.

SHELDON, J.: It is taken de bene.

Mr. MCCLENNEN: [Reading:]

"C. W. Barron, Manager Boston News Bureau, 13 Exchange Place, P. O. Box 231.

BOSTON, *Oct.* 22, 1895.

Thomas Nelson, Sears Building, Boston.

MY DEAR MR. NELSON: Can you not arrange in the matter of my Old Dominion subscription now? I want to put those 80 shares away in the bottom of a new security box and see what will grow atop of it.

Very truly yours,

C. W. BARRON.

[In pencil:]

Bigelow	10 shares
Nelson	10 shares
Luce	10 shares
Coram	10 shares
	40 shares

C. T. F. 40 shares mailed Barron Jan. 20, 1896."

62 I should also like to have the fact appear in evidence, which shows entirely from an inspection of the files, that the file from which letters appear removed, as stated in the correspondence of Mr. Altmiller and Mr. Bigelow, is the file of 1895, terminating with January 6, 1896, or thereabouts; and that letter to Mr. Barron, although dated October 22, 1895, appears in the file of 1896, between a letter of January 15 and a letter of January 20, 1896. I think it has already appeared to your Honor that other 40 shares came out of the treasury, making up the 80.

Mr. FARLEY: If your Honor please, that 40 shares which Mr. McClennen says came out of the treasury, came out of the much-discussed stock which we contend did not come out of the treasury, and we do not wish to accede to his statement.

Mr. MCCLENNEN: From the transfer book of the company I will offer transfer No. 352 which shows a transfer on January 11, 1896, by J. A. Coram to C. W. Barron of 10 shares.

SHELDON, J.: This is also taken de bene.

Mr. MCCLENNEN: Transfer No. 353, a transfer by Thomas Nelson to C. W. Barron, January 11, 1896, of 10 shares; transfer No. 354, a transfer by A. S. Bigelow to C. W. Barron of 10 shares, January 11, *1906;* transfer No. 351, a transfer by Matthew Luce on January 11, 1896, to C. W. Barron of 10 shares. It appears from the margin of these transfers that the 40 shares made up from those four are in the certificate No. 573. The 40 shares that were referred to as coming from the treasury, to be more specific, were in certificate 93, September 19, 1895, coming out of certificate No. 73 of Thomas Nelson, treasurer.

I think that is all we have at the moment to fill up the time.

SHELDON, J.: Well, you ought not to be called upon to rest, of course, until the defendant does, and the defendant has in mind one more witness. Well, I think I can let you go now, gentlemen, and as I have two habeas corpus cases assigned for to-morrow morning, which of course you will not be interested in, I will not hold any of you until half past 10 o'clock to-morrow forenoon.

Mr. HEMENWAY: The case will be argued at that time?

SHELDON, J.: You will be ready, will you not? The testimony so much of it has been in writing that you are all familiar with it.

Mr. MCCLENNEN: I can see no better time than while the testimony is fresh in your Honor's mind.

SHELDON, J.: It will be of material assistance to me now to hear

the arguments, of course. We will commence the case, and if we can we will finish it to-morrow.

[Adjourned to Thursday, November 14, 1907.]

63

THURSDAY, *November* 14, 1907.

SHELDON, J.: I suppose, Mr. Hemenway, if you have further evidence, that would come first.

Mr. HEMENWAY: I will simply put in the statute of New Jersey, the corporation act of 1875, par. 55 of section 4; also the Public Laws of 1889, p. 414, and Public Laws of 1893, p. 444. I do not think it is necessary to read that. It is simply that stock issued for property purchased shall so state on the certificate, and for cash if it is for cash.

Mr. TREADWELL: Those two sections were the law in force just before the incorporation in 1895.

SHELDON, J.: If you have the statutes here, Mr. Hemenway, perhaps you had better read them.

Mr. HEMENWAY: Mr. Farley has them.

Mr. TREADWELL: I have a copy here of one of the sections, if your Honor please.

SHELDON, J.: Of the act of 1895?

Mr. TREADWELL: Yes. It reads—

"That section fifty-five of the same act be and hereby is amended so as to read as follows:

"55. And be it enacted, That the directors of any company incorporated under this act may purchase mines, manufactories, or other property necessary for their business, or the stock of any company or companies owning, mining, manufacturing or producing materials or other property necessary for their business and issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be declared and be taken to be full paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payment under any of the provisions of this act; and said stock shall have legibly stamped upon the face thereof 'issued for property purchased' and in all statements and reports of the company to be published, this stock shall not be stated, &c., reported as being issued for cash paid into the company, but shall be reported in this respect according to the fact."

Then came the following section that operated and applied only where straight stock was issued, then the section applying where there was stock and cash paid for property. In that case it was not required to be stamped, but was considered as full payment for property.

64 I do not like to have your Honor take my statement, but I presume it will be conceded by the other side that Mr. C. C. Beaman was dead before this suit was begun.

SHELDON, J.: That is agreed?

Mr. BRANDEIS: Yes.

Mr. TREADWELL: Relative to Mr. Evarts' testimony, I do not

know exactly what the statute is in this state. The statute with us is that counsel cannot testify as to communications from his clients unless and after a deliberate waiver by the client; and if that may be considered to be any objection——

SHELDON, J.: There is no such statute in this state. Mr. Evarts was called and testified.

Mr. HEMENWAY: If your Honor please, one moment. As I stated, the matter has nothing to do with the evidence here, but inasmuch as the evidence is to be used in New York, he thought it would be safer to put in a waiver.

SHELDON, J.: Well, you may do it.

Mr. HEMENWAY: The stipulation, if your Honor please, I understand is confined to depositions taken out of court.

Mr. TREADWELL: I understand it extends to all the testimony here given.

SHELDON, J.: In this case, Mr. Evarts having been called by the party in whose interest he acted in this suit, I should have held, if the occasion had arisen, that Mr. Bigelow could not object to Mr. Evarts testifying as fully as the other side might desire on cross-examination. Of course in this case no such question could have arisen. The mere calling of him by Mr. Bigelow, so far as Mr. Bigelow could have made that objection, was a waiver of any such objection.

Mr. TREADWELL: Under the stipulation I understand the testimony which is adduced here can be filed and stipulated into the record in the federal court in the case against Lewisohn, therefore I thought a waiver as far as that is concerned might be made.

SHELDON, J.: You can file such a waiver. I thought perhaps a statement would be sufficient.

That closes the testimony for the defence?

Mr. HEMENWAY: Yes.

SHELDON, J.: Have you anything further, Mr. McClennen?

Mr. McCLENNEN: I want to add one of the New York cases I did not mention yesterday, namely, Campbell v. Cypress Hills Cemetery Co., 41 N. Y. 34. That is the only further testimony.

65 SHELDON, J.: This closes, then, the testimony.

Mr. McCLENNEN: Now, if your Honor please, the testimony being closed, I move you, with respect to each one of the pieces of evidence, interrogatories and answers that have been introduced over our objection, and admitted de bene, be stricken out.

SHELDON, J.: Well, you may minute the fact that the request is made——

Mr. HEMENWAY: The defendant makes a like motion.

SHELDON, J.:—and that the defendant makes a like motion, and that each motion is denied.

Mr. McCLENNEN: We save our exception.

Mr. HEMENWAY: Yes, and we save an exception.

[Mr. McClennen handed up requests for rulings.]

SHELDON, J.: You have considered, I suppose, whether you want to make regular requests for rulings? As, in case of appeal, the

whole case will go up on appeal, you might be found to have hampered yourselves, perhaps. But you have considered that?

Mr. McCLENNEN: I have considered that.

SHELDON, J.: And as Mr. McClennen has spoken of the length of the argument, although I had not intended to do so, I ought to ask, before you begin the arguments, whether you are content with the usual time of an hour apiece?

Mr. HEMENWAY: I shall ask to have my time extended.

SHELDON, J.: What time do you think you would like?

Mr. HEMENWAY: A reasonable length of time.

SHELDON, J.: Well, there is certainly a good deal of ground to cover, and I think that while I will not give you unlimited time for argument on each side, I will not feel myself called upon to interfere unless I think I ought to. In view of that, do you wish to look over these requests of the plaintiff before argument, Mr. Hemenway?

Mr. HEMENWAY: If your Honor please, it would take some little time to look them over as to the findings. I think we could more profitably spend the time in making my argument, and then subsequently let me except to them, or except to them now without reading.

SHELDON, J.: Well, I will allow either one of you, if you desire, as to whatever rulings I make, to save an exception. But whether you would not prefer to save all your rights, whatever my findings may be, would be for the full court to consider. I do not want to restrict your rights on either side at all. You can proceed, then, with the argument, Mr. Hemenway.

66

[Arguments omitted.]

Stipulation.

In the above-entitled cases it is stipulated and agreed that copies, duly certified by the notaries before whom they were taken, of the testimony hereinafter set out, and the exhibits thereto, taken in the above-entitled cases or in the case of the Old Dominion Copper Mining & Smelting Company v. Lewisohn, pending in the Circuit Court of the United States for the Southern District of New York, may be filed in the above-entitled cases by either party at any time before the hearing, and may be read and used as evidence in these cases; reserving, however, to each party all rights to object to the relevancy, competency, and materiality of any of said depositions or documents, and to any interrogatories or answers therein contained, and reserving the right of the respondent to cross-examine. Signatures waived.

The evidence, together with the exhibits, covered by this agreement is as follows:

Name of witness.	Date of taking.	Name of notary.
F. L. Rauhauser	Feb. 4, 10, 11, 1903	W. L. Webb.
Walter Lewisohn		
Adolph Lewisohn		
Frederick Lewisohn		
Albert Lewisohn		
—— Rahaeuser	Feb. 24 & 25, 1903	W. L. Webb.
—— Westervelt		
Jesse Lewisohn		
—— Rahaeuser	March 5, 1903	W. L. Webb.
—— Westervelt		
A. S. Bigelow	Mar. 24, Apr. 16, 23, May 5, 1903	Howland Twombly.
—— Hyams	Mar. 27, May 5, '03	" "
G. L. Stone	June 15, 1904	" "
J. A. Coram		
C. H. Altmiller	Oct. 11, 18, 1904	" "
W. R. Reed	July 19, 20, 1905	" "
S. N. Brown		
67		
R. F. Bolles		
C. R. Batt		
W. B. Mossman		
C. L. Davenport		
H. V. Snow		
A. W. Hale		
S. B. Capen		
W. A. S. Chrimes		
W. A. S. Chrimes	Oct. 27, 1905	Howland Twombly.
—— Wood		
S. M. Crosby		
W. A. Rust		
E. C. Swift		
E. M. Dodd		
D. M. Anthony		
G. M. Preston		
J. F. Ormand		
J. Grout	Dec. 14, 1905	George S. Frye.
F. D. Stocker		
F. D. Stocker		
A. H. McLeod		
W. P. Smith		
H. A. Root	May 12, 1906	W. L. Webb.
C. F. Brooker		
J. S. Bigelow	May 22, 1906	Howland Twombly.
C. H. Bissell		
J. M. Meredith		
A. S. Bigelow		
S. H. Stern	May 23, 1906	W. L. Webb.

W. J. Ladd.....	July 24, 1906	E. F. McClennen.
C. S. Altmiller.....		
C. S. Smith.....		
John Stanton.....		(Written interrogatories)
E. V. R. Thayer.....	Feb. 16, 1907	Howland Twombly.
—— Hyams		

BRANDEIS, DUNBAR & NUTTER,
Attorneys for Complainant.
ALFRED HEMENWAY,
Attorney for Respondents.

April 1, 1907.

68 Circuit Court of the United States, Southern District of New York.

No. 1.

OLD DOMINION COPPER MINING AND SMELTING CO.
v.
FREDERICK LEWISOHN et al.

Taken before Howland Twombly, Esq., Notary Public, at 220 Devonshire Street, Boston, Mass., March 24 et seq., 1903.

Appearances:

Louis D. Brandeis, Esq., for the Plaintiff.
Edward Lauterbach, Esq., Alfred Hemenway, Esq., for Defendants.
George C. Durpee, Stenographer.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
220 DEVONSHIRE ST.,
BOSTON, *March* 24, 1903.

Deposition of Albert S. Bigelow.

ALBERT S. BIGELOW, Esq., being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by L. D. Brandeis, Esq., counsel for plaintiff, deposes and says:

Q. 1. State your full name, age, residence, and occupation.
A. Albert S. Bigelow; fifty-seven years old; president of mining companies; residence in Cohasset, Mass.

Q. 2. State how long prior to April 30, 1895, you first considered purchasing an interest in the Old Dominion Copper Company of Baltimore City.

A. I could not say.

Q. 3. Have you the original option given by the Simpson estate to J. M. Meredith, for the purchase of their stock in the
69 Old Dominion Copper Company of Baltimore City, which option was dated April 30, 1895, as stated in your answer in the suit of the Old Dominion Copper Mining & Smelting Company v. A. S. Bigelow in the Supreme Judicial Court for the county of Suffolk? (A copy produced.)

Mr. LAUTERBACH: It is my impression that I have the original option in my possession. The copy now produced by the witness is admitted, subject to possible correction; if the original is in my possession, it may be inspected by plaintiff's counsel and substituted, if desired.

[Copy of option from Simpson estate to Meredith, dated April 30, 1895, marked "Exhibit 1, G. C. B., March 24, 1903."]

Q. 4. What communication did you have with Leonard Lewisohn concerning this option of April 30, 1895, before that date?

A. It is impossible for me to remember.

Q. 5. Do you have any recollection of any communication with Mr. Lewisohn?

Mr. LAUTERBACH: I want to note an objection that, Mr. Leonard Lewisohn being deceased, any conversation with him is not admissible under our New York statute.

A. Do you mean with respect to my getting an interest in it?

Q. 6. In respect to that, yes, partly.

A. Well, so far as I can remember, the first thing I heard of it was through the telephone from Mr. Leonard Lewisohn, in which he said that he would give me half of this option that he had secured on the Old Dominion Copper Company of Baltimore City on the shares of the Simpson estate.

Q. 7. Did not you have some communication with Mr. Lewisohn or with Mr. Meredith before any option had been secured at all?

A. I do not remember whether I did or not; it was probably before; I should think so; it would be before the option was secured.

Q. 8. Did not Mr. Lewisohn talk with you about having Mr. Meredith get an option?

A. Not that I remember.

Q. 9. Did not Mr. Lewisohn talk with you about that fact that Mr. Meredith was going to try to get an option?

Mr. LAUTERBACH: My objection applies to all conversations with Lewisohn.

A. It is impossible for me to remember so far back.

Q. 10. Will you examine your letter book, "Letters to," and see whether there is not, prior to April 30, 1895, some letter-press copy to Leonard Lewisohn or Lewisohn Brothers, or some one connected

with that concern, or to you from Leonard Lewisohn or Lewisohn Brothers, to you or Mr. Hyams, some letter or telegram relating to the proposed option on the Simpson stock in the Old Dominion Copper Company of Baltimore City?

70 A. I have looked these all through myself; so I have put my marks in, and I know how far back they go. The first letter I find is dated May 16, I think [shown to Mr. Brandeis]. Shall I read it?

Q. 11. No; if you will not read that just at present, we will come to it a little later. That is the first letter from you to Mr. Leonard Lewisohn or to Lewisohn Brothers?

A. That is the first.

Q. 12. Now what is the date of the earliest letter which you received from Leonard Lewisohn or Lewisohn Brothers, or any one connected with them, in relation to this matter?

A. May 15.

Q. 13. Do you not recall that, prior to the obtaining of this option on April 30, 1895, Mr. J. Morris Meredith came into your office and telephoned from your office to Mr. Leonard Lewisohn relating to this proposed purchase?

A. It would be impossible for me to recall anything like that.

Q. 14. How soon after April 30, 1895, did you have any communication with Leonard Lewisohn regarding that option?

A. It is impossible for me to say.

Q. 15. Have you in your possession the revised option, dated May 4, 1895, from the Simpson estate to J. Morris Meredith for the purchase of the Simpson stock in the Old Dominion Copper Company of Baltimore City?

A. [Copy produced; original will be exhibited.]

Mr. LAUTERBACH: It is my impression that I have the original in my possession. The copy now produced by the witness is admitted, subject to possible correction; if the original is in my possession, it may be inspected by plaintiff's counsel, if desired.

[Copy of revised option, dated May 4, 1895, marked "Exhibit 2, G. C. B., March 24, 1903."]

Q. 16. Do you recall whether you had any communication with Leonard Lewisohn in regard to the proposed purchase of the stock of the Old Dominion Copper Company of Baltimore City before this revised option of May 4 was executed?

A. I could not recall that.

Q. 17. Have you any recollection of being in New York at the time this revised option was drawn up?

A. I do not think I was there.

Q. 18. You have no recollection whatever about it?

A. No, sir.

Mr. LAUTERBACH: I understand my objection is intended to cover all this, and that it will be fully entered.

Mr. BRANDEIS: When we get through you can dictate the objection in exact form, so that the stenographer will have it.

71 Q. 19. What is the earliest date that you can recall as to your agreement with Leonard Lewisohn to take the half interest in the option for the purchase of the stock of the Simpson estate in the Old Dominion Copper Company of Baltimore City?

A. I shall have to refer to my letter from Mr. Leonard Lewisohn of May 15. Shall I read the letter?

Q. 20. Yes.

A. This was addressed to me:

"DEAR SIR: Enclosed please find statement. I suppose you understand I paid Mr. Meredith two thousand dollars for the option on the Old Dominion property. At your convenience at any time, will you kindly send us your half, as I understand you are going to take a half interest in this matter. Yours truly."

Q. 21. I would like to ask this question before we leave the option of May 4: Will you state in whose handwriting the memorandum in pencil at the bottom of the copy of the May 4 option is: "Are any contracts out with Keyser for selling, smelting, refining, or other contracts; are any liabilities, mortgages, liens, etc., against the company? Want twenty days instead of fourteen."

A. I cannot make out. I do not know whose writing it is. It looks like Leonard Lewisohn's writing; I think it is Leonard Lewisohn's writing.

Q. 22. Have you the statement enclosed in Mr. Lewisohn's letter of May 15, 1895?

A. I am sure I don't know. I have been unable to find it.

Q. 23. Have you any recollection of what the statement was?

A. I have not any recollection except that I received it; that is all. If you will hear this letter, I will read this letter to Leonard Lewisohn, May 16:

"Herewith find my check for $1000, being one-half of the $2000 which you paid to Mr. Meredith for the option on the Old Dominion property. Your understanding that I am going to take a one-half interest in the matter is correct. Please receipt your statement and return it to

Yours very truly."

Q. 24. But you have no recollection as to what statement it was?

A. No.

Q. 25. What, at that time, was the relation of Mr. Godfrey M Hyams to you and Mr. Lewisohn; what business relation?

A. The same as it is now.

Q. 26. State what it was please.

A. Well, I do not know; it is impossible for me to say.

Q. 17. Will you state?

A. He never had a title, I might say; he acted as consulting engineer.

72 Q. 28. And what else?

A. Well, I don't know.

Q. 29. Secretary?

A. Private secretary? Almost everything.

Q. 30. I asked whether he was private secretary?

A. No.

Q. 31. If you will, state as fully as you can what Mr. Hyams' duties were. I want to have it appear what his relations were to you at that time. Just state it in your own way.

A. He was in our employ, by the different companies.

Q. 32. What were his relations to Mr. Leonard Lewisohn or Lewisohn Brothers?

A. I do not know of any, beyond that of being a friend.

Q. 33. What was the relation to the companies which you were then managing of Lewisohn Brothers?

A. Lewisohn Brothers acted as our selling agents.

Q. 34. And were largely interested as stockholders in the companies?

A. Yes.

Q. 35. And as officers?

A. In some of the companies.

Q. 36. In which companies were you and Leonard Lewisohn, or Lewisohn Brothers, both interested as stockholders and officers?

A. You mean back at that time?

Q. 37. At that time.

A. Tamarack, Osceola,—I am not sure that Mr. Lewisohn was director in these companies at that time, he was not director in all of them, at any rate,—Boston & Montana, Butte & Boston; I believe that is all.

Q. 38. Merced?

A. I do not think he had any official relations with that company.

Q. 39. Lewisohn Brothers were the selling agents?

A. No, sir, not of that company.

Mr. SMITH: That is a gold company.

The WITNESS: It did not need any selling agent.

Q. 40. As a matter of fact, Mr. Hyams went, at your request and at the request of Leonard Lewisohn, to examine this Old Dominion property shortly after the option was obtained?

A. Do you put that as a question? Yes, sir.

Q. 41. Are you able to fix the date when Mr. Hyams left Boston to make that investigation?

A. No, sir.

Q. 42. Have you not some letters to Mr. Hyams relating to this matter which will enable you to refresh your recollection in this respect?

A. No, I have not.

Q. 43. Have you with you the letter-press copy book which would contain any letters addressed to Mr. Hyams on this subject, assuming that there were such, after he left Boston?

A. Yes. These are the only books that I have here.

Q. 44. Have you made search in that book to see whether there was any letter written to Mr. Hymans about that time?

A. I have.

73 Q. 45. During what period has your search covered?

A. I have really looked through this whole book. It begins May 29, 1893, and the last date is October, 1896.

Q. 46. How is that letter book designated?

A. "A. S. B., Private."

Q. 47. Is there not some other letter book covering the period of April and May, 1895, which may contain letters from you to Mr. Hyams or to Mr. Lewisohn?

A. [Referring to another letter-press book.] This book is designated "A. S. B."

Q. 48. What period does that cover?

A. 1892, to February, 1897.

Q. 49. Have you examined that book also to see whether there is any letter to Mr. Hyams in April or May?

A. Yes, sir, I have.

Q. 50. What is the earliest letter that you find there?

A. There is not any.

Q. 51. None whatever?

A. None that I know of. I do not find any.

Q. 52. You had, in May, 1895, certain interests in Great Falls, Mont., did you not?

A. At what time?

Q. 53. In May, 1895.

A. Yes, sir.

Q. 54. And, assuming that Mr. Hyams was at Great Falls, Mont., in May, 1895, in what letter book would copies of letters to him be contained?

A. They would doubtless be in the companies' letter books.

Q. 55. The Great Falls Manufacturing Company?

A. There was no manufacturing company. The Boston & Montana did its smelting.

Q. 56. Is that book in your possession?

A. No, sir.

Q. 57. Is the letter of May 15, 1895, from Leonard Lewisohn, which you have read, the earliest letter or written communication of any kind from any person relating to the acquisition of the option on the Simpson interest in the Old Dominion Copper Company of Baltimore City, or the formation or proposed formation of a syndicate to take over that interest?

A. It is the earliest I can find.

Q. 58. What is the date of the earliest paper of any kind which you have relating to the organization of the Old Dominion Syndicate?

A. May 21, 1895.

Q. 59. Will you let me see the paper?

[Witness produces a subscription paper dated May 21, 1895, which is marked "Exhibit 3, G. C. B., March 24, 1903."]

Q. 60. Will you kindly produce the other subscription papers bearing date later than May 21?

[Witness produces a subscription paper dated May 24, 1895, which

is marked "Exhibit 4, G. C. B., March 24, 1903;" also another subscription paper dated June 14, 1895, which is marked "Exhibit 5, G. C. B., March 24, 1903."]

74 Q. 61. Was there not some paper prior to May 21, 1895, embodying some agreement in regard to the Old Dominion Syndicate, between yourself and J. A. Coram, Matthew Luce, Henry M. Whitney, J. Morris Meredith, Thomas Nelson, or some of them?

A. I have been unable to find any paper.

Q. 62. Was there not, prior to May 21, some agreement with those gentlemen, or some of them, in relation to the Old Dominion Syndicate?

A. It would be impossible for me to say what the date was.

Q. 63. Was not there some such agreement at some date prior to this earliest subscription paper, dated May 21?

A. I think there was.

Q. 64. Will you state what that agreement was?

A. I do not remember.

Q. 65. Have you no recollection whatever in regard to it?

A. No.

Q. 66. You have been unable to find anything in any of your books and papers relating to that agreement?

A. Yes, sir.

Q. 67. Do you find any copy of any letter from you or Hyams, or to you or to Mr. Hyams, or any other paper relating to Old Dominion matters prior to May 21, 1895, except the letter from Leonard Lewisohn to you dated May 15, and your reply under date of May 16, quoted above?

A. No, sir, I do not.

Q. 68. Were Mr. Hyams' letters in matters relating to Old Dominion Syndicate copied in your letter book, or letters to him from Leonard Lewisohn, or Lewisohn Brothers, relating to the matter, kept among your letter files?

A. No, sir. Mine are private. These are my private letter books; absolutely private.

Q. 69. Are those three subscription papers, dated, respectively, May 21, May 24, and June 14, 1895, being Exhibits 3, 4, and 5, the only papers of any kind which were ever executed between you and the members, or any of the members, of the Old Dominion Syndicate?

A. There were undoubtedly other subscription papers which I believe to be of the same tenor, as the papers submitted do not figure up to the full amount of the subscription. I find, also, one additional paper without date or day of the month, in the year 1895, in precisely the same form.

[Subscription paper, no date, 1895, marked "Exhibit 6, G. C. B., March 24, 1903."]

Q. 70. Were there no other papers of any kind besides such additional subscription papers in the same form as Exhibits 3, 4, and 5, relating to the Old Dominion Syndicate?

A. Not unless they are here. I do not remember of any. [In-

specting a bunch of papers.] I do not find any. There may have been a prior agreement with Coram and others referred to.

75 Q. 71. I call your attention to the fact that on the Exhibits 3, 4, 5, and 6, neither you nor Messrs. Nelson, Whitney, Meredith, Luce, or Hyams appear as subscribers. Does not that fact refresh your recollection so that you are able to testify definitely that there was some other agreement between yourself and them relating to the Old Dominion Syndicate?

A. Certainly it does, if that is the fact. I have not looked over it. [Inspecting.] I find that is the fact.

Q. 72. Are you able to recall now what that agreement was between yourself and Messrs. Nelson and the others?

A. You mean the wording of it?

Q. 73. The substance of it.

A. I really cannot, but I think it is very similar to one of these [referring to Exhibits 3, 4, 5, and 6]; I think the wording was very similar to it, if I remember.

Q. 74. What is the earliest communication from you to Leonard Lewisohn, or Lewisohn Brothers, or Hyams, or from any of them to you, after May 16?

A. June 11, 1895.

Q. 75. June 11, 1895, is the earliest letter from yourself to Leonard Lewisonn?

A. Yes.

Q. 76. In your private letter book?

A. Yes.

Q. 77. Now in the other letter books?

A. Well, just the same. This [book] is what you might call one of these detail books; there would not probably be anything here to Lewisohn. June 11, 1895, is the earliest letter to Leonard Lewisohn, or Lewisohn Brothers, or to Mr. Hyams in my letter book marked "Private;" in my other letter book, marked "A. S. B.," there is none earlier than June 11.

Q. 78. Now in regard to letters from any of them.

A. A letter from Mr. Hyams; impossible to say where it was written from; I think it is "Granite,"—dated May 11.

[Mr. Hyams en route.]

Q. 79. What is the earliest date of any communication to or from any of the subscribers to the syndicate agreement, Exhibits 3, 4, 5, and 6?

A. May 27, 1895.

Q. 80. What was that communication?

A. It was addressed to D. M. Anthony, Esq.

Q. 81. Just read that, will you?

A.—

"DEAR SIR: Enclosed herewith you should find receipt of your favor for $700, being the first payment of 14 per cent of your subscription of $5000 to the Old Dominion syndicate."

Q. 82. Were letters in that form sent to all of the sub-
76 scribers on Exhibits 3, 4, 5, and 6?

A. I could not say they were sent to all; some might have come in and paid, and got their receipt over the counter, or in my office, probably; there were quite a number here on May 27, as you will see.

Q. 83. Have you not some copy of some letters or receipts given to Messrs. Coram, Nelson, Whitney, Meredith, and Luce for the payment of the first instalment, called May 27?

A. Yes, I find two receipts.

Q. 84. Now will you read those?

A.—

"BOSTON, MASS., *May* 27, 1895.

Received of Henry M. Whitney the sum of $7000, being first payment of his subscription of $50,000 towards the purchase of stock in the Old Dominion Copper Company according to the terms set forth in a certain paper which said Whitney has signed, and a copy of which he has."

"BOSTON, MASS., *May* 27, 1895.

Received of J. Morris Meredith the sum of $3500, being first payment of his subscription of $25,000 towards the purchase of stock in the Old Dominion Copper Company according to the terms set forth in a certain paper which said Meredith has signed, and a copy of which he has."

Q. 84½. Have you not also a letter from J. Morris Meredith dated May 25; and if so, will you read it?

A.—

"BOSTON, *May* 25, 1895.

A. S. Bigelow, Esq.

DEAR SIR: Enclosed you have check for $3500 on account of my share in the Old Dominion Copper Mining purchase.

Yours very truly, J. MORRIS MEREDITH."

Q. 85. How long prior to May 27 had you and Mr. Lewisohn decided to accept the option for the Simpson stock?

A. It is impossible for me to remember the date.

Q. 86. I show you a copy of a letter from Leonard Lewisohn to you dated May 28, 1895, with a copy of an agreement annexed, and now marked for identification 7, and ask you whether you have not the original letter of which that is a copy?

A. I have not.

[STIPULATION.—It is stipulated that the original is believed to be in the possession of Mr. Lauterbach, and will be produced.]

77 Q. 87. Are you able, after reading the letter of Leonard Lewisohn to you on May 28, to recall whether or not you were in New York on that day?

A. On May 28?

Q. 88. Yes. Or whether Mr. Leonard Lewisohn was in Boston on that day? I refer specifically to the reference in the letter to the fact that you had endorsed notes of Leonard Lewisohn.

A. I do not remember. It does not say what the notes are, or the amount, does it? You want to know whether I remember that Mr. Lewisohn was here or in New York?

Q. 89. Yes.

A. I do not remember.

Q. 90. The letter of Lewisohn to you of May 28, 1895, Exhibit 7, refers to your having paid—you and Mr. Lewisohn having each paid—to the executors of Simpson on that day, $50,000 in part payment for the purchase of the Simpson estate's stock. What further sum or sums did you personally pay in carrying out the agreement to purchase the Simpson stock?

A. I do not remember. You ask, "What further sums?" It is impossible for me to remember.

Q. 91. Have you any books which will enable you to determine?

A. I have not any books except a check book.

Q. 92. Have you not any book of account in which your transactions in connection with the Old Dominion stock are entered?

A. Only in a check book.

Q. 93. The stub of the check book?

A. That is all. I keep no books.

Q. 94. I mean you have not at any time since 1895?

A. No.

Q. 95. Did you before 1895?

A. No.

Q. 96. You never have?

A. Never have kept any books, no, except a check book.

Q. 97. In what books have your large or great transactions been recorded?

A. My check books.

Q. 98. You mean on the stub of the check book?

A. Yes, sir.

Q. 99. And those check books or stubs have been preserved?

A. Yes, sir, so far as I know.

Q. 100. Has any book been kept showing the operations of this Old Dominion Syndicate? I mean the receipts of the money by the Old Dominion Syndicate and the disbursements.

A. I would not keep those books. It would not be in my province to keep them. There were no account books kept for the Old Dominion Syndicate. All the transactions can be determined by the deposits and checks drawn in my several individual bank accounts; all of the funds were received and paid out, out of my indi-
78 vidual bank account. No separate account was kept in which the Old Dominion Syndicate funds were deposited and from which they were drawn.

[Recess until 2 p. m., and resumed.]

Q. 101. Can you not, by reference to the Old Dominion Syndicate receipt book, which is produced by you, determine the amount of

money that you had received from the Old Dominion Syndicate subscribers on or before May 28, 1895?

A. There was received on May 27 and 28, $30,450 on Old Dominion Syndicate, as the first instalment of 14 per cent on Old Dominion Syndicate there was also received on May 27, $10,500, as appears by the receipts of Henry M. Whitney and J. Morris Meredith, quoted above in answer to Int. 84; there was also received on May 29, $3640, as first subscription of 14 per cent on Old Dominion Syndicate; making an aggregate of $44,590.

Q. 102. Will you please examine the Old Dominion Syndicate receipt book and state whether or not it is not a fact that in the receipts of the first instalment of Old Dominion subscriptions for the purchase of Old Dominion stock, aggregating $44,500, there is not included any subscription from Thomas Nelson, Matthey Luce, or Mr. Volkman?

A. I have examined the book, and find there is no receipt given to either of them.

Q. 103. There was produced by Mr. Lauterbach, in the taking of the depositions in New York, in the suit of the Old Dominion Copper Mining & Smelting Co. v. Bigelow, a copy of a letter of June 4, from Lewisohn Brothers to you: "We today received the Old Dominion syndicate blanks, for which we are obliged. Kindly send us bill and we will remit." Are you able to find that letter?

A. Yes, sir.

Q. 104. What is the date of the earliest letter after May 15 received by you from Leonard Lewisohn or Lewisohn Brothers?

A. That I have, you mean? June 3. A. S. Bigelow.

Q. 105. You stated, in answer to Int. 104, that the earliest letter that you find you received from Lewisohn Brothers, or Leonard Lewisohn, after May 28 is June 3: will you please read that letter?

A.—

"NEW YORK, *June* 3, 1895.

A. S. Bigelow, Esq., Boston, Mass.

DEAR SIR: In going over the Old Dominion matter, the undersigned finds the due dates of the notes given to the trust company to be 60, 90 and 120 days, which would make the due dates of
79 those notes July 27, August 26 and September 25, respectively. Now, in the syndicate form we find payments noted down as one day earlier than the notes are due. Has this been done on purpose or were the notes dated May 27 instead of May 28, as the writer thinks? Kindly enlighten me on this subject.

Yours truly, By J. RECKERT."

Q. 106. Also read the reply thereto, under date of June 4.

A. "Replying to your letter of June 4, the payments on Old Dominion syndicate subscriptions were fixed one day earlier than the due dates of the notes on purpose so as to get more money in to pay them when they mature. Yours truly."

Q. 107. Have you among your files a letter from Leonard Lewisohn dated June 10, 1895, of which a copy was produced by Mr. Lauterbach at the deposition taken in New York in the suit of Old Dominion

Copper Mining & Smelting Co. v. Bigelow? Will you produce a letter from Leonard Lewisohn to you dated June 10, 1895, and will you read the letter of Leonard Lewisohn to you dated June 10, 1895, and your reply thereto, under date of June 11, 1895?

A.—

"NEW YORK, *June* 10, 1895.

A. S. Bigelow, Esq., Boston, Mass.

DEAR SIR: As per telephonic conversation with Mr. Meredith, I have communicated by telephone with Mr. Keyser, accepting his two-sevenths 'net,' and expect to get an answer sometime tomorrow.

Mr. Meredith also stated that you had proposed we should give him (Mr. Meredith) 14 453rds of the interest in profits which our share derives ultimately in the Old Dominion matter—after the principal and interest actually paid in have been repaid. I have informed Mr. Meredith, that I will accept anything you say in the matter, but I wish to state that in reality, as I am getting only one-third of the Keyser purchase and you two-thirds, I am paying Mr. Meredith pro-rata actually more than you are, considerably. However, I am perfectly satisfied, and only hope I will have to pay him a lot of money!!

Please confirm that this understanding is correct.

Very truly yours, LEONARD LEWISOHN."

Q. And the answer?

A. My reply?

80 Q. 109. Yes.

A.—

"BOSTON, MASS., *June* 11, 1895.

Leonard Lewisohn, Esq.

MY DEAR SIR: Your favor of the 10th referring to Mr. Keyser's interest in the 2 7 of the Old Dominion is received. Your understanding that we should give Mr. Meredith 14 453rds of the interest in profits which our share derives ultimately in the Old Dominion matter after the principal and interest actually paid in have been repaid is in accordance with our understanding. This demand of Mr. Meredith does not relate simply to the 2 7ths of Keyser's, but it has a bearing on the whole question. You were very anxious we should pay Mr. Meredith something rather than have him stick out for his commission and thus imperil the trade with Keyser; and I think it has as close a connection with the whole business as it has with the 2 7ths. It was on that account therefore that we made this arrangement with Mr. Meredith. Unfortunately, as you know, you will have a much greater share in the profits than any other one person, but the manifest difference is that you obtain this by taking one-half of the 5 7ths and by putting up the money for it, but not only were we willing but anxious to take any part of this from you. You will understand that this 14 453rds which you are to pay Mr. Meredith is to come out of the whole of the interest which you subscribed for, or in other words is a charge against your one half of the 5 7ths and one third of the 2 7ths. Not that you alone shall pay

it out of profits which you keep to yourself but that others associated with you shall bear their share of it.

Yours very truly."

Q. 110. Is that the only letter under that date of June 11, 1895, which you have?

A. Yes. This other letter is out of place as June 11.

Q. 111. Will you now read the letter of Lewisohn Brothers to you, dated June 11, 1895, and the copy of the telegram from William Keyser therein referred to?

A.—

"JUNE 11, 1895.

A. S. Bigelow, Esq., Boston, Mass.

DEAR SIR: Please find enclosed herewith copy of telegram received today from Mr. William Keyser, addressed to our Mr. Leonard Lewisohn, which explains itself.

Yours very truly,

LEWISOHN BROTHERS,
——— ———, *General Manager.*"

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[*Telegram.*]

"BALTIMORE, MD., *June* 11, 1895.

To Leonard Lewisohn, 81 Fulton St., New York.

I confirm sale Baltimore stock terms your letter yesterday. Am prepared to deliver at once also to surrender control of corporation. Have telegraphed stoppage all work. Will advise about Ladenburg matter in few days. Will turn over my interest, which is one-half, in Old Dominion and other claims.

WILLIAM KEYSER."

Q. 112. Will you now read in chronological order the further correspondence which passed between you and Leonard Lewisohn, or Lewisohn Brothers, between June 12 and June 17, both dates inclusive?

A.—

"JUNE 12, 1895.

A. S. Bigelow, Esq., Boston, Mass.,

DEAR SIR: Your letter of the 11th instant received, which is perfectly in accordance with our understanding.

Very truly yours,

LEWISOHN BROTHERS,
L. LEWISOHN,
General Manager."

"JUNE 12, 1895.

A. S. Bigelow, Esq., Boston, Mass.,

DEAR SIR: This morning I spent fully two hours with Mr. Keyser and Mr. Beaman, and some hours again this afternoon in the matter; and even remained in the city on this account, instead of going

to my home in the country; but I have not been able to get Keyser to sign the paper—after having agreed everything with Mr. Beaman. This afternoon he made some few small objections and on that account said he would rather not sign until he had showed his father, which he expected to do tomorrow; and he will then telegraph us if his father signs.

82 I hope to send you the papers tomorrow after I hear that Mr. Keyser has signed. Meanwhile I hold his telegram of yesterday that he confirms the sale.

Very truly yours,

L. LEWISOHN.

"Copper looks well again, and we have reason to believe Europe will advance again."

This is a copy of a letter addressed to A. S. Bigelow, Esq., Boston, Mass.:

"JUNE 13, 1895.

DEAR SIR: After a long telephonic communication between Messrs. Beaman, Keyser and myself this afternoon, we have arranged as per enclosed copy of agreement, which Mr. Keyser has signed in Baltimore today and is sending me, and which I have signed at Mr. Beaman's office and am sending him.

Besides, please find enclosed plan of procedure for meeting of the directors of the Old Dominion Copper Company next Thursday, June 20th, when transfer is to be made.

Mr. Allen W. Evarts and I will be in Baltimore on that day, and I should be very pleased if you could make arrangements to be there also.

Very truly yours,

LEONARD LEWISOHN.
Per JESSE LEWISOHN."

[The original Keyser agreement is introduced in evidence and marked "Exhibit 8, G.C.B., March 25, 1903," and the plan of procedure is marked "Exhibit 9, G.C.B., March 25, 1903."]

"NEW YORK, *June* 14, 1895.

A. S. Bigelow, Esq., Boston, Mass.:

To avoid any delay and to facilitate the transfer of the Old Dominion Copper Company, I propose that you see the Old Colony Trust Company and arrange with them that Mr. Keyser shall have the notification before 10:30 a. m. on Thursday, June 20, that the money has been paid and the notes given for the Simpson and Keyser shares, so that when I have a meeting with Mr. Keyser in Baltimore on Thursday morning, matters may progress without delay, as otherwise Mr. Keyser might decline to finish the transaction, saying that we had not paid the money over, &c.

83 To do this it will probably be best to deposit the money on Wednesday afternoon or else arrange with the trust company that they will take your word that the money shall be paid

on Thursday. But what we specially want is that Mr. Keyser shall have received notification by 10.30 a. m., Thursday, of the deposit of the money and notes, and also that the Old Colony Trust Company shall notify us of the deposit of Keyser's and Simpson's stock. It would be well if you would see either Mr. Simpson or Mr. Butler and obtain from them in writing their agreement to deliver us their half of the interest in the Old Dominion, Keystone, New York and Chicago claims and whatever others there may be, as Mr. Keyser has transferred to us the other half interest which he has in those claims. Mr. Butler stated to Mr. Leonard Lewisohn when the matter was closed with the Old Colony Trust Company on the 28th of May in the presence of Mr. Beaman that the estate of Simpson would certainly transfer whatever interest it had in those claims.

All we want is to be sure that everything will go in perfect order, as we believe it will; but it is better to be fully prepared.

Very truly yours,

LEONARD LEWISOHN.

Please telephone Saturday regarding this."

"JUNE 15, 1895.

Lewisohn Brothers, New York.

GENTLEMEN: Your favors of the 13th and 14th were duly received, the former enclosing an agreement with Keyser and a plan of procedure for meeting of the directors of the Old Dominion Copper Company, both of which seem to be all right. It will be impossible for me to be at Baltimore on Thursday, but as our Mr. Altmiller from this office and Mr. Hyams will be there on that day, you will probably get along just as well.

In the matter of the directors, I see that you propose to allow three of the present Baltimore directors to remain, but that they shall place their resignations in your hands. There is one point in this which I wish to call your attention to, though it may not matter at all. If for any reason they should desire to kick up a row, would it not require a majority of the board present to accept their resignations? It might be well for you to see Mr. Beaman about this. I see that you did not make your point with Keyser that they should pay expenses due to the 20th day of June. I have been telephoning you about the amount which it will be necessary for us to pay in to the Old Colony Trust Company which we will have there in time so that the trust company will be able to certify early Thursday morning that it has been paid. We make the amount here for us to pay $183,650.89, plus interest $501.48, making a total of $184,152.37; leaving for you to pay, including interest —, which I suppose you will remit so that we will have it here Wednesday. I have figured the interest 23 days, carrying it up to Thursday, although we request payments to be made on Wednesday. I do not see how this can be avoided. I called upon the Old Colony Trust Company today and saw 2475 shares of stock there in their hands, which leaves 25 shares for qualification of directors. I have telephoned to Mr. Simpson and he and Mr. Butler

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re both coming here today between one and two o'clock about their greement to deliver us their half interest in the Old Dominion, eystone, New York and Chicago claims and whatever else they ave. Like you, I believe in making everything sure so that there ill be no hitch.

I have regretted very much to learn that your Mr. Leonard was ot to be present with us at the Osceola meeting on Tuesday next. had looked forward with pleasure to having him with me at my ouse.

Yours truly,

A. S. BIGELOW."

I do not think the postscript to that letter ought to go in.

Here is a letter of June 15, 1895:

"JUNE 15, 1895.

. S. Bigelow, Esq., Boston, Mass.,

DEAR SIR: Confirming conversation with Mr. Bissell over telehone today, we agree with him in the amount that has been paid in he Old Dominion Copper Company matter, viz:—$184,152 37.

Very truly yours,

LEWISOHN BROTHERS,
LEONARD LEWISOHN,
General Manager;
By JOSEPH RECHERT."

My next letter would be June 16. Shall I read this of mine of he 16th?

Mr. BRANDEIS: You read only one letter of yours of the 15th to Mr. Lewisohn.

The WITNESS: This is June 15. "Second letter."

85 "OLD DOMINION SYNDICATE, Sears Building,

Second Letter.

BOSTON, MASS., *June* 15, 1895.

Leonard Lewisohn, Esq., Box 1247 New York,

DEAR SIR: I have just returned from an interview with Mr. Simpson. He tells me that he saw young Mr. Keyser and gave him authority to transfer their one-half interest in the Old Dominion, Keystone, New York and Chicago claims and whatever others there may be to us. Mr. Simpson also tells me that he proposes to be in Baltimore Thursday morning at the meeting; consequently this will render all chance of any misunderstanding impossible. Mr. Simpson and Mr. Butler seemed to think that Mr. Keyser expected his payment to be made in Baltimore. I do not see how I can do this now, as I have made all the arrangements for the money to be paid in here on Saturday. I shall be over to the Old Colony Trust Co. on Wednesday and show them that I propose paying in that money to them the first thing Monday morning so

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that they will be able to wire the first thing Thursday morning to Mr. Keyser that the money has been paid. This should surely satisfy all parties.

Yours very truly,

A. S. BIGELOW.

Mr. Keyser has the receipt of the Old Colony Trust Co. for his stock which he can assign to you."

"JUNE 17TH, 1905.

A. S. Bigelow, Esq., Boston, Mass.,

DEAR SIR: In answer to your second letter of June 15th; we wish to say that we have had a conversation over the telephone this morning with Mr. Keyser regarding the way in which payments are to be made; and Mr. Keyser understands fully, and wishes us to make the payment in Boston—so that all the payments will be made in Boston at the office of the Old Colony Trust Company.

We also hear from Mr. Keyser that Mr. Bigelow has arranged with the Old Colony Trust Company that the money will be paid on Thursday. Mr. Abbott has written to this effect to Mr. Keyser.

Mr. Keyser is writing a letter to Mr. Abbott to-day telling him on payment of this money, to hold the shares to the order of Mr. Lewisohn—although we understand that the shares will have to be retained by the Old Colony Trust Company until the last note is paid.

86 Mr. Keyser is sending copies of the letters he is writing, of which we will send you copies.

In regard to the 25 shares of stock which Mr. Keyser is holding over; he is doing this as each Director needs 5 shares to qualify, and he thought it best to have these on hand in case they are needed at the Meeting, so that the Directors are qualified. Mr. Beaman also says this is necessary. We saw Mr. Beaman this afternoon and this gentleman says he believes that as regards the three Directors who, they promise, will resign, this will go quite in order; but he says he understood Mr. Bigelow had some relative or friend residing in Maryland who could be a Director—that if Mr. Bigelow desired this and that gentleman could be present, he could act as a director. Please telephone regarding this, if you desire your friend to act.

If there is anything further you wish us to do, please let us know over the telephone and we will be glad to attend to it.

Very truly yours,

LEWISOHN BROTHERS.
L. LEWISOHN,
General Manager;
Per JESSE LEWISOHN.

P. S.—Mr. Leonard Lewisohn was not at office today but will be here tomorrow."

Q. 113. Have you any letter from, or copy of letters to, any of the subscribers to the Old Dominion Syndicate prior to June 11, 1895, other than the copies of letters dated on or about May 27, 28, or 29

to subscribers acknowledging the receipt of the first payment of 14 per cent, about which you have testified?

A. The first letter I find, except mere acknowledgments of credited receipts and a letter acknowledging payment from Mr. Belches, who was a subscriber through the Lewisohn syndicate in New York, is a letter dated Boston, Mass., June 8, 1895, to Albert O. Smith, Esq., of Boston, Mass. [reading]:

"JUNE 8, 1895.

Albert O. Smith, Esq., 55 High St., Boston, Mass.

DEAR SIR: By accident your favor of May 27 was overlooked for a few days. I will do what I can for Mr. Mawhinney, but will tell you frankly that the subscription is already very largely oversubscribed. We may be able to obtain the other 2/7ths of
87 the property, and in that case Mr. Mawhinney can come in with the others who wish to subscribe. No interest will be allowed on anticipated payments.

Yours truly,

A. S. BIGELOW
W. A. S. CHRIMES."

Q. 114. Have you any letter from, or copy of letters to, any of the subscribers to the Old Dominion Syndicate prior to June 11, 1895, other than the copies of letters dated on or about May 27, 28, or 29, to subscribers acknowledging the receipt of the first payment of 14 per cent, about which you have testified?

A. I find in my letter books no other letter to any subscriber prior to June 11; I find no letter from any of the subscribers prior to June 11, other than letters enclosing payment of first instalment, except the letters of May 24 and May 27, from A. O. Smith, those letters being referred to in the letter quoted above. These letters are as follows:

"MAY 24, 1895.

Mr. Albert S. Bigelow, Boston, Mass.

DEAR SIR: My friend Mr. Hugh H. Mawhinney would like $2000 of the Dominion syndicate stock, and I hope you will arrange to let him have it, for in my opinion it will aid very much in making him a good client for you. When we called together week before last, you told him that you would let him in when you had any new scheme, and I hope you will be able to do it in this one.

Truly yours,

ALBERT O. SMITH."

"BOSTON, *May* 27, 1895.

Mr. Albert S. Bigelow, Boston, Mass.

DEAR SIR: Please inform me when you will probably know if the Dominion project is to be carried through and what interest will be allowed on anticipated payments of future assessments. I do not

wish to be importunate, but hope you will be able to let H. H. Mawhinney have the $2000, about which I wrote you on the 24th instant.

Respectfully yours,

ALBERT O. SMITH."

88 Q. 115. Now, Mr. Bigelow, will you read the letter to Maxwell Woodhull, Esq., of June 11, 1895?

A. There is something about other matters to begin with in that letter, but I will read this:

"JUNE 11, 1895.

Maxwell Woodhull, Esq., 2033 G St., Washington, D. C.

DEAR SIR: * * * In the letter which you wrote to me some days ago you said you heard that I had become interested in an Arizona property. This is true. Some time since we bought 5/7ths of the stock of the Old Dominion Copper Company which was owned by an estate here, for $714,285. The reason I did not write to you about this at that time was that on account of Mr. Lewisohn of New York insisting upon taking one-half of this purchase, we had but a small portion here for our friends. Since then we have been negotiating for the other 2/7ths on the same terms, and I think we shall get them. The terms of sale were $1,000,000 for the whole property. We have already made the first payment on our contract for the 5/7ths which was $100,000 and given three notes for the balance due upon the following dates, viz:—

$204,761.66, July 27, 1895.
204,761.66, August 26, 1895.
204,761.66, Sept. 25, 1895.

Mr. Lewisohn having taken one-half of this, of course left only one-half to be taken here, but in taking the 2/7ths which I think we may be able to secure—we shall know about it positively today or tomorrow—Mr. Lewisohn takes only one-third, leaving two-thirds for us here. Out of this 2/3rds I can offer you an interest. The terms of payment for the 2/7ths will be practically the same as that for the 5/7ths. I enclose you a paper which you can sign, if you please, which is the same as others have signed, and which tells you the dates of payment and so forth. All this interest is to be held as a syndicate until the reorganization of the company is effected.

The Old Dominion is a company of many years' standing and has been a considerable copper producer in the past. It has an efficient plant and is today capable of producing from 1,500,000 to 2,000,000 pounds of copper per month. Mr. Hyams examined the property for us carefully, and he reports that there are four years' ground opened ahead, and that he sees a profit in working the mine of from $350,000 to $500,000 a year. I firmly believe that

89 we shall make a great deal of money out of the purchase; but this was not the incentive that induced us to go into it. Our reason for securing it was, as I have often expressed to you, to secure yet more control of the copper market than we now have; in other words, to place our office first in the world as a copper producer; and we feel bound, when we have a chance to buy well known

and developed copper properties, to take hold of them largely and protect ourselves.

We have not yet decided what plan we shall pursue in regard to the Old Dominion. It will however be something like this, viz: The present company is organized with a share capital of 25,000 shares. We shall doubtless reorganize on a basis of 100,000 shares, and our present idea is to place somewhat less than half of this in Europe at a price that will pay back to the subscribers their money and give them their stock in the new company for nothing. These are the terms on which the other subscribers have come in.

Please let me know as soon as you can whether you wish to take any, and how much, for I have many applicants on my list and there really is not a great deal of it to go around.

Perhaps you had better wire me your answer about this.

Very truly yours,

A. S. BIGELOW."

Q. 116. Will you now read the telegram received by you from Mr. Woodhull in answer to your letter of June 13? It is annexed to a long slip of paper.

A.—

"WASHINGTON, D. C., *June* 13, 1895.

A. S. Bigelow, Sears Building, Boston:

I will subscribe $15,000 to Old Dominion Copper syndicate. See letter.

M. WOODHULL."

Q. 117. Also the letter or letters?

A.—

"2033 G STREET,
WASHINGTON, D. C., *June* 13, 1895.

A. S. Bigelow, Esq., Sears Building, Boston, Mass.,

DEAR Mr. BIGELOW: I received by the last mail Saturday afternoon your letter of the 11 instant, in which you offer me a chance to subscribe to the syndicate which has just bought the stock
90 of the Old Dominion Copper Company, for which letter and the chance offered I beg you to accept my thanks. I have just telegraphed you in reply thereto as follows:

"WASHINGTON, *June* 13—10.30 a. m., 1895.

A. S. Bigelow, Sears Building, Boston, Massachusetts:

I will subscribe $15,000 to Old Dominion Copper syndicate. See Letter.

M. WOODHULL."

As I understand it, subscriptions are made to the capital of the syndicate and not for a given number of shares. My subscription is therefore $15,000 to the capital of the syndicate. I can make the first payment of 14 per cent whenever you call upon me for the same. The balance of the subscription will, I infer from your let-

ter, be due and payable at the same time as the other payments to the syndicate are due, viz:

July 26, 1895, 28 2/3 per cent; interest 5 per cent from date of last payment (or what date exactly?)
August 25, 1895, 28 2/3 per cent, do
Sept. 24, 1895, 28 2/3 per cent do
Is this a correct statement?

I shall be in Boston either Monday or Tuesday morning. Is not Monday, the 17th, a holiday? Will you kindly acknowledge receipt hereof under special delivery stamp as it is now Thursday, and I should like to get your answer this week.

Very truly yours,

M. WOODHULL."

"2033 G STREET,
WASHINGTON, D. C., *June* 13, 1895—Afternoon.

Albert S. Bigelow, Esq., Boston, Mass.,

DEAR MR. BIGELOW: Your letter of June 12, 1895, in re subscription to Old Dominion Copper syndicate has just been received. In it, in the postscript, you say:

'Since writing you the foregoing I find that there may be some change made in payments as outlined, and that the 14 per
91 cent cash and the 28 2/3 per cent of July may have to be paid next week. I will duly notify you as soon as I know myself.'

I wrote you this morning subscribing for $15,000 of the syndicate subscription.

14 per cent upon that subscription equals	$2,100
Second payment, 28 2/3 per cent	4,300
	$6,400
Third payment, 28 2/3 per cent	4,300
Fourth payment, 28 2/3 per cent	4,300
Total	$15,000

I assume from your letter of the 12th instant now under consideration that my subscription of $15,000 will be accepted. I therefore sign the subscription paper enclosed in your letter of June 11, 1895, in the sum of $15,000, and return the same enclosed herewith.

As you say that the cash payments will be due next week and that you will duly notify me in respect to said payment, I shall not send you my check herein for the first payment, but shall await your promised notification. Please write under a special delivery stamp, as I shall go over to Boston Monday and shall want to hear from you before leaving Washington. I shall hope to see you Tuesday morning. I beg to refer to my letter of this morning as a part hereof.

Very truly yours,

M. WOODHULL.

One enclosure as stated above."

Q. 118. What is the next communication from Mr. Woodhull?
A. A telegram.

"WASHINGTON, D. C., *June* 14, 1895.

A. S. Bigelow, Sears Building, Boston, Mass.:

Will you allow rebate if I will pay Old Dominion Copper subscription in cash. Telegraph in reply.

M. WOODHULL."

Q. 119. What next?
A. A letter.

92 "JUNE 15, 1895.

Maxwell Woodhull, Esq., 2033 G St., Washington, D. C.

DEAR SIR: I have various communications from you to acknowledge; two letters on the 15th, telegram on the same day, another telegram on the 14th, all referring to Old Dominion syndicate matter. I have wired you today as follows:

'Have entered your Old Dominion subscription of $15,000. Have 42 2/3 per cent payment here Wednesday which we understand amounts to $6413.74. No rebate allowed on anticipated payments.' which I now confirm. Your understanding of the subscription is correct; they are made to the capital of the syndicate, not for a given number of shares. In figuring the interest on the different payments at 5 per cent they are figured from the 23rd of May up to the time when the notes on the contract are due. I call in the money from the different subscribers on the day before so as to be sure to have it in time. In this way they lose one day's interest, but I do not see how it can be avoided. For instance, in sending you the figures of your remittance, which I wish to have here on Wednesday, namely, $6413.74, I have figured 23 days' interest on $4300. You will have to excuse this brief note, as I am so busy and particularly as I am to have the pleasure of seeing you so soon. I will see you here on Tuesday when we can talk over the matter very fully.

Yours very truly,

A. S. BIGELOW."

Q. 120. Was there any other letter written to or received from any member of the Old Dominion Syndicate to June 11; if not, what was the earliest date of any such letter or copy of letter in your list?

A. [Read by Mr. Brandeis.] A telegram under date of June 12, 1895, to Leonard Wheeler of Worcester, asking him as follows:—

"Have obtained other two-sevenths Old Dominion. How many dollars interest do you want?

A. S. BIGELOW."

Mr. HEMENWAY: The admission of this letter [following] is objected to for the reasons stated as to other similar letters. [See page 94.]

93 "BOSTON, MASS., *June* 12, 1895.

Maxwell Woodhull, Esq., 2033 G Street, Washington, D. C.

DEAR SIR: Looking over my letter to you of yesterday you may have observed an apparent discrepancy between the paper which you were asked to sign and my letter giving the time when the notes are due. The reason for this is that I must have the money here the day before the notes are due so as to be prepared to take them up on the following day. Since writing my letter I learn from Mr. Lewisohn of New York that they have actually secured the 2/7ths, therefore the first payment by you of 14 per cent is now due. I do not see anything else that my yesterday's letter does not contain.

Yours truly,

A. S. BIGELOW.

P. S.—Since writing the foregoing I find that there may be some change made in the payments as outlined and that the 14 per cent cash and the 28⅔ per cent of July may have to be paid next week. I will duly notify you as soon as I know myself. The reason for this change is that our contract for purchase says that in order to have the control of the management of the company turned over to us, we must take up the payments due in July with a cash payment. You of course see that by prepaying you save 5 per cent interest any way.

Yours truly,

A. S. BIGELOW."

Q. 121. What is the next?

A. That was a telegram. Here is a letter: [Read by Mr. Brandeis.] On the same day, a letter to Joseph A. Brown as follows:

"DEAR SIR: Mr. Bigelow is extremely busy today and requested the writer to inform you that he had obtained the other two-sevenths of the Old Dominion. Mr. Bigelow would like to know immediately how much of an interest you would like.

Yours respectfully,

W. A. S. CHRIMES,
For A. S. BIGELOW."

Q. 122. Mr. Chrimes was a clerk of yours?

A. Yes, sir.

Mr. LAUTERBACH: I move to strike out all testimony of all transactions affecting the syndicating of the Bigelow interest in
94 the matter in Boston as having no reference and as being irrelevant, impertinent, and immaterial to the issue in this action, and as not affecting in any respect the transactions of Mr. Leonard Lewisohn or Lewisohn Brothers in the matter.

[Adjourned to Wednesday, March 25, and resumed.]

The WITNESS: Shall I read this [showing letter to Mr. Hemenway]?

Mr. HEMENWAY: The defendants object to the admission of the letter of June 12, 1895, from A. S. Bigelow to Moses T. Stevens, it being immaterial, irrelevant, and incompetent, and as being res inter alios.

The WITNESS: [Reading.]

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *June* 12, 1895.

Moses T. Stevens, Esq., North Andover, Mass.

DEAR SIR: Mr. Luce was in the office yesterday and told me that he had reserved a $10,000 subscription in the Old Dominion syndicate for you. I enclose paper which please sign and return. Some little time since we bought the Old Dominion property for $1,000,000, and have already made the first payment which was 14 per cent. There will therefore be due from you to be returned with the enclosed paper signed, your check for $1400; then there will be 28⅔ per cent of your subscription payable on July 26; 28⅔ per cent payable August 25, and 28⅔ per cent payable Sept. 24, these last three payments bearing interest at the rate of 5 per cent. It is proposed to reorganize this company, and the scheme as at present outlined is to float a little less than one-half of the new stock in Europe, which we have reason to believe we can do successfully, and then to pay back to subscribers their subscriptions, leaving their stock in the new company costing them nothing. The Old Dominion is a company of many years' standing, and has been a considerable copper producer in the past. It has an efficient plant and is today capable of producing from 1,500,000 to 2,000,000 pounds of copper per month. Our expert examined the property very carefully, and reports that there are four years' ground opened ahead, and that he can see a profit in working the mine of from $350,000 to $500,000 a year on a 10-cent copper market, and I firmly believe we shall make a good deal of money out of the purchase.

Yours truly,

A. S. BIGELOW.

95 P. S.—Since writing you the foregoing I find there may be some change made in the payments as outlined, and that the 14 per cent cash and the 28⅔ per cent of July may have to be paid next week. I will duly notify you as soon as I know myself. The reason for this change is that our contract for purchase says that in order to have the control of the management of the company turned over to us we must take up the payment due in July with a cash payment. You will of course see that by prepaying you will save 5 per cent interest any way."

Next is a letter to Mr. Charles S. Randall.

Mr. HEMENWAY: This is objected to for the reasons above stated.

The WITNESS: [Reading.]

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *June* 12, 1895.

Charles S. Randall, Esq.

DEAR SIR: Mr. Luce was in the office yesterday and told me that he had reserved a $5000 subscription in the Old Dominion syndicate for you. I enclose a paper which please sign and return. Some little time since we bought the Old Dominion property for $1,000,000, and have already made the first payment, which was 14 per cent. There will therefore be due from you, to be returned with the enclosed paper signed, your check for $700; then there will be 28⅔ per cent of your subscription payable on July 26; 28⅔ per cent payable August 25 and 28⅔ per cent payable Sept. 24, these last three payments bearing interest at the rate of 5 per cent. It is proposed to reorganize this company, and the scheme as at present outlined is to float a little less than one-half of the new stock in Europe, which we have reason to believe we can do successfully and then to pay back to subscribers their subscriptions leaving them their stock in the new company costing them nothing. The Old Dominion is a company of many years' standing and has been a considerable copper producer in the past. It has an efficient plant and is today capable of producing from 1,500,000 to 2,000,000 pounds of copper per month. Our expert examined the property very carefully and reports that there are four years' ground opened ahead, and that he can see a profit in working the mine of from $350,000 to $500,000 a year on a 10-cent copper market, and I firmly believe we shall make a good deal of money out of the purchase.

Yours truly,

A. S. BIGELOW.

96 P. S.—Since writing you the foregoing I find there may be some change in the payments as outlined, and that the 14 per cent cash and the 28⅔ per cent of July may have to be paid next week. I will duly notify you as soon as I know myself. The reason for this change is that our contract for purchase says that in order to have control of the management of the company turned over to us we must take up the payment due in July with a cash payment. You will of course see that by prepaying you will save 5 per cent interest any way."

These are all I know of, excepting these, my receipts.

Mr. BRANDEIS: Suppose we run through them, and we will make one general statement about those when we get through.

Q. 123. Is this a correct statement? I find no copy of any letter to any of the Old Dominion subscribers between this date and July 1 except letters acknowledging receipt of the first and second payments and the receipts given therefor, and the letter to A. O. Smith of the 15th, in which I say that the subscriptions are all taken up.

A. Yes. That is all in that book. Now would you like those in the other book?

Q. 124. Now let us see the letters of the 18th.

A.—

"JUNE 18TH, 1895.

A. S. Bigelow, Esq., Boston, Mass.

Old Dominion Syndicate—Simpson.

DEAR SIR: Enclosed I hand you Certificate of Deposit with the New York Guarantee & Indemnity Company, of $102,708.07, which I understand you will use with the $102,708.07 more to be paid by yourself—to anticipate Note due July 28th, given to the Simpson Estate for $204,761.66, with interest.

When you have paid this Note, you will kindly get from the Old Colony Trust Company the Note which I have given, May 28th, for the above amount; and, after cancelling your endorsement thereon, please return this Note to me by registered mail—and also see that the Simpson Estate give a letter to the Old Colony Trust Company requesting them to transfer the stock over to us on the payment of the last Note.

We enclose also the original agreement between the Simpson Estate and Meredith, which is assigned to me, with the receipt for the $100,000, in cash thereon. We think that the Executors of the Simpson Estate should either give a receipt for the above Note on this paper, or give us a special receipt.

97 Kindly return the Memorandum of Agreement, together with the Note, by registered mail, and oblige.

Very truly yours,

L. L."

"JUNE 18TH, 1895.

A. S. Bigelow, Esq., Boston, Mass.

DEAR SIR: We have this afternoon written Mr. Keyser asking him to instruct the Old Colony Trust Company to give you a letter stating that they hold all the Old Dominion shares which they will deliver over to Leonard Lewisohn upon the payment of the last note due to Simpson and Keyser. We think it would be well for you to get the Simpson estate also to ask the trust company to give you a similar letter for the shares we bought from Simpson.

Very truly yours,

LEWISOHN BROTHERS.
L. LEWISOHN,
General Manager."

"JUNE 18TH, 1895.

A. S. Bigelow, Esq., Boston, Mass.

DEAR SIR: Enclosed herewith please find copies of letters received from Mr. William Keyser this morning.

Yours very truly,

LEWISOHN BROTHERS.
L. LEWISOHN,
General Manager."

"BALTIMORE, *June 17th*, 1895.

Mr. Leonard Lewisohn, New York City.

DEAR SIR: I enclose herewith copy of letter sent to Mr. Gordon Abbott, vice-president of the Old Colony Trust Company, also copy of an order given him in regard to the payments by you on the 20th and the details connected therewith, which explain themselves and which I trust you will find in order. If there is anything further you can suggest, please let us hear from you.

Yours truly,

WILLIAM KEYSER."

98 "BALTIMORE, *June 17th*, 1895.

Mr. Gordon Abbott, Vice-President Old Colony Trust Company, Boston, Mass.

DEAR SIR: I have your favor of the 15th instant and have wired you that the understanding in regard to the payment for the stock of the Old Dominion Copper Company is correct and I enclose herewith a form of order which I trust you will find satisfactory. If anything further is needed, please wire me immediately upon receipt of this. It is proposed to hold a meeting here on Thursday the 20th instant, and it is necessary that we know as early as possibly on that date that the payments as arranged in the enclosed order have been made. Will you kindly, therefore, wire us as early as possible just what has been done both in connection with payment on account of the 2/7ths, also on account of the notes heretofore given for the 5/7th interest in the stock of the Old Dominion Copper Company.

Yours truly,

WILLIAM KEYSER,
Per R. BRENT KEYSER."

"BALTIMORE, *June 17th*, 1895.

Old Colony Trust Company, Boston, Mass.

GENTLEMEN: I enclose herewith copy of agreement between Mr. Lewisohn and myself, dated June 13, 1895, which gives the details of the sale of the 2/7ths of the stock of the Old Dominion Copper Company. In accordance with this agreement, cash and notes specified, hold the 7118 shares of the stock of the above company deposited with you by me on the 14th instant as collateral security for the payment of the notes as therein provided, the notes to be drawn by Leonard Lewisohn and endorsed by A. S. Bigelow and Lewisohn Brothers. You will note a difference of 25 shares between the number of shares of stock mentioned in the enclosed agreement and the number left with you. Those 25 shares are held to qualify directors and will be given to Mr. Lewisohn personally on the 20th instant. Upon receiving settlement of the above, will you please telegraph me at once, forwarding the cash and notes to me here in due course?

Yours truly,

WILLIAM KEYSER,
Per R. BRENT KEYSER."

"JUNE 18TH, 1895.

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A. S. Bigelow, Esq., Boston, Mass.

Old Dominion Syndicate—Keyser Matter.

DEAR SIR: As I understand, the two-sevenths interest which we have bought from Mr. William Keyser in the Old Dominion matter is to be divided differently from the Simpson five-sevenths, viz:

You and your associates are to have two-thirds of the Keyser shares and I am to have one-third.

I send herewith Cashier's check on the Importers & Traders National Bank for $40,722.22, which will be in payment of the one-third of the $40,000. cash and also in payment of the one-third of the first note to be given of $81,905.—which makes $40,722.22.

I understand that you will add to this your two-thirds, so as to make the full cash payment and the payment of the first note—which is to be anticipated in order to get the control now.

In addition to this I send you my note, endorsed by Lewisohn Brothers, for $81,905, payable August 26th at the office of the Old Colony Trust Company in Boston—with interest at 5 per cent. per annum from May 28th; and also my note for $81,905., endorsed by Lewisohn Brothers, payable September 25th, at the office of the Old Colony Trust Company in Boston, with interest at the rate of five per cent. per annum from May 28th.

The above-mentioned check and two notes—together with the payment of the two-thirds of the cash which you will add—constitute the settlement for the purchase of the two-sevenths interest from Mr. William Keyser.

As soon as this is all arranged, you will kindly see that the Old Colony Trust Company telegraph or telephone to Mr. William Keyser that these payments and notes have all been arranged for, so that Mr. William Keyser will transfer, on Thursday, June 20th, in Baltimore, the control of the Company over to us—which will really be transferring to us the three Directorships. You will also please get from the Old Colony Trust Company a letter stating that they hold the 7143 shares subject to the conditions of the agreement—which conditions are that they will transfer these shares to Leonard Lewisohn or his order on receipt of the payment of the last Note.

I will have Mr. Beaman draw up a little paper in this two-
100 sevenths agreement; as the division of these two-sevenths is two-thirds and one-third between us, as against half and half for the Simpson share.

Trusting this will be satisfactory, I remain

Very truly yours,

LEONARD LEWISOHN.

P. S.—The two notes above mentioned are in a registered letter together with the original agreement.

LEONARD LEWISOHN.

P. S.—You will understand that you will have to endorse the two notes over to the order of William Keyser."

Q. 125. Now there is one other letter of June 18.

A. Those are all the letters of June 18 which I can find.

Q. 126. Have you not a letter dated June 18, 1895, which is the original of the copy produced in connection with the deposition of Ferdinand Royhauser, taken in New York in the suit of Old Dominion Copper Mining & Smelting Co. v. A. S. Bigelow, marked "Exhibit 59," and reading as follows:

"JUNE 18TH, 1895.

A. S. Bigelow, Esq., Boston, Mass.

DEAR SIR: I wish to inform you that we have today received a telegram from Mr. Hyams reading:

'Your telegram today. I have deed in Boston,' referring to the deed from Keyser to the Old Dominion.

You telephoned today that Mr. Butler said that deed from Keyser to Old Dominion was in Baltimore; but what Mr. Butler refers to are the deeds to these properties which they claim are not worth anything and which Mr. Keyser will transfer to Mr. Leonard Lewisohn in Baltimore.

The other deeds were sent to us by Mr. Keyser and were taken to Arizona to be looked over out there, and Mr. Hyams no doubt has these as he telegraphs. If he has not them in your office no doubt he has them at home.

Yours very truly,

J. L. LEWISOHN BROTHERS,
—— ——, *General Manager.*"

101 A. I cannot find it.

Q. 127. Do you recall the conversation with Mr. Butler referred to in that letter?

A. No, sir.

Q. 128. Have you any recollection whatsoever in regard to the matter except so far as stated in that letter?

A. None whatever.

Q. 129. Is there any letter from you to Leonard Lewisohn on the 18th,—if not on the 19th,—of June?

A.—

Lewisohn Brothers, New York. JUNE 19, 1895.

GENTLEMEN: I have several favors of yours of the 18th to acknowledge: First, enclosing two notes for $81,905 each, and also your original agreement with the Simpson estate; second, enclosing cashier's check on the Importers & Traders Bank, New York, for $40,722.22 in payment of one-third of the $40,000 cash, and I suppose one-third of the payment on the first note to be given of $81,905; third, enclosing certificate of deposit of the New York Guarantee & Indemnity Company for $102,708.07 in payment of your one-half of note given to the Simpson estate for $204,761.65 with interest.

I have today been over to the Old Colony Trust Company and have left with them the above enclosures which you sent me and have also left with them a Boston bank check for $184,152.37, which is my one-

half of the payment due on account of the Simpson contract and two-thirds of the amount due on the Keyser contract.

I enclose you copy of a letter which I got from the Old Colony Trust Company which is practically a receipt from them with explanations of what they hold for our account to be used by them tomorrow in fulfillment of the arrangement, which is to take up the first note on both the Simpson and Keyser interests and the cash payment to the Keyser interest. I thought it was just as well to do this today so that there would be as little delay as possible tomorrow at the office of the Old Colony Trust Company and to enable them to telegraph Keyser in Baltimore very soon after ten o'clock that everything on our part had been done.

Yours very truly,

A. S. BIGELOW."

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"JUNE 20, 1895.

Leonard Lewisohn, Esq.,

MY DEAR SIR: I have just come from the Old Colony Trust Company, where I have closed up everything, I think satisfactorily, with regard to the agreements made with the Simpson estate and William Keyser for the purchase of all the shares of the Old Dominion Copper Company, less the 25 shares which were kept in Baltimore for the qualification of directors. I enclose with this, marked duly paid, your note for $204,761 66, dated May 28, 60 days, given to the Simpson estate and endorsed by me. This should be carefully preserved by you for the reason that when you come to ask for the stock when the last note is paid under the agreement made with the Simpson estate you will have to present all the paid notes given to the estate before you can get the stock from the Old Colony Trust Company. In my yesterday's letter I enclosed a copy of a letter received from the Old Colony Trust Company of yesterday's date, and now enclose copy of letter which I gave today to the Old Colony Trust Company, with instructions as to what use they should make of the funds in their hands which I left with them yesterday. I also enclose a letter addressed to you by the Old Colony Trust Company stating that they hold 7118 shares of the stock of the Old Dominion Copper Company to be kept by them and eventually delivered to you in accordance with the terms of the agreement between you and Mr. Keyser. I presume everything has gone through satisfactorily at Baltimore. I have been trying to get you over the telephone, without success thus far. (11.25 A. M.). There is one little thing to which I wish to call your attention. The notes that were made to Mr. Keyser were a little different from those given to the Simpson estate. Those to the Simpson estate were so drawn up that they had to be held by that estate until paid, thereby giving us the power, should we choose to exercise it, of anticipating them at any time. Those to Keyser are so drawn that he can use them if he chooses; and, naturally, if they should fall into other hands we would not be able to anticipate the payment of them. If I can get you on the telephone I shall explain this matter to you while you are in Baltimore so that you may have a chance to arrange with Mr. Keyser that he will hold them.

I also enclose you your original agreement with the Simpson estate showing the receipt of Mr. Butler as one of the executors of the estate, of the payment of the note of $204,761.66.

Then in one of your letters of the 18th I see that you ask the Simpson estate to give a letter to the Old Colony Trust Company
103 requesting them to transfer the stock over to you on payment of the last note. I spoke to the counsel of the Old Colony Trust Company about this, and he said that was all expressed in the agreement; the Simpson estate would have to transfer the stock on payment of the last note, and that asking the estate for a letter to that intent was in his opinion superfluous and might lead them to think that we thought we were weak in the agreement.

Yours very truly,

A. S. BIGELOW."

Q. 130. Now what is the next one that you have?

A. Under date of June 21, Lewisohn Brothers, by Adolph Lewisohn, acknowledge receipt of the letter of the 19th, and there is also the following letter on the 21st:

"JUNE 21, 1895.

A. S. Bigelow, Esq., Boston, Mass.

DEAR SIR: I have today received your favor of yesterday covering original agreement with the Simpson estate, and also note for $204,761.66 paid on the 19th inst.

Yours very truly,

LEONARD LEWISOHN.

P. S.—You will receive all papers next week."

Q. 131. Now what is the next letter you have, either to or from Leonard Lewisohn? Let us see whether this is correct: the next letter of mine to Lewisohn Brothers, of which I find a copy in either of my letter books, is dated July 12, and the next date of a letter received from Lewisohn Brothers is July 15; is that correct?

A. Yes.

Q. 132. Do you find any copy of a letter or telegram to any of the subscribers to the Old Dominion Syndicate, or from any of the subscribers to the Old Dominion Syndicate, between July 1 and July 12, both dates inclusive?

Mr. HEMENWAY: As to all these letters to and from third parties our objection is saved as above, as in all other cases.

A. I find no copy of any letter or telegram to any Old Dominion subscriber except a telegram to A. J. Coram, in which appears "Old Dominion subscription 75 per cent premium bid."

Q. 133. Is there not a telegram to Henry M. Whitney? If so, please read it.

A. There is a telegram to Henry M. Whitney [reading]:

104 "BOSTON, *July* 5, 1895.

Henry M. Whitney, Sydney Hotel, Cape Breton, Nova Scotia.

Want you to be a director in reorganized Old Dominion with Lewisohn, Nelson, Moses T. Stevens, Joseph G. Ray and myself.

A. S. BIGELOW."

Q. 134. Do you find among your papers any answer to that telegram to Mr. Whitney?

A. No, I do not seem to find any at all.

Q. 135. I call your attention to the following copy of a letter, being Exhibit No. 1 produced in connection with the deposition of Frederick Roxhauser in New York in the case of the Old Dominion Copper Mining & Smelting Co. v. A. S. Bigelow; viz:

"JULY 5, 1895.

Allen W. Evarts, Esq., New York City.

DEAR SIR: Since this morning I have communicated with Mr. A. S. Bigelow, who desires me to have for the first year the following seven directors of the Old Dominion Copper Mining & Smelting Company namely, Mr. A. S. Bigelow, Mr. Thomas Nelson, Mr. Leonard Lewisohn, Mr. Edgar Buffum, Mr. Moses T. Stevens, Mr. Joseph G. Ray and Mr. J. A. Coram.

Yours very truly,

L. L."

Was the communication with Mr. Lewisohn, there referred to, in writing?

A. Probably not. I should say it was by telephone, as we had a private telephone with Mr. Lewisohn's office at that time.

Q. 136. I call your attention to the record of the directors' meeting of the Old Dominion Copper Mining & Smelting Company on July 11, 1895, in which it appears that Mr. Henry M. Whitney of Boston was elected a director; are you able to recall whether or not you received any reply from him to the telegram of July 5, between that date and July 11, when he was so elected?

A. I do not recollect of having received any communication from Mr. Whitney.

Q. 137. Have you any further answer to make in reply to Int. 132, which is: "Do you find any copy of a letter or telegram to any of the subscribers to the Old Dominion Syndicate or from any of the subscribers to the Old Dominion Syndicate between July 1 and
105 July 12, both dates inclusive?"

A. A letter from Charles J. Hodge, dated July 8, 1895, addressed to me.

"When do you expect to reorganize Old Dominion Copper Company and place it on the market? Lake people are hungry for it."

This is a quotation from my letter to Charles J. Hodge, dated July 12, 1895:

"I was over in New York yesterday for the very purpose of getting Old Dominion Copper Company into shape, and I should think

some time in the course of a couple of weeks we should open the bag just a little to the public. Lake people are not the only ones who are hungry for it; in Boston they seem to be starving for it."

Mr. BRANDEIS: If there is anything else we will put it in to-morrow.

Q. 138. I call your attention to a copy of the record of the minutes of the meeting of the directors of the Old Dominion Copper Mining & Smelting Company, at the office of Lewisohn Brothers, 81 Fulton street, New York, July 11, at 12 o'clock noon. This is merely a copy, but we will have here in the morning the original record. I will put this question now and we will assume that the original is here, and ask whether that is the meeting of the directors referred to by you in your letter to Mr. Hodge?

A. I do not know.

Q. 139. Whether that meeting was the visit in New York to which you referred?

A. That I do not know; I should suppose it was, from the letter which has been presented.

Q. 140. Have you no recollection? I wish you would just look over the records there.

A. I have looked over the original.

Q. 141. Have you no recollection other than what appears by the correspondence which has been put in evidence in connection with your deposition and the records of the directors' meeting of July 11, 1895, now shown you, as to what took place in connection with the organization of the company, or any conversations with Leonard Lewisohn, or any other person in relation thereto?

A. No, sir.

Q. 142. I call your attention to the offer made by the Old Dominion Copper Company of Baltimore City, A. S. Bigelow, president, for the sale of all its property to the Old Dominion Copper Mining & Smelting Company for 100,000 shares of its capital stock, and which is embodied in the record of the minutes of the directors' meeting of the Old Dominion Copper Mining & Smelting Company on July 11, now shown you, and ask you whether you have any recollec-
106 tion in regard to the making of that offer, or of the action taken thereunder or in relation thereto, except so far as appears by the record of that meeting?

A. No, sir.

Q. 143. I call your attention also to the offer made by Leonard Lewisohn for the sale of the Old Dominion mine, the New York mine, the Chicago mine, the Keystone mine, a certain lot of land near Bloody Tanks to the Old Dominion Copper Mining & Smelting Company for 30,000 shares of its capital stock, a copy of which offer is embodied in the records of the meeting of the Old Dominion Copper Mining & Smelting Company on July 11, 1895, now shown you, and ask you whether you have any recollection in regard to that offer or the action taken thereunder, or any transaction in relation thereto, except as appears by the record of that meeting?

A. I have not.

Q. 144. Do you mean by your answers to the last two questions

that your recollection upon that matter is a blank except so far as refreshed by the records of the meeting?

A. Entirely; I do not remember being present at the meeting.

Q. 145. In your letter to Mr. Woodhull of June 15 you stated that you expected to see Mr. Woodhull on the following Tuesday, which appears to be June 18: do you recall whether or not you did see Mr. Woodhull, during that day or soon thereafter?

A. No, sir; I could not possibly tell.

Q. 146. Do you recall any conversation which you had about that time with Mr. Woodhull about this matter?

A. No, sir.

Q. 147. Or whether you had any at all?

A. I do not, no, sir.

Q. 148. Have you any recollection of talking with Mr. Woodhull within the next few months after that?

A. No, sir.

Q. 149. Are you able, by reference to the Old Dominion Syndicate receipt book, produced by you, to determine whether or not this subscription list, Exhibit 6, on which the month and day is left blank, should actually bear date before June 1?

A. Undoubtedly it should.

Q. 150. Is it not a fact that the subscriptions on Exhibit 5, which is dated the 13th day of June, were subscriptions taken on or after that date?

A. Undoubtedly.

Q. 151. Were the subscriptions which appear on Exhibits 3, 4, 6, and 5 taken or signed wholly in your presence and at your office, or were they signed elsewhere, in part?

A. I do not remember.

Q. 152. Have you any recollection in regard to whether those subscriptions were signed in your presence?

A. No, sir.

Q. 153. Have you any recollection except so far as appears by the correspondence already introduced, as to whether the subscrip-
107 tions appearing on Exhibits 3, 4, 6, and 5 were obtained by you personally or by some one of your associates?

A. I cannot remember.

Q. 154. You have no recollection whatsoever in regard to that?

A. No.

Q. 155. Have you any recollection in regard to any of the circumstances as to any of these subscriptions other than that which appears by the correspondence?

A. None at all.

Q. 156. Then your mind is a complete blank as to anything which may have occurred in connection with any of these subscriptions, except so far as appears by the correspondence, or so far as has been testified to by you?

A. It is.

Q. 157. Did you personally conduct any negotiations with the Simpson estate, or any one representing the Simpson estate, with a view to the purchase or transfer of any of this property?

A. I think not.

Q. 158. You have no recollection whatever in regard to the matter?

A. No.

Q. 159. You mean either in writing or orally?

A. I do not remember.

Q. 160. That is, you do not remember that you did anything?

A. No.

Q. 161. Did you personally, either orally or in writing, conduct any negotiations whatsoever in connection with the Keyser interest, or purchase of the Keyser interest, or transfer of any of the property?

A. I did not, no, sir.

Q. 162. Did you personally, so far as you recall, conduct any negotiations with the Simpson or Keyser interests, indirectly through Mr. Meredith?

A. I do not remember.

Q. 163. Have you any recollection other than that which is shown by the copies of letters and other papers which have been introduced in connection with your testimony, what has been testified to by you, concerning any conferences, negotiations, consultations or interviews with Mr. Leonard Lewisohn or Lewisohn Brothers in regard to the purchase of either the Simpson or the Keyser interest, or in regard to the formation of a syndicate or the operation of a syndicate?

A. No, sir.

Q. 164. Do you mean, by your answer to that last question, that you have no recollection whatsoever as to what passed between you and Mr. Lewisohn or Lewisohn Brothers in regard to the matter, except so far as already appears by what has gone in evidence, in regard to the matters that I have mentioned?

A. Yes, sir.

Q. 165. Will you now state, after examining the Old Dominion Syndicate receipt books, what amount was received from the subscribers between June 1 and June 18, both dates inclusive?

A. $27,848.12, E. & O. E.

Q. 166. Will you kindly give also, separately, the amount of money received from the subscribers on June 19, June 20, June 21, and June 22?

A. Separately or in the aggregate?

108 Q. 167. Separately.

A.—

On the 19th	$103,018 32
June 20	14,303 32
June 21	15,817 05
June 22	10,027 49
Being a total of	$142,166 18

[Adjourned to March 26, 1903.]

THURSDAY, *March* 26, 1903.

Q. 168. Are there any other letters from subscribers between July 1 and July 12?

A.—

"Houghton, Michigan, *July* 12, 1895.

A. S. Bigelow, Esq., Boston, Mass.,

Dear Sir: I presume the subscription for the Old Dominion has been closed; if not, I would like to take some of it. Can you tell me where it will be listed, and about what price? * * *

Yours truly,

J. B. STURGIS."

Q. 169. Will you now give us the correspondence between you and Leonard Lewisohn, or Lewisohn Brothers, between July 12 and August 1, 1895, in regard to the Old Dominion Syndicate or the Old Dominion Copper Mining & Smelting Company,—the correspondence from and to Lewisohn?

A. The first I find after July 12 is July 24.

Aside from the letters transmitting checks to Lewisohn Brothers to be credited on account of notes given by me in the Old Dominion matter, the first letter I find is one of July 14, to Leonard Lewisohn:

"Dear Sir: Referring to conversation with Mr. Hyams yesterday, your proportion of the 50,000 shares referred to will be 453/1000ths. These will be turned over to you personally, to be disposed of as you see fit. I think this will answer your question.

Yours very truly,

A. S. BIGELOW."

109 Q. 170. What is the next one after that, Mr. Bigelow?

A. The only letter I find from Leonard Lewisohn, or Lewisohn Brothers, between July 12 and July 31, except the letter of July 15, enclosing a check for $175, being one half of the amount paid to the Old Colony Trust Company, and the letters acknowledging receipts of my remittances, is a letter of July 31, 1895, which is as follows:—

"New York, *July* 31, 1895.

A. S. Bigelow, Esq., Boston, Mass.,

Dear Sir: According to your circular received on July 19, I beg to state that I shall take the entire 18,120 shares which will come to me in the new company of the Old Dominion Company in lieu of the money which was originally advanced and which was to be repaid from the proceeds of the sale of the new stock. Please confirm and oblige.

Very truly yours,

LEONARD LEWISOHN,
Per JESSE LEWISOHN.

P. S.—As telephoned yesterday.

L. L."

My letters to Lewisohn Brothers, sending remittances between July 12 and August 1 were as follows:—

July 15, 1895	$43,003 90
July 16, 1895	55,999 14
July 17, 1895	25,474 26
July 18, 1895	10,105 79
July 19, 1895	4,333 25
July 20, 1895	2,888 57
July 22, 1895	28,889 63
July 24, 1895	44,936 43
July 25, 1895	8,670 47
July 29, 1895	4,337 51
July 31, 1895	7,520 86

Q. 171. Now please turn to the Old Dominion Syndicate receipt book, and see what amounts were received by you from the Old Dominion Syndicate subscribers between July 12 and August 1, giving the amounts received by you each day.

A.—

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July 15, 1895	$42,568 39
July 16, 1895	50,225 99
July 17, 1895	31,247 41
July 18, 1895	10,105 79
July 19, 1895	4,333 25
July 20, 1895	2,888 57
July 22, 1895	28,889 63
July 24, 1895	44,936 43
July 25, 1895	8,670 47
July 26, 1895	289 06
July 29, 1895	4,048 45
July 31, 1895	7,520 86

being a total of $236,189.81, or $235,724.30, subject to correction.

Q. 172. Is there not among the receipts on these dates which you have read a receipt of a payment by J. Morris Meredith? If so, kindly read the receipt.

A. $14,432.88.

"BOSTON, *July* 16, 1895.

Received from J. Morris Meredith fourteen thousand four hundred and thirty-two dollars and eighty-eight cents, being bal. payment and interest of subscription of twenty-five thousand dollars to the Old Dominion syndicate, second payment of 28 2/3 per cent and 5 per cent interest, due July 26, 1895, third payment of 28 2/3 per cent and 5 per cent interest due August 25, 1895, fourth and last payment of 28 2/3 per cent and 5 per cent interest due Sept. 24, 1895.

No. 179.

A. S. BIGELOW."

Q. 173. Have you not in the same Old Dominion Syndicate book a receipt from J. Morris Meredith, under date of June 21, No. 155, for $7189.56, being the second payment on account of subscription of $25,000 to Old Dominion Syndicate? And if so, state whether

or not that receipt is in all respects the same in form as No. 179, except as to the amount and the number of the subscription, and that it is for the second instalment instead of the third or final, and the words "and interest."

A. Yes.

Q. 174. Are not those two receipts that were given to J. Morris Meredith on the same printed form of receipt, and in substantially the same form, as the receipts given to all the syndicate subscribers whose names appear on Exhibits 3, 4, 6, and 5?

A. Yes, where the payments were made in a similar number of instalments.

111 Q. 175. Will you now please produce the correspondence between yourself and the several syndicate subscribers from July 12 to July 31, inclusive?

Mr. HEMENWAY: Of course all this is objected to.

A.—

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *July* 16, 1895.

Harold Williams, Esq., Nantucket, Mass.,

DEAR SIR: Your favor of July 14 has been received and contents noted. Mr. Bigelow was so very busy today that he has requested me to answer your letter for him. Your original subscription to the Old Dominion syndicate was $5000, and the balance due is 28 2/3 per cent, plus 28 2/3 per cent, equals 57 1/3 per cent, equals $2866.67; interest on this amount from May 28 to July 24, say 57 days, at 5 per cent, equals $22.70; which, added to the $2866.67 makes the total amount due $2889.37. If we do not receive your check for this amount until July 24, you should add 40 cents extra for another day's interest, as we have to send the money to New York and do not get credit for it until it is received there. Mr. Bigelow says you could not have a better writing outfit.

Yours truly,

C. H. BISSELL,
For A. S. BIGELOW."

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *July* 26, 1895.

Harold Williams, Esq., Nantucket, Mass.,

DEAR SIR: Mr. Bigelow being very busy today has requested the writer to answer your letter to him of July 24. You are correct in your supposition that by taking the bonus on your original subscription to the Old Dominion syndicate in stock instead of cash, you will receive 400 shares in all.

Yours respectfully,

W. A. S. CHRIMES,
For A. S. BIGELOW."

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"OLD DOMINION SYNDICATE,
BOSTON, MASS., *July* 17, 1895.

F. S. Mead, Esq., 7 Exchange Place, Boston, Mass.,

MY DEAR MR. MEAD: Your favor of the 16th is received and contents noted. You of course know that all transactions in Old Dominion subscriptions must be of a private nature between buyer and seller as the receipts are not negotiable and thus recognize no trade at all of this kind; but it is perfectly immaterial to me whether you sell your interest or not.

Yours truly,

A. S. BIGELOW."

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *July* 17, 1895.

Isaac Fenno, Esq., Lake Dunmore House, Salisbury, Vt.,

DEAR SIR: Replying to your favor of July 16, the amount due on balance of your subscription of $5000 to the Old Dominion (presuming your check will reach here on Friday the 19th instant is $2887.75.

Yours truly,

A. S. BIGELOW,
By W. A. S. CHRIMES."

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *July* 18, 1895.

R. M. Field, Esq., Poland Spring House, South Poland, Me.,

DEAR SIR: Your favor of July 17 has been received and contents noted. The subscription to the Old Dominion Copper Mining & Smelting Company's stock has not yet been opened, but I am putting down the names of those of my friends who ask for it and already most of the 60,000 shares to be offered has been applied for. I have entered your subscription upon my list for 100 shares on the same basis as those of the others. It may be, however, that the amounts applied for will have to be pro rated as subscriptions bid fair to be considerably in excess of the amount of stock that can be offered.

Yours truly,

A. S. BIGELOW."

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"SOUTH POLAND, ME., 17 *July*, 1895.

MY DEAR MR. BIGELOW: Possibly a loser of some exceptional opportunities through an enforced absence from Boston during the current summer, I take the opportunity of asking you if it would not be possible for me to secure the allotment of 100 shares of the Old Dominion stock in the new subscription. Any favor you may consistently be able to render me in this direction will be most heartily appreciated by

Yours sincerely,

A. S. Bigelow, Esq." R. M. FIELD.

"OLD DOMINION SYNDICATE.
BOSTON, MASS., *July* 19, 1895.

Joseph T. Herrick, Esq., 684 State St., Springfield, Mass.

DEAR SIR: Your letter of July 17 has been received and contents noted. Replying to your inquiries about the Old Dominion property, I enclose an article which will give you the information you wish. As to the subscription to the new stock, it is already over-written, and there will doubtless have to be some scaling down of the subscriptions; I will, however, put your name down on the same basis as the others, but you had better wire me on receipt of this, confirming your subscription, as there is not much time to lose. The price of the stock to subscribers is $25 per share, payable at one time on or before Oct. 1, 1895.

Yours very truly,

A. S. BIGELOW."

"684 STATE STREET,
SPRINGFIELD, MASS., *July* 17, 1895.

A. S. Bigelow, Esq.

DEAR SIR: Will it be possible to get 100 shares in the Old Dominion Copper Company, and about what would I have to pay? What are the prospects for this property, and can you give me some facts about it? If you are not too busy I should be glad to hear.

Very truly yours,

JOSEPH T. HERRICK."

[*Telegram.*]

"SPRINGFIELD, *July* 20, 1895.

A. S. Bigelow, Esq., 199 Washington St., Boston.

Put me down for 100 shares of Old Dominion.

J. T. HERRICK."

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"BOSTON, *July* 19, 1895.

Henry F. Woods, Esq., 81 Milk St., Boston, Mass.

DEAR SIR: I am in receipt of your favor of July 18. The subscription to the new stock of the Old Dominion Copper Mining and Smelting Co. is already over-written. There will doubtless have to be some scaling down of subscriptions. I will, however, put your name down on the same basis as the others and notify you in due course of the amount allotted to you. The price to stock subscribers is $25 per share, payable at one time on or before October 1st, 1895.

Yours very truly,

A. S. BIGELOW."

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *July* 26, 1895.

S. S. Spaulding, Esq., Jerusalem Road, Cohasset, Mass.

DEAR SIR: Mr. Bigelow being very busy today has requested the writer to answer your letter to him of July 24. You are correct in your supposition that by taking the bonus of your original subscription to the Old Dominion syndicate in stock instead of cash, you will receive 240 shares in all. The balance due, including interest on your original subscription to the Old Dominion syndicate, if check is received at this office August 1st, will be $1735.77.

Yours respectfully,

W. A. S. CHRIMES,
For A. S. BIGELOW."

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *July* 26, 1895.

Harold Williams, Esq., Nantucket, Mass.

DEAR SIR: Mr. Bigelow, being very busy today, has requested the writer to answer your letter to him of July 24. You are correct in your supposition that by taking the bonus of your original subscription to the Old Dominion syndicate in stock instead of cash you will receive 400 shares in all.

Yours respectfully,

W. A. S. CHRIMES,
For A. S. BIGELOW."

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"OLD DOMINION SYNDICATE,
BOSTON, MASS., *July* 26, 1895.

Hon. William W. Grout, St. Johnsbury, East, Vt.

DEAR SIR: Mr. Bigelow, being very busy today, has requested me to answer your letter to him of the 25th instant. It has not yet been decided when Old Dominion Copper Mining & Smelting Company stock will be issued, but due notice will be sent to each subscriber. Mr. Bigelow has already written you asking that you confirm by letter your subscription of 1000 shares of the subscription stock.

Yours respectfully,

W. A. S. CHRIMES,
For A. S. BIGELOW."

"ST. JOHNSBURY, EAST, VT., *July* 25, 1895.

MY DEAR MR. BIGELOW: What about Old Dominion? The papers seem to speak as though the stock was issued, though I have seen no substantial statement to that effect, and I infer that such cannot be the case, as have had no notice from you, and you will remember I was to have notice. I thought when I heard from you, would go down to see about it.

Very truly,

WILLIAM W. GROUT."

"JULY 29, 1895.

DEAR SIR: Mr. Bigelow is very busy today and therefore requested the writer to acknowledge the receipt of your favor of the 24th instant and to say that he is perfectly willing that you should take 500 shares of Old Dominion instead of 1000, but he wishes you would allow the 1000 shares to remain in your name. The whole issue is largely over-subscribed, and calls are continually being made on Mr. Bigelow for additional subscriptions. He knows of a gentleman who wants 500 shares, and as the subscription list is full, your letter gives him an opportunity to do a favor for his friend.

Yours respectfully,

W. A. S. CHRIMES,
For A. S. BIGELOW."

E. V. R. Thayer, Esq., Isles of Shoals, N. H."

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"BOSTON, *July* 23, 1895.

A. S. Bigelow, Esq.

DEAR SIR: I authorize you to sign for me for 1000 shares in the Old Dominion Mining & Smelting Co.

Yours truly,

E. V. R. THAYER."

"APPLEDORE HOUSE,
ISLES OF SHOALS, N. H., *July* 24, 1895.

DEAR BERT: As you said the other day the Old Dominion was oversubscribed, would you mind making my subscription 500 instead of 1000 shares? I promised to let a friend have 500 shares who since has decided that he cannot take it. If it makes any difference to you, do not hesitate to say so and let it stand.

Sincerely yours, EUGENE V. R. THAYER."

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *July* 31, 1895.

Maxwell Woodhull, Esq., The Aldine, Springlake Beach, N. J.

DEAR SIR: Your favor of July 20 has been received and contents noted. I have only time today to write a few lines and regret that I am compelled to say that there will be no chance of your securing any more of the subscription stock than that to which you are entitled as a member of the original Old Dominion syndicate. We shall tell F. S. Moseley & Co. this if they apply to us to enter any increase of your subscription. In haste.

Yours very truly, A. S. BIGELOW."

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *July* 15, 1895.

Maxwell Woodhull, Esq., The Aldine, Springlake Beach, N. J.

DEAR SIR: Your favor of July 13 has been received. * * * The balance of your subscription to the Old Dominion syndicate is due as follows:

28 2/3 per cent, say, $4300, Aug. 25, 1895.
28 2/3 per cent, say, $4300, due Sept. 24, 1895.
Interest at 5 per cent from May 28, 1895, should be added to each payment.

117 Making the total amount due Aug. 25, $4352.56, and the total amount due Sept. 24, $4369.88.

Yours very truly,

A. S. BIGELOW."

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *July* 22, 1895.

Maxwell Woodhull, Esq., 2033 G Street, Washington, D. C.

DEAR SIR: Your letter of July 19 has been received and contents noted. I am very busy today and cannot write you at length, but will only say that instead of taking payment for my original subscription in the Old Dominion syndicate in cash, I shall take it in subscription stock of the new company at $25 a share. If you desire to follow my example, please write me a letter confirming your intention of so doing.

Yours very truly,

A. S. BIGELOW."

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *July* 24, 1895.

Maxwell Woodhull, Esq., The Aldine, Springlake Beach, N. J.

DEAR SIR: Your favor of the 22nd instant has been received and contents noted. As I had already written you on the same date that I intended to take my proportion of subscription stock to the Old Dominion Copper Mining & Smelting Co. at $25 a share in lieu of cash, I did not think it necessary to telegraph you. The original members of that syndicate will not have any special right to subscribe to the balance of the subscription stock above their pro rata share. Your subscription of $15,000 to the original syndicate and $15,000 of subscription stock will entitle you to 1200 shares; that is, you put in no more money, but receive stock instead of cash for your bonus as a member of the original syndicate. The original stock of the new company is 150,000 shares of the par value of $25 each. 60,000 shares are issued for subscription at $25 a share cash; the proceeds of 40,000 shares, or the shares themselves, going to the original members of the syndicate as a bonus, and the proceeds of 20,000 shares, or, say, $500,000, going to the company as a working capital.

Yours very truly,

A. S. BIGELOW,
By BISSELL.

118 Mr. Bigelow, who was called away shortly after dictating the above letter, requested the writer to sign it for him."

"2033 G St., Washington, D. C., *July* 19, 1895.

A. S. Bigelow, Esq., Sears Building, Boston, Mass.

Dear Mr. Bigelow: The papers are writing so much about the proposed reorganization of the Old Dominion syndicate and its conversion into a company that I write to ask you what you propose to do about subscribing to the stock of the new company. I propose to do, within the range of my operations, what you do yourself; that is to say, under the suggested plan of reorganization of the company, as outlined in your letter to me, informing me of the syndicate, you said substantially that your purpose was to organize a new company on the basis of returning the cash paid by the syndicate plus a proportion of the stock equal to the amount subscribed to the syndicate. Now, do you propose to subscribe this cash to the capital of the new company or not? Whatever you do, I shall do. My subscription was, as you know, $15,000. If you subscribe to the stock of the company instead of drawing down your cash, I also will subscribe this $15,000 to the stock of the new company. I congratulate you on the advance in coppers, but go slow. It is time enough to push prices up after the first of October. We are not yet out of the woods. Patience, just now, is better than almost any other quality. If we have good crops this fall (and the crops are not yet assured) and without future heavy gold exports, then the time for a bull campaign will have come; now it is premature.

Sincerely yours,

MAXWELL WOODHULL."

"The Aldine,
Springlake Beach, N. J., *July* 22, 1895.

A. S. Bigelow, Esq., Sears Building.

Dear Mr. Bigelow: Your circular of July 19 as to the Old Dominion Copper syndicate has just been received. Of course your letter to me had crossed my letter to you of July 19, the same date. If you subscribe to the stock of the new company instead of drawing out your cash subscription to the syndicate, I shall of course do what you do as to my syndicate subscription. Please telegraph me at my address as to what you propose to do in the premises in order that I may send forward a proper reply to the syndicate circular of July 19, 1895. I have received no copy of project of the new com-
119 pany. Will you kindly let me have the points of the proposed organization, capital stock, terms of subscription, etc.? Will the members of the syndicate have any special right to subscribe to the balance of the stock of the new company? I mean beyond their syndicate cash subscription. I mean by sending in such additional subscriptions before August 1st? How much stock will my subscription of $15,000 to the syndicate and the subscription of $15,000 syndicate cash to the new company entitle me to?

Very truly yours,

MAXWELL WOODHULL.

My address for the next three weeks will be as given above."

"NEW YORK, *July* 26, 1895.

A. S. Bigelow, Esq., Sears Building, Boston, Mass.

DEAR SIR: Write today care Chesebrough, 24 State St., terms payment additional subscription Old Dominion.

M. WOODHULL."

"JULY 27, 1895.

Thomas Nelson, Esq., 119 Washington St., Boston, Mass.

In re Old Dominion Syndicate.

DEAR MR. NELSON: I have advised a young cousin here in New York to subscribe for some Old Dominion Copper stock. He tells me that he does not care to take more than he can pay for and therefore only wants to take 15 of the shares. Will you kindly put his name down on the subscription list for 15 shares and see that he gets according to allotment? If so, I will be much obliged. His name and address are as follows:

Oswald N. Cammann,
24 State St., New York,
Care Chesebrough Mfg. Co.

Please acknowledge this note to my address at The Aldine, Springlake Beach, N. J. I shall go down to the seashore this afternoon. Of course I told my cousin he should lose nothing by following my advice.

Sincerely yours,

M. WOODHULL."

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"THE ALDINE,
SPRINGLAKE BEACH, N. J., *July* 29, 1895.

A. S. Bigelow, Esq.

DEAR MR. BIGELOW: I have just written to F. S. Moseley & Co. of your city, note brokers, that if they can arrange a satisfactory loan for me, they can subscribe for me in my name for 600 additional shares of Old Dominion stock. Should they be able to carry through this negotiation, this subscription would give me 1800 shares. I now hold under my syndicate subscription and the 600 shares, instead of drawing down the $15,000 of my syndicate subscription for 1200 shares. I do not know when this subscription closes. Presumably, August 1st. But I have instructed F. S. Moseley & Co. to send to your office to ascertain. Please inform me of the action taken thereunder and if F. S. Moseley & Co. call upon you to subscribe for 600 shares additional, explain to them just how to make such subscription.

Sincerely yours,

M. WOODHULL."

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *July* 17, 1895.

James P. Sturgis, Esq., Houlton, Michigan.

MY DEAR SIR: Your favor of the 12th is received. The Old Dominion Company was reorganized last week with a capital of

150,000 shares, par value $25 each. 60,000 of those shares are to be sold at $25 a share: 40,000 of them for account of the original syndicate subscribers and 20,000 for a working capital. The subscription for those has not really been opened yet, but my friends have come in and told me what they want to pay for this, and asked me to put their names on the list. These foot up over 30,000 shares, and while I stand ready to take the balance, I am willing to let my friends in if they will signify what they wish. It may be that these subscriptions will have to be pro rated, as it looks as if the amount might be oversubscribed. You had better, therefore, wire, on receipt of this, what you would like to take. We cannot at present say just when we will ask for the money from the subscribers; we shall probably require it in one payment, but it is not likely that it will be wanted before the 1st of October. If it is not too much trouble, will you kindly notify those whom you know are my friends in your region, so that they may have an opportunity to subscribe?

Yours truly,

A. S. BIGELOW."

121 | *Telegram.* |

"HOUGHTON, MICHIGAN, *July* 20, 1895.

A. S. Bigelow, Boston, Mass.

Letter received. Please enter my subscription for 550 shares of Old Dominion stock.

J. B. STURGIS."

| *Telegram.* |

"HOUGHTON, MICHIGAN, *July* 21, 1895.

A. S. Bigelow, Boston.

Please enter my subscription for 500 shares old Dominion in addition to former subscription.

J. B. STURGIS."

"BOSTON, MASS., *July* 22, 1895.

James B. Sturgis, Esq., Houlton, Michigan.

DEAR SIR: Your telegrams of July 20 and 21 have been received, and I have noted your subscription for 1050 shares of the stock of the Old Dominion Copper Mining and Smelting Co. on the terms as noted in my previous letter to you. You understand of course that in all probability the subscriptions will have to be scaled down somewhat, as the amount that can be issued is already oversubscribed for.

Yours truly,

A. S. BIGELOW."

"BOSTON, MASS., *July* 17, 1895.

W. B. Mossman, Esq., Care R. H. Stearns & Co., Cor. Tremont St. and Temple Place, Boston, Mass.

DEAR SIR: I have received your letter of the 17th instant. There are no circulars on the Old Dominion, and all that we can do is to

put down the names of people who apply with the amount of shares that they wish to take and assume that we shall have to pro rate them and reduce their subscriptions somewhat. If you wish any, please let me know by tomorrow morning just how much, and I will put your name down on the list with the others. The price will be $25 per share and the money will probably be called not earlier
122 than Oct. 1st. There have been so many applications for the stock that it is necessary for us to know at once.

Yours truly,

THOMAS NELSON."

"BOSTON, MASS., *July* 17, 1895.

Gustaf Lundberg, Esq., P. O. Box 280, Boston, Mass.

DEAR SIR: Your favor of July 16 has been received and contents noted. The subscription to Old Dominion Copper Mining & Smelting Company's stock has not really been opened yet, but I am putting down the names of those of my friends who ask for it, and already most of the 60,000 shares to be issued has been applied for. I have entered your subscription on my list on the same basis as those of the others. It may be however that the amount applied for will have to be pro rated, as subscriptions bid fair to be considerably in excess of the amount of stock that can be offered.

Yours truly,

A. S. BIGELOW."

"ROOM 604, 19 KILBY STREET, BOSTON, *July* 16, 1895.

Thomas Nelson, Esq.

DEAR SIR: I beg to make application for subscription to 100 shares of Old Dominion Copper Co. of Arizona.

Respectfully yours,

GUSTAF LUNDBERG."

"BOSTON, *July* 22, 1895.

R. R. Goodale, Esq., Houlton, Michigan.

DEAR SIR: In accordance with your telegram of the 20th instant, I have entered your subscription for 100 shares of the new stock of the Old Dominion Copper Mining & Smelting Co. at $25 per share payable in one instalment on or before Oct. 1st, 1895. You understand, of course, that your subscription is liable to be scaled down somewhat, as the amount which can be offered is already subscribed for.

Yours truly,

A. S. BIGELOW."

123 "JULY 22, 1895.

H. Wallerstein, Esq., P. O. Box 2737, New York.

MY DEAR SIR: Your favor of the 20th instant is received and contents have been fully noted. I do not in any way consider you a bore or peculiar, you simply try to do what all the rest of us are

triving for, and that is to make a few dollars. The original subscription to the Old Dominion was not offered freely to brokers in Boston, and I have no idea how it was offered to Mr. Stanton. In the first purchase at 5 7ths of the property, Messrs. Lewisohn Brothers took one-half and allowed me to take the other half, though I think they would have preferred to have me take only such portion as I absolutely wanted for myself. Then when we afterward bought the 2 7ths completing the entire purchase, I rather insisted I should have two-thirds of that. You will therefore see that I had very little to offer even to my immediate friends. One particular friend of mine who lives out of town said to me the other day, 'How was it I did not get any Old Dominion originally?' I told him it was simply because he was not here right under my nose where I could see him. I then told him we had built a little ladder, and he could come in on the third round, which he was very glad to do. But even this third round is now all filled up, and there is no room for anybody else. I am informed that you were told the middle of last week that you had better get in on this basis rather than not at all, but until today I have heard nothing from you. I did not tell Lewisohn Brothers originally to offer you any Old Dominion. So far as I know they simply took one-half of the 5 7ths and one-third of the 2 7th, and I know nothing as to what they have done with their friends in the matter. * * * You have done nothing to forfeit my esteem or friendship in any way, and I am very sorry you did not have a chance to get into the Old Dominion at the start, but you have no idea how fast these things go when they begin, and a day's delay often leaves a man outside. * * *

Yours very truly,

A. S. BIGELOW."

"NEW YORK, *July* 20, 1895.

A. S. Bigelow, Esq., Boston.

MY DEAR SIR: I do not want you to consider me a bore or peculiar, and I only write these lines to say that accidentally I heard
124 this week for the first time about the Old Dominion Copper mine. I understand that the original subscription to the first syndicate had been offered freely to brokers in Boston as well as to people like John Stanton here, and surprise was expressed to me that I, as one of your past particular friends had not been taken in also. When I applied to Mr. Lewisohn a few days ago, he was going to the Mountains and referred me to his son; and when I went to see him, Mr. A. L. he said he would give me 500 shares in the present subscription at $25. I then asked him if, as I had learned, there had been a previous subscription with certain rights attached. He replied that was ancient history and that he could do nothing for me in that direction. Now, to me it was not ancient but perfectly modern history, and I hope I have not done anything to forfeit your esteem or friendship, as outside of any money considerations. I have always had the best of regards for you and could only believe that you cherished similar feelings for me. Of course I should have liked to have had a little participation in the first

syndicate, and would have been satisfied to take 200 shares of the old subscription and 200 shares of the new subscription; and I would like to know from you, if not presuming too much upon your time, whether you told Lewisohn to offer me originally any participation in the Old Dominion. Of course, consider this confidential, as I shall also consider any answer which you wish to give me. I am sorry that I could not invest largely in Montana. I have had to use a good deal of money in my business, but still could and would have gone moderately into Old Dominion had it been offered to me. * * *

Yours truly,

H. WALLERSTEIN."

"BOSTON, *July* 25, 1895.

A. S. Bigelow, Esq.

DEAR SIR: Referring to your circular of July 24, this letter is to confirm my subscription for 200 shares of Old Dominion Copper Mining & Smelting Company made through Mr. Matthew Luce. I trust my subscription will not be cut down, as I understand from Mr. Luce that I was to have the whole of 200 shares.

Yours truly,

JAMES M. PRENDERGAST."

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"BOSTON, *July* 26, 1895.

A. S. Bigelow, Esq.

DEAR SIR: I wish to subscribe for 80 shares of the Old Dominion Copper Mining Company. If you cannot give me 80 shares, please see that I get my share, and oblige

Respectfully,

JOHN O. CONNER."

"BOSTON, *July* 26, 1895.

A. S. Bigelow, Esq., Sears Building.

DEAR SIR: I have yours of the 24th notifying me that I am down as subscriber for 300 shares of Old Dominion Copper Mining & Smelting Co. and that it is oversubscribed and will doubtless have to be scaled down. I desire to confirm my subscription for 300 shares and trust that I may escape much pruning.

Very truly yours,

F. G. WEBSTER."

Q. 176. Will you now read a copy of the circular letter of July 19, referred to in a letter of Maxwell Woodhull to you, dated July 19, 1905?

A.—

"303 SEARS BUILDING,
P. O. BOX 5104.

A number of the largest subscribers to the Old Dominion syndicate have requested that they be allowed to take shares in the new

company at a par value of $25 in lieu of the money which they originally advanced and which was to be repaid to them from the proceeds of the new stock. As a subscriber to the syndicate, you are hereby informed that it has been decided to grant this request. If you wish to avail yourself of the opportunity, you must notify me in writing on or before August 1, 1895, after which date this option will positively expire.

A. S. BIGELOW."

That appears to be all the letters received except letters relating merely to the payment of subscriptions.

Q. 177. The letter to F. G. Webster, dated July 26, refers to your letter to him of the 24th: will you see whether you have that letter, or a copy of that letter?

A. I cannot find any.

126 Q. 178. Are you able to recall anything in regard to that letter to Mr. Webster?

A. No, I cannot.

Q. 179. Will you now produce the correspondence between yourself and Lewisohn Brothers, or Leonard Lewisohn, or one of that concern, during the period from August 1, 1895, to October 1, 1895?

A. The correspondence in relation to Old Dominion matters other than that consisting merely of the transmission and receipt of checks, is as follows:

"SEARS BUILDING,
"BOSTON, MASS., *August* 2, 1895.

Leonard Lewisohn, Esq., Box 1247, New York.

DEAR SIR: Answering yours of July 31, we have entered your subscription for the entire shares which will come to you in the new company in lieu of the money originally advanced. The shares will not be exactly 18,120, as we do not take the fractions into account. Your proportion however will be for some few shares less than that. Of course we will notify you of the number later.

Yours truly,

A. S. BIGELOW."

"AUG. 29, 1895.

Leonard Lewisohn, Esq., Box 1247, New York.

DEAR SIR: I take pleasure in forwarding a copy of the report of Messrs. Hyams and Colquhon on this company's mine at Globe, Arizona. I am glad to say that this report more than confirms all that was originally claimed for the property.

Yours truly,

A. S. BIGELOW."

"SEPT. 18, 1895.

Adolph Lewisohn, Esq., Box 1247, New York.

DEAR SIR: You should find herein certificate No. 74 covering the 30,000 shares of the capital stock of this company to A. S. Bigelow

and Leonard Lewisohn for property purchased in accordance with the vote of the directors of the company. Please endorse said certificate on the back as attorney for Leonard Lewisohn and return it to me.

Yours very truly,

A. S. BIGELOW."

127 Now the letters relating to payments, remitting checks to Bigelow, show the following:

August 3	$3,183.48
August 19	8,988.79
August 21	19,581.06
August 23	13,926.26
August 23	4,787.80
August 26	17,707.79
August 30	2,903.70
September 16	2,328.03
September 16	1,456.25
September 24	5,651.25

Q. 180. Let us have now the syndicate receipts. We had them before through July.

A.—

August 2	$289.34
August 3	2,894.14
August 5	578.90
August 16	1,449.46
August 19	6,960.43
August 20	435.08
August 21	19,445.98
August 22	13,926.26
August 23	4,787.80
August 26	17,707.79
August 26	2,903.70
September 13	2,328.03
September 23	1,456.25
September 24	5,828.89
September —	21,333.33
Footing (to be verified)	$100,625.37

Q. 181. Now let us go back to the 1st of August for the private letters. We are now bringing up the subscribers' letters from August to October 1.

A.—

128 "AUGUST 5, 1895.

R. R. Goodell, Esq., Houghton, Michigan.

DEAR SIR: Your favor of the 31st ultimo is at hand. We duly received your wire for another 200 shares of Old Dominion stock,

but it came too late for you to get any additional. In fact, we are oversubscribed as it is, and I do not know how much of your first lot you will get. You will get something any how. Please say nothing to anyone else, but the insiders themselves who took 20,000 shares of the subscription have given up their rights in those to accommodate subscribers. * * *

Yours truly,

A. S. BIGELOW."

"BOSTON, *August* 7, 1895.

MY DEAR MR. GROUT: Your two letters of August 5 have been received and contents noted. In all probability you will get 1000 shares; that is, I do not think there is much doubt about it. Please do not say anything about this, however, as it will be a special favor to you if you do get that amount of stock. I am glad to be able to say that the copper market is very strong and the outlook for the future promising. In haste.

Yours very truly,

A. S. BIGELOW."

"Hon. W. W. Grout, Barton National Bank, Barton, Vt.

BARTON, VERMONT, *Aug.* 5, 1895.

A. S. Bigelow, Esq.

MY DEAR SIR: I notice that the papers are telling about the subscriptions to the Old Dominion Company being scaled down. That will not, of course, affect my 1000 shares, taken, as you will remember, immediately after the formation of the first syndicate and which really ought to have included me in that. You will not of course forget that my relation to the office is such that no question arises about my subscription.

Very truly yours,

WILLIAM W. GROUT."

"BARTON, VERMONT, *Aug.* 5, 1895.

MY DEAR MR. BIGELOW: It occurred to me that possibly you might want a letter with which to suitably explain my re-
129 lation to the Old Dominion subscription and that I did not leave it in the best possible shape by simply signing the paper I did the other day, and that your letter to me suggesting that I confirm my subscription for 1000 shares, &c., when replied to by me would put you in possession of material with which to satisfy any one who might be dissatisfied with the assignment of stock, that I was entitled to my stock without any scaling down. Hence I wrote a letter to enclose with this which will furnish an explanation of the situation; is such as to make it necessary, though I presume it is not. I know, in fact, that the whole matter is in your hands and expect you will take care of my 1000 shares any way. I want it not to sell but to keep, and I am in shape to carry it, and shall, except a little I wish to have to spare to some friends to whom I have promised

participation. If this letter will not help, as I presume to be the case, throw it aside, but do not fail to save the 1000 shares.

Very truly yours,

WILLIAM W. GROUT."

"BOSTON, MASS., *Aug.* 7, 1895.

Henry Wood, Esq., Green Acre Inn, Eliot, Me.

DEAR SIR: Your favor of Aug. 6th has been received and contents noted. It is probable that you will get the whole amount of Old Dominion Copper Mining & Smelting Company stock for which you subscribed."

[No signature.]

"AUG. 6TH, 1895,
GREEN ACRE INN, ELIOT, MAINE.

A. S. Bigelow, Esq., President Old Dominion Company.

DEAR SIR: Please kindly inform me if the allotment of Old Dominion Mining stock is yet made, and if my small subscription of 100 shares is to be cut down.

Yours truly,

HENRY WOOD.

Present temporary address as above."

"AUG. 7, 1895.

J. B. Sturgis, Esq., National Bank of Houlton, Michigan.

DEAR SIR: I am in receipt of your favor of Aug. 3rd. It is probable you will get the full amount of Old Dominion Copper Mining & Smelting Company stock for which you subscribed.

Yours truly,

A. S. BIGELOW."

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"OLD DOMINION SYNDICATE,
BOSTON, MASS., *Aug.*, 22, 1895.

J. B. Sturgis, Esq., Houlton, Michigan.

DEAR SIR: Replying to your favor of Aug. 17 anent Old Dominion subscription, it is true that you subscribed for 1050 shares, but you were allotted 1000 shares.

Yours very truly,

A. S. BIGELOW,
By W. A. S. CHRIMES."

"HOULTON, MICHIGAN, *Aug.* 3, 1895.

A. S. Bigelow.

DEAR SIR: Referring to my subscription for 1050 shares of Old Dominion stock for myself and friends, can you give me some idea of the number of shares we shall be able to get? It would be of some advantage to me to know, on account of holding the money for an investment. The newspapers state the stock has been oversubscribed. A reply will oblige.

Yours truly,

J. B. STURGIS."

"HOULTON, MICHIGAN, *Aug.* 17, 1895.

A. S. Bigelow, Esq.

DEAR SIR: Your favor of the 13th instant notifying me 1000 shares of Old Dominion stock had been allotted on my subscription is received. My subscription was for 1050 shares. Did you make an error in the allotment or was there a scaling of the subscription?

Yours truly,

J. B. STURGIS."

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *Aug.* 21, 1895.

S. N. BROWN, Esq., 77 Milk St., Boston.

DEAR SIR: Replying to your favor of August 19, the notices to which you refer were sent only to those subscribers of Old Dominion stock at $25 per share to whom stock was allotted.

Yours truly,

W. A. S. CHRIMES,
For A. S. BIGELOW."

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"BOSTON, *Aug.* 19, 1895.

DEAR MR. BIGELOW: Mr. Williams tells me he has received a notice as to award of Old Dominion Copper stock. I have not heard from mine. Did the notice to me miscarry?

Very truly yours,

SAMUEL N. BROWN."

"BOSTON, *Aug.* 22, 1895.

DEAR MR. BIGELOW: Thank you for yours of the 21st relative to distribution of Old Dominion copper stock.

Very truly yours,

SAMUEL N. BROWN."

"SEPT. 12, 1895.

W. B. Mosman, Esq., Boston, Mass.

DEAR SIR: Your letter of Sept. 11 is at hand. Your first question was answered by notice in regard to payment on Old Dominion Copper Mining & Smelting Company stock, mailed you yesterday.

Yours truly,

A. S. BIGELOW."

"AUGUST 17, 1895.

Old Dominion Copper Mining & Smelting Company, Boston, Mass.

DEAR SIRS: Your favor of the 13th instant notifying me that 15 shares of the stock of your company had been allotted to me at $25 per share is received. Please address all notices or other communications hereafter to me at 24 State St., New York City, N. Y., and oblige,

Yours truly,

OSWALD CAMMANN."

"Aug. 15, 1895.

A. S. Bigelow, Esq., Sears Building.

Dear Sir: We note that we are awarded 100 shares Old Dominion at $25 a share as per your favor of the 13th.

Yours truly, FOOTE & FRENCH.
Per FOGG."

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"Aug. 20, 1895.

My Dear Mr. Bigelow: In answer to your circular letter of the 17th, I shall be very glad to pay both the August and September payments to the $8000 Old Dominion syndicate in the name of Henry T. Coe. If you will kindly have the account made up with interest I will plan to call Thursday and hand you check.

Very sincerely yours,

SAMUEL B. CAPEN."

"Franklin, Mass., *Aug.* 24, 1895.

Mr. A. S. Bigelow.

Dear Sir: Your notice of August 13 saying I have been allotted 400 shares Old Dominion copper stock was received through Mr. Matthew Luce. My address is Franklin, Mass. Will you please send all future notices there and greatly oblige.

Yours very truly,

CHARLES J. McKENZIE."

"Maplewood Hotel.
"Maplewood, N. H., *August* 25, 1895.

My Dear Mr. Bigelow: Pursuant to your notice of the 17th, I enclose my check for present instalment of subscription to Old Dominion syndicate made up with interest to the 28th instant, which will cover remittance to New York $5805. You may send receipt to my office in usual course. * * *

STEPHEN M. CROSBY."

"South Poland, Me., 22 *July*, 1895.

A. S. Bigelow, Esq.

Dear Sir: In reply to your communication of the 19th instant, I beg leave to say that it is my wish to avail myself of the opportunity offered thereby to take the shares in the new company formed by the Old Dominion syndicate at their par value of $25 in lieu of the money originally advanced which was to be repaid from proceeds of the sale of the new stock.

Very respectfully,

R. M. FIELD."

"Bethlehem, N. H., *July* 27, 1895.

My Dear Mr. Bigelow: I hereby confirm my subscription for 400 shares of the Old Dominion Copper Mining & Smelting Company.

Very truly yours, SAMUEL N. BROWN."

133 "JULY 24, 1895.

A. S. Bigelow, Esq.

DEAR SIR: Your notice to the subscribers of the Old Dominion syndicate was duly received. As I understand it, having $3000 in the syndicate which was to be paid back to me, I can put that amount into new stock if I so desire. If I am correct about it, you will please put me down for that much stock, which would be 120 shares, giving me 240 shares in all. Please let me know if I am correct in the matter and oblige. I would like to pay my subscription in full on Aug. 1st. Please let me know the amount due, and I will see that it is paid on that day.

S. S. SPAULDING."

"NANTUCKET, MASS., *July* 24, 1895.

DEAR BERT: Your circular letter of July 19 in re Old Dominion mine was duly received. In reply I would say that I will take all my subscription in stock. Will you kindly let me know how many shares in the mine I shall thus receive when the certificates are issued? Thanking you again for your kindness, and with my sincerest regards, I am

Ever yours,

HAROLD WILLIAMS.

POSTSCRIPT.—My subscription was $5000. Shall I receive 400 shares or what?"

"BOSTON, *July* 29, 1895.

A. S. Bigelow, Esq., Boston, Mass.

DEAR SIR: Please take notice I do accept the option lately offered by you. I will take the bonus on my original subscription to the Old Dominion syndicate in subscription stock at $25 a share instead of in cash.

Yours truly,

JOHN H. PIERCE."

"BOSTON, *July* 29, 1895.

Mr. A. S. Bigelow, 303 Sears Building.

MY DEAR SIR: Will you please add my name to the number who subscribed for the Old Dominion stock in the new company at the par value of $25 a share in lieu of the money which I advanced and which was to be repaid to me? I am

Yours very truly,

N. E. HOLLIS."

134 "JULY 30, 1895.

Mr. A. S. Bigelow, Boston.

As per your letter of the 19th instant please enter my subscription to be taken in the shares of the new company at their par value of $25 per share.

STEPHEN O. METCALF."

"BOSTON, *July* 31, 1895.

A. S. Bigelow, Esq., Sears Building.

DEAR SIR: At the request of Mr. Luce, I wrote to say that he would like to have you include the following names in the list of those who wish additional shares in the Old Dominion in place of their original subscription: Moses T. Stevens, Timothy E. Hopkins, Isaac Fenno.

Respectfully yours,

F. H. MANNING."

The others are simply notices.

Q. 182. Does that include all the letters?

A. Yes.

Q. 183. You mean up to that date of October 1?

A. That is everything in there.

Q. 184. From subscribers?

A. Yes.

Q. 185. Have you not, in your letter book marked "A. S. B.," on pages 385 and 386, copies of forms of allotment of subscriptions to Old Dominion Copper Mining & Smelting Company stock? If so, will you now read the same, giving the page on which each appears?

Mr. HEMENWAY: The defendants object to the admission of forms on pages 385 and 386, which do not appear to have been sent to anybody by Mr. Bigelow or by anybody else.

A.—

"SEARS BUILDING, BOSTON, MASS., *August* 13, 1895.

Referring to your subscription to the stock of the Old Dominion Copper Mining & Smelting Company, you are hereby notified that — shares have been allotted to you at $25 per share. Notice will be sent in due course when payment for this should be made. Besides this you will receive — shares on subscription of — dollars to the Old Dominion syndicate, being the stock taken by you in accordance with the circular of July 19, 1895, and of course, in addition, the — shares to which you are entitled under your original subscription to the Old Dominion syndicate, in other words on the further payment by you of — dollars, you will be entitled to — shares of the stock of the Old Dominion Copper Mining & Smelting Company. When the stock is ready for delivery you will be notified.

A. S. BIGELOW."

"SEARS BUILDING, *August* 13, 1895.

Referring to your subscription to the stock of the Old Dominion Copper Mining & Smelting Company, you are hereby notified that — shares have been allotted to you at $25 per share. Notice will be sent in due course when payment for this should be made. Besides this you will receive — shares on your subscription of — dollars to the Old Dominion syndicate, being the stock taken by you in accordance with the circular of July 19, 1895. Of course, in ad-

dition to the — shares to which you are entitled under your original subscription to the Old Dominion syndicate, in other words, on the further payment by you of — dollars, and together with balance due by you on your original subscription to the Old Dominion syndicate, you will be entitled to — shares in the Old Dominion Copper Mining & Smelting Company. When the stock is ready for delivery you will be notified.

A. S. BIGELOW."

[Adjourned to Friday, March 27, and resumed.]

Q. 186. Your letter dated July 19, 1895, to Herrick refers to your enclosing an article to him about the Old Dominion: do you recall what that article was?

A. I do not.

Q. 187. Have you no recollection whatever in regard to it?

A. I should suppose it was a newspaper article, from the reading of the letter.

Q. 188. Is there not a subscription list containing the names of the subscribers to the Old Dominion Copper Mining & Smelting Company stock?

A. Yes, sir.

Q. 189. Will you kindly produce it?

A. Yes, sir. I now produce it.

Mr. HEMENWAY: The admission of this list is objected to as being incompetent, irrelevant, and immaterial, and as a matter between others than the plaintiff and defendants in this action.

[The witness produces a subscription list dated Boston, July 18, 1895, which reads:]

136 "We the undersigned, each for himself and not for the others, hereby subscribe for and agree to take and pay for stock of the Old Dominion Copper Mining & Smelting Company, organized under the laws of the State of New Jersey, to the number of shares set opposite our names respectively, at twenty-five dollars ($25) a share on or before October 1st, 1895."

[This paper is marked "Exhibit 10, G. C. B., March 27, 1903."]

Q. 190. Is that the only list of subscriptions for stock in the Old Dominion Copper Mining & Smelting Company? In other words, does that list include all the subscriptions taken referred to in the letters which have been introduced in evidence and include, as stated in the letter to Maxwell Woodhull of July 24, in the clause "60,000 shares are offered for subscription at $25 cash: the proceeds of 40,000 shares or the shares themselves going to the original members of the syndicate as a bonus and the proceeds of 20,000 shares, say $500,000, going to the company as a working capital"?

Mr. HEMENWAY: The question is objected to as immaterial, irrelevant, and incompetent, and res inter alios, and also as being a declaration subsequent to the transactions complained of.

A. That is the only one I have ever seen.

Q. 191. Is there any other subscription list that you have had anything to do with or know of?

A. I cannot recollect of any now.

Q. 192. I ask you to examine the subscription list [Exhibit 10] and state whether it does not appear to be the fact that all of the subscriptions up to the subscription of Ben F. Meservy, 100 shares, are in the handwriting of the party subscribing or in the handwriting of some person purporting to act as attorney for the subscriber?

Mr. HEMENWAY: That is objected to as immaterial, incompetent, and irrelevant.

A. It would appear so.

Q. 193. I will ask you whether the signatures commencing with George H. Lyman and ending with H. S. Goodwell do not appear to be all in the same handwriting, and whether you are able to state in whose handwriting those signatures are?

A. I would not want to answer that question; I would not dare to say.

Q. 194. Are you able to recall any correspondence with any of these subscribers which has not already been introduced in evidence,—any of these subscribers, prior to October 1, 1895, which has not been already introduced in evidence by you?

A. In relation to the Old Dominion matter?

Q. 195. Any correspondence, letters, telegrams, or other written communications.

A. No, sir, I cannot.

137 Q. 196. Are you able to recall, prior to October 1, 1895, any conversations with any of these subscribers except so far as such conversations may have been referred to or embodied in the correspondence which you have produced, in relation to the Old Dominion matter?

A. The only recollection of any conversations that I have, in a general way, is that they set forth the plan as outlined in that letter to Woodhull.

Q. 197. Do you recall any person with whom you had such a conversation?

A. I cannot.

Q. 198. You mean you cannot recall any person?

A. Any specific conversation, no.

Q. 199. Do you recall distinctly that you had any conversation with any one of these subscribers?

A. I think that question has been answered before. It is only in a general way that I recall conversations, if I had any.

Q. 200. What was the total amount of subscriptions to the Old Dominion Copper Mining & Smelting Company stock at $25 a share which was actually allotted?

Mr. HEMENWAY: That is objected to as immaterial, incompetent, and irrelevant, and as res inter alios.

A. 60,000 shares.

Q. 201. I call your attention to the fact that, according to Mr. Hyams' footing, the aggregate number of shares subscribed for, as per Exhibit 10, was 77,120. Can you state how the allotment of the 60,000 shares was distributed against those 77,120 shares subscribed for?

Mr. HEMENWAY: Objected to as immaterial, incompetent, and irrelevant.

A. To the best of my recollection, I do not think there was any general rule for doing it; to the best of my recollection, it was left discretionary with me.

Q. 202. Do you recall in what way you exercised your discretion?

A. I cannot, beyond, of course, what is stated in any letters that have been read.

Q. 203. Do you recall whether Lewisohn Brothers, or Mr. Lewisohn, were allotted any of this stock at $25 a share?

A. Judging from Mr. Lewisohn's letter of July 31, I should say that he did take some stock. I have no recollection beyond what is contained in that letter of July 31 to me, which has been already read in evidence.

Q. 204. In what way was this allotment of 60,000 shares distributed between the 20,000 shares that were sold for the purpose of providing a working capital for the company and the 40,000 shares that were sold to repay the members of the syndicate their original investments?

A. I do not remember now.

Q. 205. What was your cash contribution to the Old Dominion Syndicate?

138 Mr. HEMENWAY: That is objected to as immaterial, incompetent, and irrelevant.

A. I could not tell without reference to my check book.

Q. 206. I call your attention to a certificate in the Old Dominion receipt book produced by you, certificate No. 218; also to the stub of certificate No. 254, the stub and certificate being as follows:—

"Not Negotiable.
$30,487.60
A. S. Bigelow
July 24, 1895.
Balance instalment on 50,000
No. 218."

"*Receipt.*

$30,487.60. BOSTON, *July* 24, 1895.

Received from A. S. Bigelow thirty thousand four hundred and eighty-seven dollars and sixty cents, being balance payment and interest on subscription of fifty thousand dollars to the Old Dominion syndicate; second payment of 28 2/3 and 5 per cent interest due July 26, 1895; third payment 28 2/3 and 5 per cent interest due

August 25, 1895; fourth and last payment 28 2/3 and 5 per cent interest due Sept. 24, 1895.
No. 218.

A. S. BIGELOW."

[Stamped] "Not negotiable."
[Stub:]
"Not Negotiable.
$21,333.33.
A. S. Bigelow.
42 2/3 per cent instalment on $50,000
No. 254."

Then, written over it, "14 per cent, 28 2/3 per cent, [added] 42 2/3 per cent;" underneath the 42 2/3 per cent is "(57 1/3 per cent);" "paid, July 24, Receipt 218; [added up] 100 per cent."

I will ask you whether by reference to those stubs you do not recall that the total amount contributed by you was $50,000?

A. Yes.

Q. 207. The total amount paid by you, $51,820.93, being a $50,000 contribution to the syndicate, with interest at 5 per cent to the time of the payment?

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A. So it appears, by the receipts.

Q. 208. Will you now state what you received from the operation of the syndicate in stock and in money?

A. I should have to look over my private memoranda and check books before I could answer.

[Examination of the witness suspended.]

FRIDAY, *April* 10, 1903.

[The taking of the deposition of Albert S. Bigelow was resumed at 10 a. m. at the office of Messrs. Brandeis, Dunbar & Nutter, 220 Devonshire street, Boston, Mass.]

Q. 209. Mr. Bigelow, have you since the adjournment of the taking of your deposition found any other papers of any kind which bear upon the matter of your examination?

A. No, sir.

Q. 210. Have you been able to recall any facts which bear upon the matter?

A. No, sir.

Q. 211. Your memory has not in any way been refreshed by reading over the depositions or by looking over the papers as to the transactions?

A. Only so far as I have stated.

Q. 212. Is it not a fact that up to the annual meeting of April 4, 1902, when Mr. Charles Smith and his associates were elected directors of the Old Dominion Copper Mining & Smelting Company, you and Mr. Lewisohn, through your own stock and that of other persons whose proxies you held, retained control of the company?

Mr. LAUTERBACH: That is objected to as to substance, because

it has no bearing upon the issues in this action; and as irrelevant to the issues, incompetent, and immaterial.

A. The only evidence I have of that is what is contained in the records of the company at the annual meetings which were held.

Q. 213. As a matter of fact, you remained president of the company up to April 4, 1902?

A. If that is the date, yes.

Q. 214. You mean if that is the date of the meeting at which Mr. Smith came in?

A. That I was kicked out.

Q. 215. And all of the persons who were elected directors prior to the meeting of April, 1902, were either selected by you or Mr. Lewisohn or with your or his approval, were they not?

140 Mr. LAUTERBACH: The same objection as stated above.

A. I really cannot remember about all those things.

Q. 216. Is it not a fact that you did select the directors?

A. I think Mr. Lewisohn and I together did.

Q. 217. Will you state whether or not up to the time of the acquisition by the Old Dominion Copper Mining & Smelting Company of the properties in Globe, Ariz., formerly belonging to the Old Dominion Mining Company of Baltimore City, or to Simpson and Keyser, you had any knowledge of those mines except that furnished of the report of Messrs. Hyams and Colquhoun?

A. Only in a general way. I had heard of them.

Q. 218. [Presenting a report.] Do you recognize that as a copy of the report of Messrs. Hyams and Colquhoun?

A. I think it is. I have not the original.

[It is stipulated that this copy of report may be treated as a copy, subject to correction by comparison with the original; and the copy is marked "Exhibit 13, G. C. B., April 10, 1903."]

[For text, see page 237.]

Q. 219. Mr. Bigelow, you called my attention, on the last day of the taking of your deposition, to certain pages in your letter book which had been cut out; will you give the numbers of the pages that are cut out and the date before and after such pages? Just read the memorandum, if any, in the margin of the book at that point.

A. "June 15, 1895. Pages 309 to 313, inclusive, were spoiled." The date before is "June 15, 1895," and the date after is "June 15, 1895."

Q. 220. Can you state in whose handwriting the lead pencil memorandum "June 15, 1895, pages 309 to 313, inclusive, were spoiled" is? I want to know in whose handwriting that is.

A. I could not say as to that. It is not in my handwriting.

Q. 221. I call your attention to a printed report dated Boston, April 3, 1901, entitled, "To the stockholders of the Old Dominion Copper Mining & Smelting Company," and to a printed report entitled, "Report of the directors to the stockholders—report of the Old Dominion Copper Mining & Smelting Company for the year

ending December 31, 1901," and ask you whether it is not a fact that these two reports, of which these are copies, were issued by the company and were the only reports issued by the company to the stockholders of the company prior to April 4, 1902?

Mr. LAUTERBACH: That is objected to on the ground that whether the reports were or were not issued is of no relevancy to this action against Leonard Lewisohn, there being no evidence of any
141 duty devolving upon him to issue or cause to be issued any report, and on the general ground of the irrelevancy, immateriality, and incompetency of the question.

A. I cannot remember; these reports were doubtless sent out, but whether they are the only ones ever sent out, I cannot say.

Mr. LAUTERBACH: I move that the answer be stricken out in regard to the sending out and circulation of the reports, on the ground that Leonard Lewisohn is not shown to have had any connection with the making or preparation of the report, or any knowledge of its having been communicated to the stockholders.

Q. 222. You have no recollection, have you, of any other reports than the two exhibited to you having been sent out?

A. No, sir.

Mr. BRANDEIS [to the stenographer]: Now if you will mark those as exhibits; you need not copy them.

Mr. LAUTERBACH: I object to their introduction.

Mr. BRANDEIS: I want them marked as exhibits.

Mr. LAUTERBACH: I object to their introduction as exhibits, as being irrelevant, immaterial, and incompetent; that they are not shown to have been authorized by Mr. Leonard Lewisohn, or that he had any knowledge of them, and that they are reports concerning the company long subsequent to the time of the transactions set forth in the bill of complaint; and have no bearing upon the issues presented.

Mr. BRANDEIS: I think that is all I want to ask Mr. Bigelow until I get that account from Mr. Hyams.

[The two reports referred to in Int. 221 were respectively marked "Exhibit 14, G. C. B., April 10, 1903," and "Exhibit 15, G. C. B., April 10, 1903."]

[The further taking of this deposition was suspended until Thursday, April 16, 1903, at 10 A. M.]

THURSDAY, *April* 16, 1903.

[The further taking of the deposition of ALBERT S. BIGELOW, Esq., was resumed at the office of Messrs. Brandeis, Dunbar & Nutter, No. 220 Devonshire street, Boston.]

(By Mr. BRANDEIS:)

Q. 223. I hand you an account entitled "Old Dominion Syndicate" which has been furnished by Mr. G. M. Hyams, as being an account made up from the stub of your check

142 book, showing the amounts received from subscribers, and the amounts paid out, and showing a balance on the whole transaction of $50,464.15 contributed by you to the syndicate, which will be marked Exhibit 16; I also hand you an account entitled "A. S. Bigelow Old Dominion Investment Account," also furnished me by Mr. Hyams as being the result of the entries on your check book showing the amounts of Old Dominion Copper Mining & Smelting Company stock received by you, the disposition of that stock by sale, and the portion of stock retained by you, and I ask you whether or not these statements prepared by Mr. Hyams are correct?

A. To the best of my knowledge and belief they are.

[The account entitled "Old Dominion Syndicate" is marked "Exhibit 16, April 16, 1903, G. C. B." and the account entitled "A. S. Bigelow Old Dominion Investment Account" is marked "Exhibit 17, April 16, 1903, G. C. B."]

[For text, see B Exhibit 46 and B Exhibit 47.]

Q. 224. Is it not a fact that from the time of the first meeting of the Old Dominion Copper Mining & Smelting Company, held July 9, 1895, by the incorporators and stockholders for the purpose of organization, up to April 3, 1901, no meeting whatever of the stockholders was held, with the exception of the annual meeting held April 5, 1899, and the special meeting held June 15, 1899?

A. On examining the minute book of the Old Dominion Copper Mining & Smelting Company, I find that only such meetings of stockholders took place as stated in your question, but I find *that* on the 18th of September, 1895, as appears on page 27, the following minute or record which immediately follows the record of the meeting of the directors on that date:—

"All action taken by directors at above meeting is fully confirmed and approved of in all respects.

A. S. BIGELOW.
THOMAS NELSON.
M. T. STEVENS.
LEONARD LEWISOHN.
HENRY M. WHITNEY.
JOSEPH G. RAY.
EDGAR BUFFUM.

143 The undersigned common stockholders of the Old Dominion Copper Mining & Smelting Company do hereby approve of the action of the directors shown by the above record of meeting held on the 18th day of September, 1895.

[In pencil]

30,000 shs. LEONARD LEWISOHN.
A. S. BIGELOW.
20,000 shs. THOMAS NELSON, *Trens.*
100,000 shs. PHILIP A. DUMARESQ.

150,000 shs."

Q. 225. Are you able to state in whose handwriting the pencil figures of the number of shares on page 27, to which you have referred, are?

A. No; I could not say. I do not think I ever wrote "shares" in that way.

Q. 226. Have you, since the last adjournment, found any papers of any kind relating to the subject under consideration, or relating to the Old Dominion matters, in addition to those which you have already produced or which have been produced by Mr. Hyams at the taking of his deposition?

A. No, I have not.

Q. 227. Have you, since the last adjournment, seen any papers other than those of which you and Mr. Hyams had possession of, relating to this matter?

A. I do not think so.

Q. 228. Have you, since the last adjournment, in any way refreshed your recollection so that you are able to give any testimony on the matters inquired about in addition to that which you have already given?

A. You mean with regard to the whole subject?

Q. 229. With regard to the whole, or any part.

A. Why, certainly.

Q. 230. How have you refreshed your recollection?

A. By looking over the letters that have been submitted.

Q. 231. You mean by looking over the record of the testimony?

A. Yes, sir.

Q. 232. Now will you state fully all that you have been able to recall, in addition to that which has been testified to by you?

A. Well, I can recall the matter of the purchase of the Simpson 5/7ths; I can recall as to that; and I can recall as to what led us to go into it; and I can recall what ideas we had regarding it.

Q. 233. Is that all?

A. I think it is, yes.

Q. 234. Now will you state fully what you have been able to recall as to the Simpson 5/7ths interest?

A. The letters that have been submitted show that I was interested in the purchase of that Simpson interest to the extent of one half.

144 Q. 235. I do not want to ask questions, but you may just go on and state as fully as you can what you remember in regard to the matter.

A. My recollection of the matter is that we considered it of great value. There was nothing fully determined, as I recollect, at that time, as to what should be done with the property. As I remember it, we decided to keep on working the property as it was, in the shape that it was. Then I recollect afterwards—I could not say exactly whether it was afterwards or not—when we got the Keyser interest, that it was thought Mr. Lewisohn could float a minority interest in Europe, which I think is also stated in some of the letters which have been submitted, for a price that would reimburse us for what we had paid for the property. There was nothing, to my

recollection, entered into as to forming a new company under New Jersey laws until the last part of June, 1895. Up to that time, the matters in connection with the property were left, pretty much, in charge of Mr. Lewisohn. After the New Jersey company was formed I assumed more or less charge. My recollection is that the plan to be adopted was that a New Jersey corporation should be formed with 150,000 shares of stock; then that, as Mr. Lewisohn and I owned the entire property, we should turn over that entire property as a whole, with $500,000 in money, as a whole, to the company for its entire capital stock; the details to be carried out by the counsel who had been employed by Mr. Lewisohn, Mr. Beaman, of Evarts, Choate & Beaman. That, in a nutshell, is as I recollect the matter.

Q. 236. Is there anything else that you recollect in regard to the matter?

A. I do not now remember.

Q. 237. You have, I presume, refreshed your recollection by conference with counsel since the last adjournment, as well as by reading the record, have you not?

A. I do not see how counsel could refresh my memory.

Q. 238. You have conferred with them?

A. Certainly.

Q. 239. And you recall nothing additional to what you have testified beyond what you testified at the previous sessions and beyond what you have now given?

A. I could not recall anything more, unless some specific question were asked me as to details.

Q. 240. You stated, in answer to Int. 235, that "There was nothing fully determined, as I recollect, at that time, as to what should be done with the property:" what time did you refer to?

A. At the time we first got the option from Simpson.

Q. 241. You say "nothing was fully determined:" what was discussed?

A. There were no plans discussed at that time beyond getting Mr. Hyams' and Mr. Colquhoun's report on the property. Soon after it was discussed as to placing the property in Europe.

145 Q. 242. And forming a new company to take that over?

A. No, sir.

Q. 243. I do not mean there was discussion of forming a particular company, but there was talk, was there not, of a reorganization?

A. There was talk of a reorganization of the old company,—of the Baltimore Company.

Q. 244. Was not there talk of transferring the interest to the new company?

A. Not that I remember.

Q. 245. I mean shortly after the taking of the option?

A. Not that I remember. As I say, these details were left largely to Mr. Lewisohn, and he was the party in interest who was going to negotiate to see whether he could place the property in Europe upon certain terms which I do not remember; if the negotiations had been

carried out in Europe of course then I should have heard what th terms would be.

Q. 246. And that came up almost immediately after the optio was taken?

A. I do not think that came up for some little time afterwards.

Q. 247. Well, at this time, when you first discussed the matte who were interested in the property besides yourself and Mr. Lew isohn?

A. The parties who had signed these syndicate papers.

Q. 248. Not all of them, were they? When did Mr. Coram, Mr Nelson, Mr. Luce, and Mr. Meredith become parties and get thei interest in the Simpson option?

A. Not later than May 16, 1895.

Q. 249. I call your attention to Int. 8 of your deposition and th answer thereto, viz.,—

"Q. 8. Did not Mr. Lewisohn talk with you about having Mr Meredith get an option? A. Not that I remember."

Have you been able to recall anything in regard to that matter?

A. I do not remember any special talk with Mr. Lewisohn about that, as I have already testified in answer to that interrogatory, but I think it is more than possible that he did talk it over with me. We were apt to meet together pretty nearly every morning on the telephone and discuss matters in general.

Q. 250. I will also ask you about Int. 13 and the answer thereto, viz.,—

"Q. 13. Do you not recall that prior to the obtaining of this option of April 30, 1895, Mr. J. Morris Meredith came into your office and telephoned from your office to Mr. Leonard Lewisohn relating to this proposed purchase? A. It would be impossible for me to recall anything like that."

Have you been able to recall anything further?

A. No, sir.

146 Q. 251. I call your attention also to Int. 14 and the answer thereto, viz.,—

"Q. 14. How soon after April 30, 1895, did you have any communication with Leonard Lewisohn regarding that option? A. It is impossible for me to say."

Have you been able to recall anything further in regard to that?

A. Nothing definite.

Q. 252. Anything further at all?

A. I could not change my answer to that. It is impossible for me to say.

Q. 253. I call your attention also to Int. 16 and the answer thereto, viz.,—

"Q. 16. Do you recall whether you had any communication with Leonard Lewisohn in regard to the proposed purchase of the stock of the Old Dominion Copper Company of Baltimore City before this revised option of May 4 was executed? A. I could not recall that."

Do you recall anything further in regard to that?

A. I could not recall anything now. There is no doubt but what I had communication with Lewisohn all the time.

Q. 254. I also call your attention to Ints. 62, 63, 64, 65, and 66, inclusive, inquiring whether you have not some recollection of some subscription paper prior to the paper of May 21, which you produced, and to your answer that you had no recollection, that you thought there was such a paper, but you had no recollection as to what the agreement was: have you any recollection now as to what that paper provided?

A. What the wording of it was? No.

Q. 255. I do not mean the exact wording, but what the purport of it was?

A. I do not recollect. Mr. Hyams has, however, just handed me the following, which he says is a copy of an agreement which was signed by Messrs. Coram, Lewisohn, Nelson, Whitney, Meredith, and myself. Mr. Hyams recollects that he last remembers of seeing the original in Mr. Lauterbach's possession some time after the demand was first made upon me and upon Mr. Leonard Lewisohn for the syndicate in this matter by the Old Dominion Copper Mining & Smelting Company:

"Whereas, A. S. Bigelow has contracted to purchase eight thousand nine hundred and twenty eight (8928) shares of the Old Dominion Copper Company, a corporation organized under the laws of Maryland and owning property in Arizona, at forty (40) dollars per share, or thereabouts, the undersigned hereby agree to take the number of shares set opposite their respective names and pay for the
147 same at the rate of forty (40) dollars per share; the said stock to remain in the hands of A. S. Bigelow and the management of the property to be left with him. Payments to be made as follows:

May 27, 1895, fourteen per cent (14%).

July 26, 1895, twenty eight and two thirds per cent (28 2/3%) with interest at five per cent (5%) from the date of the first payment.

August 25, 1895, twenty eight and two thirds per cent (28 2/3%) with interest at five per cent (5%) from the date of the first payment.

September 24, 1895, twenty eight and two thirds per cent (28 2/3%) with interest at five (5%) from the date of the first payment.

The stock to be delivered on final payment.

The conditions, covenants and agreements herein contained shall be binding on the substitutes, successors, heirs representatives and assignees of the respective subscribers hereto.

In witness whereof we have hereunto set our hands and opposite thereto the amount of our subscription respectively this twenty second day of May, 1895."

Q. 256. My question asked whether you did not have some agreement earlier in date than the first Old Dominion subscription introduced by you in connection with your deposition, which was marked "Exhibit 3," and which was dated May 21, 1895? The paper you

have just read is dated May 22. Was there not some paper earlier than May 21; in other words, some paper as early or earlier than May 16, when it appears that Messrs. Coram, Nelson, Meredith, and Luce, made their first payment to you towards the one half of the $2000 for the Simpson-estate option?

A. I do not believe there is any earlier paper than that which the stenographer has just taken a copy of [referring to the paper of May 22]. I believe that is the earliest paper that there was.

Q. 257. Do you have any recollection as to what the agreement with Messrs. Meredith, Whitney, Coram, and Nelson was on which they paid you the $720 on May 16?

A. I do not believe there was any agreement.

Q. 258. Well, if they paid you $720 on that date, it must have been upon some agreement or understanding, must it not?

A. That I cannot recollect. I cannot recollect anything more than that account shows.

Q. 259. Well, you do not mean to testify that there was no agreement or understanding, but you do not recall what it was?

A. I do not recall what it was or whether there was any agreement.

148 Q. 260. I call your attention to Ints. 87, 88, and 89, inquiring as to whether Mr. Leonard Lewisohn was in New York or Boston on May 28, and your answers thereto, and ask you whether you now have any recollection on that subject?

A. No, sir.

Q. 261. I call your attention to Ints. 127 and 128, inquiring whether you have any recollection as to the conversation with Mr. Butler, referred to in the letter of Lewisohn Brothers to you on June 18, 1895, and ask you whether you have now any recollection on that subject?

A. I do not recall anything further.

Q. 262. I call your attention to Int. No. 141, viz.,—

"Q. 141. Have you any recollection other than what appears by the correspondence which has been put in evidence in connection with your deposition and the record of the directors' meeting on July 11, 1895, now shown you as to what took place in connection with the organization of the company or any conversation with Leonard Lewisohn or any other person in relation thereto? A. No, sir."

You have to-day testified to some fact, you have given some testimony in addition to that previously testified to, have you not?

A. What I understood by that question was, at the time of the meeting; as to what took place at the meeting, of the organization. I do not believe I took in the question fully. Was not the organization meeting held in New Jersey?

Mr. HEMENWAY: Yes, the records say so.

The WITNESS: And I was not there.

Mr. BRANDEIS: But the meeting of July 11 was held at the office of Lewisohn Brothers.

The WITNESS: That was not the organization meeting.

Q. 263. But the meeting of July 11, about which you were inquired of and the record of which you looked over before answering,

was the meeting held July 11, 1895, at which you and the others voted to purchase the property of the Old Dominion Copper Company of Baltimore City for 100,000 shares and certain mining claims standing in the name of Keyser for 30,000 shares. Now what has refreshed your recollection in regard to what took place? What, if anything, has refreshed your recollection as to what took place at that meeting?

A. Nothing has refreshed my recollection there except what is contained in the records. As I said, I do not remember of being present at that meeting. But I want to state here, Mr. Brandeis, that there is nothing I have heard since the last hearing, or since
149 the adjournment of the taking of my deposition, that has refreshed my memory as to the fundamental facts that are in my mind as to the organization of the New Jersey Company, what was to be done by that company and by Mr. Lewisohn and myself.

Q. 264. I call your attention to Int's. 145, 146, 147, and 148, inquiring about any interview with Mr. Woodhull, and your answers thereto, and ask you whether you have been able to refresh your recollection in regard to that?

A. No, sir.

Q. 265. I call your attention to Int's. 151, 152, 153, 154, 155, and 156, in which I inquired as to your recollection in regard to the subscriptions taken to the Old Dominion Syndicate, Exhibits 3, 4, 6, and 5, and ask you whether you have any further recollection in regard to any of the matters therein inquired about.

A. If you ask me if I have any recollection, I have no recollection.

Q. 266. I call your attention to Int's. 157, 158, 159, 160, 161, 162, 163, and 164, in which I inquire as to what part you had, if any, in conducting negotiations in connection with the purchase of the Simpson and Keyser interests, and ask you whether you have any recollection in regard to the matter other than what you have already testified to?

A. I remember nothing additional, and I can recall nothing except what appears by the letter of Lewisohn Brothers to me, dated June 18, which has been put in evidence. I have no recollection, but there were doubtless consultations had by me with Lewisohn Brothers or with Mr. Leonard Lewisohn.

Q. 267. I call your attention to Int. 191 and the answer thereto, in which I asked whether there was any subscription list to the Old Dominion Copper Mining & Smelting Company stock other than the list introduced and marked "Exhibit 10;" you stated that you could recollect no other. Have you any further recollection on that subject?

A. That is the only list I know of.

Q. 268. I call your attention to Int's. 194, 195, 196, 197, 198, and 199, inquiring in regard to correspondence and conversations with subscribers to the stock of the Old Dominion Copper Mining & Smelting Company, and ask you whether you have been able to recall anything further than what you have already testified to on that subject?

A. I testified before, didn't I, that I could not recall any specific

conversation? I doubtless had conversation with many of them.

Q. 269. Have you any recollection other than that which you have already given?

A. No, I have not.

Q. 270. I call your attention to Ints. 201 and 202, in which I inquired as to your recollection concerning the way you exercised your discretion in allotting the 60,000 shares of Old Dominion Copper Mining & Smelting Company stock to subscribers, and ask you whether you have now any recollection on that subject?

150 A. I do not change my answers to Ints. 201 and 202.

[Recess until 2.15 P. M., and resumed.]

Mr. BRANDEIS: I believe that is all that I have to ask Mr. Bigelow at present.

Cross-examination:

[In answer to cross-interrogatories propounded by Edward Lauterbach, Esq., counsel for the defendants, the witness further deposes and says:]

X 271. Mr. Bigelow, you have been all through your adult life, as far as business is concerned, dealing in metals, mining stocks, and mining properties?

A. Yes, sir; I began when I was seventeen, and with the exception of about two years' interlude, when I was in Chicago,—I went through the great fire there,—I have been in the copper-mining business all my days since.

X 272. You succeeded your father in the business?

A. Yes, my father was in the business before me.

X 273. So that before, and during the transactions which are being considered here, you were familiar with mining properties and their values, and the values of stocks?

A. Yes, sir.

X 274. Your business relations with Leonard Lewisohn, and the firm of Lewisohn Brothers, were very intimate in 1895, and prior to that time?

A. Very intimate indeed, yes.

X 275. And transactions, other than the one in question, had been carried on between you?

A. Yes, sir.

X 276. The firm of Lewisohn Brothers were largely engaged in dealing in metals and mining properties?

A. Yes, sir.

X 277. Your business relations with them were so close that, as you have testified, you had connection with them by private telephone?

A. By private telephone, yes.

X 278. And such that you had daily conversation with them over the wire?

A. Yes, sir.

X 279. Had you known by repute the Old Dominion properties prior to 1895?

A. Yes, sir.

X 280. You knew of the mine by reputation?

A. Yes, sir.

X 281. It was a dividend-paying concern?

A. I believe it was, yes sir.

X 282. And you believed it to be a valuable property?

A. Very.

151 X 283. From your relation with the Lewisohns, and in the course of business that was transacted between you, can you tell me what, according to your best recollection, was the first intimation that some negotiation in respect to the Old Dominion property was on foot?

Mr. BRANDEIS: That is objected to as calling for an inference, and not a recollection?

X 284. State your best recollection.

A. According to my best recollection we had conversations, doubtless, before the option on the Simpson interest was obtained.

X 285. You did not communicate in the first instance, so far as you recollect, to Mr. Lewisohn that the property could be acquired?

A. No, sir.

X 286. Your best recollection is that the first intimation came from him to you?

A. Yes, sir.

X 287. Judging from the correspondence that took place, and the options, and the records generally, do you know at about what time your attention was first called to the matter?

A. I should say it was probably some time in April, 1895.

X 288. And your recollection is that the possibility of the acquisition of the Simpson interest in the mine was called to your attention?

A. Yes, sir.

X 289. On the basis of a million dollars for the whole property?

A. Yes, sir.

X 290. And what was your judgment of that price, as to the reasonableness of that price?

A. We thought it was very cheap at that price.

X 291. You had been engaged in other similar transactions with Lewisohn Brothers, in the purchase of mining properties?

A. Yes, sir.

X 292. And in this transaction Mr. Beaman acted as counsel, did he not?

A. Yes.

X 293. He had your full confidence?

A. Yes, sir.

X 294. You knew that at about the time the first option, for the five sevenths, was obtained, Mr. Beaman was advising Mr. Lewisohn?

A. Yes, sir.

X 295. Before the Keyser option was obtained, what, if you recol-

lect, was the policy pursued, or intended to be pursued, in respect to the management of the mine?

A. It was to run the mine as it was in its then condition, having the Keyser interest as a minority interest.

X 296. And it was not until the acquisition of the Keyser option that any change in the policy could have been made?

A. No, sir, I do not think so.

X 297. You gathered from the record, and you state the fact to be, that upon obtaining the option on the five sevenths you were to be interested one half and Mr. Lewisohn one half?

A. Yes, sir.

152 X 298. And you knew that that would necessitate the contribution by you of one half of the purchase price of the Simpson interest?

A. Yes, sir.

X 299. And you immediately made arrangements for raising the money?

A. Yes, sir.

X 300. By associating with yourself whom?

A. By associating with myself Mr. Henry M. Whitney, Mr. Matthew Luce, Mr. J. A. Coram, Mr. Thomas Nelson, and Mr. J. Morris Meredith.

X 301. It is in evidence that you received from certain subscribers on the 16th of May a contribution towards the first payment that you were called upon to make of $1000 towards the $2000 paid by Mr. Lewisohn for that option; and it is also in evidence that on the 22d of May a formal subscription was made by these gentlemen, as you have testified?

A. Yes, sir.

X 302. And it appears that shortly thereafter, that is, on May 28, you repaid to these gentlemen the amounts that they had contributed towards the $1000?

A. Yes, sir.

X 303. From those facts do you not gather that some arrangement, either oral or in writing, was entered into between you and them before the 22d of May?

A. Doubtless there was.

X 304. And that the contribution made by them on the 16th of May was in the proportion it was contemplated they should enter into the arrangement with you?

A. Yes, sir.

X 305. And it is fair to assume that the repayment of money to them was based upon the same proportion?

A. Yes.

X 306. And is the proportion that was afterwards carried out, under the terms of the agreement of May 22?

A. I believe it is, yes, sir.

X 307. Do you happen to recall what the subscriptions of the respective parties were to the agreement of May 22, as a matter of memory?

A. I would not dare to swear to that.

X 308. Mr. Bigelow. I call your attention to a letter of June 28, 1895, from Lewisohn Brothers to C. C. Beaman, as follows:

"DEAR SIR: We merely desire to confirm our message to your clerk on the telephone this afternoon that Mr. Leonard Lewisohn would like to hear from you at your convenience whether you would consider it would be best to reorganize the Old Dominion Copper Company under the laws of Arizona, or whether it would be more advantageous to do so under the laws of some other State.

Very truly yours,

LEWISOHN BROTHERS."

153 Bearing that letter in mind, can you recollect whether you had any intimation at any date earlier than June 28 of any intention to organize a New Jersey corporation?

A. No, sir, I do not.

X 309. You do not recall anything prior to that date? Does the reading of that letter refresh your memory as to when the subject of the organization of a corporation other than under the laws of Arizona was called to your attention?

A. It was probably some little time after that.

X 310. The old corporation was really a Maryland corporation, and it was an error to speak of it as a corporation under the laws of Arizona?

A. Yes, sir.

X 311. Had you conceived of the policy of organizing a New Jersey corporation, or any corporation other than a Maryland corporation, at any time prior to June 28?

A. No, sir.

X 312. Or for several days thereafter?

A. No, sir, not according to my recollection.

X 313. Have you any recollection of being consulted by Mr. Lewisohn in reference to the extent of the capitalization of the New Jersey corporation when it was about to be formed?

A. Why, certainly we discussed it together.

X 314. What was the nature of that discussion?

A. The nature of the discussion was that it should be a company formed with 150,000 shares of stock, with a par value of $25 a share.

X 315. And this discussion was after the exercise of the option?

A. So I understand.

X 316. Can you recall any discussion as to the distribution of the stock of the company when formed?

A. Why, certainly; that is the fundamental thing of the whole business, as I understand.

X 317. What was it?

A. It was that we should receive all the stock of the new company for the entire property of the Old Dominion Company of Baltimore, located in Arizona, and $500,000 in money.

X 318. Which you were to furnish?

A. Yes, sir.

X 319. Were you aware at any time of having a change in that policy; if so, when?

A. No, sir, I am not aware of any change.

X 320. It appears in evidence that in form the property of the Old Dominion Company of Baltimore, other than the mines and mining claims conveyed to Mr. Lewisohn by Mr. Keyser, was conveyed for a separate consideration of 100,000 shares of the new company, and those mining claims for a separate consideration of 300,000 shares of the new company: was there an arrangement
154 or agreement or understanding at any time that separate values should be placed on the two classes of property?

A. No, sir.

X 321. Did any discussion ever take place in your presence in which the relative values of the Old Dominion property and the mining claims spoken of was considered or canvassed?

A. No, sir; to the best of my recollection.

X 322. Under whose direction was the organization of the new company, the transfer of property to it, and the issue of the stock of the new company conducted?

A. By Mr. Beaman, of the firm of Evarts, Choate & Beaman.

X 323. And you relied upon his advice in the matter?

A. Entirely and absolutely.

X 324. Do you know of any reason why a separation in the issuance of the stock was made?

A. No, sir; I cannot understand why it was done.

X 325. Was your attention ever called to the separation referred to?

A. I do not think it was called to my attention until Mr. Brandeis came into the office, at the time I read the record to Mr. Brandeis.

X 326. Is the same statement true of the separation of the 20,000 shares from the 130,000 shares?

A. Yes, sir, absolutely.

X 327. And you assumed up to that time that 20,000 shares with the 130,000 shares had come into your possession as owners of the property in bulk?

A. Entirely into my possession and Mr. Lewisohn's.

X 328. Was that the first occasion on which you read the letters?

A. I think so, to the best of my knowledge.

X 329. Did you personally make any of the records of the company except as your signature may appear upon the records in your own handwriting?

A. No, sir, I do not think so.

X 330. In providing moneys through the stock-subscription agreement of July 18, how much money did you contemplate raising by the sale of stock under that agreement? I am speaking now of the agreement that resulted in the subscription for 72,000 shares that was scaled down to 60,000 shares.

A. A million and a half of money.

X 331. Which was to repay the million dollars, the purchase price of the Old Dominion of Baltimore stock, and to provide a working capital for the new company?

A. The Old Dominion stock and the other properties.

X 332. And to provide a working capital for the new company?

A. Yes, sir.

X 333. The subscribers to the agreement of May 22 were not called upon to take up the eight thousand and odd shares of stock to which they had subscribed, were they, at any time?

A. No, sir.

155 X 334. That agreement referred to your one half interest in the stock that you were to acquire?

A. That agreement referred to my one half interest in the stock I acquired in the Old Dominion of Baltimore, Md.

X 335. And the money was raised by subscriptions to the Old Dominion Syndicate agreement, Exhibits 3, 4, 6, and 5?

A. Yes, sir.

X 336. To which agreement some of the subscribers to the agreement of May 22 became parties?

A. Yes, sir.

X 337. In securing subscriptions, either to the original subscription of May 22, or to the Old Dominion Syndicate, or to the stock-subscription syndicate of July 18, did you at any time solicit any one to make subscriptions?

A. No, sir, not one.

X 338. Did you at any time refrain from giving any information to any one of the subscribers to any of the papers referred to upon request?

A. No, sir.

X 339. Or did you ever withhold any information that was requested of you by any subscriber?

A. No, sir.

X 340. Did you ever make any statement or representation to any subscriber, or to any one, that was not truthful?

A. No, sir.

X 341. Did you at any time suppress any information?

A. No, sir.

X 342. In the letters which you addressed to those who became subscribers, did you state truthfully the situation as you believed it to be at the time the letter was written?

A. Why, certainly.

X 343. I call your attention to a letter of June 11, written by you to Maxwell Woodhull of Washington, D. C., in which you wrote that you had become interested in an Arizona property. That was true, was it not?

A. Yes, sir.

X 344. That you "had bought five-sevenths of the stock of the Old Dominion Copper Company, which was owned by an estate here, for $714,285." That was true?

A. I said we had.

X 345. That was true?

A. Yes, sir.

X 346. "Since then we have been negotiating for the other two-

sevenths on the same terms, and I think we shall get them." That was true?

A. Yes.

X 347. "The terms of the sale were $1,000,000 for the whole property." That was true?

A. Yes, sir.

X 348. "We have already made the first payment on our contract for the five-sevenths, which was $100,000, and given three notes for the balance, due upon the following dates," and the dates follow. That was true?

A. Yes, sir.

X 349. "But in taking the two-sevenths, which I think
156 we may be able to secure—we shall know about it positively today or tomorrow—Mr. Lewisohn takes only one-third, leaving two-thirds for us here." That was true?

A. Yes, sir.

X 350. "The terms of payment for the two-sevenths will be practically the same as that for the five-sevenths." That was true?

A. Yes, sir.

X 351. "All this interest is to be held as a syndicate until a reorganization of the company is effected." That is true?

A. Yes, sir.

X 352. "The Old Dominion is a company of many years' standing, and has been a considerable copper producer in the past." That was true?

A. Yes, sir.

X 353. "It has an efficient plant, and is today capable of producing from 1,500,000 to 2,000,000 pounds of copper per month. Mr. Hyams examined the property for us carefully, and he reports that there are four years' ground opened ahead and that he sees a profit in working the mine of from $350,000 to $500,000 a year. I firmly believe that we shall make a great deal of money out of the purchase, but this was not the incentive that induced us to go into it. Our reason for securing it was, as I have often expressed to you, to secure yet more control of the copper market than we now have, in other words, to place our office first in the world as a copper producer, and we feel bound when we have a chance to buy well known and developed copper properties to take hold of them largely to protect ourselves." All those statements are true?

A. True, to the best of my knowledge and belief.

X 354. And your statement in respect to Mr. Hyams' examination of the property—you knew that he had examined it?

A. Yes.

X 355. And you believed his report?

A. Oh, yes.

X 356. And your statement in regard to his report was based upon his report?

A. Yes, sir.

X 357. "We have not yet decided what plan we shall pursue in regard to the Old Dominion." That was on June 11. And that was true?

A. Yes, sir.

X 358. "It will have to be something like this, viz: The present company is organized with a share capital of 25,000 shares. We shall doubtless reorganize on a basis of 100,000 shares." That was of the existing company?

A. Yes, sir.

X 359. An increase of the stock of the existing company?

A. It refers to that company.

X 360. "Our present idea is to place somewhat less than half of this in Europe at a price that will pay back to the subscribers their money and give them their stock in the new company for nothing. Those are the terms on which the other subscribers have come in." You believed that to be entirely true?

A. Yes, sir.

157 X 361. And in all statements in all letters written to subscribers, or intending subscribers, you stated what you believed to be true?

A. Certainly.

X 362. On the 24th of July, 1895, the new corporation had been formed?

A. It had been.

X 363. And when the stock-subscription agreement of July 18 was subscribed to, the company had been formed?

A. Yes.

X 364. And a new policy had been adopted?

A. Yes, sir.

X 365. After that period, at any time when subscriptions to the stock-subscription agreement of July 18 were made, did you answer fully and truthfully any questions that were propounded at any time?

A. Yes, sir.

X 366. By any subscriber?

A. Yes, sir.

X 367. And in your letters to subscribers you endeavored to state what was truthful and correct?

A. Yes, sir.

X 368. I refer to your letter to Mr. Woodhull of July 24, in which you say, "Your favor of the 22nd has been received and contents noted. As I had already written you on the same day that I intended to take my proportion of the subscription stock of the Old Dominion Copper Mining & Smelting Company at $25 per share in lieu of cash, I did not think it necessary to telegraph you. The original members of the syndicate will not have any special right to subscribe to the balance of the subscription stock above their pro rate share." That was correct?

A. Yes, sir.

X 369. "Your subscription of $15,000 to the original syndicate and $15,000 to the subscription stock will entitle you to 1200 shares." That was correct?

A. Yes.

X 370. "That is, you put in no more money, but receive stock in-

stead of cash for your bonus as a member of the original syndicate. The original stock of the new company is 150,000 shares of the par value of $25 each."

A. Yes.

X 371. "60,000 shares are issued for subscription at $25 a share cash; the proceeds of 40,000 shares or the shares themselves going to the original members, of the syndicate as a bonus and the proceeds of 20,000 shares, or, say $500,000, going to the company as a working capital." That was a truthful statement?

A. Yes, sir.

X 372. And, so far as you know, in all other correspondence to subscribers or others you stated what was truthful concerning the stock?

A. Yes.

Mr. BRANDEIS: Whatever he stated was truthful.

Mr. LAUTERBACH: Yes; I understand the distinction.

X 373. In availing of the options of the Simpson estate and of the Keyser, was any one interested in the purchase except Lewisohn, or Lewisohn Brothers, and yourself and your associates, under the agreement of May 22?

A. I do not think so.

158 X 374. And no one else was interested in the purchase at the time of its consummation?

A. Not that I know of.

X 375. And the interest of those mentioned in the agreement of May 22 extended only to the purchase, to furnishing funds for the purchase of your one half of the stock?

A. That is all.

X 376. And, as you have stated, that agreement was never availed of?

A. No; I knew it could be availed of very well.

X 377. You knew nothing of the details of any syndicate which Mr. Lewisohn might have formed in order to furnish the money for the purchase of his share of the stock?

A. No.

X 378. You had nothing whatever to do with that?

A. Nothing at all.

X 379. And he had nothing to do originally with the raising of your share of the purchase money?

A. No, sir.

X 380. And the subscribers to the agreement of May 22 had no connection with the share of stock that Mr. Lewisohn was to purchase?

A. Not that I know of.

X 381. And no relation of partnership or otherwise existed between you and the subscribers to that agreement except as termed by the agreement itself?

A. No, sir.

X 382. You had no general partnership relation with Mr. Leonard Lewisohn?

A. No, sir.

X 383. No interest in the firm of Lewisohn Brothers?

A. No, sir; not that I know of.

X 384. No relation with them in this purchase except that you were to acquire a half interest in the five sevenths and a two thirds interest in the two sevenths, and that they were to acquire an interest of one half in the five sevenths and one third in the two sevenths?

A. That was all.

X 385. And no partnership relation existed between you?

A. No, sir.

X 386. In exercising the option, did you rely upon the report of Mr. Colquhoun and Mr. Hyams?

A. I relied on the report of Mr. Hyams mostly.

X 387. Had you ever any intention, or did Mr. Lewisohn ever express to you any intention, of keeping apart from the transactions the mining claims conveyed by Keyser to him, Leonard Lewisohn?

A. No, sir.

X 388. They were to form a part of the whole transaction?

A. Why, surely.

X 389. Had you ever any intention, or did Mr. Lewisohn ever express to you his intention, of keeping from the syndicate, or from the transaction, or out of the transaction in which the syndicate would be interested, these mining claims or their proceeds?

A. No, sir.

159 X 390. It was intended that they should form part of the whole transaction?

A. Surely.

X 391. Were the mining claims kept out of the original underwriting or syndicate of May 22, or out of any of the subsequent agreements?

A. They were not supposed to be.

X 392. And not in fact, so far as you know?

A. No, sir.

X 393. Mr. Bigelow, let me see if I understand the general scheme properly. In order to provide funds for your share of the seventeen thousand and odd shares acquired from the Simpson estate, you may have orally, and you did in writing, on May 22, provide for the underwriting of those shares?

A. Yes, sir.

X 394. With Mr. Lewisohn's purchase money you had no connection?

A. Nothing to do with it at all.

X 395. Instead of relying upon the underwriting, you received subscriptions to Exhibits 3, 4, 6, and 5 in order to raise the amount necessary to acquire the Simpson interest—your share of the Simpson interest?

A. Yes, sir.

X 396. And you subscribed yourself whatever was necessary to make up that amount?

A. Yes, sir.

X 397. Fifty thousand dollars?

A. Yes.

X 398. Which rendered it unnecessary for the underwriters to furnish the money?

A. Yes, sir.

X 399. And that applied, as well, to the money necessary for the payment for the Keyser interest?

A. Yes, sir.

X 400. So that the additional subscriptions were taken after the Keyser option had been obtained, in order to raise the whole of the money?

A. Yes, sir.

X 401. After the incorporation of the new company, the stock subscription of July 18 was opened, and subscriptions were received thereto?

A. Yes, sir.

X 402. With the intention of raising a million and a half of dollars,—a million to pay back the whole of the purchase money, and $500,000 as a working capital for the new company?

A. Yes, sir.

X 403. And that became oversubscribed?

A. Yes, sir.

X 404. The subscriptions amounting to 72,000 shares and more?

A. Yes, sir.

X 405. It required, then, 60,000 shares for the purposes mentioned?

A. Yes, sir.

X 406. And an allotment was made, so that 60,000 shares only were issued to subscribers?

A. Yes, sir.

X 407. Those who had subscribed to the Old Dominion
160 Syndicate were notified that in lieu of the return of the money to which they were entitled they could receive shares?

A. Yes, sir.

X 408. And in most instances the selection was made to receive the shares?

A. Yes, they were given the option.

X 409. And that was exercised generally?

A. Yes, sir; an option to take the shares or to take the money.

X 410. And in very few instances the money was taken?

A. Yes, sir.

X 411. And they became subscribers to the stock subscription of July 18?

A. Yes, sir.

[The further taking of this deposition was postponed until Thursday, April 23, at 10 a. m.]

BOSTON, *April* 23, 1903.

[The taking of this deposition was resumed at the office of Messrs. Brandeis, Dunbar & Nutter, at 220 Devonshire street, Boston, Mass., at 10 a. m., on Thursday, April 23, 1903, when, in answer to cross-interrogatories by Edward Lauterbach, Esq., counsel for the defendants, the witness further deposes and says,—]

X 412. Mr. Bigelow, I show you a copy of a letter of Lewisohn Brothers to the Old Colony Trust Company dated July 8, 1895, being Exhibit 82 in the suit of the Old Dominion Copper Mining & Smelting Company v. A. S. Bigelow, pending in the Supreme Judicial Court of Massachusetts, which reads as follows:—

"JULY 8th, 1895.

The Old Colony Trust Company, Boston Mass.

GENTLEMEN: In accordance with our telephonic conversation, I am sending you, under separate cover, registered:

$50,000.00, draft on Boston National Bank, Boston,
155,956.11, cashier's check N. Y. Guaranty & Indemnity Company

Total $205,956.11

This is in payment of my note due Sept. 25th, for $204,761.67, endorsed by Lewisohn Bros. and A. S. Bigelow, and interest from May 28th, to July 9th, 42 days, at 5 per cent; amounting to $1194.44. Total as above, $205,956.11.

Kindly strike out my signature on this note, and hold the note there. And, as stated to you by telephone, you will receive
161 from Mr. Wm. Keyser, Baltimore, on Wednesday morning another note endorsed as above, for $81,905.00, due Sept. 25th. I shall tomorrow send you the following three notes from here:

$204,761.66, due July 27th,
204,761.67, " Aug. 26th,
81,905.00, " " "

So that on Wednesday morning you will have on hand the following five notes in the Old Dominion matter, $204,761.66, due July 27th; $204,761.67, due Aug. 27th, $204,761.67, due Sept. 25th, $81,905.00, due Aug. 26th and $81,905.00, due Sept. 25th.

I will also send you from here tomorrow, the 9th, two receipts for the following cash payments which we made to you in this matter, namely, May 28th, $100,000.00 and June 20th, $121,905.00.

After you have had these notes and receipts in your possession you will kindly send to me by express, the total stock certificates of the Old Dominion Copper Company, namely 24,975 shares; also the five notes as stated above, and the agreement which contains the two receipts above mentioned.

Please telegraph me, at my expense, as soon as you receive the two checks above mentioned.

Very truly yours."

Does the reading of that letter refresh your recollection as to the time when the final payment to be made by the Lewisohns and yourself for the Keyser and Simpson stock was made?

A. Yes, sir.

X 413. That date would be the 9th of July?

A. The 9th of July, 1895.

X 414. And that letter was written prior to the incorporation of the Old Dominion Copper Mining & Smelting Company, which took place on the 9th of July?

A. Yes, sir.

X 415. And the first meeting of the board of directors of that company, as appears from the records, took place on the 11th of July?

A. Yes, sir.

X 416. So that on the 10th of July you and Mr. Lewisohn had become the owners of all the stock of the Old Dominion Company of Baltimore, and of the Keyser mining claims, and were in a position to make a disposition of the property of the Old Dominion Company of Baltimore and of those mining claims; and such disposition was made, was it, at the first meeting of the company?

A. Yes, sir.

X 417. And you and Mr. Lewisohn received, therefore, what?

A. We received all the stock of that company.

162 X 418. The 150,000 shares?

A. Yes, sir.

X 419. And left you obligated at the time of the transfer to furnish a capital to the new company of $500,000?

A. As a working capital, yes, sir.

X 420. The subscription to stock under the subscription agreement of July 18 referred to what stock?

A. It referred to stock belonging to Mr. Lewisohn and me.

X 421. To a part of the 150,000 shares?

A. Yes, sir.

X 422. And the 60,000 shares allotted under that subscription agreement was part of that stock?

A. Yes, sir.

X 423. In fact the company had no other stock except that 150,000 shares?

A. No, sir.

X 424. Out of the 60,000 shares allotted, 20,000 shares were distributed by Mr. Nelson, were they not?

A. Yes, sir.

X 425. In accordance with your directions?

A. In accordance with the directions of Mr. Lewisohn and myself.

X 426. Mr. Lewisohn and yourself acting as the syndicate?

A. For the syndicate.

X 427. And to the subscribers named on the agreement of July 18?

A. Yes, sir.

X 428. Was there, so far as you know, any subscription to any stock to the company directly?

A. Not at all.

X 429. I am referring to the 20,000 shares.

A. Yes, sir.

X 430. And your answer is that no part of that was subscribed directly to the company?

A. No, sir.

X 431. So far as you know, had the company solicited any subscription?

A. No, sir, it had not.

X 432. Or had it issued any prospectus?

A. No, sir, it had not.

X 433. And none was in fact ever issued?

A. No, sir.

X 434. I refer to paragraph third of the bill of complaint in this action, Mr. Bigelow, in which it is alleged that at some time prior to May 24, 1895, you and Leonard Lewisohn formed the plan of acquiring all the stock of the said Baltimore Old Dominion Company, and certain real estate which then stood in the name of Keyser, with a view to organizing a new corporation to acquire, and of selling to such new corporation, all the property of the Baltimore Old Dominion Company, and the real estate held by said Keyser. Did you at that time or at any time, prior to July 1, contemplate the creation of any company to which the property referred to was to be conveyed?

A. No, sir.

163 X 435. It is alleged in that paragraph that at that time you intended to incorporate such new company for the purpose of putting its shares upon the market and selling them to such of the public as might be induced to buy the same a large number of said shares in order to provide the same with a working capital and make necessary improvements in the plant and acquire additional mining claims, and thereby securing to yourselves and such persons as they might associate with you a large profit from the purchase and resale to said new corporation to be organized by you of said property. Had you any such intention at that or at any other time?

A. No, sir.

X 436. It is further alleged in that paragraph of the complaint that you and Leonard Lewisohn conspired together to carry out said plan. Had you any such intention?

A. No, sir.

X 437. Or any intention to injure the corporation to be formed and its future stockholders?

A. No, sir.

X 438. Or to secure for yourselves, as promoters and organizers thereof, a large secret, or any profit?

A. No, sir.

X 439. Had you any other plan or purpose at the time of availing of the options of Keyser and Simpson than to become the purchasers of the stock of the Old Dominion Company and the mining claims of Keyser, to which I have referred, for yourselves?

A. No, sir.

X 440. In the fourth paragraph of the bill of complaint it is alleged that you caused to be organized the Old Dominion Syndicate pursuant to the plan or conspiracy referred to in the third paragraph of the complaint. Had you any such purpose?

A. No, sir.

X 441. You have already stated the only purpose for which the Old Dominion Syndicate was formed?

A. Yes, sir.

X 442. At the time that the subscriptions to the Old Dominion Syndicate were taken, was it known what the interest of the subscribers would be, or was that matter left to your discretion?

A. It was left entirely to me.

X 443. So that the allegation that at the time of that subscription it was intended to distribute $2,000,000 of the stock of the company to the subscribers to the syndicate is incorrect?

A. Yes, sir.

X 444. It is alleged that the first payment made under the syndicate was made on the 24th of May. So far as the record shows, it appears to have been made on the 27th of May?

A. Yes, sir.

X 445. It is alleged in the fifth paragraph of the bill of complaint that on or about the 2d of May, 1895, you made an agree-
164 ment with the executors of the will of said Michael H. Simpson for the purchase of 17,857 shares of the capital stock of the Baltimore Old Dominion Company, being five sevenths of the total capital stock of said corporation for the purpose of carrying out the plan and conspiracy referred to. Had you any such purpose at that time?

A. No, sir.

X 446. Had you any purpose at that time other than acquiring the interest of Simpson?

A. None other.

X 447. And of continuing the affairs of the corporation in conjunction with the minority stockholders?

A. No, sir.

X 448. The price stated for the five sevenths in the bill of complaint is $613,137.39. In fact, the payment made was $714,285.70?

A. Yes, sir.

X 449. It is alleged in that paragraph of the complaint that the agreement with the executors of Simpson was in the form of an option, for which a sum not exceeding $100,000 was paid. The fact is that for the option only $2000 was paid, is it not, and that the $100,000 was the first payment on account, after its acceptance?

A. Yes, sir.

X 450. In the sixth paragraph of the complaint the price to be paid for the Keyser interest is stated to be $175,182.11; the correct price is $356,145, is it not?

—. Yes, sir.

X 451. In the seventh paragraph of the complaint it is alleged that you and Lewisohn, for your common benefit, acquired from Keyser certain parcels of real estate in Arizona, the title to which then stood in the name of said Keyser, as above set forth, to wit, the four mining claims known as said Old Dominion mine, said New York mine, said Keystone mine, and said Chicago mine, and said parcel of land near the Bloody Tanks. Did you differentiate, in the acquisition of those Keyser claims, in any respect from the trans-

action involving the purchase of the stock of the Old Dominion Company of Baltimore?

A. No, sir.

X 452. It was an entirety?

A. Yes, sir.

X 453. And you purchased those as you did the rest?

A. Certainly.

X 454. And with the same intent and purpose?

A. Yes, sir.

X 455. And they were purchased absolutely, as was the stock of the Old Dominion Company, for Mr. Lewisohn and yourself?

A. Yes.

X 456. And not in pursuance of any plan or conspiracy?

A. No, sir.

X 457. It is alleged that for the purpose of carrying out the plan or conspiracy referred to in the third paragraph of the complaint, and in other portions of the complaint, that on or about July 8, 1895, you caused the Old Dominion Copper Mining & Smelting Company, the complainant herein, to be organized under the
165 general corporation laws of the state of New Jersey. Did you cause such organization to be made for any such plan or conspiracy, such as is set forth, or any other plan or conspiracy?

A. No, sir.

X 458. It was incorporated only for the purposes that you have testified to?

A. Yes, sir.

X 459. In the eleventh paragraph of the complaint it is alleged that you completed the purchase of the shares of stock of the Baltimore Old Dominion Company in pursuance of the plan and conspiracy referred to in the third paragraph of the bill of complaint. Such purchase was not made in pursuance of such plan or conspiracy, or any plan or conspiracy, was it?

A. No, sir.

X 460. Referring to the twelfth paragraph of the complaint, as to what transpired at the meeting of the directors on the 11th of July, it is stated that those proceedings were had as part of the plan and conspiracy referred to. Such is not the fact?

A. No, sir.

X 461. In the thirteenth and fourteenth paragraphs of the bill of complaint, the separation of the offer for the sale of the property of the Baltimore Old Dominion Company for 100,000 shares, and of the claims and mines referred to as the Keyser claims, the one to be conveyed for 100,000 shares and the other for 30,000 shares, is referred to. Was your attention at the time of the meeting called to the fact of the separate offers for each?

A. Not that I remember.

X 462. I think that you have stated that your first knowledge of that was when your attention was called to it when the record was read in the presence of Mr. Brandeis and yourself about a year ago?

A. Yes.

X 463. In the fifteenth paragraph of the complaint it is alleged that you and Mr. Lewisohn caused to be offered 20,000 shares of the capital stock of the Old Dominion Copper Mining & Smelting Company for public subscription and sale at the price of $25 per share. Was that 20,000 shares offered by you for subscription or sale in any respect except as you have already testified to as being made under the subscription agreement of July 18?

A. No, sir.

X 464. And it is alleged that such subscription was pursuant to the original plan and conspiracy. Had you any plan or conspiracy in contemplation in disposing of any of the shares?

A. No, sir.

X 465. And it is alleged in the fifteenth paragraph that the shares were subscribed for and sold, and the price therefor paid by the subscribers to the Old Dominion Copper Mining & Smelting
166 Company. Is that true, except that the subscriptions were paid in by nominees whom you designated to Mr. Nelson?

A. That is the way in which it was done.

X 466. And in no other way?

A. In no other way.

X 467. The 20,000 shares referred to in the fifteenth paragraph of the bill of complaint are alleged to have belonged to the complainant corporation. Did they, in fact, belong to that corporation, or did they belong to you?

A. They belonged to Mr. Lewisohn and me.

X 468. In the seventeenth paragraph of the complaint it is alleged that the property conveyed to the complainant by the Baltimore Old Dominion Company was, at the time of such conveyance, fairly worth not more than $1,000,000, and that said parcels of real estate sold and conveyed by Leonard Lewisohn to the complainant as aforesaid were not fairly worth more than $5000. Mr. Bigelow, having in mind the report of Mr. Hyams to yourself and your knowledge of the Old Dominion property, and the condition of the copper market and its prospects, what can you say of the value of the whole property conveyed to the Old Dominion Copper Mining & Smelting Company?

A. Well, we thought it was worth much more than we paid for it.

X 469. Judging from its probable earning capacity, as stated in the report of Mr. Colquhoun and Mr. Hyams, and from its past history as you understood it, and from the condition of the copper market at that time and its prospective condition as you believed it to be, did you believe that the capitalization of the Old Dominion Copper Mining & Smelting Company at $3,750,000 was in any respect excessive?

A. No, sir.

X 470. Or that the disposition of its stock at $25 per share was in any way excessive?

A. No, sir.

X 471. It is alleged in the seventeenth paragraph of the complaint that you knew, and that Leonard Lewisohn knew, when you acquired the stock of the Baltimore Old Dominion Company, and

when Leonard Lewisohn acquired the title to said parcels of real estate, and when offers to sell to the complainant were made by said Baltimore Old Dominion Company and by said Leonard Lewisohn, that the value of the property referred to in the offers was not in excess of $1,000,000 for the property of the Old Dominion Company, and of $5000 for the other property referred to in that paragraph of the complaint. So far as your knowledge extended had you any such knowledge as that?

A. No, sir.

X 472. It is alleged in that same paragraph that the stock of the Baltimore Old Dominion Company and the said parcels of real estate were acquired by you in the manner already stated, with intent, on your part and that of Lewisohn, to sell the said property of the Baltimore Old Dominion Company and said parcels of
167 real estate for a large price. At the time of the acquisition of that property had you any such intent?

A. No, sir.

X 473. Of course, when you sold the property to the new company, you intended to sell it for all its stock?

A. Yes.

X 474. And did so sell it?

A. Yes.

X 475. And thought it a reasonable price for it?

A. Yes, sir.

X 476. At the time of that sale you were the sole stockholders of the new company?

A. Yes, sir.

X 477. Except what was needed to qualify directors?

A. That is all.

X 478. And that was your stock, in point of fact?

A. Yes, sir.

X 479. The allegation is made in the same paragraph that you made no disclosure to the corporation of the fact that the value of the property was less than that for which it was sold to the corporation. The fact is that the corporation knew of the whole transaction?

A. Yes, sir.

X 480. And you were really the corporation?

A. Yes.

X 481. You and Mr. Lewisohn?

A. Yes, sir.

X 482. It is alleged that no disclosure was ever made by you to any of the persons who subscribed for, or who afterwards purchased stock in the complainant corporation, or to any other persons of the facts as to the purchase of said properties, or as to the reasonable value thereof. Did you ever fail to disclose, upon request, any fact connected with the transaction?

A. No, sir.

X 483. Was not the whole transaction a matter of public knowledge?

A. Yes, sir.

X 484. So far as the members of the Old Dominion Syndicate were concerned, the whole transaction was left to your discretion?

A. Yes, sir.

X 485. In the eighteenth paragraph it is stated that by the transactions set forth in the complaint you carried out the plan and conspiracy referred to. There was, as you say, no plan or conspiracy?

A. No, sir.

X 486. There was none to carry out?

A. No.

X 487. It is alleged that you acquired all the capital stock of the Baltimore Old Dominion Company for a sum less than $800,000. There is no foundation for that at all?

A. No; no truth in that.

X 488. And that you acquired it without making any further payment than the $800,000. That is not true?

A. No, sir.

X 489. You and Mr. Leonard Lewisohn acquired it by the payment of $1,000,000?

A. Yes, sir.

168 Redirect examination:

[Upon redirect examination, in answer to questions propounded by Louis D. Brandeis, Esq., counsel for the plaintiff, the witness further deposes and says,—]

R. 490. Referring to Cross-Int. 295 and the answer thereto:

"Before the Keyser option was obtained, what, if you recollect, was the policy pursued, or intended to be pursued, in respect to the management of the mine? A. It was to run the mine as it was in its then condition——"

You mean by that answer to say that that was the intention?

A. At the beginning, yes, sir.

R. 491. Well, up to the time the Keyser option was obtained?

A. I cannot say the exact date, but of course we recognized that Keyser still had an interest in it.

R. 492. Well, is it not a fact that you did not intend to run that mine with Keyser as a minority interest, but that your intention was to acquire that minority interest?

A. Why, certainly, if we possibly could.

R. 493. And you made an effort at once to do so?

A. So I understand.

R. 494. And further than that, as soon as you acquired the majority interest,—I mean the Simpson interest,—you gave directions to shut down the mine, did you not?

A. I do not remember as to that.

R. 495. Has not your counsel, when refreshing your recollection of the testimony at the beginning of the cross-examination, called your attention to the letter of June 3, 1898, produced as Exhibit 18, in connection with the testimony of Frederick Royhauser in the suit of Old Dominion Copper Mining & Smelting Co. v. A. S. Bigelow, viz.,—

"JUNE 3RD, 1895.

William Keyser, Esq., President, Old Dominion Copper Co., Baltimore, Md.

DEAR SIR: The expert has returned from the Old Dominion Copper Company and—as you were doubtless advised by Mr. Butler—the first payment was duly made and good and sufficient notes given for balance.

The new owner would be obliged to you if under the circumstances you would send directions to the line to stop all work of every kind except pumping and such other work as is necessary for the protection of the property.

Very truly yours,

LEWISOHN BROTHERS,
General Manager."

169 A. I do not remember that. These matters were left with Mr. Lewisohn at that time.

R. 496. In answer to Cross-Int. 311, "Had you conceived of the policy of organizing a New Jersey corporation, or any corporation other than a Maryland corporation, at any time prior to June 28," you answered, "No, sir." And in answer to Cross-Int. 434, "Did you at that time or at any time prior to July 1 contemplate the creation of any company to which the property referred to was to be conveyed," you answered, "No, sir." Are those answers correct?

A. To the best of my knowledge and belief, yes, sir.

R. 497. Did not your counsel in conferring with you, preparatory to your cross-examination, call your attention to the letter of Lewisohn Brothers, by Jesse Lewisohn, General Manager, to Adolph Lewisohn, dated May 24, 1895, which was produced in connection with the deposition of Frederick Royhauser, in the suit of Old Dominion Copper Mining & Smelting Co. v. A. S. Bigelow, viz.,—

"NEW YORK, *May 24th*, 1895.

Adolph Lewisohn, Esq., London.

DEAR SIR: Mr. Meredith got back from Baltimore yesterday and had a conference of a couple of hours' duration with Mr. Keyser, but is none the wiser as to whether this gentleman intends to let us have his two-sevenths of the Old Dominion or not. He intimates that if we make it a different company with a higher capitalization, he would probably not remain in; but he had not decided and is not compelled to decide for sixty days. Having three directors out of five, they control; and we would have to get one of those directors to our side—otherwise they would have the running of the company until next February when a meeting will be held and new directors appointed.

We will have to take our chances on this matter, and we hope he will act fairly.

Mr. Lieberman of Arizona is one of the directors, we understand, and Mr. Leonard Lewisohn believes we will be able to win him over, and Mr. Simpson also promised to help us in gaining our point there, and it is probable that this matter will right itself in course of time

as it is not likely that Keyser will be very mean when there is not much for him to gain thereby.

Very truly yours,

LEWISOHN BROTHERS.
LEWISOHN, *General Manager.*"

170 A. No, sir, he did not.

R. 498. Having this letter now called to your attention, and particularly the sentence that "He intimates that if we make it a different company with a higher capitalization, he would probably not remain in;" and the further fact that the letter states that "Mr. Meredith got back from Baltimore yesterday,"—which would have been May 23,—do you not recall that the subject of forming a different company with a higher capitalization was considered by you and Mr. Lewisohn at some time prior to May 23?

A. No, sir, it was not.

R. 499. That is, you do not recall the fact?

A. I am very positive such was not the fact.

R. 500. Are you equally positive that there was no discussion of a new company before June 28, or July 1, as you have answered in answer to your counsel's question?

A. To the best of my knowledge and belief, there was not.

R. 501. I call your attention to the following passage in your letter of June 11, 1895, to Maxwell Woodhull: "We shall doubtless reorganize on a basis of 100,000 shares, and our present idea is to place somewhat less than half of this in Europe at a price that will pay back the subscribers their money, and give them their stock in the new company for nothing," and I call your attention specifically to the expression "their stock in the new company," and I ask you whether you do not now recall that there was at some time, on or prior to June 11, some discussion between you and Mr. Lewisohn as to the formation of a new company?

A. I do not think there was, sir.

R. 502. Do you mean by your last answer to say that you made the statement which you did to Mr. Woodhull without consultation with Mr. Lewisohn, and upon your own individual initiative wholly?

A. It would be very likely to be the case.

R. 503. And therefore you wish to have it understood, and wish the court to understand, that, according to your best recollection, while you considered the question of a new company, you did not discuss that with Mr. Lewisohn?

A. I do not admit it was a question of a new company.

R. 504. You admit that in your letter you said you were going to give to the stockholders stock in the new company for nothing, do you not?

A. I meant by that letter that the old company was to be reorganized; if I used the words "new company," it meant a reorganization of the old Baltimore Company.

R. 505. Well, will you kindly look through that letter, and point out to me anything in that letter which enables you to refresh your recollection so as to testify that you meant by the words "new company" the old company?

A. This one of June 11, do you mean?

R. 506. The letter of June 11 to Maxwell Woodhull.

171 A. Simply this paragraph: "The present company is organized with a share capital of 25,000 shares. We shall doubtless reorganize on a basis of 100,000 shares."

R. 507. That is all that you can point out?

A. That is what I think refers to the old company, and there was no other idea in my mind at the time.

R. 508. I ask you to point to anything and everything in that letter which enables you to testify now, as a matter of recollection, that when you used the words "new company," you meant the old company.

Mr. HEMENWAY: "The old company reorganized," is what he said.

A. I have pointed it out.

R. 509. And that is all, is it?

A. That is all that I can see.

R. 510. I call your attention also to your letter of June 12, 1895, to Moses T. Stevens, as follows: "It is proposed to reorganize this company, and the scheme, as at present outlined, is to float a little less than one-half of the new stock in Europe, which we have reason to believe we can do successfully, and then pay back to subscribers their subscription, leaving their stock in the new company costing them nothing." Did you, in that letter to Stevens, of June 12, when you used the words "new company," also mean the old company?

A. Yes, sir.

R. 511. Now will you point out to me anything in that letter which enables you to refresh your recollection so that you can testify that when you used the words "new company," you meant old company?

A. "It is proposed to reorganize this company."

R. 512. Is that all?

A. Yes, that is what I meant.

R. 513. I call your attention also to another letter of yours, to Charles S. Randall, dated June 12, 1895, in which you use the expression: "It is proposed to reorganize this company, and the scheme as at present outlined is to float a little less than one-half of the new stock in Europe, which we have reason to believe we can do successfully, and then pay back to subscribers their subscription, leaving them their stock in the new company costing them nothing." When you used the words "new company," in this letter did you also mean the old company?

A. Yes, sir.

R. 514. Are you able to point to anything in that letter which enables you to refresh your recollection to the extent that you can testify that when you used the words "new company" you meant old company?

A. Except for the words "It is proposed to reorganize this company."

R. 515. And you think if any one uses the words "to reorganize this company," or "the company," it must necessarily mean to simply make a change in that company under the laws of the same
172 state, and not to transfer the property to another company to be organized under the laws of a different state?

A. That was the intention, and that is what I recognized by these letters. It was to increase the stock of the old company.

R. 516. And is that what you mean—what you understand as the meaning of that language?

A. The meaning of those letters, yes, sir.

R. 517. I mean the meaning of the words "to reorganize the company."

A. "To reorganize this company," it is said there.

R. 518. Well, "to reorganize this company," to use that term generally?

A. That is what I mean to convey.

R. 519. Now is it not a fact, Mr. Bigelow, that, according to the ordinary parlance, in every, or nearly every, reorganization which has taken place about which you have knowledge, the expression "to reorganize the company" does not mean merely making a change in the organization of that particular company as it stands, but making such a change as may involve a new company to take over the property, as in the case of a number of railroad and other reorganizations with which you have been familiar?

A. It did in this case, to the best of my recollection.

(By Mr. LAUTERBACH:)

Q. What did it mean in this case? Your answer is not very clear. What did you suppose in this case it meant?

A. It meant to increase the capital stock of this company.

R. 520. What do you find in these letters to indicate that this particular reference to this company, which is used in one or two of the letters, was used in that narrow, that contracted, sense by you?

Mr. LAUTERBACH: That is objected to, as it is by no means a narrow and contracted sense, but a very justifiable method of construction.

A. I find enough to refresh my memory enough to remember that that was the intent at that time.

R. 521. Now I call your attention to the letter of Lewisohn Brothers to C. C. Beaman, which your counsel incorporated in Cross-Int. 308, viz.,—

"DEAR SIR: We merely desire to confirm our message to your clerk on the telephone this afternoon that Mr. Leonard Lewisohn would like to hear from you at your convenience whether you would consider it would be best to reorganize the Old Dominion Copper Company under the laws of Arizona, or whether it would be more advantageous to do so under the laws of some other State.

Very truly yours,

LEWISOHN BROTHERS."

173 Now will you note the use of the expression "to reorganize the Old Dominion Copper Company under the laws of Arizona, or whether it would be more advantageous to do so under the laws of some other State?" Do you not see that there the term "to reorganize the old company" was applied to the reorganization of the corporation under the laws of a different state to which the company was to be transferred,—a different company?

Mr. LAUTERBACH: That question is objected to on the ground that the letter bears its own interpretation, and on the further ground, as suggested by Mr. Hemenway, that the letters before referred to were the letters of Mr. Bigelow himself, and that this is a letter of Mr. Lewisohn, and the witness' interpretation of the letter is not properly called for, and the letter is not binding upon him.

A. If it calls attention to other states,—of course, I am trying to interpret what he did mean, whether he meant to form a new company in another state under some other state law.

R. 522. That is, under the law of Arizona, or under the law of some other state?

A. Yes, at that time.

R. 523. Now to a leading question by your counsel, "The old corporation was really a Maryland corporation, and it was an error to speak of it as a corporation under the laws of Arizona," you answered "Yes." Who committed that error?

A. Well, sir, I do not know.

R. 524. What did you mean by answering "Yes" to that question?

Mr. LAUTERBACH: That is objected to on the ground that the question referred to the attitude of the Old Dominion Company being incorporated in Maryland, and the reference was to its being incorporated under the laws of Arizona, which was evidently an error. That was my question and his answer.

A. I do not know.

R. 525. Why did you answer "Yes" to that question of your counsel?

A. Because it was an error to speak of it in that way.

R. 526. Who spoke of it as a corporation organized under the laws of Arizona?

A. I do not remember.

R. 527. Why did you answer "Yes, sir," to that question of your counsel?

A. Simply it was in answer to his question.

R. 528. Point out any error that any one committed with reference to that use of the word "Arizona" in connection with the Old Dominion Copper Company.

Mr. LAUTERBACH: That is objected to because the question referred to was simply that if the company was referred to as the Old Dominion Company of Arizona, it was an error, because it was

174 the Old Dominion Company of Baltimore, incorporated under the laws of Maryland, and that was the only question that was asked, and to that the witness answered that if the existing company

was referred to as a company under the laws of Arizona it was an error.

A. I do not find, I cannot see, where there is any error.

R. 529. Now is not the fact, Mr. Bigelow, this: that that letter of Lewisohn Brothers to Mr. Beaman shows that, prior to the writing of that letter, the question of reorganization by forming a new company had been discussed, and the question was whether a new company should be organzied under the laws of Arizona, where the property was situated, and under whose laws many mining companies are organized, or whether it would be more advantageous to organize a new company under the laws of some other state than Arizona?

A. I do not remember.

R. 530. You stated that, according to your recollection, the intention was, prior to July 1, not to organize the company under the laws of any other state, but to increase the capital of the Old Dominion Copper Company of Baltimore City, a Maryland corporation: is that correct?

A. That is as I understand it.

R. 531. Now will you explain to me in what way, according to your recollection, this old company, this Maryland corporation, could be reorganized with the result of having a capital of 100,000 shares, of which all but a majority would be sold abroad and the money raised to pay back to the syndicate subscribers their $1,000,000, and let them get the other half of the stock in the Baltimore Company for nothing?

Mr. LAUTERBACH: That question is objected to, as it is a matter of legal procedure not within the ken of the witness.

A. I do not recollect.

R. 532. You have no explanation to give?

A. None.

R. 533. Now it was a fact, was it not, that when you took over the Baltimore Company, the Simpson and Keyser interests, in pursuance of an agreement with Mr. Lewisohn and yourself, you stripped it of all the cash assets or working capital, turning over the company only with merely its mining property, plant, and a small quantity of supplies?

Mr. LAUTERBACH: That is objected to on the ground that the agreements speak for themselves.

Mr. BRANDEIS: No, I am not asking for the agreements, I am asking whether it was not practically done.

Mr. LAUTERBACH: Well, the objection is that the agreements speak for themselves as to what was to be done.

175 A. I do not remember outside of what is in here.

R. 534. Do not you remember that the company was turned over without any working capital, even copper on hand?

A. I should say by the agreement that it was.

R. 535. Now it was necessary, was it not, to raise a working capital with which to operate that mine?

A. To operate which mine?

R. 536. The Old Dominion mine.

A. — of Maryland, do you mean?

R. 537. I am not talking of the company, but of carrying on the mining operations of the property which you purchased, and which was vested in the Old Dominion Copper Company of Baltimore City. You have to have a working capital, and a large one, too.

A. You have to have money to carry on the work, of course.

R. 538. Well, how large an amount of money did you need?

A. I do not recollect as to that.

R. 539. Now how did you propose to raise that money which was required for a working capital?

A. At what time do you mean?

R. 540. At the time when it was arranged that you should take over the mine without any working capital.

Mr. LAUTERBACH: The question is objected to on the ground that working capital is not essential to the conduct and operations of a mine; that there are other methods of securing that operation.

A. I do not recollect.

R. 541. I call your attention again to the clause in your letter to Mr. Woodhull of June 11, "We shall doubtless reorganize on a basis of 100,000 shares, and our present idea is to place somewhat less than half of this in Europe at a price that will pay back to subscribers their money and give them their stock in the new company for nothing," and particularly to the following: "These are the terms on which the other subscribers have come in." Now I ask you if it was a fact that when you used the words, "new company," you meant new company; whether it does not appear from the very expression, "These are the terms on which the other subscribers have come in," that you had that same new company and reorganization in contemplation at the time that the subscribers to the several papers of May 21 and May 23 subscribed their names thereto?

A. No, sir.

R. 542. Why not?

A. That refers to the syndicate subscription, in my opinion, on reading the letter.

R. 543. You mean that it does not refer to that which immediately precedes it?

A. No, sir; I do not think so.

R. 544. What do you find in that letter to indicate that "These are the terms upon which the other subscribers have come in"

176 does not refer to what it would naturally appear to refer, namely, the clause immediately preceding it in the same paragraph?

A. I think it refers to the whole letter and to the syndicate subscription, and that there was no decision made as to the plans, as I say, "We have not yet decided," but if there were any profits in it, why, they were to share in any profits the same as all other syndicate subscribers.

R. 545. Your counsel examined you in relation to the fourth paragraph of the bill of complaint, called your attention to the allegation,

namely, that the amount so subscribed, the $1,000,000, and paid in, should be used, so far as required, for the purpose of acquiring the property and all the capital stock of said Baltimore Old Dominion Company, and that the subscribers to said syndicate should receive, in cash or in stock of the new corporation to be formed to purchase said property from said company, $2,000,000, to be distributed pro rata according to their several subscriptions; and your counsel asked you, in Cross-Int. 443: "So that the allegation that at the time of that subscription is was intended to distribute $2,000,000 of the stock of the company to the subscribers to the syndicate is incorrect?" And you answer, "Yes, sir." Now I ask you whether, refreshing your recollection from the statements, from the clauses read to you from the letter to Maxwell Woodhull of June 11, from the letter to Moses T. Stevens of June 12, and from the letter to Charles S. Randall of June 12, you do not recall that at that time it was the intention to get for the syndicate subscribers $2,000,000 in stock and cash for what they had paid $1,000,000?

A. I cannot change my answer to that.

R. 546. Is it not a fact that at the time of the writing of those letters it was your intention and expectation that the syndicate subscribers who contributed $1,000,000 in cash should receive $2,000,000 in stock or cash, or partly in stock, $1,000,000 in stock and $1,000,000 in cash?

A. I did not know what they were going to receive at that time.

R. 547. I asked you whether it was not your intention and expectation, at the time of the writing of those letters, that the syndicate subscribers who contributed $1,000,000 in cash would receive $2,000,000, $1,000,000 in stock and the other $1,000,000 in cash?

A. I do not recollect.

R. 548. Are not you able by reading the letters and those passages in the letters to refresh your recollection in that respect?

A. I do not think anything was specified, or anything definite in my mind.

R. 549. Do you wish to be understood as testifying that when you used in the letter of Maxwell Woodhull of June 11 the expression,

"We shall doubtless reorganize on a basis of 100,000 shares,
177 and our present idea is to place somewhat less than half of this in Europe at a price that will pay back to subscribers their money and give them their stock in the new company for nothing. These are the terms on which the other subscribers have come in;" and when you stated in the letter to Moses T. Stevens of June 12, 1895, "It is proposed to reorganize this company, and the scheme as at present outlined is to float a little less than one-half of the new stock in Europe, which we have reason to believe we can do successfully, and then to pay back to subscribers their subscription, leaving their stock in the new company costing them nothing;" and when you used in the letter of June 12, 1895, to Charles S. Randall, the expression, "It is proposed to reorganize this company, and the scheme as at present outlined is to float a little less than one-half of the new stock in Europe, which we have reason to believe we can do successfully, and then pay back to subscribers their subscription, leaving

them their stock in the new company costing them nothing," it was your intention and expectation to make such a disposition of the stock in the Old Dominion Copper Company of Baltimore City, or of the property owned by that company, so that you should give to the syndicate subscribers who contributed $1,000,000 their money back and stock to the amount of $1,000,000 without the payment of any other compensation?

A. I do not see where it says so in the letters. It says "give them their money back and their stock in the new company for nothing;" it does not say how much stock. That was left entirely discretionary with me under the syndicate papers.

R. 550. You wish now to be understood as testifying that it was not your intention to give them stock of the par value of $1,000,000 do you?

A. That I could not say. The thing was quite indefinite at that time. I intended to try to get them their money back and show them a profit.

R. 551. Well, I call your attention to the fact that you speak in your letter to Woodhull of June 11 of the present company being organized with a share capital of 25,000 shares which were of the par value of $20, and that it was proposed to reorganize on a basis of 100,000 shares. Does not that fact enable you to recall that it was then your intention to give back to stockholders their money in cash and shares of an equal par value to the amount which they had contributed?

A. No, sir, it does not. There is no par value mentioned in that letter.

R. 552. It was your intention, was it not, at the time you took subscriptions to the syndicate, to reorganize the company?

A. I cannot remember.

R. 553. Well, what is your best recollection; that it was or was not?

A. My intention to reorganize the company?

178 R. 554. At the time when you took subscriptions to the syndicate.

A. I do not think anything definite was settled then when they signed that paper.

R. 555. I am not asking you whether anything definite was settled; I am asking whether it was your intention at the time you took subscriptions to reorganize the company.

Mr. HEMENWAY: His answer is complete on that. He says there was nothing definite settled then.

A. I do not think it was definitely settled in my mind then.

R. 556. Were you considering, at the time when you took subscriptions, the reorganization of the company?

Mr. LAUTERBACH: The question is objected to unless the term "reorganization" is more fully defined, because there has been some parrying about that word for some time.

A. I cannot remember.

R. 557. Is it your best recollection that you were or were not?

A. The subscriptions were taken at so many different times, when that matter was settled I do not know.

R. 558. Were not subscriptions taken at the time when you were considering the reorganization of the company, or after you had begun to consider the reorganization of the company?

A. That I do not remember.

R. 559. Have you no recollection whatever upon that?

A. I do not remember about that.

R. 560. I call your attention again to the letters of June 11, 1895, to Woodhull, of June 12, 1895, to Stevens, and of June 12, 1895, to Randall, and ask you whether, at the time of writing those letters, the question of reorganization was not under consideration?

Mr. LAUTERBACH: Do you include in that term "reorganization" an increase of the capital stock? Otherwise, I think it is confusing to the witness.

Mr. BRANDEIS: He can state what he wishes.

Mr. LAUTERBACH: I am trying to make it clear.

Mr. HEMENWAY: He can answer only as questions are put to him.

A. I simply say in the letter to Mr. Woodhull, "We have not yet decided what plan we shall pursue in regard to the Old Dominion. It will, however, be something like this."

R. 561. What I ask you is whether, at that time, you were not considering the question of the reorganization of the company?

A. Reorganizing the old company under the Maryland laws.

179 R. 562. I ask whether you were not considering the reorganization? It is a perfectly definite expression.

A. To the best of my knowledge and belief, on reading that letter, we were considering the reorganization of the Old Dominion Company under the laws of Maryland, with increased capital.

R. 563. When, according to your best recollection, did that idea of increasing the capital of the Maryland Company enter your mind?

A. What time?

R. 564. Yes, with reference to the taking of subscriptions.

A. I cannot recollect what time.

R. 565. Well, it did enter your mind before June 11, didn't it?

A. Probably it did.

R. 566. And it was, was it not, your settled purpose at some time before June 11 to effect in some way a reorganization?

A. I do not think it was a fixed purpose.

R. 567. I call your attention to the following passage in the letter of June 11 to Maxwell Woodhull. After stating the purchase of the five sevenths, or the Simpson interest, and the proposed purchase of the two sevenths, or the Keyser interest, you say, "I enclose you a paper which you can sign if you please, which is the same as others have signed, and which tells you the dates of payments, &c. All this interest is to be held as a syndicate until the reorganization of the company is effected." Does not the reading of those words "all

this interest is to be held as a syndicate until the reorganization of the company is effected," refresh your recollection that it was then a settled purpose to effect the reorganization of the company?

A. To effect the reorganization of the company at some time, certainly; it was not going to be held as a syndicate forever.

R. 568. Now it is a fact, is it not, that after June 11 a large number of subscriptions were taken to the syndicate?

A. Does not that appear by the records that have been submitted?

R. 569. Well, does it not so appear in the subscription paper, Exhibit 5, which is dated June 14, and covers $179,119 of subscriptions?

A. It does so appear.

R. 570. I call your attention to the questions put by your counsel, viz., Cross-int. 316 [p. 153]:

"Can you recall any discussion as to the disposition of the stock of the company when formed?

"A. Why, certainly; that is the fundamental thing of the whole business, as I understand.

"X 317. What was it?

"A. It was that we should receive all the stock of the new company for the entire property of the Old Dominion Company of Baltimore located in Arizona and $500,000 in money.

180 "X 318. Which you were to furnish?

"A. Yes, sir.

"X 319. Were you aware at any time of having a change in that policy; if so, when?

"A. No, sir, I am not aware of any change."

I call your attention to the passages in the letter to Woodhull of June 11, 1895, in the letter to Stevens of June 12, 1895, and in the letter to Randall of June 12, 1895, above quoted, in which you state, "We shall doubtless reorganize on a basis of 100,000 shares," and ask you whether the policy of reorganizing on a basis of 150,000 shares was not a change from that under contemplation on June 11 and June 12, when you wrote the letters above referred to?

Mr. LAUTERBACH: The question is objected to because the question of counsel referred to a period after the formation of the new company with a capital of 150,000 shares, and had no reference to anything anterior to that time, and the answers referred only to a period after the formation of the new company.

A. No, sir; for the reason that they did not relate to the same subject.

R. 571. I call your attention to the question put to you by your counsel:

"X 320. It appears in evidence that in form the property of the Old Dominion Company of Baltimore, other than the mines and mining claims conveyed to Mr. Lewisohn by Mr. Keyser, were conveyed for a separate consideration of 100,000 shares of the new company, and those mining claims for a separate consideration of 30,000 shares of the new company. Was there any arrangement or agree-

ment or understanding at any time that separate values should be placed on the two classes of property?

"A. No, sir.

"X 321. Did any discussion ever take place in your presence in which the relative values of the Old Dominion property and the mining claims spoken of was considered or canvassed?

"A. No, sir, to the best of my recollection.

* * * * * * *

"X 325. Was your attention ever called to the separation referred to?

"A. I do not think it was called to my attention until Mr. Brandeis came into the office, at the time I read the record to Mr. Brandeis."

A. At the time the record was read to Mr. Brandeis.

Mr. BRANDEIS: Well, that has been changed since.

R. 572. I call your attention to the original offer of the Old Dominion Copper Company of Baltimore City to sell to the Old Dominion Copper Mining & Smelting Company its properties for 100,000 shares of the capital stock of the plaintiff company, which offer is dated July 11, 1895, and is as follows:

181 To the Old Dominion Copper Mining and Smelting Company, a corporation organized and existing under the laws of the State of New Jersey:

The Old Dominion Copper Company of Baltimore City, a corporation organized and existing under the laws of the State of Maryland being the owner of certain mines and mining properties at Globe in the Territory of Arizona described in the annexed Schedule and of machinery, lumber, wood, tools, implements and other personal property for use for and in connection with the operation and maintenance thereof hereby makes the following proposition.

To convey, assign and transfer all its property, both real and personal of every kind and nature whatsoever and wheresoever situated by good and sufficient deeds and instruments properly executed so as to confer absolute title thereto to the Old Dominion Copper Mining and Smelting Company upon receiving from said company one hundred thousand shares of its capital stock to be issued to said Old Dominion Copper Company or to its nominees.

It being understood that the Old Dominion Copper Mining and Smelting Company shall assume all obligations of The Old Dominion Copper Company of Baltimore City incurred since the first day of June 1895, and shall be entitled to all earnings and profits of said company since that date.

July eleventh 1895.

A. S. BIGELOW, *President.*

A. W. EVARTS, *Secretary.*"

SCHEDULE.

First. The Globe Mine, patented by the United States Government to B. W. Reagan on the 18th day of October 1881, by patent recorded in the office of the Recorder of Pinal County, Territory of Arizona, on the 19th day of November, 1881, to which record reference is made for a fuller description of said Mine.

Second. The Globe Ledge Mine, patented by the United States Government to Benjamin W. Reagan on the eighteenth day of October, 1881, by patent recorded in the office of the Recorder of Pinal County, Territory of Arizona on the nineteenth day of November, 1881, to which record reference is made for a fuller description of said Mine.

Third. The Copper Jack Mill Site, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 311, and to which record
182 reference is hereby made for a fuller description of said Mill Site, and upon which the Smelting Works formerly owned by the Old Dominion Copper Mining Co. are situated.

Fourth. The Globe Mill Site, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona in Book 2 of Records of Mines at page 311, to which record reference is hereby made for a fuller description of said Mill Site.

Fifth. The Globe Ledge Mill Site, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 310, to which record reference is hereby made for a fuller description of said Mill Site.

Sixth. The Southeast Globe Mine, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 312, and reference is hereby made to said records for a fuller description of said Mine.

Seventh. All of that certain Mining Claim known as the Interloper, in Globe District, County of Gila, Territory of Arizona, and recorded in Gila District Records on pages 116 and 117 in Book 2, reference to which will more fully show, being the same property conveyed to William Keyser by Thomas H. Mason, by deed bearing date January 3rd, 1887, and recorded at page 568, Book 2, record of deeds to Mines, Gila County, Arizona Territory.

Eighth. The Fraction mine, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines, at page 569, to which record reference is hereby made for a fuller description of said mine.

Ninth. The Alice Mine or lode, located October 10th, 1875, by A. R. Hammond and J. W. Reed, and notice of location recorded in Book 1, page 131, Globe District Mining Records (now a part of the Records of Gila County) and re-located February 28th, 1879, and notice of location recorded in Book 5, Globe District Mining Records (now a part of the Records of Gila County) on pages 184 and 185, said Mine or Lode being more particularly described in the last mentioned notice of location, as follows, to wit, commencing at

this monument of stones in a gulch, being the centre of Southwest end of claim, and upon which this notice is posted, thence Southeast 300 feet to a monument of stones, thence Northeast 1400 feet to a monument of stones; thence Northwest 300 feet to a monument of stones, being the centre of the Northeast end of claim; thence
183 Northwest 300 feet to a monument of stones; thence Southwest 1400 feet to a monument of stones, under a tree; thence Southeast 300 feet to the place of beginning, being the same mining claim conveyed to Michael H. Simpson, deceased, by deed of the Globe City Mining Company, dated July 1st, 1884, and recorded with Gila County Deeds to Mines, Book 2, page 227, et seq.

Tenth. The Mining claim called and known as the Hypatia Mine, situate, lying and being in Globe Mining District, Gila County, Territory of Arizona, and more particularly described in the notice of location recorded at page sixty six (66) Book 2, Records of Mines, Gila County Records, to which Record reference is made for a more definite description of said Mine; said Mine was formerly known as the Southwest Alice Mine, being the same mining claim conveyed to said Michael H. Simpson, lately deceased, by deed of William H. Cook, dated November 18th, 1884, and recorded with Gila County Deeds, Book 2, page 305."

and ask you whether the signature of A. S. Bigelow to that offer is not in your handwriting?

A. Yes, sir.

R. 573. Do you wish to be understood as testifying that you did not know what you signed when you signed that paper?

A. Yes, sir.

R. 574. This book of records, Old Dominion Copper Company of Baltimore City, has been in your and Mr. Hyams' possession, and has been produced by you here in response to call, has it not?

A. Yes.

R. 575. I call your attention to the following record of the special meeting of the board of directors of the Old Dominion Copper Company of Baltimore City, held at New York, July 11, 1895:—

"NEW YORK CITY, *July* 11, 1895.

A special meeting duly called of the board of directors of this company was held at 11 o'clock in the forenoon at the office of Lewisohn Brothers, 81 Fulton St., in the city of New York.

Present: Messrs. A. S. Bigelow, Leonard Lewisohn and R. Brent Keyser.

The president, Mr. Bigelow, in the chair:

The assent in writing of all except two shares of stock to the making and carrying out of a proposition to convey all of the company's property to the Old Dominion Copper Mining & Smelting Company was presented by Mr. Lewisohn and read as follows:

[Side note in margin:]

Mem. July 11th, 1895. The assent of these two shares obtained."

[For text of this offer, see pages 181-183 of this deposition.]

184 "We, the undersigned, being all the stockholders of the Old Dominion Copper Company of Baltimore City, do hereby approve of and assent to the making and carrying out of the foregoing proposition, and request and authorize the board of directors to take all necessary steps to make and carry out the same.

July 11th, 1895.

A. S. BIGELOW,	
LEONARD LEWISOHN,	
	Twenty-four thousand nine hundred and seventy-five (24,975) shares.
A. S. BIGELOW,	Five (5) shares.
LEONARD LEWISOHN,	Five (5) shares.
R. BRENT KEYSER,	Five (5) shares.
*WILLIAM KEYSER,	Five (5) shares.
*GEORGE A. POPE,	Five (5) shares.

*Added after this meeting.

and it was stated that the like assent of the remaining ten shares was promised and would be promptly obtained, whereupon Mr. Lewisohn moved and Mr. Keyser seconded the adoption of the following resolutions.

Whereas a corporation has been formed in the interest of the stockholders of this company under the laws of the State of New Jersey by the name of the Old Dominion Copper Mining & Smelting Company which it is proposed shall, among other things, acquire and operate the mining property of this company at Globe, Arizona, and

Whereas said New Jersey corporation has perfected its organization and is duly authorized to transact business and issue its capital stock, and

Whereas the assent of every stockholder of this company to the making and carrying out of a certain proposition to convey all of this company's property to the Old Dominion Copper Mining & Smelting Company has been practically obtained,

Resolved that such proposition, duly signed, be submitted in writing to the Old Dominion Copper Mining & Smelting Company, and

Resolved that the proper officers of this company execute and deliver all conveyances, assignments and transfers necessary to carry out and complete the transaction involved in such proposition, and that the president and treasurer be and they are hereby appointed a committee to supervise and carry out the same on behalf of this company with full power and authority to name the persons
185 to whom the said 100,000 shares of the stock of the Old Dominion Copper Mining & Smelting Company shall be issued, and to dispose of and distribute said stock and to do any other matter or thing in the premises that may seem to them necessary or proper.

The president and secretary thereupon reported that they had

duly executed on behalf of the company the proposition authorized to be submitted to the Old Dominion Copper Mining & Smelting Company.

Mr. Evarts then offered his resignation as secretary which was, on motion, duly accepted, to take effect at the close of the meeting, and Mr. Thomas Nelson was duly chosen as secretary in his place.

The meeting then adjourned.

A. W. EVARTS, *Secretary.*"

and call your attention to the fact that the record shows that you were present at that meeting; that there was presented, signed by you, at that meeting, an offer to sell the property of the Old Dominion Copper Company to the Old Dominion Copper Mining & Smelting Company for 100,000 shares of its stock; that you, as a stockholder of the Old Dominion Copper Company of Baltimore City, signed, with Leonard Lewisohn, an assent to the making and carrying out of that proposition twice, once generally with Leonard Lewisohn, as the owner of 24,975 shares, and once individually as the holder of five shares; and that the record shows that you, as president, together with the secretary, reported that you had executed, on behalf of the company, the proposition so authorized; and I ask you whether you wish to have it understood that in performing the several acts set forth in that record you did not know what you were doing?

A. I left all those matters to the counsel, Mr. Beaman, to carry out those meetings in every respect; left it entirely to him and did not follow it up myself; supposed it was properly done.

R. 576. There is no evidence that Mr. Beaman was present at that meeting.

A. Was not there a partner of his there?

R. 577. Mr. Evarts?

A. That was the firm that was employed, Evarts, Choate, & Beaman.

Mr. BRANDEIS: I also introduce here as Exhibits 18 and 19, a copy of the record of the meeting of the directors of the Old Dominion Copper Company of Baltimore City, of June 17, 1895, and a copy of the record of the meeting of the directors of the Old Dominion Copper Company of Baltimore City on June 20, 1895.

186 [For text of the meeting of June 17, 1895, Exhibit 18, April 23, 1903, G. C. B., see Bigelow Exhibits, p. 258; for text of the meeting of June 20, 1895, marked "Exhibit 19, April 23, 1903, G. C. B.," see Bigelow Exhibits, p. 259.]

Mr. LAUTERBACH: I object to the admission of these records on the ground that Mr. Bigelow was not present at either of the meetings of the 17th or the 20th.

R. 578. I call your attention to the original offer purporting to be signed by Leonard Lewisohn, dated July 11, 1895, to sell to the Old Dominion Copper Mining & Smelting Company for 30,000 shares of its stock, the Old Dominion, the New York, the Chicago, the Keystone

mining claims, together with a certain parcel of land at Bloody Tanks, which is as follows:—

"To the Old Dominion Copper Mining and Smelting Company:

I hereby offer to convey the following described property now owned and held by me upon receiving thirty thousand shares of the capital stock of the Old Dominion Copper Mining and Smelting Company to be issued to me or to my nominees;

1st. The Old Dominion Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land office at Tucson, Arizona, Entry No. 267, Lot No. 45 situated in Globe Mining District, Gila County, Arizona.

2nd. The New York Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1883, in the United States Land office at Tucson, Arizona, Entry No. 268, Lot No. 46 in Globe Mining District in Gila County, Arizona.

3rd. The Chicago Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land office at Tucson, Arizona, Entry No. 269, Lot No. 51 in Globe Mining District, Gila County, Arizona.

4th. The Keystone Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1885, in the United States Land office at Tucson, Arizona, Entry No. 384, Lot No. 54 in Globe Mining District, Gila County, Arizona.

5th. A lot or parcel of land situated near the Bloody Tanks and deeded by E. A. Saxe to the Old Dominion Copper Mining Company, Deed recorded in Book 1 of Deeds to Real Estate at page- 126
187 and 127 in the office of the Recorder of Gila County, Arizona, and reference is hereby made to said record for a fuller description of said parcel of land.

New York, July 11th, 1895.

LEONARD LEWISOHN.

Please issue said 30,000 shares of stock to Mr. A. S. Bigelow & myself.

LEONARD LEWISOHN."

and ask you whether the signature of Leonard Lewisohn is in his handwriting?

A. I think it is, yes.

R. 579. I now call your attention to the record of the meeting of the directors of the Old Dominion Copper Mining & Smelting Company on July 11, 1895, as follows:—

"Minutes of a Meeting of the Directors Duly Called, Held at the Office of Lewisohn Brothers, at 81 Fulton St., in the City of New York, on the 11th Day of July, 1895, at 12 o'clock Noon.

Present: Messrs. Lewisohn, Evarts, Buffum, Welch, Riddlesbor**ffer** and Rowe.

The president, Mr. Evarts, in the chair.

The resignation in writing of Mr. Montgomery as a director of the company was presented and read and, on motion, was accepted, and Mr. A. S. Bigelow of Cohasset, Massachusetts, was duly elected a director in his place, and, being present, took his seat as such.

The resignation in writing of Mr. Rowe as a director of the company was presented and read and, on motion, duly accepted, and Mr. Leonard Lewisohn of New York was duly elected a director in his place, and, being present, took his seat as such.

The resignation in writing of Mr. Welch as a director of the company was presented and read and, on motion, duly accepted, and Mr. Henry M. Whitney of Boston, Massachusetts, was duly elected a director in his place.

The resignation in writing of Mr. Jesse Lewisohn as treasurer was presented and read, and on motion, duly accepted, and Mr. Thomas Nelson was duly elected as treasurer in his place.

The resignation in writing of Mr. Jesse Lewisohn as a director of the company was presented and read and, on motion, duly accepted, and Mr. Thomas Nelson of Boston, Massachusetts, was duly elected a director in his place.

The resignation in writing of Mr. Evarts as president was
188 presented and read and, on motion, duly accepted, and Mr. Bigelow was thereupon duly elected as president in his place and thereupon took the chair.

The resignation in writing of Mr. Biddlesborffer as a director was presented and read and, on motion, duly accepted, and Mr. Joseph G. Ray of Franklin, Massachusetts, was duly elected a director in his place.

Mr. Evarts presented and read a proposition from the Old Dominion Copper Company of Baltimore City as follows:

[For text of this offer, see pages 181-183 of this deposition.]

Whereupon Mr. Lewisohn moved and Mr. Evarts seconded the adoption of the following resolutions:

Whereas the Old Dominion Copper Company of Baltimore City has made and submitted a proposition to convey all of its property to this company which has just been presented and read; and

Whereas it is reported and appears that such property is reasonably and fairly worth the par value of the stock proposed to be paid and issued and received therefor,

Resolved that said proposition be and the same is hereby accepted and that this company do purchase and acquire all said property upon the terms contained in the said proposition and in payment therefor issue 100,000 shares of its capital stock to said The Old Dominion Copper Company of Baltimore City or to its nominees, all such stock to be full paid and not subject to assessment; and

Resolved that Messrs. Bigelow and Nelson be appointed a committee to supervise and carry out the details of such purchase and issue of stock.

Which were thereupon duly adopted.

Mr. Lewisohn presented and read a written proposition as follows:

[For text of this offer of Leonard Lewisohn, to Old Dominion Cop-

per Mining & Smelting Company, see pages 186 and 187 of this deposition.]

Whereupon Mr. Evarts moved and Mr. Buffum seconded the adoption of the following resolutions:

Whereas Mr. Leonard Lewisohn of the city of New York has made and submitted a proposition to convey certain mining properties in Arizona to this company, which has just been presented and read;

189 and whereas it is reported and appears that such properties are reasonably and fairly worth the par value of the stock proposed to be paid and issued and received therefor,

Resolved that said proposition be and the same is hereby accepted and that this company do purchase and acquire said properties upon the terms contained in said proposition and in payment therefor issue 30,000 shares of its capital stock to said Leonard Lewisohn or to his nominees, all such stock to be full paid and not subject to assessment; and

Resolved that Messrs. Bigelow and Nelson be appointed a committee to supervise and carry out the details of such purchase and issue of stock.

Which were thereupon duly adopted.

The following resolution was thereupon, on motion, duly adopted:

Resolved that Niles S. Berray of Globe, Gila county, in the Territory of Arizona, be and he is hereby appointed the agent of the Old Dominion Copper Mining & Smelting Company in and for said Territory upon whom all notices and processes, including the services of summonses may be served, which, when so served, may be deemed taken and held to be a lawful personal service on said company for all purposes whatsoever.

And the president and secretary were requested to attend to the prop- filing of a copy thereof in the office of the Recorder of Gila county, Arizona.

The secretary reported that he had caused the statements of officers, directors, &c., required by law to be filed in the office of the Secretary of the State of New Jersey on the 10th instant, and had received an official certificate to that effect and that he had caused to be filed in said office on the same day a certificate as to issue of additional stock.

The resignation in writing of Mr. Buffum as secretary was presented and read and, on motion, duly accepted, to take effect at close of meeting, and Mr. Thomas Nelson was duly elected as secretary in his place.

EDGAR BUFFUM, *Secretary.*"

and ask you whether you wish to be understood as testifying that when you voted at that meeting as is there stated to make the sale of the property of the Old Dominion Copper Company of Baltimore City for 100,000 shares, in accordance with your offer as president, and to make the sale of the mining claims standing in the name of Lewisohn for 30,000 shares, as there stated, you did not know what you were doing.

Mr. LAUTERBACH: Do the records show that he voted as president? You said that he voted.

Mr. BRANDEIS: He presented it as president of the other company, and he voted as a director.

A. I do not recollect being present at that meeting, and, after reading the record, I doubt very much if I noticed what the particular forms of votes were that were passed. My instructions to Messrs. Evarts, Choate & Beaman, as the lawyers in the case, were that they should carry out the programme in this way; that we owned all the properties of the Old Dominion Copper Mining Company of Maryland, and all those standing in the name of Keyser, and that we should receive all the stock of the new company for those properties and for $500,000 in money. What methods Mr. Beaman took in carrying out my instructions I would not have been likely to have noticed, supposing that to have been done in accordance with my instructions.

R. 580. I call your attention to a passage in the records:

"The resignation in writing of Mr. Montgomery as a director of the company was presented and read and, on motion, was accepted and Mr. A. S. Bigelow of Cohasset, Massachusetts, was duly elected a director in his place, and, being present, took his seat as such."

Do you now have any doubt as to your being present at that meeting?

A. Why, if the records state it, there certainly should be no doubt, I should think.

R. 581. I call your attention to Int. 141, and your answer thereto:

"Have you no recollection other than what appears by the correspondence which has been put in evidence in connection with your deposition and the record of the directors' meeting on July 11, 1895, now shown you, as to what took place in connection with the organization of that company or any conversations with Leonard Lewisohn or any other person in relation thereto? A. No, sir."

And also to numerous other interrogatories in which I endeavored to refresh and exhaust your recollection as to conversations or communications with Leonard Lewisohn, and other facts in regard to the organization of the plaintiff company, and the transfer of the property to it, and ask you how, in view of the answers then given, and the fact that at the several sessions at which you were examined by me on the direct you had no recollection as to the terms on which this property was going to be turned over to the company, you have now been able to testify with the directness with which you have testified on these facts in regard to the turning over of the property?

191 A. I think I have answered that by saying that I supposed your interrogatories referred to a meeting of the organization at which I was not present; but that I always had remembered the fundamental fact which I have stated here before.

R. 582. I call your attention to the following passages in the record of the meeting of the directors of the Old Dominion Copper Mining

& Smelting Company held in Boston September 18, 1895, at page 26 of the record book; viz.,—

"Upon a report of the committee appointed at a meeting of the stockholders of the Old Dominion Copper Company of Baltimore City, held at New York July 11, 1895, on motion of Mr. Ray, seconded by Mr. Stevens, it is

Voted that one hundred thousand (100,000) shares of this company's full paid stock be issued to Mr. Philip Dumaresq.

Upon the report of Messrs. Bigelow and Nelson, the committee appointed at the meeting of the directors of the Old Dominion Copper Mining & Smelting Company held at New York July 11, 1895, on motion of Mr. Ray, seconded by Mr. Stevens, it is

Voted that thirty thousand (30,000) shares of this company's full paid stock be issued to Messrs. A. S. Bigelow and Leonard Lewisohn."

I also call your attention to the fact that you were present at that meeting and presided, and I ask you whether you wish to be understood as testifying that you did not understand at the time the purport of the votes which have just been called to your attention?

A. That meeting was probably outlined by the attorneys, and I followed whatever programme they laid out.

R. 583. That does not answer my question.

[R-Int. 582 repeated.]

A. I probably could have understood them if I had given my attention to them.

R. 584. I also call your attention to the fact that after the record of the meeting there is a statement, "All action taken by directors at above meeting is fully confirmed and approved in all respects," to which are appended the names of the directors, yours being the first, and ask you whether you wish to be understood as testifying that when you signed that statement you did not understand its purport?

A. I could have understood it if I had read it. I probably did not read it.

R. 585. I also call your attention to the fact that following the statement signed by the directors as above, there is the following:—

"The undersigned, stockholders of the Old Dominion Copper Mining & Smelting Company do hereby approve of the action of the directors shown by the above record of meeting held on the 18th day of September, 1895."

192 and to which statement is subscribed, after the name of Leonard Lewisohn, your name; and I ask you whether you wish to be understood as testifying that when you signed your name to that statement you did not understand its purport?

A. I probably signed that in the same way as the one before.

R. 586. I call your attention to the following Cross-Ints. and your answers thereto:—

"X 317. What was it? A. It was that we should receive all the stock of the new company for the entire property of the Old Dominion Company of Baltimore located in Arizona and $500,000 in money.

"X 318 Which you were to furnish? A. Yes, sir.

* * * * * * *

"X 417. And you and Mr. Lewisohn received therefor what? A. We received all the stock of that company.

"X 418. The 150,000 shares? A. Yes, sir.

"X 419. And left you obligated at the time of the transfer to furnish a capital to the new company of $500,000? A. As a working capital, yes, sir.

"X 420. The subscription to stock under the subscription agreement of July 18 referred to what stock? A. It referred to stock belonging to Mr. Lewisohn and me.

"X 421. To a part of the 150,000 shares? A. Yes, sir.

* * * * * * *

"X 467. The 20,000 shares referred to in the fifteenth paragraph of the bill of complaint are alleged to have belonged to the complainant corporation. Did they in fact belong to that corporation or did they belong to you? A. They belonged to Mr. Lewisohn and me."

Do you wish by your answers to those questions, particularly the last, to be understood as testifying that the 20,000 shares of stock was not treasury stock?

A. I understood it belonged to us, sir; that we were to give the $500,000 in money for it.

R. 587. And that it was not treasury stock?

A. Not as I understand the meaning of those words.

R. 588. Is it not a fact that under date of August 8, 1895, you wrote to Mr. Woodhull as follows: "I received your letter of the 7th. You are right in presuming the 20,000 shares which has been offered to be treasury stock?"

Mr. LAUTERBACH: That is objected to on the ground that the witness is entitled to see the letter before answering. It does not appear that any such letter was written.

193 A. Naturally I do not know that it is a fact.

R. 589. Will you make further search in your letter book for a copy of that letter of August 8 1895; also for the original letter of August 7, 1895?

Mr. LAUTERBACH: I think he has already made answer that he has made search, and he has no other letter.

Mr. BRANDEIS: I still believe that the search is not yet complete.

Mr. HEMENWAY: It is a matter that is not material.

The WITNESS: How is the letter signed, Mr. Brandeis?

Mr. LAUTERBACH: This is mythical.

R. 590. To Cross-Int. 373, put to you by your counsel.—

"In availing of the options of the Simpson estate and of the Keyser, was any one interested in the purchase except Lewisohn or Lewisohn Brothers and yourself and your associates under the agreement of May 22?"

you answer, "I do not think so." Is that answer true?

A. I thought it was when I made it.

Mr. LAUTERBACH: That is my mistake, Mr. Brandeis. It is correct as to the Simpson, and incorrect as to the Keyser. I will make the statement that in asking the question I was mistaken in including the Keyser option, since the Keyser option was only availed of on June 12, and subscriptions to the Old Dominion Syndicate had been made in the mean time, and those subscribers may be looked upon as being parties in interest. If those subscriptions are to be looked upon as creating an interest in the purchase, then the error was mine in framing the question.

R. 591. Is not your answer to Cross-Int. 373 correct, with the amendment now submitted by Mr. Lauterbach?

A. To the best of my knowledge and belief, it is.

R. 592. Is it not a fact that the option to take the Simpson shares was not availed of until May 28, as appears by Exhibit —?

A. Yes, if the evidence shows it.

R. 593. Is it not also a fact, as appears by Exhibit 3, that one syndicate subscription paper was dated May 21, and, as appears by Exhibit 4, another subscription paper was dated May 24?

A. It appears so.

R. 594. Is it not also a fact that there were paid in to you by subscriptions of May 27, $—?

A. It appears so.

R. 595. You said, in answer to your counsel,—

"X 375. And the interest of those mentioned in the agreement of May 22 extended only to the purchase, to furnishing funds for the purchase, of your one half of the stock? A. That is all.

191 "X 376. And, as you have stated, that agreement was never availed of? A. No. I knew it could be availed of very well."

Now I call your attention to the receipts given to Henry M. Whitney and J. Morris Meredith for their subscriptions under date of May 27, 1895, introduced by you in answer to Int. 84, namely,—

"Received of Henry M. Whitney the sum of $7000, being first payment of his subscription of $50,000 toward the purchase of stock in the Old Dominion Copper Company according to the terms set forth in a certain paper which said Whitney has signed, and a copy of which he has."

and ask you whether those payments made by Mr. Whitney and Mr. Meredith were not made under the agreement of May 22?

A. I think those were really payments on the Old Dominion Syndicate.

R. 596. It is obvious they do not so read, is it not?

A. It does not appear so.

R. 597. I call your attention to Cross-Int. 391, and your answer thereto, viz.,—

"X 391. Were the mining claims kept out of the original underwriting or syndicate of May 22, or out of any of the subsequent agreements? A. They were not supposed to be."

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Do you wish to be understood as testifying that those mining claims,—by which I assume you refer to the Keyser claims,—were supposed to be included in the agreement of May 22?

A. They were included in the Keyser option.

R. 598. Mr. Lauterbach's question to you was, "Were the mining claims kept out of the original underwriting or syndicate of May 22," which is an agreement——

Mr. LAUTERBACH: Oh, no, the underwriting agreement, I mean.

A. What I mean to say is they were not supposed to be kept out. As we understood at the time, we were to buy all the claims they owned down there, but we found afterwards that some stood in the name of Mr. Keyser.

R. 599. Do you wish to be understood as testifying that you knew nothing whatever about those so-called Keyser claims at that time?

A. Not at that time, no, sir.

R. 600. You did not know anything whatever in regard to them until Mr. Hyams returned from the West and told you, from his previous knowledge, that there were some such claims?

A. That was my first information that I remember.

R. 601. And, learning that there were such claims, Mr. Lewisohn and you undertook to get them included in the Keyser agree-
195 ment, and also undertook to get the Simpson estate to agree to the transfer of their interest in them?

A. So I understand.

R. 602. Now it is a fact, is it not, that these claims did not belong to the Old Dominion Copper Company of Baltimore City?

A. I think they did, sir.

R. 603. They were not included in any of the list papers or lists of properties which were sent by the Old Dominion people, and on which Mr. Hyams examined the property, were they?

A. As I understood it, they stood in Mr. Keyser's name, but were held by him for the Old Dominion Copper Company at Baltimore.

R. 604. I ask you, is it not a fact that they were not included in the list of properties which was furnished to Mr. Hyams and Mr. Colquhoun for their examination?

A. That I do not remember.

R. 605. Now is it not a fact that the interest of Mr. Keyser, and of the Simpson estate in these mining claims was entirely different from the interest which they had in the Old Dominion Copper Company, namely, that in the Old Dominion Copper Company they had a five sevenths interest to Simpson, and a two sevenths interest to Keyser, but in these mining claims, Keyser owned one half, and the Simpson estate the other half?

A. That I do not remember.

R. 606. I call your attention to your letter to Leonard Lewisohn dated June 15, 1895, and introduced in evidence [p. 85] as part of your answer to Int. 112, which is as follows:—

"Old Dominion Syndicate,
Sears Building,
(Second Letter.)

BOSTON, MASS., *June* 15, 1895.

Leonard Lewisohn, Esq., Box 1247, New York.

DEAR SIR: I have just returned from an interview with Mr. Simpson. He tells me that he saw young Mr. Keyser and gave him authority to transfer their one-half interest in the Old Dominion, Keystone, New York, and Chicago claims and whatever others there may be to us"—

and ask you whether that does not refresh your recollection that the Simpson estate had a one half interest in these claims?

A. It would appear so by that letter.

R. 607. And those are the same claims, are they not, referred to in Lewisohn Brothers' letter to you of June 18, 1895, [p. 100], inquired about in Int. 126, where it is stated, "You telephoned today that Mr. Butler said that deed from Keyser to the Old Dominion was in Baltimore. But what Mr. Butler refers to are the deeds of
196 those properties which they claim are not worth anything, and which Mr. Keyser will transfer to Mr. Lewisohn in Baltimore"?

A. Whose letter is that?

R. 608. Lewisohn's to you. I ask you whether they are not the same thing?

A. The same claims? That I do not remember, whether they are the same or not.

R. 609. Did you have any report upon the value or character of these mining claims conveyed by Mr. Keyser to Mr. Lewisohn, and by Mr. Lewisohn to the company, for which the 30,000 shares appear to have been used?

A. Only the report of Mr. Hyams, saying he thought it was very important they should go in.

R. 610. You mean the early statement that he made to you?

A. Yes, sir. I do not know whether it was made to me or through Mr. Lewisohn first, and then through him to me.

R. 611. I call your attention again to the pages which were cut out of your letter book, namely pages 309-313, inclusive, under the date of June 15, 1895, referred to in Int. 219, and ask you whether you will permit an examination of the index of the letter book, and of the letter book, to be made, to ascertain if possible, what letters were copied on the pages which have been cut out?

Mr. LAUTERBACH: I see no objection. That is for us to answer, and not for the witness.

R. 612. Will you also permit the index to be examined with a view to searching the index and book for the letter to Woodhull of August 8, 1895?

Mr. LAUTERBACH: If you will give us a copy of the letter to which you refer that would make it very simple.

Mr. BRANDEIS: August 8, 1895.

Mr. LAUTERBACH: I do not want to be placed in the position of saying that there is no such letter.

The WITNESS: I have often written letters to Mr. Woodhull, and I have no copy of them.

Mr. BRANDEIS: Well, we have given you the date. I am asking for the letter of August 8.

Mr. LAUTERBACH: Yes. I think there is objection to that.

Mr. BRANDEIS: We ask whether you will permit it?

R. 613. And will you also permit the index and letter books to be examined for the purpose of ascertaining whether there is not in them a copy of a letter to Woodhull of August 8, 1895?

Mr. LAUTERBACH: The answer to that is that you have referred, in the examination of Mr. Bigelow, to what purports to be
197 the original of a letter so sent. If you have the original, there is no need of our furnishing secondary evidence by looking for a copy. If you will exhibit the original, we will see if we have a copy, and it may be unnecessary so to do, if the original is produced; but in the present attitude of the evidence we decline to make any further examination.

Mr. BRANDEIS: I think that is all, subject to that information that we may get.

Mr. LAUTERBACH: After we have read the minutes there may be a few questions we may want to ask Mr. Bigelow, and I will reserve that right. We will take an adjournment, I suppose, until some date that is agreeable.

[The further taking of this deposition was suspended until Thursday, April 30, 1903, at 10 a. m.]

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
220 DEVONSHIRE STREET, BOSTON,
TUESDAY, *May* 5, 1903.

Cross-examination of ALBERT S. BIGELOW resumed:

[Mr. Lauterbach states that he has found the original agreement, dated that 22d of May, of which a copy, without signatures, has been introduced in answer to Int. 255 of Mr. Bigelow's deposition; he produces it, and it is admitted in evidence as Exhibit 20; (for text of this exhibit, see Bigelow Exhibits, p. 262) that he has also found a telegram from Mr. Meredith to Lewisohn Brothers, dated Boston, May 25, 1895, which is admitted in evidence as Exhibit 21. (For text of this exhibit, see Bigelow Exhibits, p. 263.)

[Mr. Brandeis offers in evidence the certificate of incorporation, found in the record book of the Old Dominion Copper Company of Baltimore City on pages 3, 4, 5, and 7; also the record of the first meeting of the corporation, found on pages 8 and 9 and part of page 10 of the same record.]

[A copy of this record is designated as Exhibit 22, and the text will be found at page 263 of Bigelow Exhibits.]

Mr. LAUTERBACH: The admission of this record is objected to as immaterial, irrelevant, and incompetent.

[In answer to cross-interrogatories propounded by Mr. Lauterbach, counsel for the defendant, the witness further deposes and says—]

X 614. Mr. Bigelow, referring to Exhibit 20, just taken in evidence, and referring to Exhibit 3, that is, the subscription list, dated May 21, and to the respective dates of the two exhibits, Exhibit 3 being dated the 21st day of May and Exhibit 20 being dated the 22d day of May, have you any recollection as to which of the two papers was in fact first executed in point of time?

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A. Yes, I have.

X 615. Will you give us your best recollection on that subject?

A. This one [Exhibit 20] was the first.

X 616. Did you know Mr. Stanton, whose name is referred to in some of the correspondence?

A. Yes, sir.

X 617. Did you know him?

A. Know John Stanton?

X 618. Yes.

A. Yes, sir; "honest John Stanton."

X 619. Did you have any dealings with him in regard to the Old Dominion Copper Company matters?

A. No, sir.

X 620. Neither directly nor indirectly, so far as you know?

A. No, sir.

X 621. I have asked you the question whether you solicited any one to join the Old Dominion Syndicate or the stock-subscription syndicate, and you said you did not. Did any one, in your behalf or to your knowledge, solicit any one to join the syndicate?

A. No, sir; they did not solicit any one.

X 622. Or request anybody to solicit?

A. No, sir.

X 623. Some reference has been had to newspaper articles. Did you or Mr. Hyams, to your knowledge, or any one connected with you, to your knowledge, cause any newspaper statements concerning the Old Dominion Copper Company, or its successor company, or concerning the syndicate, to be published?

A. No, sir, not to my recollection.

X 624. Or of the stock subscription or the Old Dominion subscription?

A. No, sir.

Mr. LAUTERBACH: I notice that on page 154 of this deposition I asked the witness: "Int. 328. Is that the first occasion on which you read the letters?" The next interrogatory shows that the words "letters," should read "records," and I would like to have that correction made. The interrogatory before that is, "Int. 327. And you assumed, up to that time, that the 20,000 shares with the 130,000 shares had come into your possession as owners of the property in bulk? A. Entirely into my possession and Mr. Lewisohn's." "Int. 328. Is that the first occasion on which you read the letters? A. I think so, to the best of my knowledge."

That is all, Mr. Bigelow, that we have. Mr. Brandeis may have some more questions.

Mr. BRANDEIS: I think I have no questions.

Mr. LAUTERBACH: You will find another error in the copy
199 of a letter from Bigelow to Woodhull, in which he says, "Copper is rising, but so slow;" it should read, "go slow."

A. S. BIGELOW.

Boston, May 6, 1903.

Subscribed and sworn to before me this 6th day of May, 1903.

[SEAL.] GEO. C. BURPEE,
Notary Public.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE ST., BOSTON,
TUESDAY, *May* 22, 1906.

Deposition of ALBERT S. BIGELOW, resumed.

ALBERT S. BIGELOW, having been again duly sworn by Howland Twombly, Esq., a notary public, in answer to interrogatories propounded by Edward F. McClennen, Esq., of counsel for plaintiff, further deposes and says.—

Q. 625. Mr. Bigelow, this letter on page 48 of the company's letter book, dated July 10, 1895, was signed by you?

A. It was signed by me, yes.

Mr. MCCLENNEN: This letter I will offer.

Mr. HEMENWAY: It does not seem material.

Mr. MCCLENNEN: The letter reads as follows:—

"JULY 10TH, 1895.

N. S. Berray, Esq., Supt. Old Dominion Copper Company, Globe, Arizona.

DEAR SIR: The bearer, Mr. S. A. Parnall, has been appointed Manager of the reorganized Old Dominion Copper Mining and Smelting Company. If your arrangements with Mr. Simpson will permit it, we should be pleased to have you remain a week or two at Globe with him, in order to give him the benefit of your experience before turning over to him the affairs of the Company.

In this connection we wish to thank you for your consideration in staying on with us as you have done, up to the present time.

Very truly,

A. S. BIGELOW, *Pres't.*"

Q. 626. Mr. Bigelow, is the company which you refer to
200 in this letter as the Old Dominion Copper Mining & Smelting Company, the present company?

A. I surely do not remember.

Q. 627. Was there any company except the present company that had that name?

A. I do not know.

Q. 628. Did you ever know of any other company of that name?

A. No.

Q. 629. And the name of the company whose stock you acquired was what?

A. I do not remember.

Q. 630. You have no recollection on that subject at all?

A. I do not remember what the name was.

Q. 631. Do you remember whether it was the Old Dominion Copper Company?

A. I do not remember.

Q. 632. Does that name sound familiar to you?

A. "Old Dominion" does, that part of it.

Q. 633. But you do not recall the rest?

A. No.

Q. 634. Well, having in mind the date of that letter——

A. What was the date, please?

Q. 635. July 10, 1895,—would it enable you to state whether or not it was the present company to which you referred?

A. I could not possibly say.

Q. 636. With your knowledge of the tran-action, to what company other than the present company could it refer?

A. That I do not know.

Q. 637. Do you think of any company other than the present to which it could refer?

A. I do not.

Mr. McClennen: The option recites it as the Old Dominion Copper Company; whether "of Baltimore City" was part of the title, I do not know.

Q. 638. Now I show you a letter of July 13 or 15, 1895, to N. S. Berray, which appears on page 51 of the letter book: is that signed by you?

A. That is signed by me.

Mr. McClennen: This letter I will offer.

Mr. Hemenway: Objected to as immaterial.

Mr. McClennen: The letter reads as follows:—

"July 13th, 1895.

N. S. Berray, Esq., Supt., Globe, Arizona.

Dear Sir: We have completed today the reorganization of the Old Dominion Co. and appointed the new officers. It is necessary to have an Agent in Arizona and we have appointed you as our agent, as you have been advised by Mr. Evarts, which appointment you
201 will please file in the usual way with the Recorder. We were obliged to do this temporarily until our Manager, Mr. Parnall, got out to Globe, as the Agent's appointment must be a continuous one. Of course, Mr. Parnall will be our permanent Agent there, after his arrival.

Will you please look over all the papers of the Company at Globe and forward to Mr. Evarts all the deeds, conveyances or other legal documents connected with the Company, which you find. There are some deeds and conveyances, such as the title to the saw mills and others that are at Globe and we wish to have them all here so as to

have them recorded as the Statutes require. Please give this your prompt attention; also make a list of all claims of the Company on which assessment work for 1895 has yet to be done for Mr. Parnall.

We expect that our Mr. Parnall will arrive during the first week in August. Mr. Evarts, of the Firm of Evarts, Choate & Beaman, New York, will forward you some papers for filing which you will please attend to.

Yours truly,

A. S. BIGELOW, *Pres't.*"

Q. 639. In the first line of that letter, where you say "We have completed today the reorganization of the Old Dominion Co." to which company did you refer; the old or the new?

A. I do not remember.

Q. 640. Is there anything in the language of that letter that would enable you to answer that question?

A. No.

Q. 641. For instance, you say, "We have completed today the reorganization of the Old Dominion Co." speaking as of July 13 or 15. Do you remember whether you were at work at that time upon the reorganization of the old Old Dominion Company?

A. I do not remember.

Q. 642. Do you remember anything ever being done towards the reorganization of the old Old Dominion Company?

A. I do not remember.

Q. 643. Then I am right that so far as you now remember nothing was done?

A. I do not remember.

Q. 644. Now on the preceding June 11, as appears in your testimony at page 170, you had written to Mr. Maxwell Woodhull, "We shall doubtless reorganize on a basis of 100,000 shares, and our present idea is to place somewhat less than half of this in Europe." Was the reorganization there referred to the same one that you now refer to in this letter of July 13?

A. I do not know.

202 Q. 645. Do you entertain any doubt on that subject?

A. I do not know that I do, sir.

Q. 646. From your recollection of the matter, coupled with your desire at the present time to give us all possible information, do you entertain any doubt on that subject?

A. I cannot answer that question.

Q. 647. Do you mean by that you do entertain any doubt as you sit there?

A. I say I do not know anything about it.

Q. 648. I now ask you if you will state as nearly as possible, in the terms of yes or no, whether you entertain any doubt, in view of your recollection, as to whether you were talking about the same reorganization in the two letters?

A. I could not say whether I had any doubt or not; it might be the same and might not.

Q. 649. What is there that stands in your way, as you sit there, that prevents you from saying?

A. Because I do not know.

Q. 650. You do not know whether you entertain any doubt?

A. I say I do not know whether one refers to the other or not, therefore I suppose——

Q. 651. There is some doubt in your mind?

A. I suppose an inference can be drawn there.

Q. 652. What is in doubt in your mind on that subject?

A. Simply I do not know whether they refer one to the other, that is all.

Q. 653. Is there anything about the language of those letters that causes you to believe that they refer to different companies?

A. Well, I should like to see the two letters and compare them. I do not remember either letter.

Mr. HEMENWAY: What are the dates of the two letters?

Mr. MCCLENNEN: The one to Mr. Woodhull was June 11, and the one to Mr. Berray was July 13 or 15, both 1895.

The WITNESS: I do not know whether they referred to the same or not.

Q. 654. Do you see anything in them leading you to conclude that they refer to different companies?

A. Not if you do not.

Q. 655. How will my position in the matter assist you in determining?

A. By simply reading the two letters.

Q. 656. And you see nothing in them leading you to believe that they refer to different companies?

A. I do not see anything that they refer to different companies or to the same companies.

Q. 657. I am right in assuming, am I not, that you are desirous of investigating and as far as possible refreshing your recollection and giving us every information possible?

A. Certainly.

203 Q. 658. Does anything occur to you to assist you in determining whether those refer to different companies?

A. Nothing.

Q. 659. If for your own purposes you desired to find out, what would you do?

A. Well, I could not go beyond those letters, so far as I know.

Q. 660. Well, now, in one of them you say, "We shall doubtless reorganize on a basis of 100,000 shares." You never reorganized the old company on the basis of 100,000 shares, did you?

A. Not that I remember.

Q. 661. So it is clear to you that that phrase refers to the new company?

A. It is not clear to me.

Q. 662. What difficulty is there in the way?

A. Well, I think in my former testimony I said that we contemplated increasing the capital stock of the old company at first. I think that is in my testimony.

Q. 663. And you think that when you refer to reorganizing with 100,000 shares you have reference to that?

A. Well, I do not know.

Q. 664. That is to say, with all the facts before you that have come out, you do not know on June 11 whether you referred to the new corporation or to the old one?

A. I do not.

Q. 665. If you wanted to find out you would be obliged to simply draw an inference that was to be drawn from the text of the letter?

A. So far as I know.

Q. 666. I show you on page 81 of the letter book a letter purporting to be signed by Thomas Nelson. Is that in Mr. Nelson's handwriting?

A. Which one?

Mr. HEMENWAY: Let me see it first.

Q. 667. The one dated September 18.

A. It looks like his signature.

Mr. McCLENNEN: That letter I will offer.

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

Mr. McCLENNEN: The letter reads:

"SEPTEMBER 18TH, 1895.

Maxwell Woodhull, Esq., 2033 G Street, Washington, D. C.

DEAR SIR: Your favor of the 17th inst., enclosing note for Fifteen thousand dollars ($15,000.) in favor of the Old Dominion Copper Mining & Smelting Company, and two receipts as stated, has been received.

Yours truly,

THOMAS NELSON, *Treas.*"

204 Q. 668. Have you no recollection, Mr. Bigelow, for what that note was given.

A. No.

Q. 669. Do you recall now whether or not Mr. Maxwell Woodhull did give a note for some portion of his stock?

A. That I do not remember.

Q. 670. You have no recollection on that subject?

A. No.

Q. 671. Do you recall the fact that has appeared that he received 600 of the shares that were sold for cash?

A. For what?

Q. 672. Cash.

A. I do not remember anything about it.

Q. 673. You do not remember anything about that?

A. Not a thing.

Q. 674. Do you recall the fact that those shares which were sold for cash were sold on the basis of $25 a share?

A. I do not remember.

Q. 675. You do not recall that?

A. I do not remember.

Q. 676. You have no recollection of the price at which those shares were sold?

A. Not at all.

Q. 677. You have no knowledge at the present time of anything other than stock for which Maxwell Woodhull would be giving his note to the Old Dominion Copper Mining & Smelting Company?

A. I really do not have any memory of anything.

Q. 678. Have no memory of anything? There is nothing standing in the way of this note for $15,000 having been given for 600 shares of the treasury stock of the corporation?

A. I do not remember anything about it.

Q. 679. Do you remember whether you took any note of Maxwell Woodhull for any stock?

A. I do not.

Q. 680. You have no recollection of taking any note?

A. No, I have not.

Q. 681. Or any recollection of Mr. Lewisohn's taking any such note?

A. I do not remember.

Q. 682. Do you chance to know, Mr. Bigelow, as to whether any of the following persons are deceased: Horace Stevens?

A. He is dead.

Q. 683. H. C. Moses?

A. He is dead.

Q. 684. Moses T. Stevens?

A. I believe he is dead; I think he is.

Q. 685. Samuel S. Stevens?

A. I do not know.

Q. 686. W. A. Tower?

A. I do not think he is dead.

Q. 687. William Keyser?

A. I believe he is dead.

Q. 688. Mr. Bigelow, is this letter of June 12, 1902, one received by you from Mr. Altmiller?

[Objected to as immaterial.]

205 A. I do not know. It probably was. It is addressed to me.

Q. 689. That is Mr. Altmiller's signature?

A. That I do not know. I think it is, as near as I can remember.

Mr. McCLENNEN: That letter I will offer.

Mr. HEMENWAY: The contents of that letter are objected to as immaterial, incompetent, and irrelevant.

Mr. McCLENNEN: It reads:

"Old Dominion Copper Mining & Smelting Co.

Office 35 Congress Street.

Chas. S. Smith, *Pres't.*
Charles H. Altmiller, *Sec'y & Treas.*

BOSTON, *June* 12, 1902.

A. S. Bigelow, Esq.

DEAR SIR: When the new management assumed control of the Old Dominion Copper Mining and Smelting Company, I requested to be delivered to me all of the books and papers of the company.

On June 9th we had occasion to refer to some of the earlier correspondence, and upon looking at the letter book and files of letters, found there had not been sent to us any letter book showing letters sent from your office earlier than January 10th, 1900, nor any letters received at your office earlier than May 1st.

Early on June 9th I requested your Mr. Bissell to deliver these earlier books and papers to us. Mr. Bissell stated that he did not feel at liberty to do so until he had consulted you, and told me later on the 9th that he had had no opportunity to do so but would mention the matter to you on the following day.

On June 10th I again called the matter to Mr. Bissell's attention and not getting any satisfaction from him, I called again at the office and saw you. You stated that you did not wish to send us the books and papers until Mr. Hyams had looked them over and that you expected Mr. Hyams on the following day.

On the following day, June 11th, I called at the office again and then learned that Mr. Hyams had not returned from New York, but that he was expected to return today.

Today I called again and saw you and was informed by you that Mr. Hyams had been very busy, and that you had not had an opportunity to take up the matter with him, but would do so promptly, and you stated further that the business was at first conducted by the Old Dominion syndicate and not by the company and
206 that there might be some of the syndicate matter mixed up with the company matter, and you wanted Mr. Hyams to look it all over.

I realize that both you and Mr. Hyams have considerable other business, but do not think that you have treated us properly in deferring so long the sending us of the books and papers of the company, which are the company's property and which should have been sent to the company's office two months ago in accordance with the promise.

I must also protest against your taking from the books or files of the company anything that is in them. There should be nothing in those files that does not properly appertain to the company's business, and I believe that the company is entitled to all the information and assistance which any matter upon its files would give.

I must request you again to let me have these books and papers today.

Yours very truly,

C. H. ALTMILLER, *Treas.*"

Q. 690. Mr. Bigelow, will you read our copy of a letter of June 24, 1902, and see whether you recall receiving such a letter?

A. Only that one?

Q. 691. Yes, that is all. Do you recall receiving such a letter?

A. No.

Q. 692. Now the letter of Mr. Brandeis to Mr. Bigelow, July 16.

A. About the same time as that last one?

Q. 693. No, this is June 24.

A. I was off on my boat a good deal at about that time.

Q. 694. I show you this letter of July 16, produced from your files, from Mr. Brandeis: do you say that you recall receiving that letter?

[Objected to as incompetent, irrelevant, and immaterial.]

A. No.

Q. 695. Do you know in whose handwriting are the pencil notations on it?

A. It is signed by Mr. Chrimes.

Mr. McCLENNEN: This letter I will offer.

Mr. HEMENWAY: Objected to as incompetent and irrelevant, being simply a statement of plaintiff's counsel.

Mr. McCLENNEN: It reads:

207 "JULY 16, 1902.

A. S. Bigelow, Esq., 303 Sears Building, Boston.

DEAR SIR: I have completed to the extent of the information available, the investigation undertaken at the request of the Old Dominion Copper Mining & Smelting Co. concerning the organization of that company, the issue of its capital stock and the acquisition of its property.

I regret that you and the executors of Mr. Leonard Lewisohn have seen fit to deny to the company and myself access to the papers and other information in your possession directly bearing upon this subject, which I requested on June 25th and which obviously would afford the best evidence of the facts relating to the matter.

Upon all the information available to me you appear to be under liability to the company for a very large amount and I should be glad to confer with you or your counsel at an early day with a view to a possible adjustment.

Yours very truly,

LOUIS D. BRANDEIS."

Mr. McCLENNEN: I now offer a letter of July 21, 1902, from Mr. Chrimes to Mr. Brandeis.

Mr. HEMENWAY: Objected to as incompetent and immaterial, being correspondence between Mr. Chrimes and Mr. Brandeis.

Mr. McCLENNEN: It reads:

"Sears Building, Room 303, P. O. Box 5104, Boston, Mass.

JULY 21, 1902.

Louis D. Brandeis, 220 Devonshire Street, Boston, Mass.

DEAR SIR: Your favor of July 16th to Mr. A. S. Bigelow was

duly received. Mr. Bigelow is away on his vacation and will not return until the latter part of this month.

The writer was at home ill last week, hence the late acknowledgment of your letter.

Yours very truly,

W. A. S. CHRIMES, *Sec'y.*"

208 Q. 696. Mr. Chrimes was your secretary at that time?

A. So far as I know. I do not know what that date is. If he signed himself as secretary, he was.

Mr. McCLENNEN: Now may I have the letter to the executors of the estate of Leonard Lewisohn from Mr. Brandeis?

Mr. TREADWELL: I have not any such letter.

Mr. McCLENNEN: It is addressed to the executors of the estate of Leonard Lewisohn.

Mr. TREADWELL: I want to call your attention to this [showing a paper, not described].

Mr. McCLENNEN: Then I will offer that [referring to a page of a letter-press copy book].

Mr. HEMENWAY: I object. It is a mere copy. It does not appear it was ever received.

Mr. McCLENNEN: I now offer a letter-press copy of a letter of July 24, 1902, from Mr. Brandeis to the executors of the estate of Leonard Lewisohn.

Mr. HEMENWAY: Objected to as incompetent, being simply the declaration of Mr. Brandeis; also because it is a matter between parties other than parties to the suit in which Mr. Bigelow is party defendant; also because it is not yet shown to have been either signed by Mr. Brandeis or received by the executors of the estate of Leonard Lewisohn, it only appearing in the letter book of Mr. Brandeis.

Mr. McCLENNEN: I suppose it is conceded that counsel for Mr. Bigelow and counsel for the Lewisohn estate received notice to produce for this hearing the correspondence covering all this period.

Mr. HEMENWAY: Merely giving notice does not make the whole of Mr. Brandeis' correspondence competent evidence even in this case.

Mr. McCLENNEN: I quite agree with you that you cannot use a copy of a letter unless there is notice to produce; I simply ask if you concede there has been notice to produce.

Mr. HEMENWAY: So far as I am concerned, I will say there was a letter to produce given to me.

Mr. McCLENNEN: And the same to Mr. Treadwell?

Mr. HEMENWAY: It is not a letter which is in possession of my client, and it does not purport to be.

Mr. McCLENNEN: And you received also, Mr. Treadwell, notice to produce?

Mr. TREADWELL: Well, I only got this on the morning of Saturday. The only question is whether I have had reasonable
209 time to search for these letters. So far as my own opinion goes, I do not think I would find any more than I did find. Yes, I will concede that, because I know we have not got the letter.

Mr. McCLENNEN: The letter is as follows:

"JULY 24, 1902.

To the Executors of Leonard Lewisohn, deceased, 81 Fulton Street, New York City.

DEAR SIRS: As you have already heard from Mr. Hyams, we were requested by our clients, the Old Dominion Copper Mining and Smelting Company, to investigate the facts concerning the organization of that company, the issuing of its capital stock and the acquisition of its property.

In connection with that investigation we made a request of Mr. Bigelow for access to the papers and other information in his possession, mainly of the Old Dominion Syndicate, directly bearing upon the subject which would obviously have afforded the best evidence of the facts relating to the matter.

We have been informed by Mr. Hyams that you had instructed Mr. Bigelow to deny our request and had even given notice that you would hold Mr. Bigelow liable for any damages which might result from a failure to observe your instructions.

We have now completed our investigation to the extent of the information available, and, upon the facts as far as ascertained, you appear to be under liability to the company for a very large amount.

I should be glad to confer with you or your counsel at an early day with a view to a possible adjustment.

Yours very truly,

LOUIS D. BRANDEIS."

Mr. McCLENNEN: I will now offer a letter from Mr. Walter Lewisohn to Mr. Brandeis, dated August 1, 1902.

Mr. HEMENWAY: Objected to as immaterial.

Mr. McCLENNEN: The letter reads as follows:

"Estate of Leonard Lewisohn, 11 Broadway.

NEW YORK, *Aug.* 1, 1902.

Mr. Louis D. Brandeis, Boston, Mass.

DEAR SIR: We beg to acknowledge receipt of your letter of the 24th ult.

Mr. Edward Lauterbach, of the firm of Hoadly, Lauterbach & Johnson, of New York, is counsel to the executors of the
210 estate of Leonard Lewisohn, deceased, with whom any conference that you may desire to have upon the matters affecting the Old Dominion Copper Mining and Smelting Company may be had.

We observe that you add to the desire for a conference with our counsel the view that some adjustment of a claim which you state exists against the estate may be had.

In respect to this view we desire to say in order that no misconception may be had, that we believe that any claim such as that which you refer to is absolutely unfounded.

Very truly yours,

ESTATE OF LEONARD LEWISOHN.
WALTER LEWISOHN, *Executor.*"

Q. 697. Is this letter of August 2, 1902, to Mr. Brandeis from Mr. Bigelow, signed by you?

A. It is.

Mr. McCLENNEN: This letter I will offer.

Mr. HEMENWAY: Objected to as immaterial.

Mr. McCLENNEN: The letter reads as follows:

"Sears Building, Room 303, P. O. Box 5104, Boston, Mass.

AUG. 2, 1902.

Louis D. Brandies, Esq., 220 Devonshire St., Boston, Mass.

DEAR SIR: Upon receipt, on my return, of your letter of July 16th I communicated with the Estate of Leonard Lewisohn.

I am informed that Mr. Edward Lauterbach, of the firm of Hoadly, Lauterbach & Johnson, of New York, is of counsel to the executors, and that any conference that you desire to have in respect to the affairs of the Old Dominion Copper Mining and Smelting Company so far as they concern that estate, may be had with him.

Some such conference would perhaps render it unnecessary for me to refer you to counsel for a similar purpose, at least until after you had conferred with him.

I desire to add that I believe your statement that any obligation or liability from me to the company exists is entirely unfounded.

Very truly yours,

A. S. BIGELOW."

211 Mr. McCLENNEN: Now a letter to Mr. Bigelow from Brandeis, Dunbar & Nutter, dated August 6, and of the same date to the Lewisohns.

Mr. HEMENWAY: Objected to as incompetent and immaterial.

Mr. McCLENNEN: This letter reads:

"AUGUST 6, 1902.

A. S. Bigelow, Esq., P. O. Box 5104, Boston.

DEAR SIR: We are in receipt of your letter of the 2nd to Mr. Brandeis. Last week Mr. Brandeis left town on a vacation, and will not return before the first of September. On his return he will take the matter up.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER."

Mr. TREADWELL: I have not any such letter of any such date.

Mr. McCLENNEN: Then a letter of September 4, 1902, from Mr. Brandeis to Mr. Bigelow, also to the Lewisohns.

Mr. HEMENWAY: Objected to as incompetent and immaterial.

Mr. McCLENNEN: Now I offer the letter of September 4, 1902, from Mr. Brandeis to Walter Lewisohn.

Mr. HEMENWAY: Objected to for the reasons heretofore stated.

Mr. McCLENNEN: This letter reads as follows:—

"SEPT. 4, 1902.

Walter Lewisohn, Esq., Executor of Estate of Leonard Lewisohn, 11 Broadway, New York City.

Re Old Dominion Copper Mining and Smelting Co.

DEAR SIR: Upon my return from my vacation I find your letter of August 1st.

If you desire that I should confer with your counsel, Mr. Edward Lauterbach, I shall be glad to arrange for an interview with him at an early date.

The tone of your letter leaves me, however, in doubt as to whether you desire that such conference should be had, or prefer that without such conference the Old Dominion Copper Mining and Smelting Company shall take such action as it may deem best to protect its interests.

Yours very truly,

LOUIS D. BRANDEIS."

MR. MCCLENNEN: A letter of the same date to Mr. Bigelow reads as follows:—

"SEPT. 4, 1902.

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A. S. Bigelow, Esq., Sears Building, Boston.

DEAR SIR: Upon my return from my vacation I find yours of August 6th.

As I previously advised you, I am requested by the Old Dominion Copper Mining and Smelting Company to investigate the facts concerning the organization of that company, the issue of its capital stock, and the acquisition of its property with a view to determining the legal rights of the company. Recognizing that you were in the possession of the papers and other information directly bearing upon the subject which would afford the best evidence of the facts relating to the matter, I applied to you for access to the same, and was denied the opportunity of getting information through you.

I therefore completed to the extent of the information available the investigation which I had undertaken and reached the conclusion that you were under a large liability to the company. I notified you of the result and suggested an interview with you or your counsel.

I do not understand that Mr. Edward Lauterbach is your counsel in this matter. If he is, I should be glad to arrange through you for an interview with him here at an early time. If he is not your counsel, I do not see how any interview which may possibly be had with him as counsel for the estate of Leonard Lewisohn could render unnecessary a conference with you.

Will you kindly let me know promptly whether you prefer a conference or whether it is your preference that without such conference the Old Dominion Copper Mining and Smelting Company take such action as it deems proper to protect its interests? Awaiting your reply.

Yours very truly,

LOUIS D. BRANDEIS."

Mr. McCLENNEN: I will now offer a letter from Edward Lauterbach, Esq., to Mr. Brandeis, dated September 9, 1902.

Mr. HEMENWAY: Objected to as immaterial.

Mr. McCLENNEN: It reads.—

"SEPT. 9, 1902.

Louis D. Brandeis, 220 Devonshire St., Boston, Mass.

DEAR SIR: The executors of the estate of Leonard Lewisohn have sent to me your letter to them of the 4th inst. in which you
213 express a desire to arrange for an interview with me upon the subject of the Old Dominion Copper Mining and Smelting Company.

I shall be very glad to have you call upon me at any time that may suit your convenience, suggesting that you notify me a day in advance of your coming.

Very truly yours,

EDWARD LAUTERBACH."

Mr. McCLENNEN: Now a letter of September 10, 1902, Brandeis to Bigelow.

Mr. HEMENWAY: The letter is objected to as incompetent, immaterial, and irrelevant.

Mr. McCLENNEN: The letter reads as follows:—

"SEPTEMBER 10, 1902.

A. S. Bigelow, Esq., Sears Building, Boston.

DEAR SIR: Will you kindly let me have before noon tomorrow an answer to my letter of September 4th?

Yours very truly,

LOUIS D. BRANDEIS."

Mr. McCLENNEN: This letter reads as follows:—

Mr. HEMENWAY: Objected to as immaterial.

Mr. McCLENNEN: [Reading:]

"Sears Building,
Room 303, P. O. Box 5104,
Boston.

SEPT. 10, 1902.

L. D. Brandeis, Esq., 220 Devonshire Street, Boston, Mass.

DEAR SIR: I have yours of September 4th. Permit me to correct the statement in the first paragraph of your letter. I have not only never refused, but have been more than ready to furnish any facts in my possession bearing upon the organization of the Old Dominion Copper Mining & Smelting Company or its affairs, to which, in my judgment, the stockholders and directors of the company are legitimately entitled. A general verbal request of yours to be allowed to have access to all the papers in relation to the original purchase of the property was very properly refused.

In order, however, that there may be no misconception as to my

position in the matter, and as to just what information I have
214 refused to give you, will you kindly send me a list of the questions which you wish answered, and I shall be pleased to promptly reply to them if they appear to call for information which your clients should legitimately possess.

If after the receipt of my answers you are still of the opinion that you would like to arrange for an interview with my counsel, I shall be prepared to take up the matter then.

My only desire is to have specific points upon which we may base a conference and it seems to me that the method I have suggested is the shortest way of coming at such a basis. I think the course I have recommended suggests my answer to the question in the last paragraph of your letter.

Very truly,

A. S. BIGELOW."

Mr. McCLENNEN: Now a letter of September 11, to Mr. Bigelow from Mr. Brandeis.

Mr. HEMENWAY: This letter is objected to as incompetent, irrelevant, immaterial, and impertinent.

Mr. McCLENNEN: This letter reads as follows:—

"SEPT. 11, 1902.

A. S. Bigelow, Esq., Sears Building, Boston.

DEAR SIR: I am in receipt of your letter of the 10th.

The statement in my letter of September 4th to which you take exception is, I assume, the following:

'Recognizing that you were in the possession of papers and other information directly bearing upon the subject which would afford the best evidence of the facts relating to the matter, I applied to you for access to the same, and was denied the opportunity of getting information through you.'

The statement is substantially a repetition of the statement made in my letter of July 16, 1902, to which you replied under date of August 2, 1902, without indicating in any way that you deemed it incorrect. The statement in my letter of July 16th was as follows:—

'I regret that you and the executors of Mr. Leonard Lewisohn have seen fit to deny to the company and myself access to the papers and other information in your possession directly bearing upon this subject, which I requested on June 25th, and which obviously would afford the best evidence of the facts relating to the matter.'

215 These statements made by me in my letters of July 16th and September 4th express, I believe, accurately the facts as to the past.

You say, however, that you are ready to furnish facts; but your remarks justifying the refusal of access to 'the papers in relation to the original purchase of the property' and your limitation of the information to the facts 'bearing upon the organization of the Old Dominion Copper Mining and Smelting Company or its affairs to which in my [your] judgment the stockholders or directors are legitimately entitled' leads me to fear that even you are not dis-

posed to furnish access to the papers and information which I have deemed and still deem important for determining the rights of my clients.

I desire to have access to those papers in your possession,—including in this term agreements, correspondence, and other documents, bearing upon the formation and acts of the syndicate formed by yourself or Mr. Leonard Lewisohn ,the organization of the Old Dominion Copper Mining & Smelting Company was issued to you and your associates, the acquisition of the property by the syndicate by yourself or Mr. Leonard Lewi-ohn, the organization of the Old Dominion Copper Mining and Smelting Company, the conveyance of the several properties to that company, and the taking of subscriptions for and the issue of such portion of the stock of that company which was issued for cash.

I understood from my interview with your secretary Mr. Hyams that substantially all such papers or copies of them are at your office.

If access to those papers is furnished me, I shall undoubtedly after examining them, desire to ask you specific questions, which I shall be glad to do in the presence of your counsel.

I feel clear that it would not be profitable for me to adopt the method which you suggest of formulating questions for you to answer. If, however, you prefer to talk with me before replying definitely to my request for access to the papers referred to above, I should be glad to make an appointment to see you at my office tomorrow, Friday, morning, at eleven o'clock, if you will let me hear from you some time today.

Yours truly,

LOUIS D. BRANDEIS."

Mr. McCLENNEN: I will now offer a letter of September 11, 1902, which reads——

Mr. HEMENWAY: One moment. Objected to as immaterial.

216 Mr. McCLENNEN: The letter reads as follows:—

"SEPT. 11, 1902.

Louis D. Brandeis, Esq., 220 Devonshire street, Boston, Mass.

DEAR SIR: I have yours of even date. As your request takes in all matters relating also to the late Leonard Lewi-sohn's connection, I have forwarded your letter to the counsel for the estate, Mr. Edward Lauterbach, with whom I understand you have been in correspondence on the matter, and shall act according to his instructions.

I have telephoned his office this afternoon that an important letter is on the way, so that he may get it to-morrow and there be no delay.

Yours truly,

A. S. BIGELOW."

Mr. McCLENNEN: Now the letter of Mr. Brandeis to Mr. Bigelow of September 12, 1902.

Mr. HEMENWAY: Objected to as incompetent, irrelevant, and immaterial.

Mr. McCLENNEN: I offer this letter, which reads as follows:—

"SEPT. 12, 1902.

A. S. Bigelow, Esq., Sears Building, Boston.

DEAR SIR: I received your letter of the 11th this morning, and have not heard from you since.

As our clients are desirous that there should be no delay I enclose herewith a letter addressed to yourself and the Executors of Leonard Lewisohn relating to a part of the claim concerning which we have written you.

I may add that in the event of no adjustment being reached we are directed to commence proceedings, and in that event we should like to have an attachment bond in the amount of $500,000. The claim considerably exceeds that amount, but our clients have expressed a willingness to accept a bond for that amount.

Yours very truly,

LOUIS D. BRANDEIS."

Mr. McCLENNEN: Now a letter from the Old Dominion Copper Mining & Smelting Company of the same date to Mr. Bigelow and the executors of the estate of Leonard Lewisohn.

217 Mr. HEMENWAY: Objected to as immaterial.

Mr. McCLENNEN: The letter I offer reads as follows:—

"OLD DOMINION COPPER MINING AND SMELTING CO.
Office 35 Congress Street.

Charles S. Smith, Prest.
Charles H. Altmiller, Sec'ty and Treas.

BOSTON

A. S. Bigelow, Esq., and the Executors of the Estate of Leonard Lewisohn, Deceased.

DEAR SIRS: Shortly after the organization of the Old Dominion Copper Mining & Smelting Co., Mr. A. S. Bigelow and Mr. Leonard Lewisohn caused 30,000 shares of the stock of that company to be issued to themselves, ostensibly as the consideration for a conveyance to the company of certain mining properties and claims, the title of which we are advised then stood in the name of Mr. Leonard Lewisohn and which in the record of the meeting of the company held July 11, 1895, were described as follows:

First, The Old Dominion mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land Office at Tucson, Arizona, entry #267, Lot #45, situated in Globe Mining District, Gila County, Arizona.

Second, The New York mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land Office at Tucson, Arizona, entry #268, Lot #46, in Globe Mining District, in Gila County, Arizona.

Third, The Chicago mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the

United States Land Office at Tucson, Arizona, entry #269, Lot #51, in Globe Mining District, Gila County, Arizona.

Fourth. The Keystone mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1885, in the United States Land office at Tucson, Arizona, entry #384, Lot 54, in Globe Mining District, Gila County, Arizona.

Fifth. A lot or parcel of land situated near the Bloody Tanks and deeded by E. A. Saxe to the Old Dominion Copper Mining Company, deed recorded in Book 1 of deeds to real estate at pages 126 and 127 in the office of the recorder of Gila County, Arizona, and reference is hereby made to said record for a fuller description of said parcel of land.

218 The Old Dominion Copper Mining & Smelting Company is advised that these shares were issued under circumstances which entitle it to rescind the transaction, and hereby offers to reconvey the property to you or either of you, or to such person as you or either of you may name, upon the return by you or either of you of the 30,000 shares, or if and so far as said shares have been disposed of upon a proper accounting therefor.

Yours truly,
OLD DOMINION COPPER MINING & SMELTING CO.
By CHARLES S. SMITH, *Prest.*,
CHARLES H. ALTMILLER, *Treas.*"

Mr. McCLENNEN: I will now offer a letter from Mr. Hyams to Mr. Brandeis, dated September 12, 1902.

Mr. HEMENWAY: Objected to as immaterial.

Mr. McCLENNEN: [Reading]:

"G. M. Hyams,
Sears Building,
P. O. Box 5104, Boston.

SEPT. 12, 1902.

Louis D. Brandeis, Esq., 220 Devonshire Street, Boston, Mass.

DEAR SIR: Your letter of today to Mr. Bigelow was received at 4:45 p. m., after he had left the office for the day.

You do not say whether you have forwarded a copy of the Old Dominion Company's letter to the executors of the estate of Leonard Lewisohn. I have called up their office in New York but every one had gone, nor had Mr. Lauterbach, their counsel, heard anything.

To make sure, I am sending him a copy of the Old Dominion Company's letter and requested that he call me up on the telephone tomorrow, as soon as he has read it.

Very truly,
G. M. HYAMS.
B."

Q. 698. Mr. Hyams was acting for you in this connection, was he?

A. He was in the office as general manager of all the different companies.

Q. 699. Mr. Bigelow, after the change in the office of the com-

pany which occurred in 1902, and up to the time of this
219 letter of September 12, 1902, did you have any conversation with Mr. Brandeis about the subject of the alleged claim of the Old Dominion Copper Mining & Smelting Company against you?

A. I do not remember what the time was; I remember his calling at the office once.

Q. 700. You remember it was after the change?

A. That I do not remember. It was about that time, I should say; but I do not remember.

Q. 701. Do you remember what the conversation was?

A. No, it is very hazy. I just remember his being there.

Q. 702. Did it include a request by him to you for access to all the papers connected with the affairs of the old company?

A. That I do not remember.

Q. 703. In view of the letters that have been read, is your memory refreshed at all?

A. Well, simply from what those letters tell me, that is all.

Q. 704. In a general way, do you recall that from that time on until the time suit was brought, there was constant activity on the part of counsel?

Mr. HEMENWAY: Objected to as immaterial and irrelevant. The activity of counsel has nothing to do with the issues in this case.

A. Will you repeat the question?

Q. 705 Do you remember that from the time of the change of management of the company in 1902 up to the time suit was brought, there was practically constant activity on the part of counsel?

A. I do not remember at all. I do not remember how soon suit was brought after the changes.

Q. 706. You do recall that there was considerable communication on the subject?

A. No, I do not. I remember Mr. Brandeis came into the office once.

Q. 707. How long was he there; have you any recollection?

A. He made himself quite inquisitive, I remember that.

Q. 708. Was that the only thing.

A. I believe I was not in the office at the time, or the result might have been different.

Q. 709. Well, then, did he ever have the pleasure of meeting you in the course of these negotiations?

A. As I remember it, when he came in I went into the back office, —I do not know why, but it may have been to look after some of the things he wanted. Then when I came back there had been quite a little disturbance.

Q. 710. Do you recall that that related to the information that Mr. Brandeis attempted to get?

A. That I do not remember; it is so hazy now.

Q. 711. Were those waters that you spoke of composed of Mr. Brandeis and Mr. Hyams?

A. They were. I do not think Mr. Brandeis would have
220 said what I was told he had said if I had been there.

Q. 712. The substance of the interview was reported to you, was it, by Mr. Hyams?

A. Yes, certainly. Mr. Ladd, I believe, was there.

Mr McCLENNEN: That is all.

Mr. HEMENWAY: That is all. We will notify you after we have seen Mr. Lauterbach whether we desire to cross-examine.

EXHIBITS.

Copies of Exhibits to be Attached to the Deposition of Albert S. Bigelow.

[EXHIBIT 1, MARCH 24, 1903. G. C. B.]

BOSTON, *April* 30, 1895.

In consideration of two thousand dollars ($2,000) paid Frank E. Simpson of Framingham, Massachusetts, by J. Morris Meredith, receipt whereof is hereby acknowledged, the said Simpson hereby covenants and agrees to sell and convey to the said Meredith, his heirs or assigns, any time prior to the expiration of fourteen days from the date of this agreement, his five sevenths (5-7ths) of the capital stock of the Old Dominion Copper Mining Company of Maryland, with property in Arizona, for the sum of seven hundred and fourteen thousand, two hundred and eighty-five dollars ($714,285) on the following terms and conditions, to-wit:

From the property of the said Old Dominion Copper Mining Company shall be reserved to the said Simpson five sevenths (5-7ths) or its equivalent of copper, cash or notes receivable, not to exceed three hundred and fifty thousand dollars ($350,000) from the company's surplus, and the purchase money shall be paid in the following manner: One hundred thousand dollars ($100,000) down in cash prior to the expiration of said fourteen days from the date of this agreement, the balance in three notes of equal amount each, bearing interest at the rate of 5% per annum and payable respectively in sixty (60) ninety (90) and one hundred and twenty (120) days from the date of conveyance. Said notes to be secured by the to be conveyed stock of the company as collateral and also by good and satisfactory indorsements and it is understood and agreed that said Simpson shall be the sole judge of what indorsements are satisfactory.

As the above sold stock is in the possession of said Simpson as trustee under his father's will sufficient time shall be allowed for the necessary legal steps to transfer said stock, but nothing in this
221 condition shall relieve said Simpson from his obligations to complete this sale as soon as possible and in the event of such delay the purchase money shall be deposited in some trust company agreeable to both parties.

Under this agreement the place for paying the money and passing the other necessary papers shall be at the office of the said Simpson in Boston, county of Suffolk, and Commonwealth of Massachusetts,

and it is also agreed that at the time of making the conveyance as above and paying the said purchase money, a good and satisfactory guarantee shall be given to said Simpson that at any time within sixty (60) days, on sight, the purchasers shall take and pay for at the same pro rata price and on the same terms and conditions as the above sale, any part or all of the remaining two sevenths (2-7ths) of the capital stock of the said Old Dominion Copper Mining Company.

Witness said Simpson's hand and seal the day and year first above written.

FRANK E. SIMPSON.

G. H. GREENWOOD.

[Mem. in pencil: Are any contracts out with Keyser for sale of smelting, refining or other contracts; are any liabilities, mortgages, liens, etc., against Co. Want twenty days instead of fourteen.]

[EXHIBIT 2, MARCH 24, 1903. G. C. B.]

Memorandum of agreement between Frank E. Simpson of Framingham, Massachusetts, and William Butler of Boston, Massachusetts, for themselves and the other executors of Michael H. Simpson, parties of the first part, and J. Morris Meredith of Boston, Massachusetts, party of the second part, made at New York this fourth day of May, eighteen hundred and ninety-five.

The Old Dominion Copper Company is a corporation organized under the laws of Maryland, having a capital of five hundred thousand dollars ($500,000) divided into twenty five thousand (25,000) shares of twenty (20) dollars each and owns certain property in Arizona known as the Old Dominion mine, which has been worked for some years and other property in Arizona and elsewhere The estate of Michael H. Simpson is the owner of seventeen thousand eight hundred and fifty seven (17,857) shares of the capital stock of said company and is desirous of selling the same. The property owned by the company consists of mines, mining rights, smelting furnaces,
222 buildings, mining tools and other appurtenances; also ores in dump and in process and in the furnaces; also pig or ingot copper and cash and certain notes receivable and amounts due.

Mr. Meredith is desirous of buying the seventeen thousand eight hundred and fifty seven (17,857) shares of the capital stock owned by the said Simpson estate.

Now, therefore, in consideration of two thousand dollars paid to the parties of the first part by the said Meredith, the party of the first part agree with the said Meredith, his executors, administrators and assigns as follows:

First. The said parties of the first part agree to sell, transfer and deliver to the said Meredith seventeen thousand eight hundred and fifty seven (17,857) shares of the capital stock of the said Old Dominion Copper Company at and for the price of seven hundred and

fourteen thousand two hundred and eighty five dollars ($714,285) and an additional sum not exceeding two hundred and fifty thousand dollars ($250,000), such additional sum to be equal to the value of five sevenths of the pig or ingot copper and of the cash and notes receivable and amounts due which shall constitute part of its assets when the first payment on account of said sale shall have been made as hereinafter provided and which are hereinafter called surplus earnings.

Second. Payments for said stock are to be made as follows: One hundred thousand dollars ($100,000) on the deposit of the said capital stock endorsed in blank with the Old Colony Trust Company in Boston on or before the twenty eighth day of May eighteen hundred and ninety five, said stock to be held by said trust company in trust to secure to the said parties of the first part the balance of the said payments. The balance of said seven hundred and fourteen thousand two hundred and eighty five dollars ($714,285), namely, six hundred and fourteen thousand two hundred and eighty five dollars ($614,285) shall be evidenced by three notes made by the said Meredith or his assigns, of equal amount each, namely, for two hundred and four thousand seven hundred and sixty one dollars and sixty six cents ($204,761.66), bearing interest at the rate of five per cent per annum and payable respectively in sixty, ninety and one hundred and twenty days from the date of the deposit of said stock, said stock to be held as security for the payment of said notes and the said notes also to have an endorsement satisfactory to the said parties of the first part.

Third. It is understood and agreed that the payment of any or all of said notes may be anticipated by the said Meredith with interest down to the date of payment, and the stock shall be delivered to the said Meredith when all of the said notes are paid, and the said parties of the first part will try in all practicable ways to cause such steps to be taken that whenever the first of said notes shall have been paid, the majority of the board of directors of said Old Do-
223 minion Copper Company shall be persons satisfactory to said Meredith or his assigns, and that the president or other officers of said company and the superintendent of said mine shall be persons satisfactory to the said Meredith or his assigns.

Fourth. It is further agreed that the value of the five sevenths of said surplus earnings shall be determined as follows: As soon as practicable and prior to the fourteenth day of May eighteen hundred and ninety five the parties of the first part will give to the said Meredith a written memorandum showing in detail said surplus assets, and if the said Meredith purchases the said seventeen thousand eight hundred and fifty seven (17,857) shares of the capital stock, such of the surplus assets as remain shall either be retained by the company and five sevenths of the value thereof be paid by said Meredith to the parties of the first part or shall be divided in kind pro rata to the said parties of the first part and to the holders of the remainder of the capital stock of said company.

Fifth. The said parties of the first part guarantee and agree that the said mining company and its property is or will be at the time

of sale of said stock free from all debts, claims, liens or mortgages, and that there are no outstanding contracts between it and any other person or corporation except as stated in the list thereof to be furnished to the said Meredith on or before the fourteenth day of May eighteen hundred and ninety five.

Sixth. It is also agreed that at the time of depositing said seventeen thousand eight hundred and fifty seven (17,857) shares of stock as above provided and paying said one hundred thousand dollars ($100,000) said Meredith shall give a good and satisfactory guarantee to the said parties of the first part that at any time within sixty days thereafter on ten days' notice and tender he will take and pay for at the same pro rata price and on the same general terms and conditions as hereinbefore provided any part or all of the remainder of the capital stock of said company.

Seventh. Said parties of the first part give to said Meredith the option until and during the twenty eighth day of May eighteen hundred and ninety five to purchase said shares of stock on the terms herein set forth and agree that meanwhile and until that time said Meredith shall have every facility by himself or by his assigns to examine the property of said company and its title thereto.

Eighth. It is understood and agreed that the two thousand dollars ($2000) paid on the signing of this agreement shall form part of the first one hundred thousand dollars ($100,000) to be paid thereunder.

Ninth. It is understood and agreed that the foregoing agreement
finds the estate of Michael H. Simpson and is for the benefit
224 of the executors, administrators and assigns of the said Meredith.

In witness whereof the parties hereto have set their hands and seals this — day of — eighteen hundred and ninety five.

I, Lucius W. Smith of Boston, Massachusetts, one of the executors of Michael H. Simpson, for value received do hereby approve, ratify and make the agreement hereinbefore made by Frank E. Simpson and William Butler for themselves and other executors of Michael H. Simpson with J. Morris Meredith.

[Note.—The following is written in ink on the margin of the first page of this agreement.]

"Received from Leonard Lewisohn, assignee of J. Morris Meredith, one hundred thousand dollars, being the payment due this date under the within agreement on the deposit with the Old Colony Trust Co., of 17,857 shares of the capital stock of the Old Dominion Copper Company.

WILLIAM BUTLER,
For Self and Co-executor of
Thos. C. Simpson's Estate of M. H. Simpson."

Boston, May 28, 1895.

[EXHIBIT 3, G. C. B., MARCH 24, 1903.]

We the undersigned propose to form a syndicate to be called the Old Dominion Syndicate.

And we hereby agree to pay to A. S. Bigelow the sums set against our respective names.

Subscriptions to this syndicate shall be payable as follows:

May 27, 1895, fourteen per cent (14 per cent).

July 26, 1895, twenty eight and two thirds per cent (28⅔ per cent) and interest at five per cent from date of first payment.

August 25, 1895, twenty eight and two thirds per cent (28⅔ per cent) and interest at five per cent from date of first payment.

Sept. 24, 1895, twenty eight and two thirds per cent (28⅔ per cent) and interest at five per cent from date of first payment.

It is expressly agreed and understood that each subscriber hereto acts for himself alone and that the relation of partners shall
225 not exist or be deemed to exist between the subscribers hereto by virtue hereof.

The conditions, covenants and agreements herein contained shall be binding on the substitutes, successors, heirs, representatives and assigns of the respective subscribers hereto.

In witness whereof we have hereunto set our hands and opposite thereto the amounts of our subscription respectively this twenty-first day of May, A. D. 1895.

Charles J. Hodge,	Ten thousand dollars.	$10,000
D. L. Demmon,	Ten thousand dollars.	10,000
Henry T. Coe, by S. B. Capen,	Six thousand dollars.	6,000
C. H. Palmer,	Ten thousand dollars.	10,000
James S. Cumston and William Cumston, by S. W. Richardson	Ten thousand dollars.	10,000
Stephen M. Crosby,	Ten thousand dollars.	10,000
Samuel N. Brown,	Ten thousand dollars.	10,000
George H. Ball,	Ten thousand dollars.	10,000
H. H. Stevens,	Five thousand dollars.	5,000
	Ten thousand dollars.	10,000
A. S. Maltman, by J. A Coram, Atty.,		$91,000
J. A. Coram,	Nine thousand dollars.	9,000
		$100,000

MEMO.—See other paper.

[EXHIBIT 4, G. C. B., MARCH 24, 1903.]

We the undersigned propose to form a syndicate to be called the Old Dominion Syndicate.

And we hereby agree to pay to A. S. Bigelow the sums set against our respective names.

Subscriptions to this syndicate shall be payable as follows:

May 27, 1895, fourteen per cent (14 per cent).

July 26, 1895, twenty eight and two thirds per cent (28 2/3 per cent) and interest at five per cent from date of first payment.

August 25, 1895, twenty eight and two thirds per cent (28 2/3 per cent) and interest at five per cent from date of first payment.

226 Sept. 24, 1895, twenty eight and two thirds per cent (28⅔ per cent) and interest at five per cent from date of first payment.

It is expressly agreed and understood that each subscriber hereto acts for himself alone and that the relation of partners shall not exist or be deemed to exist between the subscribers hereto by virtue hereof.

The conditions, covenants and agreements herein contained shall be binding on the substitutes, successors, heirs, representatives and assigns of the respective subscribers hereto.

In witness whereof we have hereunto set our hands and opposite thereto the amounts of our subscriptions respectively this twenty-fourth day of May, A. D. 1895.

F. D. Somers,	Five thousand dollars.	$5,000
Albert O. Smith, by Albert P. Smith, att'y,	Five thousand dollars.	5,000
Isaac Fenno,	Five thousand dollars.	5,000
George M. Preston, by M. Luce.	Five thousand dollars.	5,000
Total.		$20,000

[Exhibit 5, G. C. B., March 24, 1903.]

We the undersigned propose to form a syndicate to be called the Old Dominion Syndicate.

And we hereby agree to pay to A. S. Bigelow the sums set against our respective names.

Subscriptions to this syndicate shall be payable as follows:

May 27, 1895, fourteen per cent (14 per cent).

July 26, 1895, twenty-eight and two thirds per cent (28⅔ per cent) and interest at five per cent from date of first payment.

August 25, 1895, twenty eight and two-thirds per cent (28⅔ per cent) and interest at five per cent from date of first payment.

Sept. 24, 1895, twenty eight and two thirds per cent (28⅔ per cent) and interest at five per cent from date of first payment.

It is expressly agreed and understood that each subscriber hereto acts for himself alone and that the relation of partners shall not exist or be deemed to exist between the subscribers hereto by virtue hereof.

The conditions, covenants and agreements herein contained
227 shall be binding on the substitutes, successors, heirs, representatives and assigns of the respective subscribers hereto.

In witness whereof we have hereunto set our hands and opposite thereto the amounts of our subscriptions respectively this fourteenth day of June, A. D. 1895.

Figures in pencil		
$2,000	Henry T. Coe by S.B.C.	Two thousand dollars.
10,000	George H. Ball.	Ten thousand dollars.
10,000	Charles W. Moseley.	Ten thousand dollars.
5,000	Charles H. Cole.	Five thousand dollars.
10,000	John H. Pierce.	Ten thousand dollars.
10,000	Harry Burnett.	Ten thousand dollars.
10,000	Hayden, Stone & Co.,	Ten thousand dollars.
10,000	Stephen M. Crosby.	Ten thousand dollars.
5,000	Ely & Co.,	Five thousand dollars.
2,500	Thomas P. Beal.	Two thousand five hundred dollars.
10,000	W. F. Fitzgerald.	Ten thousand dollars.
10,000	F. S. Mead & Co.,	Ten thousand dollars.
10,000	J. W. Belches & Co.,	Ten thousand dollars.
2,500	C. R. Batt by H.H.S.,	Two thousand five hundred dollars.
2,500	R. M. Field by H. H. S.,	Two thousand five hundred dollars.
2,500	S. S. Stevens by H.H.S.,	Two thousand five hundred dollars.
2,500	B. F. Meservy by H.H.S.	Two thousand five hundred dollars.
10,000	Charles Head.	Ten thousand dollars.
5,000	Gordon Prince.	Five thousand dollars.

(His original signature on other paper.)

1,500	C. H. Cole, Jr.,	One thousand one hundred dollars
500	C. H. Altmiller.	Five hundred dollars.
500	W. A. S. Chrimes.	Five hundred dollars.
3,000	Leonard Wheeler.	Three thousand dollars.

(Per letter June 12.)

500	Wm. A. L. Bazeley.	Five hundred dollars.
2,000	H. H. Mawhinney.	Two thousand dollars.

(Per letter.)

15,000	M. Woodhull.	Fifteen thousand dollars.

(Per letter.)

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$5,000	Harold Williams.	Five thousand dollars.
10,000	M. T. Stevens.	Ten thousand dollars.
3,119	T. E. Hopkins.	Three thousand one hundred nineteen dollars.

(Less the amount oversubscribed.)

2,000	Judge Lowell.	Two thousand dollars.
3,000	S. S. Spaulding.	Three thousand dollars.
1,000	T. H. Perkins.	One thousand dollars.
2,500	George Lyman,	Two thousand five hundred dollars.
$179,119		

[EXHIBIT G, G. C. B., MARCH 21, 1903.]

We the undersigned propose to form a syndicate to be called the Old Dominion Syndicate.

And we hereby agree to pay to A. S. Bigelow the sums set against our respective names.

Subscriptions to this syndicate shall be payable as follows:

May 27, 1895, fourteen per cent (14 per cent).

July 26, 1895, twenty eight and two thirds per cent (28⅔ per cent) and interest at five per cent from date of first payment.

August 25, 1895, twenty eight and two thirds per cent (28⅔ per cent) and interest at five per cent from date of first payment.

Sept. 21, 1895, twenty-eight and two thirds per cent (28⅔ per cent) and interest at five per cent from date of first payment.

It is expressly agreed and understood that each subscriber hereto acts for himself alone and that the relation of partners shall not exist or be deemed to exist between the subscribers hereto by virtue hereof.

The conditions, covenants and agreements herein contained shall be binding on the substitutes, successors, heirs, representatives and assigns of the respective subscribers hereto.

In witness whereof we have hereunto set our hands and opposite thereto the amounts of our subscriptions respectively this — day of —, A. D. 1895.

Joseph G. Ray,	Five thousand dollars.	$5,000
Mrs. Abby H. Manning, by F. H. M.,	Five thousand dollars.	5,000
Francis H. Manning,	Ten thousand dollars.	10,000
229 Mary L. Jones, by M. Luce, Att'y,	Ten thousand dollars.	$10,000
Henry Woods,	Ten thousand dollars.	10,000
W. H. Reed,	Five thousand dollars.	5,000
Z. T. Hollingsworth,	Five thousand dollars.	5,000
J. S. Kendall,	Ten thousand dollars.	10,000
Richard Bolles,	Six thousand dollars.	6,000
Albert E. Harding,	Two thousand dollars.	2,000
Robert C. Billings,	Ten thousand dollars.	10,000
Jeremiah Williams,	Five thousand dollars.	5,000
John W. Alline, by F. H. M.,	Five hundred dollars	500
E. C. Swift,	Ten thousand dollars.	10,000
D. M. Anthony,	Five thousand dollars.	5,000

Harold H. Anthony,	Five thousand dollars.	5,000
N. E. Hollis,	Two thousand dollars.	2,000
H. B. Goodenough,	Two thousand dollars.	2,000
John O. Connor,	Two thousand dollars.	2,000
T. E. Hopkins, by F. H. M.,	Five thousand dollars.	5,000
Mrs. Nancy E. Rust, by W. A. Rust,	One thousand dollars.	1,000
Henry C. Moses,	Three thousand dollars.	3,000
Stephen O. Metcalf,	Five thousand dollars.	5,000
	Total,	$123,500

[EXHIBIT 7, MARCH 25, 1903, G. C. B.]

BOSTON, *May* 28, 1895.

A. S. Bigelow, Esq., Boston, Mass.

DEAR MR. BIGELOW: As you know, I am the assignee of J. Morris Meredith under a contract between him and Frank E. Simpson and William Butler and others, executors of Michael H. Simpson, under which contract the executors of Simpson agree to sell to Meredith or his assigns seventeen thousand eight hundred and fifty seven (17,857) shares of the stock of the Old Dominion Copper Company. In pursuance of the terms of that contract you and I have each paid today fifty thousand dollars ($50,000) to the executors of Simpson, and I have made an agreement pursuant to the sixth article
230 of said agreement by which I have agreed to buy the balance of the stock of the Old Dominion Copper Company on the same general terms and conditions and you have warranted my performance of said agreement, in which warranty Lewisohn Brothers have also joined.

I have also given the three (3) notes called for by said contract, each for —, you have endorsed those notes and they have also been endorsed by Lewisohn Brothers. It is understood that you are to pay one-half of those notes when they become due or are sooner paid, and on your making such payments it is understood that you and I will be equally interested as owners of the seventeen thousand eight hundred and fifty seven (17,857) shares of the stock of the Old Dominion Copper Company, and if any additional shares of the stock are bought in pursuance of said agreement, you and I are to pay equally therefor and to be equally interested therein.

Yours truly,

LEONARD LEWISOHN.

[Attached to this exhibit is the following:]

For value received and for other good and valuable considerations, I, Leonard Lewisohn, of New York City, agree with Frank E. Simpson, William Butler and others, executors of Michael H. Simpson, who have this day deposited seventeen thousand eight hundred and fifty seven (17,857) shares of stock of the Old Dominion Copper Company with the Old Colony Trust Company in Boston, that

I, Leonard Lewisohn, who have this day paid to the said Simpson and Butler one hundred thousand dollars ($100,000) on account of the purchase of said shares of stock, will at any time within sixty (60) days hereafter, at ten (10) days' notice and tender, take and pay for at the same pro rata price and on the same general terms and conditions as provided in the agreement between said Simpson and Butler and J. Morris Meredith of Boston, dated — day of ——, 1895, any part or all of the remainder of the capital stock of said company; this agreement being given and received in performance of the sixth article of the said agreement between the said Simpson and Butler and the said Meredith; the said Meredith having assigned to me all his right, title and interest in the said agreement.

May 28th, 1895.

For value received we jointly and severally warrant and guarantee the performance by Leonard Lewisohn of the foregoing agreement between him and Frank E. Simpson and William Butler and others, executors of Michael H. Simpson.

May 28th, 1895.

231 [EXHIBIT S, MARCH 25, 1903, G. C. B.]

William Keyser of Baltimore and associates are the owners of seven thousand one hundred and forty three shares of twenty dollars each of the Old Dominion Copper Company of Baltimore City. Leonard Lewisohn and associates have already bought seventeen thousand eight hundred and fifty seven shares of the capital stock of the said company from the estate of Michael H. Simpson, and Lewisohn and associates are desirous of buying the other seven thousand one hundred and forty three shares and Keyser and associates and Lewisohn and associates have agreed together as follows:

Keyser and associates agree to sell their shares of stock for two hundred and eighty five thousand seven hundred and fifteen dollars, forty thousand dollars of which shall be payable on Thursday the twentieth day of June, and the balance of the payments shall be made by three promissory notes, each for eighty one thousand nine hundred and five dollars bearing interest at five per cent from the twenty eighth day of May eighteen hundred and ninety five, and running respectively sixty, ninety and one hundred and twenty days from that date. The payments of any or all of these notes may be anticipated, and on the payment of the first note Keyser and associates agree to do everything practicable to turn over to Lewisohn and associates the board of directors and the absolute management of the company.

The stock is to be deposited with the Old Colony Trust Company in Boston as security for the parties here and for the payment of the notes, the general understanding being that this sale is made in pursuance of and in general accordance with the agreement made between Frank E. Simpson and others representing the estate of Michael H. Simpson and J. Morris Meredith for himself, dated

the first day of May eighteen hundred and ninety five, Lewisohn and associates having become the assignee of the rights of said Meredith under said contract.

It is further understood that so far as this particular sale is concerned of the seven thousand one hundred and forty three shares Lewisohn and associates are to protect Keyser and associates from any claim for commissions by J. Morris Meredith, the understanding being that Keyser and associates are to receive their agreed price nett.

There are certain mines in Arizona near the property of the Old Dominion Copper Company which are known as the Old Dominion mine, the Keystone mine and the Chicago and New York mine. Those mining properties now stand in the name of William Keyser, but he states that he is only interested to the extent of one-half thereof, and that Michael H. Simpson's estate is the owner of
232 the other half thereof, and Mr. Keyser agrees that in consideration of the purchase of the stock hereinbefore arranged for, he will transfer, deliver and assign to Leonard Lewisohn or to his order all his interest in the said mines without any additional consideration than the purchase of the stock herein provided for.

Keyser and associates agree to guarantee to Lewisohn and associates that they will hold them and the Old Dominion Copper Company harmless from all debts, claims, liens or mortgages or outstanding contracts existing between it and any other person or corporation as of May twenty eighth. It is understood that in this matter William Keyser represents himself and all associates, and that payments may be made to him and the notes made payable to his order.

Baltimore, June 13th, 1895.

WILLIAM KEYSER.

Witness:
N. S. WHEAT.

Received June 20th, 1895, of Leonard Lewisohn & associates one hundred & twenty two thousand one hundred & 66 100 dollars and two notes of eighty one thousand nine hundred and five dollars each in accordance with the foregoing agreement, said money and notes having been paid to the Old Colony Trust Co., Boston, for my account.

WM. KEYSER.
P. P. R. BRENT KEYSER.

[EXHIBIT 9, MARCH 25, 1903. G. C. B.]

Plan of Procedure on Thursday, June 20, 1905. G. C. B.

At least three of the present board of directors of the Old Dominion Copper Company will meet in Baltimore pursuant to a regular notice to all directors.

Directors not present, who are not residents of Maryland, will send in their resignations. Those resignations will be accepted by the

irectors present, and thereupon Leonard Lewisohn and A. S. Bige-
w or some of their appointees will be elected directors in place of
he directors thus resigning.

The president and treasurer of the company will then resign and
ppointees of Lewisohn and Bigelow will be elected as president and
reasurer respectively.

The Maryland directors will remain temporarily at the desire of
Lewisohn and Bigelow and will give them their resignations
33 so that if desired new men can be put in their places in the
board. The law, however, seems to require that a majority
f the board shall be residents of Maryland.

This meeting herein outlined is not to take place except with the
pproval of Messrs. Keyser and the Simpson estate and on the as-
umption that the first note due them has been paid or they are
atisfied, but it is expected that the cash payment to Keyser will be
nade on this date, Thursday the 20th of June, and that the first note
o the Simpson estate will be paid on the same date and that the
irst note to Keyser and associates will be paid on the same date and
t the same time the stock held by Keyser and associates will be
handed over to the trust company and notes given to Keyser and
ssociates for the balance of the amount due to them.

WILLIAM KEYSER.

Witness:
R. BRENT KEYSER.

Baltimore, June 13th, '95.

[Exhibit 10, G. C. B., March 27, 1903.]

Boston, *July 18th*, 1895.

We the undersigned, each for himself and not for the others, hereby subscribe for and agree to take and pay for stock of the Old Dominion Copper Mining and Smelting Company, organized under the laws of the State of New Jersey, to the number of shares set opposite our names respectively at twenty-five dollars ($25) a share on or before October first, 1895.

Lewisohn Bros. by A. S. Bigelow,	Ten Thousand shares.	10,000
A. S. Bigelow,	Four thousand shares.	4,000
Leonard Lewisohn, by G. M. Hyams,	Four thousand shares.	4,000
A. S. Bigelow,	Four Thousand shares.	4,000
G. M. Hyams,	Four thousand shares.	4,000
Thomas Nelson, & J. M. Meredith, by T. N.	Four thousand shares.	4,000
J. A. Coram, by Thomas Nelson,	Four thousand shares.	4,000
Matthew Luce,	Four thousand shares.	4,000
Albert W. Smith,	Five thousand shares.	5,000
		38,500)
(Footing in pencil		
John H. Pierce,	Six hundred shares.	600

	C. H. Bissell,	One hundred shares.	100
234	W. A. S. Chrimes,	Two hundred shares.	200
	C. H. Altmiller,	Two hundred shares.	200
	Joseph S. Beal,	Two hundred shares.	200
	William A. L. Bazeley,	Two hundred shares.	200
	C. H. Coe, Jr.,	Two hundred shares.	200
	E. C. Swift,	One thousand shares.	1,000
	Horace H. Stevens,	Two hundred shares.	200
	George H. Ball, by C. H. Cole,	Three hundred shares.	300
	Charles H. Cole,	Two hundred shares.	200
	Richard F. Bowles,	Five hundred shares.	500
	John W. Belches, & Co.,	Nine hundred shares.	900
	Charles Head & Co.,	Eleven hundred shares.	1,100
	Charles Head, by J. Sullivan,	Five hundred shares.	500
	C. A. Putnam & Co.,	Five hundred shares.	500
	F. S. Mead & Co.,	One thousand shares.	1,000
	Gray, Dewey & Co.,	Five hundred shares.	500
	Price & Co.,	Five hundred shares.	500
	Harry Burnett,	Four hundred shares.	400
	Hayden, Stone & Co.,	Two thousand shares.	2,000
	Clark, Ward & Co.,	Fifteen hundred shares.	1,500
	William A. Tower, by E. L. Giddings,	Three hundred shares.	300
	Spencer W. Richardson, Agt	Four hundred shares.	400
	W. F. Fitzgerald,	One hundred shares.	100
	Foote & French,	One hundred shares.	100
	Frederick W. Remick,	Two hundred shares.	200
	H. C. Wainwright & Co.,	One hundred shares.	100
	E. C. Swift,	One thousand shares.	1,000
	D. M. Anthony,	Five hundred shares.	500
	Horatio Newhall,	Fifty shares.	50
	Henry T. Coe,	Six hundred shares.	600
	J. S. Kendall,	Two hundred shares.	200
	George N. Preston,	Two hundred shares.	200
	Robert C. Billings,	Five hundred shares.	500
	Nancy E. Rust, per W. R.,	Forty shares.	40
235	Mrs. Abbie H. Manning, by F. H. Manning,	One thousand shares.	1,000
	William H. Reed,	Four Hundred shares.	400
	George E. Newhall,	One hundred shares.	100
	George O. Sears, by Matthew Luce,	Two hundred shares.	200
	Edward M. Dodd, by Matthew Luce,	Fifty shares.	50
	T. E. Hopkins, by Matthew Luce,	Five hundred shares.	500
	Joseph G. Ray, by Matthew Luce,	One thousand shares.	1,000
	Henry F. Woods,	One hundred shares.	100

E. V. R. Thayer, by A. S. Bigelow,	One thousand shares.	1,000
Charles J. Hodge,	Four hundred shares.	400
Maxwell Woodhull,	Six hundred shares.	600
Henry Wood,	One hundred shares.	100
Charles P. Bond,	Twenty shares.	20
F. & C. S. Smith,	One hundred shares.	100
Benjamin F. Meservy,	One hundred shares.	100
Jeremiah Williams, per letter,	Six hundred shares.	600
W. B. Mosman,	One hundred shares.	100
L. M. Prendergast, per letter,	Two hundred shares.	200
J. T. Herrick, per telegram,	One hundred shares.	100
R. M. Field, per letter,	One hundred shares.	100
R. R. Goodell, per telegram,	Three hundred shares.	300
James B. Sturgis, per telegram,	One thousand and fifty shares.	1,050
F. G. Webster, per letter,	Three hundred shares.	300
John O. Connor,	Eighty shares.	80
A. Albert Sach, Providence,	Two hundred shares.	200
William W. Grout, St. Johnsbury, East	One thousand shares.	1,000
George H. Ball,	Five hundred shares.	500
Leland, Towle & Co., Fitz.	One hundred and sixty shares.	160
236 John F. Towle,	One hundred shares.	100
George H. Lyman,	One hundred shares.	100
James Ormond,	Fifty shares.	50
Henry Woods,	One thousand shares.	1,000
S. N. Brown,	Four hundred shares.	400
E. D. Greenleaf,	Two hundred shares.	200
Homer N. Snow,	Five hundred shares.	500
Moses T. Stevens,	One thousand shares.	1,000
John T. Howe,	Three hundred shares.	300
B. N. Towle,	Sixty shares.	60
Amos Towle,	Forty shares.	40
P. T. Bradley,	One hundred shares.	100
C. L. Davenport,	One hundred and twenty shares.	120
2 Richardson,	Three hundred shares.	300
A. Eldredge,	One hundred shares.	100
S. B. Bartholomew,	One hundred shares.	100
Gustave Lundberg,	One hundred shares.	100
George Whitney,	Fifty shares.	50
Charles J. MacKenzie,	Five hundred shares.	500
C. W. Barron,	Five shares.	5
H. P. Winsor,	Fifty shares.	50
J. O. Wetherbee,	One hundred shares.	100

Mrs. Mary O. Jones,	Four hundred shares	400
? Sanborn,	One hundred shares.	100
Edward P. Abbe,	Two hundred shares.	200
Samuel Cook,	One hundred shares.	100
David W. Chever,	Twenty-five shares.	25
Otis N. Pierce,	One hundred shares.	100
Albert O. Smith,	One hundred and twenty shares.	120
H. S. Goodell,	Fifty shares.	50
Henry Stackpole, A. S. B.,	Three hundred shares.	300
	Total,	72,120

237 [EXHIBIT 13, G. C. B., APRIL 10, 1903.]

CLIFTON, ARIZONA, *June 18th*, 1895.

To Messrs. A. S. Bigelow and Leonard Lewisohn.

GENTLEMEN: In compliance with your instructions we have examined the property of the Old Dominion Copper Co., of Globe, Ariz., and we now take pleasure in submitting our report on the same.

Globe is situated about 100 miles to the Northwest of the Clifton copper belt and is reached by the G. V. G. & N. Ry. which terminates at Fort Thomas, 61 7/10 miles distant from the connection with the Southern Pacific Railway at Bowie, and 71 miles distant from Globe. From Fort Thomas freight and passengers are presently conveyed by wagons and by stage. We may here state that for the proper and economical working of the Globe properties it is necessary that the G. V. G. & N. Ry. should be extended to Globe.

In our calculations we have considered the completion of the railroad as an assured fact. The property of the Old Dominion Co. comprises the following:—

The Globe Mine.
" Globe Ledge.
" Fraction.
" S. E. Globe.
" Interloper.
" Globe, S. W.
" Hidden Globe.
" Alice.
" S. W. Alice or Hypatia.
" S. E. Globe Millsite } of these the present Smelting Plant is
" Interloper " } built.
" Hidden Globe " }
" S. W. Globe Millsite.
" Hypatia "
" Alice "

Smelting Plant.

The smelting Plant consists of 2-60-ton water jacket furnaces and 1-40-ton furnace, each supplied with an independent Baker blower

propelled by independent engines. The steam boilers and machinery we found ample for the requirements of the plant. The building covering the plant and the ore bins we found roomy and
238 commodious, the ore bins having a capacity of 3500 tons. On a self-fluxing charge the furnaces could be pushed to 80 or 90 tons per day, as the ore is probably the finest smelting ore in the world, being remarkably free from fines and admirably suited for rapid and economical running. For matting the ores a somewhat larger furnace, say 7 ft. x 3′ 3″ would be required. But if the object be to make black copper, in that case the present plant is probably as economical as any, and it had the advantage of being ready to commence work at a moment's notice. The admirable condition of everything connected with this plant showed that the management had taken the greatest pains to keep everything in perfect order.

The Interloper shaft, the main outlet for the Mines, is situated less than a quarter of a mile from the Smelting Works on an upper slope of the same hill, and a Bleichert tramway, with a capacity of 200 tons in 10 hours, furnishes a cheap and exceedingly convenient method of haulage. For the present system of working, the Smelting Plant and the haulage leave but little to be desired.

Mines.

In locating the Mines of the property the locators have been singularly happy in covering in length and width what we cannot but regard as the principal lode of the district and one of the largest in Arizona. The surface level and the first level are tapped without hoisting, both delivering their ores direct to the Bleichert tramway. The second, third, fourth, fifth, sixth and seventh levels are connected to and deliver their ores through the Interloper shaft, which has been sunk to the eighth level, the latter being at the present time no more than a pumping station. The levels have not been run in straight lines and they are therefore longer than is shown by the figures given below, which represent the length in a straight line opened up by each level.

Surface level	625 feet.
Alice Tunnel	600 "
No. 1 level	2500 "
No. 2 level	2500 "
No. 3 level	1500 "
No. 4 level	850 "
No. 5 level	1650 "
No. 6 level	1350 "
No. 7 level	1700 "
No. 8 level	375 "

239 ### Surface Level.

The surface level, run in at an average depth of 50 feet below the surface of the hill, exposes large ore bodies at three different points

on each of which stoping to a considerable extent has been done. At the main outcrop the vein is 200 feet in width and practically all ore, mainly of the low grade self fluxing character. The tremendous outcrop, the most noticeable feature on the property, at once stamps the lode as one of extraordinary character. In stoping here, as on all the other levels, only the rich streaks have been followed and the main portion of the vein has, therefore, been but little disturbed.

The rich ore descends in sheets with layers of the low grade ore and occasionally of vein matter between. This characteristic we found repeated on the lower levels. A careful examination satisfied us that there is every reason to expect a continuous ore body for a distance of 700 feet on this level. In opening up this ground the footwall should be closely followed and in stoping upwards the ore should be followed to its junction with the hanging wall, and this also applies to the lower levels. The low grade ore in the backs will nearly all pay to smelt and in running we expect that sheets of richer ore will be uncovered.

First Level.

Development on this level has been done altogether between the Moony shaft and the outcrop, the total length of vein broken into being 600 feet, the main working being on the downward extension of the outcrop which showed as strong here as it did on the surface 160 feet above. With the exception of the work on the extension of the outcrop, stoping has not been conducted to a height greater than from 20 to 25 feet above the level, the lower grade ores being as usual left untouched in the backs. The promising ground lying to the Southwest of the Moony shaft lies untouched. Here there should be no difficulty in finding the extension of the ore body. It is evident that this level should produce much more than it has done heretofore.

Second Level.

On this level ore has been touched in spots for a length on the vein of 1200 feet, but only over a distance of 500 feet has stoping been done to a considerable extent and that altogether on the hanging wall and away from the main contact. At the Moony shaft, ore is to be seen in place on the footwall. Ore is again exposed at a point 50 feet to the Southeast of the same shaft. At this point the vein narrows to a few feet in width, but it opens out immediately. In
the belt of ground 1400 feet in length practically no work has
240 been done along the footwall. Judging from the relative position of the stopes it would appear as if the ore body might have left the footwall immediately below the first level and folding out horizontally had again descended on the hanging wall. This theory, however, finds no support in the developments on the levels above and below which invariably expose the main ore body making on the footwall. The development of the ore bodies on the hanging wall has no doubt been due to the driving of the main levels through the limestone. These ore bodies will I have no doubt be ultimately followed to their starting point,—the footwall. With ore to com-

mence upon at the Moony shaft it should not be difficult to prove up this ground.

Third Level.

With the exception of two small stopes on the footwall on the S. W. end of the property, all the development work has been done in the hanging wall. The work to the N. E. of the Moony shaft has been run too far into the country rock and has been done in ground which cannot be considered as in the vein or as likely to be ore bearing. We consider this level as practically so much undeveloped ground. As the ore is very strong on the footwall in the fourth level we see no reason why it should not be found in the same position on the third.

Fourth Level.

With the exception of a block of 90 ft. the ore has been followed on the footwall and found to be continuous for a distance of 900 feet. All of this work has been done to the S. W. of the Moony shaft. Stoping as usual has been done only on the rich ore sheet, good fluxing ore being left in the back. Ore has also been mined to a considerable extent along the footwall. The vein shows a width between walls of fully 200 feet for quite a distance. Much good stoping ground remains, and between the walls there is a big unprospected territory which can hardly fail to be highly productive. The ground lying to the N. E. of the Moony shaft should be tested along the footwall.

Fifth Level.

On this level the ore body on the footwall has been shown up and stoped for a distance of about 800 feet on the vein, the work being done to the S. W. of the Moony shaft. Most of this ground being inaccessible on account of a large cave due to insufficient timbering, it is impossible to judge with any degree of accuracy how much ore has been left. As only the rich ore was stoped, it is obvious that the bulk of it will pay to turn over, and we should expect it to
211 yield besides the low grade fluxing ores quite abundantly in high grade ore. With the exception of a stope situated 600 feet to the Northeast of the Moony shaft no ore has been developed or touched on the extension of the vein in that direction. No doubt this is due to the fact that the main level and all cross-cuts have been driven in the country rock and away from the vein. In a distance of 850 feet not a single crosscut has been run to test the footwall. While indications point to a narrowing of the vein on its Northeast extension there is good reason to believe that ore will be found by prospecting along the footwall and by following up the ore body in the stope last referred to. This view is strengthened by the work on the sixth and seventh levels which show the extension of the vein for a distance of 600 feet N. E. of the Moony shaft.

Sixth Level.

Ore has been stoped at intervals for a total distance of 1100 feet on the vein. In a total number of nine crosscuts run in to cut the foot-

wall, no less than eight of them struck ore, which is an excellent proof of the continuity of the ore body and emphasizes the need of systematic work in this direction. The most noticeable feature of this and of the fifth level has been the development of the ore body to the S. W. of the Interloper shaft. The ground in this direction justifies further prospecting in height, length and width. We consider it very important ground.

Seventh Level.

The continuation of the ore body in depth is shown by three large stopes opened at widely separate points on the vein. As on the upper levels the bulk of the development work has been done in the hanging wall and in no case has ore been found on this level in crosscutting into the limestone. All the ore found has been discovered in crosscutting towards the footwall. Rich sulphide ore in pay streaks shows for a considerable distance, along the floor and roof of the main level. These streaks should be followed downward and upward, especially downward in order to develop the sulphides as rapidly as possible. So little real development work has been done that this level must be regarded as new and undeveloped. The vein is undoubtedly slimmer here than on the upper levels, but it is still wide enough to hold large ore bodies. Development work to the S. W. of the Interloper should also be pushed with vigor as the ground is very favorable and inviting.

Summary.

We need not encumber this report with a detailed description of the geological conditions which obtain in the Mines at Globe.
242 It will suffice for your clear understanding of the situation if we explain only its more important features. The ores occur altogether in a strong fissure between the diorite which forms the footwall and the limestone which is the country rock lying to the East of the vein. The ore body has been found in the various levels, at intervals, over a total length of 1800 feet, and it has been followed to a depth of 515 feet from the surface of the main outcrop to the floor of the seventh level, where such small developments as have been made go to show that it is still a strong body. Near the fissure the limestone has been fractured, leaving fissures and pockets in it which have in places been filled with ore derived no doubt from the same source which impregnated the main vein. This is particularly evident on the third level where the ore makes in the limestone and away from the vein. On the same level the ore is also found in the vein on the footwall. The nature of the vein being such—and in this it resembles most limestone formations—it was impossible to block out and measure the ore in sight, and we were compelled to rely altogether on our own judgment of the ground, assisted, of course, by our knowledge of what it had produced in the past, and by our experience in other limestone formations and also by a close study of the geological conditions. The immensity of the vein and of the ore bodies in sight made this a fairly simple task. Particu-

larly were we impressed by the enormous bodies of low grade fluxing ores, nearly all of which can be treated to profit with the assistance of the cheap coke which will be obtained when the railroad is completed. With coke ranging from 40 to 60 per ton, all low grade ore had to be avoided, and wherever struck it was left standing in the mine. Sulphide ore, in like manner, whenever found *were* at once abandoned, on the ground that it was difficult to treat.

Metallurgy.

The method of treatment heretofore followed has been the simple one of smelting oxidized ores into black copper of high grade. The same method can still be followed and with good profit, but there are heavy losses in it which can be avoided by converting all the ores into copper matte and then bessemerizing. But to make the ores, a great deal more sulphur will be required than is presently in sight. It is therefore highly necessary that while the plant is shut down the development of the sulphides should proceed with vigor. The sinking of the Interloper shaft for a further depth of 300 feet we look upon as an immediate necessity. At the same time winzes should be sunk on the sulphide ores to prove them in depth and thus work should keep pace with the shaft sinking. As this work proceeds, short campaigns should be made in smelting to treat
243 the ores now in stock and those that will be derived from the prospecting. If necessary the production of black copper may be commenced at any time; but as the present shaft would not be able to keep up a large output and at the same time allow of its being sunk, we deem it better to sink before commencing to smelt on the large scale. The rich sulphide ores will probably be found for a considerable depth, possibly 200 to 300 feet below the eighth level, and much of it will be associated with considerable vein matter, forming a low grade ore which will require to be concentrated. For the treatment of this ore a concentrator will be required. Later it will be necessary to erect a leaching plant, but this need not be thought of until a sufficiency of iron pyrites has been developed. Since the commencement of the Company there has been produced about 68,000,000 lbs. fine copper, and we think that a very conservative estimate would give a like amount still to be extracted from the ground opened by the old Company. This would give a supply of five and a half years at the rate of 6,000 tons copper per annum. Taking the figures of the Old Company as a basis and reducing them to figures based on present situation of the railroad showing a wagon haul of 65 miles, will show a net profit at present price of black copper (10½c.) of $60 per ton, or $360,000 on 6,000 tons of copper per annum. To this can be added $60,000, when the railroad is completed into Globe.

Of course when the low grade sulphides are mined and the matter obtained treated by the Bessemer process, this yield can be materially increased, but of this we have taken no account in our calculations. Calculating on a yearly output of 6,000 tons of black copper and on a market value of the same of 8½ cents per pound,

and also the completion of the railroad, the profit should be $180,000. per annum; with black copper realizing 9½c per pound, the profits should be $300,000. per annum; with black copper realizing 10 cents per pound, $360,000. per annum, and with black copper realizing 10½ cents, $420,000. per annum.

In this estimate we have counted upon a yield from the ores of 9 per cent. of copper, an average which can easily be sustained, and we have not counted upon the richer sulphides, likely to be opened out in depth. With this much assured from the ground already opened out, and with every prospect of an extension of the ore bodies both in length on the vein and in depth, we consider the property as certain to be a heavy producer for many years to come.

Attached hereto is a plan showing the ground covered by the various claims and also the trend of the footwall through the Globe Ledge and Globe Claims, which have produced nearly all of the ore so far produced.

244 The following analysis shows the composition of the ore, amounting to 4,600 tons, now in the furnace bins and ready for smelting. The sample was taken from all over the surface of the ore pile:

	Per cent.
Moisture and volatile matter	12.40
Silica	22.18
Oxide of copper (Metallic copper 16.9%)	21.18
Oxide of iron (FeO)	27.26
Alumina	9.44
Oxide of Manganese	2.09
Lime (CaO)	1.35
Alkalies, Oxygen and loss	3.80
	100.00

This ore should form a slag not exceeding 36% in silica. It is perfectly self fluxing. Samples of the sulphide ores taken from various parts of the Mine assayed as follows:—

	Per cent. copper.
Sulphide streaks in raise from 5th level	28.85
" " " main drift "	9.60
" ore from stope near 7th level	12.90
" from main drift 7th level	34.90

During the 18 months ending at the time the Works were closed down, 50,947 tons of ore were smelted, resulting in a yield of 6,068 tons of black copper, being equal to an average yield of 11.9%.

The cost of Pochohontas coke during the same time was $13.10 per ton at Wilcox or $39.60 per ton at Globe. Timber is obtained from the Pinal Mountains where the Company own a saw mill. The fuel is wood from the same mountains. Water is obtained from Pinal Creek which flows past the smelter dump. A small quantity will also be obtained from the Mines.

We consider that the railroad should make you a rate of $5 per on on coke, coal and copper hauled between Bowie and Globe and ice versa. On all other material they should be allowed to make heir own rates.

For smelting purposes an ample supply of water can be 245 obtained from the creek and from the Mine. The latter will undoubtedly give an increased supply in depth.

Globe is situated at an elevation of 3500 feet above sea level. The climate is superb, being cool and pleasant every night in the year. The water being of most excellent quality, and the climate so superior, Globe has long been considered the healthiest camp in Arizona.

In conclusion we would say that we consider the property one of very great value. We have found nothing either above ground or below the surface pointing in the slightest degree to a shortening or narrowing of the ore bodies either in depth or length. The work done in the past has served to open up vast ore bodies from which only the richest streaks running from 15 to 30 per cent. copper have been removed, while the large bodies of rich sulphide ores have hardly been touched. The Mining and Smelting Plant is ample for present purposes except a boiler or two, and everything about the property is in excellent shape. We have no hesitation in recommending it as a safe and profitable investment and one which will undoubtedly increase rapidly in value as new development work is completed.

All of which is respectfully submitted.

JAMES COLQUHOUN.
G. M. HYAMS.

[Exhibit 14, G. C. B., April 10, 1903.]

Boston, *April* 3, 1901.

To the Stockholders of the Old Dominion Copper Mining and Smelting Company:

The Directors submit herewith a statement of the business of the Old Dominion Copper Mining and Smelting Company, from the formation of the Company to January 1, 1901.

Capital Stock.

Outstanding, full paid,	150,000	shares, at par	$25.00 . .	$3,750,000
In Treasury	50,000	" "	25.00 . .	1,250,000
Total	200,000	" "	$25.00 . .	$5,000,000

246 Statement.

From subscription recepits			$500,000 00
Value of copper, silver and gold produced		$3,567,557.83	
Less:			
Cost of production at mines and smelter and electrolytic refining	$2,161,293.11		
All expenses of handling copper, such as freight, copper charges, commissions and expense account.	553,303.56		
Total		$2,714,596.67	
Profit from production			852,961.16
Total			$1,352,961.16
From which deduct:			
For purchase of Continental Group of Mines and sundry mining claims		$109,821.00	
For construction and improvement account and development work at Globe and Continental Mines		841,217.64	
Total			951,038.64
Balance on hand, January 1, 1901			$401,922 52

At the time of the purchase of the Old Dominion Copper Company, there was upon the property a small but complete Smelting Plant, and a Mine equipment sufficient to supply this Plant with ore. The Gila Valley, Globe & Northern Railroad had been built north from Bowie some thirty miles towards Globe, and all supplies had to be hauled at great expense to the Mine from the end of the road. Steps were promptly taken to secure the completion of the Railroad line into Globe, but it was only after long negotiations that this was accomplished. Meantime, the Plant was run upon a small scale, more to encourage the builders of the Railroad than for any great profit. As soon as the completion of the road was assured, steps were at once taken to put the property in shape to produce largely. For this purpose, new hoisting works and pumping appliances were necessary. These have been completed, as also the necessary enlargement to the Smelting Plant. New machine, car-

penter and blacksmith shops have been built, new boiler houses built, and new boilers installed both at Mine and Smelter.

247 The great problem, however, to be solved was the finding of sulphuretted ores in the Mine, which could be used, together with the richer oxidized ores, so as to make a more economical smelting mixture. To this end very extensive exploration work has been done and much more money spent than would ordinarily be the case. Of course, this money will come back later to us, as this work will not have to be done in future.

Up to date we have not succeeded in finding any large sulphide ore bodies, although the oxidized ore bodies have continued in depth.

In order to provide ourselves with a supply of sulphides, the Continental Group of Mines was purchased in 1899. While we have developed a sufficient quantity of these ores to many times pay back the original price of the property, developments in depths have not warranted any large expenditures of money at present.

The Company has been producing at the average rate of 750,000 pounds of fine copper per month during the past twelve months, and the Mines are now developed sufficiently to insure an average monthly product of not less than this amount, and we have every reason to anticipate a steady gradual increase monthly.

At the Stockholders' Special Meeting held June 15, 1899, an increase of 50,000 shares of new stock was authorized. This is the stock now in the Treasury of the Company, the Directors having considered that it was better to use the Net Earnings of the Company as long as they were sufficient, for developing the Mines and increasing the smelting facilities rather than increase the amount of outstanding stock, reserving this new stock for the erection of larger works later on when the still further developments of the Mines warrant such expenditure.

The Directors had intended to use part of this new stock to build a railroad to the Continental Mines, but developments there are not such as to warrant the expenditure at present.

When the time comes to issue this new stock such an amount of it as will be needed will be offered to the stockholders at par, pro rata to their holdings of the present outstanding stock.

By Order of the Board of Directors.

A. S. BIGELOW, *President.*

[Exhibit 15, G. C. B., April 10, 1903.]

[Cover.]

Report of the Old Dominion Copper Mining and Smelting Company, for the Year Ending December 31, 1901.

248 [Title page.]

Report of the Directors to the Stockholders for the Year Ending December 31, 1901.

John A. Lowell & Co., Engravers and Printers, 147 Franklin Street, Boston.

Old Dominion Copper Mining and Smelting Company.

Capital Stock.

Outstanding, full paid,	150,000	shares, at par	$25.00..	$3,750,000
In Treasury	50,000	" "	25.00..	1,250,000
Total	200,000	" "	$25.00..	$5,000,000

Officers.

President, A. S. Bigelow. Vice-president, E. V. R. Thayer. Directors, A. S. Bigelow, Leonard Lewisohn, E. V. R. Thayer, Joseph S. Bigelow, W. J. Ladd, C. H. Bissell, Edgar Buffum. Secretary and Treasurer, W. J. Ladd.

Office, 199 Washington Street, Boston.

The Annual Meeting of Stockholders is held on the First Wednesday in April in each year.

Report.

The Directors submit the following Report of the operations of this Company for the year ending December 31, 1901:—

Gross value of copper, silver and gold produced		$1,276,979.83
Cost of production at Mines and smelter and electrolytic refining	$993,800.93	
All expenses of handling copper, such as freight, copper charges, commission, and expense and interest accounts	169,339.49	
249 Total		1,163,140.42
Profit from production		$113,839.41
Special Construction and Improvement Account and development work at Globe and Continental Mines		$72,179.98
Surplus for the year		$41,659.43
Balance on hand January 1, 1901	$401,922.52	
From which deduct:		
Difference in price on product at works at Globe Arizona, in matte and stock pile January 1, 1901, 2,300,000 pounds fine copper, @ 16⅝ cents per pound, and on December 31, 1901, @ 12 cents per pound, or 4⅝ cents per pound	106,375.00	
		295,547.52
Balance of Assets December 31, 1901		$337,206.95

Summary of Results.

Cost per ton ore mined	$5.845	
" " " " smelted	$4.798	
Cost per pound fine copper, excluding Construction, etc.		11.53 cts.
Cost per pound Construction, etc.		.72 "
Total cost per pound		12.25 cts.

Average yield fine copper per ton ore smelted 6.23%

The result of the operations for the year 1901 for the first time enables the Management to place before the stockholders an intelligent and safe basis for determining what the costs of mining and producing copper are at Globe. Prior to this time the various vicissitudes of a new mining property were encountered; much development work had to be done and this, together with various unforeseen difficulties

and expenses, made up a total cost which the Management knew was abnormally high, and which could not form any basis for obtaining a fair average cost.

As stated in our last report, the great problem to be solved was the finding of sulphuretted ores in the Mines which could be used to furnish a more economical smelting mixture. The richer oxyidized ores are not at all refractory in the sense of being difficult to smelt, but on the contrary, owing to the ease with which they can be
250 smelted into metallic copper they occasion an undue loss of the metal in the slag. By the use of a sulphuretted ore this loss can be to a great extent obviated by changing the process of smelting. During the present year we have succeeded in finding in the bottom of the Mine some limited ore bodies containing rich sulphide ores, but we have not yet been fortunate enough to discover any ore bodies of this nature sufficient to furnish us with the requisite amount of sulphides to warrant us in changing our method of smelting. With this end in view we purchased, as stated in our last report, the Continental Group of Mines, but while these Mines have developed a certain amount of ore, they cannot help more than in a certain degree to supply our needs.

Operations at the Mine are shown in the report of Mr. F. W. Hoar, the Acting Superintendent, who took charge upon the resignation of Mr. S. A. Parnall. It will be seen from this report that the condition of the Mine as far as oxydized ores go is very satisfactory, and that we have in the lower levels, as already mentioned, proven the existence of sulphide ore bodies which await further development before their extent can be determined. We have always had at the Mine to contend with a large amount of water which seems to come at irregular periods. This has been the case since the opening of the Mine twenty years ago, and during the latter part of the year 1901 we were practically shut off from extensive developments in the lower levels on this account. Since Mr. Hoar's report was written, however, the water has subsided to a large extent and we are again prosecuting development work in the lower levels with very favorable results.

At the Smelter everything has progressed smoothly during the year. It will be noticed that the time lost during the whole year was less than five days. While we have a Smelting Plant much in excess of our present production, the Management have deemed it best only to smelt a quantity of ore which could be produced from the Mines without exhausting unduly the reserves. In the present condition of the copper market this policy has been a fortunate one for the Company, as, if we had rushed production unduly, besides having exhausted our ore reserves we should have piled up a large quantity of copper which could not be sold at present without making a loss.

Had it not been for the sudden drop in the price of copper and had the Company been able to sell its total production at the price ruling early in the year, the financial report would have been a highly satisfactory one. When it was found that our copper was not being disposed of as rapidly as produced, the officers of the Company, upon consultation with the United Metals Selling Company, the successors

of Lewisohn Brothers, who had been the Selling Agents of
251 the Old Dominion Copper Mining and Smelting Company from the beginning, found that owing to a very great shrinkage in the foreign demand all of the copper made in this country could not be disposed of without a serious fall in the price which it was deemed inadvisable to bring about, as it was supposed the falling off in demand was only temporary. As various copper producing Companies who sold their copper through other sources than the United Metals Selling Company had expressed the same ideas and the same feeling, the officers of the Selling Company felt that it would be very unwise for them to initiate a general break-down in prices, in which the officers of this Company thoroughly concurred. When it was found later in the year that the outside Companies were systematically and secretly cutting prices and underselling the market under the protection of our maintaining the price, instructions were given to our Selling Agents to dispose of a sufficient quantity of our copper at cut prices to pay all our operating expenses for the year. The result has been that we have obtained for the copper produced during the year an average of 12½ cents per pound. It should be borne in mind, however, that had we initiated this policy early in the year the result would have been that we should have obtained a still lower average for our product, as we should then have lost the benefit of all the copper that we disposed of at high prices.

At present prices for labor, supplies, freights, etc., and setting aside a fair amount for development work, copper cannot be produced, refined and sold by our Company for less than 12 cents per pound, which is just about the price which it will bring in the market at present. Although at this price no profit can be made, the Management consider it unwise to close down the property, as it would deteriorate very rapidly owing to the large quantity of water which would accumulate in the Mine. As soon as the sulphide ore bodies are developed to a sufficient extent to warrant the installation of a Converting Plant it will be at once erected, and the cost of production will be considerably reduced. At present, however, it is not thought wise to proceed with this plant, as it can be erected in a comparatively short time.

A. S. BIGELOW, *President.*
E. V. R. THAYER,
W. J. LADD,
LEONARD LEWISOHN,
JOSEPH S. BIGELOW,
C. H. BISSELL,
EDGAR BUFFUM,
Directors.

252 *Assets and Liabilities.*

Assets.

*Cash and accounts receivable at Boston, and copper, silver and gold on hand, since sold, and at Works at Globe, Arizona, in matte and stock pile	$1,063,181.52	
Cash and accounts receivable at Mine	8,247.28	
Supplies on hand at Mine	159,801.26	
Total Assets		$1,231,230.06

Liabilities.

Accounts payable at Mine	$52,281.27	
Accounts payable at Boston, including advances on copper, since paid from the sale of same	841,741.84	
Total Liabilities		894,023.11
Balance of Assets December 31, 1901		$337,206.95

Superintendent's Report.

GLOBE, ARIZONA, *January* 24, 1902.

To the President and Directors of the Old Dominion Copper Mining and Smelting Company.

GENTLEMEN: I herewith submit a general report of the operations at the Mines and Smelter for the year ending December 31, 1901.

As maps showing where the year's work has been done, also the annual cost sheet where will be found tabulated the cost of each department, together with the construction expense for the year, have been sent, I will not here repeat.

*In addition to the assets in this item there are sulphide and Continental ores on the dumps at Smelter and at Globe and Continental mines; also fine dust at Smelter, containing in all about 1,675,000 pounds fine copper of which no account is taken in this statement.

Globe Mine.

Operations.

The total material hoisted in the Interloper Shaft, together with that which came from the surface levels, is as follows:

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Total cars	Quartz Ore	72,666
" "	Iron Ore	20,006
" "	Mixed	10,743
" "	Waste	66,154
	Grand Total	169,569 cars.

From which we obtained 82,005 tons of ore, exclusive of 935 tons of sulphide ore.

Development Work.

The number of feet opposite each level is the total of all drifting, raising or sinking on that level:

Surface level	494.5 feet.
First "	459.0 "
Second "	490.0 "
Third "	719.0 "
Fourth "	365.5 "
Fifth "	171.0 "
Sixth "	886.0 "
Seventh "	167.0 "
Eighth "	229.0 "
Ninth "	2,273.5 "
Tenth "	1,790.5 "
Eleventh "	1,222.0 "
Twelfth	1,046.0 "
Total	10,313.0 feet.

The diamond drill was used in connection with the development work, the extent of which being as follows:

Drilled	205 feet	6 inches	on	9th level.
"	129 "	6 "		10th "
"	81 "	0 "		11th "
"	162 "	9 "		12th "

Total, 579 feet 9 inches.

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Ore Reserves.

From the surface to and including the 8th level we now have as much ore in sight as at any time in the history of the Mine to my knowledge.

On the 9th and 10th levels are some good bodies of ore, the extent of which can only be proved by further development.

On the 11th and 12th levels, have developed sulphide ore carrying varying percentages of copper.

The development of the lower levels has shown more to encourage the Management than all other development work so done. This work has shown that which the Management has always endeavored to prove, namely, the existence of sulphide ore bodies. The extent of said ore bodies can only be proved by further development, and at such a time as the water supply will permit.

From the development of the lower levels, the low grade or concentrating sulphide ores have been dumped in a pile in connection with our mine surface dump. The high grade sulphide ores, of which we had on hand December 31, 1901, 935 tons, are piled separately.

Smelter.

In a stock pile at the Smelter, we have 1,500 tons of quartz ore, 1,400 tons of iron ore, and 1,500 tons of lime, which we keep as a reserve in case of accident or derangement at the Mine.

Operations at the Smelter were as follows:

Smelter in operation	361.13 days.
Delays caused by power plant	1.59 "
Delays caused by furnace	0.28 "
Holidays	2.00 "
Total	365.00 days.

Having smelted 81,015 tons of ore, from which we produced 9,248,093 pounds of pig copper and 1,737,331 pounds of matte.

The pig copper was all shipped, but the matte was placed with that previously produced, making a total on hand December 31, 1901, of 3,797,837 pounds of matte, containing about 2,650,000 pounds fine copper.

The flue dust made during the year not treated was 2,850 tons. This being placed with the flue dust previously made, gives a total of 5,924 tons on hand December 31, 1901.

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Construction.

The main items were as follows:

Fuel Oil Installation.

Experimenting with fuel oil for boiler fuel at the Smelter resulted in showing a saving over coal and the adoption for the entire

plant thereof. This required the installation of oil storage tanks, pipe lines, and pumps, about three-fourths of the total installation expense having been charged out in year 1901.

Excavation

On account of the movements of the surface ground, it was necessary to relieve the pressure on the hoisting engine foundation, which required the removal of a large amount of ground back of the engine house.

Continental Mine.

Operations at this Mine were discontinued on February 14, 1901.

Development Work,

Including raises, winzes and drifts, was as follows:

Continental	1st level	23.0 feet.
"	2d level	48.5 "
"	3d level	222.5 "
"	5th level	25.0 "
"	6th level	13.0 "
Selby Claim		30.0 "
Railroad Claim		36.0 "
Total		398.0 feet.

During the time the Mine was in operation there were 208½ tons of ore delivered to the Smelter at Globe Mine, being placed on slag dump with the ore previously delivered.

General.

On July 25th, I received the official appointment of Acting Superintendent of the Old Dominion Copper Mining and Smelting Company to succeed Mr. S. A. Parnall, and on the following day assumed the duties and powers thereof, previous to which time, during the absence of the Superintendent, I also held the position of Acting Superintendent.

I wish to state that all the officials, more particularly Mr.
256 Frank Juleff, Mine Foreman, Mr. H. B. Paull, Chief Clerk, Mr. E. F. Lundgren, Master Mechanic, and Mr. Paul Michaelson, Boss Carpenter, have performed the duties of their respective positions in the most satisfactory manner, always showing faithful devotion to the interest of the Company.

Yours respectfully,

F. W. HOAR,
Acting Superintendent.

[Exhibit 16, April 16, 1903, G. C. B.]

Old Dominion Syndicate.

May	16.	Received from	Subscribers	.....	720	May	16.	Pd. Lewisohn Bros.	1,000
	27.	"		.....	36,610		27.	" Atlas Nat. Bank Boston	683 33
	28.	"		.....	1,000		28.	" J. A. Coram	280
	"	"		.....	3,920		"	" J. M. Meredith	70
	29.	"		.....	2,940		"	" Thos. Nelson	90
	"	"		.....	700		"	" Matthew Luce	280
	31.	"		.....	420		29.	" Atlas Nat. Bank Boston	49,327 78
	"	"		.....	700	June	13.	" Lewisohn Bros.	700
June	13.	"		.....	11,880		19.	" S. S. Spaulding	855 16
	14.	"		.....	1,400		20.	" Lewisohn Bros.	184,152 37
	15.	"		.....	980		"	" for extra work	20 00
	18.	"		.....	13,588 12	Jul-	12.	" Lewisohn Bros.	175
	19.	"		.....	107,612 05		15.	" " "	43,003 90
	"	"		.....	7,189 56		16.	" " "	55,999 14
	20.	"		.....	16,316 40		17.	" " "	25,474 26
	21.	"		.....	8,627 49		18.	" " "	10,105 79
	22.	"		.....	2,875 83		19.	" " "	4,333 25
July	15.	"		.....	43,003 90		20.	" " "	2,888 57
	16.	"		.....	55,999 14		22.	" " "	28,889 63
	17.	"		.....	25,474 26		24.	" " "	44,936 43
	18.	"		.....	10,105 79		25.	" " "	8,670 47
	19.	"		.....	4,333 25		29.	" " "	4,337 51
	20.	"		.....	2,888 57		31.	" " "	7,520 86
	22.	"		.....	28,889 63	Aug.	3.	" " "	3,183 48
	24.	"		.....	14,448 83				

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1895.							
July 25.	Received	from	Subscribers.....	8,670	47		
26.	"		.....	4,337	51		
31.	"		.....	7,520	86		
Aug. 2	3.	"	.....	3,183	48		
	5.	"	.....	578	90		
	9.	"	.....	1,000			
	16.	"	.....	1,449	46		
	19.	"	.....	5,800	23		
	"	"	.....	1,160	20		
	21.	"	.....	19,581	06		
	22.	"	.....	13,926	26		
	23.	"	.....	4,787	80		
	26.	"	.....	17,707	79		
	28.	"	.....	2,903	70		
Sept.	16.	"	.....	2,328	03		
	23.	"	.....	1,456	25		
	"	"	.....	5,828	89		
Total receipts				504,843	71		

Aug.	19.	Pd.	Lewisohn	Bros.....	8,988	79	
	21.	"	"	"	19,581	06	
	22.	"	"	"	13,926	26	
	23.	"	"	"	4,787	80	
	26.	"	"	"	17,707	79	
	30.	"	"	"	2,903	70	
Sept.	16.	"	"	"	2,328	03	
	23.	"	"	"	1,456	25	
	24.	"	"	"	5,651	25	
1896.							
Jan.	20.	"	"	"	1,000		
Total Payments						555,307	86
Less amount received from subscribers						504,843	71
Balance, paid by A. S. Bigelow.....						50,464	15

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[EXHIBIT 17, APRIL 16, 1903, G. C. B.]

A. S. Bigelow Old Dominion Investment Account.

1895.			
May 22.	Subscription	4,000 sh.	$50,000
	Shares received Sept. 27.		
Oct. 17.	For Underwriting Syndicate	27,350 "	
1897.			
Oct. 8.	Bought from Luce	25 "	625
1900.			
Dec. 1.	Bought	50 "	1,575
31.	Credited G. M. H. on B. & M. joint a/c 3230 shs. at av. 29		93,670
	Balance		151,016 06
		31,425 sh.	$296,886 06

The 4 Directors' shares not included in above.

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1895.			
Oct. 17.	Transferred to J. H. Coram	5,240 sh.	
"	" " M. Luce	5,240 "	
"	" " T. Nelson	4,240 "	
"	" " J. M. Meredith	1,960 "	
"	" " H. M. Whitney	2,990 "	
Dec. 19.	" " Mrs. Bigelow	200 "	
1896.			
Jan. 11.	" " C. W. Barron	10 "	
1897.			
Sept. 22.	Sold to M. Fay	50 "	$1,250
Dec. 9.	Sold	315 "	7,870 62
10.	Transferred to G. M. Hyams	1,460 "	
1898.			
Feb. 8.	Mar. 2 Sold	1,960 "	57,295
Apr. 28.	May 2 "	2,000 "	51,900
May 6.	"	700 "	18,168 75
9.	"	500 "	13,937 50
10.	"	350 "	9,656 25
11.	"	1,150 "	31,399 25
Dec. 3, '98, Jan. 2/3, '99.	Sold	2,010 "	74,408 69
1900.			
Nov. 30.	Sold	1,000 "	31,000
Dec. 31.	On hand	50 "	
		31,425 sh.	$296,886 06

[Exhibit 18, April 23, 1903. G. C. B.]

Baltimore, *June 17th*, 1895.

A special meeting duly called of Board of Directors in this company was held this day at 2 o'clock p. m. at Co.'s office.

Present, Mess. William Keyser, William F. Frick and H. Irvine Keyser.

Mr. Frick moved and Mr. H. I. Keyser seconded following resolution.

Resolved that the President be authorized to make such distribution of the accumulated net profits of the Co. as he may deem proper.

259 President handed in the resignation of Mr. William Butler as a director to take effect at once.

On motion of Mr. H. I. Keyser seconded by W. F. Frick, Mr. Butler's resignation was accepted.

On motion of Mr. W. F. Frick seconded by Mr. H. I. Keyser, Mr. George A. Pope was elected to Mr. Butler's position as Director in this Co. and Mr. Pope, being present, took his seat as director.

President handed in the resignation of Mr. W. F. Frick as a director to take effect at one.

On motion of Mr. Geo. A. Pope seconded by Mr. H. I. Keyser, Mr. Frick's resignation was accepted.

On motion of Mr. Geo. A. Pope, seconded by Mr. H. I. Keyser, Mr. R. Brent Keyser was elected to Mr. Frick's position as Director in this Co., and Mr. Keyser being present took his seat as Director.

Mr. Clendenin offered his resignation as secretary of the Co. to take effect Tuesday, June 18th, and on motion of Mr. R. B. Keyser, seconded by Mr. H. I. Keyser, same was accepted.

On motion of Mr. Geo. A. Pope, seconded by Mr. H. I. Keyser, Mr. Albert H. Weld was elected to succeed Mr. Clendenin as secretary of the Co.

On motion,

Adjourned.

JOS. CLENDENIN, Jr., *Sec'y.*

Board of Directors as of this date, Frank E. Simpson, Wm Keyser, H. Irvine Keyser, George A. Pope, R. Brent Keyser.

JOS. CLENDENIN, Jr., *Sec'y.*

[Exhibit 19, April 23, 1903. G. C. B.]

Baltimore, Md., *June 20th*, 1895.

A special meeting duly called of Board of Directors in this company was held at company's office.

Present, Messrs. Frank E. Simpson, H. Irvine Keyser, George A. Pope and R. Brent Keyser.

260 Mr. R. Brent Keyser moved, and Mr. Simpson seconded that Mr. Pope take the chair.

The minutes of the last meeting were then read and approved

Mr. Simpson moved and Mr. R. B. Keyser seconded the following resolution:

Resolved that the dividend paid by the President on June 19th, being dividend No. 28 for 26%—$130,000.00 be, and the same is hereby approved by the board of Directors—which motion was carried.

Mr. Simpson then moved and Mr. H. Irvine Keyser seconded the following Resolution:

Resolved that any right, title or interest this company may have in any claim or claims vs. the Societe des Metaux, the Comptoir d'Escomptes, or Moreau, the Liquidateur of the Comptoir d'Escomptes be sold and assigned to Wm. Keyser for $100 with full power to him to collect and receipt for any moneys coming to this company from said claim. Approved.

Mr. R. Brent Keyser then handed in the resignation of Mr. H. Irvine Keyser as a director, to take effect at once.

On motion of Mr. Frank E. Simpson duly seconded Mr. Keyser's resignation was accepted.

Mr. R. B. Keyser moved and Mr. Simpson seconded the nomination of Leonard Lewisohn to Mr. Irvine Keyser's position as Director in this company.

Mr. Lewisohn was duly elected, and, being present, took his seat.

Mr. Frank E. Simpson then tendered his resignation as a Director to take effect at once and on motion of Mr. Keyser duly seconded Mr. Simpson's resignation was accepted.

On motion of Mr. R. Brent Keyser seconded by Mr. Leonard Lewisohn, Mr. A. S. Bigelow was elected to Mr. Simpson's position as a Director in this company.

Mr. Pope then read Mr. William Keyser's resignation as President of this Company to take effect at the pleasure of the Board of Directors.

On motion duly seconded Mr. Keyser's resignation as president was accepted.

On motion of Mr. R. B. Keyser, seconded by Leonard Lewisohn, Mr. A. S. Bigelow was unanimously elected to succeed Mr. William Keyser as president of the company.

Mr. R. Brent Keyser's resignation was then handed in as treasurer of this Co.

On motion duly seconded Mr. Keyser's resignation as treasurer was accepted.

On motion of Mr. R. Brent Keyser, duly seconded, Mr. Leonard Lewisohn was unanimously elected to succeed Mr. R. D. Keyser as treasurer of the company.

261 Mr. Weld offered his resignation as secretary of the Co. to take effect at the end of this meeting. On motion of Mr. R. B. Keyser, duly seconded, same was accepted.

On motion of Mr. Leonard Lewisohn seconded by Mr. R. Brent Keyser, Mr. A. W. Evarts was unanimously elected to succeed Mr. Weld as secretary of the company.

Mr. Lewisohn then moved and Mr. Keyser seconded the following resolutions:

Resolved that the resignation of Messrs. William Keyser, R. Brent Keyser and George A. Pope as directors now tendered in writing, be received and filed, and that the gentlemen be requested — retain their offices for the present.

On motion,

Adjourned till three o'clock this afternoon.

ALBERT H. WELD, *Sec'y.*

Board of Directors as of this date. A. S. Bigelow, Leonard Lewisohn, William Keyser, R. Brent Keyser, George A. Pope.

ALBERT H. WELD, *Sec'y.*

June 20th, 1895.

Upon reassembling at 3 o'clock June 20th, 1895, pusuant to adjournment, with Mr. Pope in the chair, there was present Messrs. Pope, Lewisohn and R. Brent Keyser.

On motion of Mr. Lewisohn the following resolution was duly passed.

Resolved that Mr. William Keyser be requested to send to Mr. N. S. Berray the Superintendent of the company at Globe, Arizona, a telegram as follows:

"The management of the Old Dominion Company has today been turned over to the proposed purchasers. Report to A. S. Bigelow, Sears Building, Boston, as President. The company, Mr. Simpson assenting, desires you to retain position as superintendent and agent until early July. Please confirm to Boston. Wm. Keyser."

The meeting then adjourned.

A. W. EVARTS, *Sec'y.*

262 [EXHIBIT 20, MAY 5, 1903. G. C. B.]

Whereas A. S. Bigelow has contracted to purchase eighty-nine hundred and twenty-eight (8928) shares of the stock of the Old Dominion Copper Company, a Corporation organized under the laws of Maryland, and owning property in Arizona, at Forty dollars ($40) per share, or thereabouts, the undersigned hereby agree to take the number of shares set opposite their respective names and pay for the same at the rate of Forty dollars ($40) per share; the said stock to remain in the hands of A. S. Bigelow, and the management of the property to be left with him.

Payments to be made as follows:—

May 27th 1895, fourteen per cent (14%).

July 26th 1895, Twenty-eight and two thirds per cent (28⅔%) and interest at 5% from date of first payment.

August 25th 1895, Twenty-eight and two thirds per cent (28⅔%) and interest at 5% from date of first payment.

September 25, 1895, Twenty-eight and two thirds per cent (28⅔%) and interest at 5% from date of first payment.

The conditions, covenants and agreements herein contained shall be binding on the substitutes, successors, heirs, representatives and assigns of the respective subscribers hereto.

In witness whereof we have hereunto set our hands and opposite thereto the amounts of our subscriptions respectively, this 22d day of May A. D. 1895.

MATTHEW LUCE	$100,000
A. S. BIGELOW	50,000
J. A. CORAM	$100,000
HENRY M. WHITNEY	$50,000
J. MORRIS MEREDITH	$25,000
	(in pencil)
THOMAS NELSON	32,142.50
(in pencil)	357,142.50

263 [EXHIBIT 21, MAY 5, 1903. G. C. B.]

[Telegram.]

Boston ms 25.

To Lewisohn Bros. Co.

Keyser does not care to consult other owners two sevenths until option is acted upon, assures me if sale is made there will be no captious opposition nor any delay in transfer of property control to new owners. If you get telegram from Hyams tomorrow cannot you repeat to me Somerset Club Boston there is so little time. Show this to Beaman.

J. MEREDITH.

[EXHIBIT 22, MAY 5, 1903. G. C. B.]

Copy of Certificate of Incorporation.

Know all men by these presents, that we William F. Frick, John S. Gilman, George A. Pope, R. Brent Keyser, Joseph Clendenin, Jr., Frank E. Simpson and Wm. Butler, being citizens of the United States, and a majority of whom are citizens of the State of Maryland do hereby certify that we do, under and by virtue of the General Laws of this State, authorizing the formation of corporations, hereby form a corporation under the name of "The Old Dominion Copper Company of Baltimore City."

2. We do certify further, that the said corporation so formed, is a corporation for conducting any kind of mining business in this State and for selling or otherwise disposing of the products of said business; and also, for washing, dressing, smelting and otherwise preparing for and bringing to market and selling the ores of all kinds of metals, that the term of existence of the said corporation is limited to forty years; and that the said corporation is formed upon

the articles, conditions, and provisions herein expressed, and subject in all particulars to the limitations relating to corporations, which are contained in the General Laws of this State;

3. We do further certify, that the general operations of the said corporation are to be carried on in the State of Maryland and that the principal office of the said corporation will be located in Baltimore City.

4. We do further certify, that the aggregate of the capital stock of the said corporation is Five hundred thousand Dollars and that the said capital is divided into twenty-five thousand shares of the par value of twenty dollars each;

5. We do further certify, that the said corporation will be managed by five Directors and that William F. Frick, John S. Gilman, R. Brent Keyser, Frank E. Simpson and William Butler are the names of the Directors who will manage the concerns of the said corporation for the first year.

264 In witness whereof, we have hereunto set our hands and seals this first day of December in the year eighteen hundred and eighty-seven.

WILLIAM F. FRICK.	[SEAL.]
JOHN S. GILMAN.	[SEAL.]
GEORGE A. POPE.	[SEAL.]
FRANK E. SIMPSON.	[SEAL.]
R. BRENT KEYSER.	[SEAL.]
JOSEPH CLENDENIN, JR.	[SEAL.]
WILLIAM BUTLER.	[SEAL.]

Witness as to Wm. F. Frick, John S. Gilman, Geo. A. Pope, Frank E. Simpson, R. B. Keyser & Jos. Clendenin, Jr.

JOHN G. MADDOX.

and as to Wm. Butler.

CHAS. HALL ADAMS.

STATE OF MARYLAND,
Baltimore City, to wit:

Before the subscriber, a Justice of the Peace of the State of Maryland, in and for the City of Baltimore, personally appeared on this First day of December eighteen hundred and eighty seven Wm. F. Frick, John S. Gilman, George A. Pope, Frank E. Simpson, R. Brent Keyser and Joseph Clendenin, Jr., and did severally acknowledge the foregoing certificate to be their act and deed.

JOHN G. MADDOX, *J. P.*

STATE OF MASSACHUSETTS,
County of Suffolk, ss:

Before me, Charles Hall Adams, a Commissioner of the State of Maryland residing in the City of Boston and State of Massachusetts, on this sixth day of December A. D. 1887 personally appeared Wil-

liam Butler and acknowledged the foregoing certificate to be his act and deed. In witness whereof, I have heerunto set my hand and affixed my official seal at my office No. 5 Court street in the city of Boston, in the County of Suffolk and State of Massachusetts, this sixth day of December A. D. eighteen hundred & eighty seven.

[SEAL'S PLACE.] CHARLES HALL ADAMS,
Commissioner of the State of Maryland.

I, William A. Stewart, one of the Judges of the Supreme Bench of Baltimore City, do hereby certify that the foregoing certificate has been submitted to me for examination; and I do further
265 certify that the said certificate is in conformity with the provisions of the law authorizing the formation of said corporation.

WILLIAM A. STEWART.

STATE OF MARYLAND,
City of Baltimore, set:

I hereby certify, that the aforegoing is a true copy, taken from the "original" filed for record on the 27th day of December A. D. 1887 at 10.50 o'clock A. M.

In testimony whereof, I hereto set my hand and affix the seal of the Superior Court of Baltimore City this 27th day of December A. D. 1887.

JAS. BOND,
Clerk of the Superior Court of Baltimore City.

[Seal of the Superior Court of Baltimore City in the 8th Judicial Circuit of Maryland.]

At a meeting of the Corporators of the Old Dominion Copper Company of Baltimore City, held in the City of Baltimore on the 29th day of December in the year 1887, at 12 o'clock, pursuant to adjournment, the committee appointed at the previous meeting to obtain subscriptions in cash to the capital stock of the Company, reported that they had performed the duty assigned to them and procured subscriptions to the same in full.

The committee delivered to the chairman the subscription list which they had obtained, and a copy of the same was ordered to be entered on the minutes of this meeting, which is done accordingly, as follows:

We, the undersigned, do hereby subscribe for the number of shares set opposite our names respectively, of the capital stock of The Old Dominion Copper Company of Baltimore City, chartered by a certificate of incorporation, recorded in the office of the Clerk of the Superior Court of Baltimore City, on the 27th December 1887.

And we do hereby, each of us, agree to pay in cash for the number of shares, subscribed by us respectively, at the rate of $20 per share,

whenever such payment may be called in by the Board of Directors of the Company.

WM. F. FRICK	1000	Shares	$20,000 00
GEORGE A. POPE	250	"	5,000 00
FRANK E. SIMPSON	7500	"	150,000 00
WILLIAM BUTLER	7500	"	150,000 00
JOHN S. GILMAN	7500	"	150,000 00
R. BRENT KEYSER	1000	"	20,000 00
JOSEPH CLENDENIN, Jr.	250	"	5,000 00
	25000	Shares	$500,000 00

266 The chairman then reported to the meeting that he had received a written offer from William Keyser of Baltimore to sell and convey to the company, in consideration of $400,000 certain valuable mine property, and from the executors of Michael H. Simpson of Boston a written offer, in consideration of $50,000.00 to sell and convey to the company, certain other mine property adjoining the former, and recommended that the same should be submitted to a regular called meeting of the stockholders of the company, for their consideration and action.

Whereupon it was, on motion, unanimously,

Resolved, that a meeting of the stockholders of the company should be called to be held on the succeeding day at 12 o'clock, for the consideration of said propositions, and such other matters as might be brought before them.

On motion the meeting adjourned.

JOSEPH CLENDENIN, Jr., *Secretary.*

I hereby certify that the foregoing is a true copy of the original deposition of Albert S. Bigelow taken before me in the case of Old Dominion Copper Mining and Smelting Co. v. Frederick Lewisohn et al. pending in the Circuit Court of the United States for the Southern District of New York, and of the exhibits annexed thereto.

[SEAL.] HOWLAND TWOMBLY,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
220 DEVONSHIRE ST., BOSTON, *March* 27, 1903.

Deposition of Godfrey M. Hyams.

GODFREY M. HYAMS, Esq., being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by L. D. Brandeis, Esq., counsel for plaintiff, deposes and says,—

Q. 1. Please state your full name, age, residence, and occupation.

A. Godfrey M. Hyams; forty-six years; Boston; manager.

267 Q. 2. Please state fully what your connection has been with Mr. A. S. Bigelow, and how long that connection has existed.

A. Well, I first became connected with Mr. Bigelow in the days of the old Santa Fé Mining Company in 1885 or 1886; at any rate, it was before the early '90s; then I had nothing more to do with him. That was merely in a consulting way. Then I had nothing more to do with him until 1891. I was then hired by the Boston & Montana Company as consulting engineer, if you please, in regard to the Great Falls works which were then being built; from that time on I took over the direction of various other enterprises with which Mr. Bigelow was connected, and gradually became more and more of a personal representative of Mr. Bigelow as a sort of connecting link between the East and West. In addition to that, I have been a sort of confidential clerk, adviser, or whatever you may please, with Mr. Bigelow, and been interested with him in a great many investments.

Q. 3. You have had your office with him?

A. Yes.

Q. 4. Please state what, during this period, your connection and relations have been with Lewisohn Brothers or Leonard Lewisohn and the members of the concern.

A. Well, I have never had any official connection with any of them, but Mr. Leonard Lewisohn was interested financially, and was an officer, in a great many of the corporations with which Mr. Bigelow was identified. I got to know him in that way, and he asked my advice on a great many things, and in that sort of a natural growth I became more or less intimately connected with Mr. Leonard Lewisohn, and he asked my advice on all sorts of questions, and we became interested together in little investments and things of that kind; and it was just in that natural line of advice that I had anything to do with Old Dominion.

Q. 5. What was your first connection with the purchase or the proposed purchase by Mr. Lewisohn and Mr. Bigelow of the interest in the Old Dominion Copper Company of Baltimore City?

Mr. HEMENWAY: The defendants object to this interrogatory, and to all similar interrogatories, on the ground of their immateriality, irrelevancy, and on the ground that they are matters wholly between parties other than the parties to the suit, and in no way binding on the defendants in this action, in this suit.

A. Well, I positively cannot recollect how I first heard of it. My impression is—and I have no record to verify it, my impression—that I was at Lake Superior and got a telegram from Mr. Lewisohn asking me what I knew about the Old Dominion mine, or something of that kind; it is an impression, and nothing more. And I do not know—I am like the fellow who woke up in the morning and did not know what had happened over night—the next thing
268 that I remember is that I was in New York, and I think I went up to Mr. Lewisohn's house, and he told me that he thought he could get control of the Old Dominion property. I told him I did not believe it.

Q. 6. Is that all that happened?

A. Whether it all happened at that interview, I cannot tell. Within a very short time, my impression is it was within a day or two, I was on the train going out to look at that Dominion mine; and I remember going there and examining it, and meeting Mr. Colquhoun at some intermediate station, and hiring a train and going up to the mine, as far as we could towards the mine, and examining it; and taking another train and coming down and wiring to accept. Now I must have had,—I must have known what they were to accept, naturally; but I have no recollection of just how the details got to me; what I got or what I did not get.

Q. 7. Have you stated all that you recall in regard to the matter prior to your sending that telegram advising them to accept?

A. I think so, yes.

Q. 8. Have you that telegram?

A. No.

Q. 9. Do you recall the date of that telegram?

A. Why, it developed that it must have been on the 27th of May, if it was received on the 28th.

Q. 10. Have you in your possession any letters or papers, or copies of letters or papers, relating to the option to purchase, or the proposed purchase of interests in the Old Dominion Company of Baltimore City prior to May 27?

A. I have got some letters here. The reason I happen to have them is that I searched through my papers and found these papers, and I have no reason why I should have them rather than Mr. Bigelow or Mr. Lewisohn, but I have got them.

Q. 11. Will you now produce such letters as you have in your possession from Mr. Meredith?

Mr. HEMENWAY: It is understood that Mr. Lauterbach may object to this testimony as if personally present to make objection now.

Mr. BRANDEIS: You can put that at the beginning, if you like, or anywhere.

A.—

"BOSTON, *April* 30, 1895.

Leonard Lewisohn, Esq., Fulton St., New York.

DEAR SIR: Your favor of yesterday received. In accordance with your instructions of this morning over the telephone, I sent for Mr. Simpson, who was out of town, at his mill, and he only arrived late

this afternoon, too late to consult you or any one. I found it harder than I supposed to pin him down. He showed a strong desire
269 before committing himself, to consult with some one, and, as he stated it, that giving an option might ruin another negotiation under way. My reply was that it appeared that he had got to ruin one or the other; that my instructions were to settle the matter forever at my first interview; and that I would not allow him even to use the long distance; if I left without a bond, he would be sure he never would hear from my people again. My acquaintance with him permitted me to be a little more severe with him than otherwise. After two hours, he has given me a bond, copy of which I enclose. We had to write it ourselves, as neither of us wanted to leave the other for fear of the long distance. If any of the details of the form are very objectionable, wire me tomorrow 'Form of bond impossible' and send me by night's mail a form provided by your lawyer, and I will try to get him to change it. Mr. Simpson is a fair-minded man, and I believe he will be perfectly reasonable with me. He goes West in two days, leaving his power of attorney at his office. He says that the company has got on hand an actual surplus of over $350,000 in copper, cash and notes receivable which are undeclared dividends, and that he will not include those in the sale. He has nothing else connected with this company except an interest in the store, which is a private enterprise. The provision for delay in transfer is because it might turn out that he would have to apply to the Probate Court. But there is no one to consult but himself. I think some of your warm friends in the street will be much troubled if this sale is completed. You may send me your check for $2000. He expects an expert to be sent by me down to the mine so as to report within fourteen days. You will know if this is necessary. He has no idea who my people are. If I have done wrong in any thing correct me. It was a difficult matter.

Yours very truly,

J. MORRIS MEREDITH."

Another letter from Meredith to Lewisohn, dated May 1, 1895, written from the Somerset Club, Boston:

"Leonard Lewisohn, Esq., Fulton St., New York.

DEAR SIR: Your favor over the telephone today was duly received. Mr. Simpson, not feeling very well, did not come to town today, so this afternoon I had to go out to his house at Saxonville to see him. My form of bond was of course unsatisfactory, but knowing him to be a thoroughly honorable man, and having
270 asked him verbally about many of the points you suggest, I deemed it better to lock him in with an unsatisfactory bond, rather than to let him talk to Baltimore, and I still think I was right. He shows every willingness this afternoon to put the bond in any form that is absolutely fair. He agrees that of course the corporation of which you buy the shares owns all the mines, smelters, furnaces, buildings, mining tools and other appurtenances, also all the ores on dump or in process, copper bottoms, and so forth,

and that all he wishes to reserve from the sale is any finished copper product, such as pig copper or ingot copper, cash or notes receivable which have been in the company's possession before this time, the total not to exceed in any case over $350,000, so-called company surplus. The clause about legal delivery of the stock from his father's estate was put in by prudence. Tomorrow I consult an attorney as to whether it is not in his power to absolutely deliver it. I think it is. He agrees with me that this must be put in such shape that no outside influence can interfere; but, when it comes to terms, he not knowing, you understand, who my people are, refuses longer time, in doing away with satisfactory endorsements; as he expresses it, he either runs the mine or sells it; and $100,000 cash is nothing to him if he loses the control of the mine and then has to take it back. He remarks that if my people are as strong as I state them, the terms named are ample. He agrees to be in New York with me on Friday and sign any new bond from which day the fourteen days shall run, but insists that he must go West Friday night and that after that day he cannot change the terms of the bond. Therefore you must consult your attorney and have him ready on Friday to prepare a bond, and I can again see Mr. Simpson without his disclosing you in the matter at all.

Telephone me tomorrow if this is all right, and I will wire you about his father's will. I should not be surprised if he believes the purchasers to be Anaconda and Calumet & Hecla, who buy to whip Montana and Tamarack.

Yours very truly, J. MORRIS MEREDITH."

May 6 is the next one from Mr. Meredith as follows:

"BOSTON, *May* 6, 1895

Leonard Lewisohn, Esq., Fulton St., New York.

MY DEAR SIR: Mr. Butler did not find Mr. Keyser at Old Point Comfort and was to follow him to Baltimore hoping to return
271 to Boston tomorrow morning. I have secured the third executor's signature to the option, and have written Mr. Beaman to that effect. Mr. Bigelow has agreed to let me have, or rather take and pay for a small share of his interest in this venture. I only mention this to show my desire to aid your side of the copper business. I think I can help you on the railroad situation with Mr. Huntington. His private secretary, Mr. Tweed, formerly a partner of Evarts, Southmayd & Choate, I have known for years, and our relations are always of the pleasantest. Mr. Johnson wires me that the senior of the banking house cannot be reached for a day or two more. I will consult with you on this on Wednesday when I shall be in New York. Tonight Mr. Hyams is to coach me thoroughly on the railroad situation. My rough idea is to try and get a five years' contract before the option is closed. It will greatly strengthen the situation and enhance the value of the property. But we will talk this over when I meet you.

All comes to those who know how to work for it. Believe me,

Yours truly, J. MORRIS MEREDITH."

"BOSTON, *May* 7, 1895.

Leonard Lewisohn, Esq., P. O. Box 1247, New York.

DEAR SIR: Your favor of yesterday enclosing check to my order for the $2000 paid out by me under agreement of May 4, received with thanks. I shall hope to see you tomorrow, and will call at the office. My hotel will be the Waldorf.

Yours very truly,

J. MORRIS MEREDITH."

The only other letter I have is one of June 12, which we will get around to in time.

Q. 12. Well, you might as well read that, and then we will have them in order. Have you any letters from J. Morris Meredith, or copies of letters to him, relating to Old Dominion matters, covering the period from April 1 to July 1?

A. A letter from J. Morris Meredith to Leonard Lewisohn:

"BOSTON, *June* 12, 1895.

Leonard Lewisohn, Esq., of Lewisohn Brothers, Fulton St., New York.

DEAR SIR: Your favor of the 11th instant received and is satisfactory excepting, of course, that my deviation from the pres-
272 ent basis of arrangement would throw me back on my rights under my commission contract unless we make another arrangement. I hope you will get the two-sevenths.

Yours very truly,

J. MORRIS MEREDITH."

"BOSTON, *June* 10, 1895.

Leonard Lewisohn, Esq., of Lewisohn Brothers, Fulton St., New York.

DEAR SIR: According to our understanding by telephone today, I am to have, for surrendering all claim to commission on the two-sevenths minority stock in the Old Dominion Copper Co. deal, fourteen four hundred and fifty third (14 453) parts of any profit coming to you, or those under you, taking the four hundred and fifty three one thousandths (453/1000) interest in the entire deal, and I also get for the same reason a similar interest of $15,000 in the Boston pool profits. Kindly write me a line agreeing to this.

Yours very truly,

J. MORRIS MEREDITH.

J. S.—This is what Messrs. Bigelow and Nelson think is fair, and it was suggested by them."

"JUNE 11, 1895.

J. Morris Meredith, 15 Congress St., Boston.

DEAR SIR: Yours of the 10th instant received and contents noted. Provided we are able to secure the two-sevenths interest from Mr. Keyser at a proportionate price to that at which we secured the

five-sevenths from Mr. Simpson, of which we individually are to get one-third and Mr. Bigelow and his people two-thirds, we agree to the payment to you of fourteen four hundred and fifty thirds (14 453) of the profits coming to us or to those taking the four hundred and fifty three one thousandths (453 1000) interest in the entire deal—this in consideration of the fact that Mr. Keyser will not pay the commission and provided the arrangement goes through on the present basis without any material modification.

Very truly yours,

LEWISOHN BROTHERS.

———, *General Manager.*

L. L."

Q. 13. Have you any letters from William Keyser, or copies
273 of letters to him, relating to Old Dominion matters, covering the period from April 1 to July 1?

A. A letter from William Keyser to Leonard Lewisohn, dated—

"BALTIMORE, *May* 11, 1895.

Mr. Leonard Lewisohn, New York City.

DEAR SIR: I have your favor of the 13th instant, also your telegram in regard to description of the Old Dominion Copper Company's property. The deeds, etc., sent you were forwarded by express and not by registered mail. The package you have received therefore is the only one sent you. I enclose a list of the property at Globe which I trust will give you the information desired. As stated in my letter of the 11th instant the records and details covering the smaller pieces are in the company's office at Globe, and your representative when there can obtain full information from Mr. Bersay, our superintendent. I trust this will give you all the information you desire. If not, I will send you such information as I can.

Yours truly,

WILLIAM KEYSER."

Attached to that is the following:

"List of Property Owned by the Old Dominion Copper Company at Globe, Gila County, Arizona.

Globe Ledge Mine, patented.
Globe Mine, patented.
Southwest Globe Mine, (deed at Globe).
Hidden Globe Mine (record at Globe).
The Interloper Mine.
The Southeast Globe Mine.
Fraction Mine.
Hypatia Mine.
Alice Mine.
The Southeast Globe mill site. } Property on which smelting
The Interloper mill site. } works is situated.
The Hidden Globe mill site. }
Hypatia mill site. } Property on which the Isabella
Alice mill site. } mill site was formerly situated.

Private road leading from the main county road opposite
274 the Southwest Globe mill site to the company's smelting plant.
Saw mills, tools and logging roads, etc., on Pinal mountains."

The next letter I have is a copy of a letter from Mr. C. C. Beaman to William Keyser, Esq., Baltimore, Md.:

"JUNE 14, 1895.

William Keyser, Esq., Baltimore, Md.

DEAR SIR: Referring to the memorandum we sent you yesterday signed by Lewisohn, we understand, of course, that the words 'as of May 20th' which you suggest mean that the old stockholders are responsible only for obligations made prior to May 28th, at the same time we understand that you have not, as managers of the company, since May 28, done anything in the way of making obligations or debts of any kind except such as relate to the ordinary every-day working and operation of the mines, the idea being that when Lewisohn takes the property on the 20th of June he will be responsible for no debts prior to May 28th, and that there have been no debts between May 28 and June 20 except such as the ordinary and usual operation of the mines necessitate. Please confirm this understanding.

We understand that you are to arrange to have your stock on deposit with the Old Colony Trust Company of Boston on Wednesday or Thursday next. If you will have it there on Wednesday, Lewisohn will arrange to make his payment so that you can arrange for telegraphic communication from the Old Colony Trust Company on Thursday that the payment has been made and the notes delivered.

Yours very truly,

C. C. BEAMAN."

"BALTIMORE, *June* 19, 1895.

Mr. Leonard Lewisohn, New York City.

DEAR SIR: I have your favor of the 18th instant, and have written the Old Colony Trust Company in accordance with your request contained therein as per enclosed copy.

Yours truly,

WILLIAM KEYSER.

P. S.—This covers only the stock purchased from me. Mr.
275 Bigelow will doubtless have no trouble in obtaining whatever authority is necessary from the Simpson executors in Boston, it being necessary that any instructions in connection with their stock should come from them."

"BALTIMORE, *June* 19, 1895.

Old Colony Trust Company, Boston Mass.

GENTLEMEN: Referring again to my letter of instructions of the 17th of June, you are hereby authorized to deliver to Leonard Lewisohn the 7118 shares of stock of the Old Dominion Copper Company

of Baltimore City upon the payment of the last note mentioned therein. The understanding is that I have sold the stock to Mr. Lewisohn subject to the payments mentioned in our agreement of June 13, and subject to its being held as collateral until the payment of the last note, after which time I have no further interest in the stock. I was under the impression that my letter of the 17th instant, taken in connection with the copy of the agreement sent you made this point clear, but write this at the request of Mr. Lewisohn to avoid any misunderstanding.

WILLIAM KEYSER,
pp. R. BRENT KEYSER."

"BALTIMORE, *June* 20, 1895.

Mr. Leonard Lewisohn, New York City.

DEAR SIR: Referring to the notes to be given to me today in payment for my two-sevenths of the interest in the stock of the Old Dominion Copper Company, I hereby agree that the said notes shall be held by me during the time of their existence, and not negotiated.

Yours truly,

WILLIAM KEYSER,
pp. R. BRENT KEYSER."

Q. 14. Have you any letters from Frank E. Simpson, or copies of letters to him, relating to Old Dominion matters, covering the period from April 1 to July 1, 1895?

A.—

276 "BALTIMORE, *May* 13, 1895.

Mr. Leonard Lewisohn, of Lewisohn Brothers, New York City.

DEAR SIR: I am just in receipt of your telegram as follows:

Hope to receive by tomorrow list of debts, claims, etc., as per clause fifth of agreement.

LEWISOHN BROTHERS.

By referring to clause fifth of the agreement I see that the property is sold free from all debts, claims, liens or mortgages, and that there are no outstanding contracts between it and any other person or corporation except as stated in the list thereof to be furnished to the said Mr. Meredith. I beg to say that, as stated by Mr. Butler in his communication to you on Friday last, there are no claims, liens, mortgages or outstanding contracts with any person or corporation and that therefore under this clause there is no list to be sent.

Yours very truly,

FRANK E. SIMPSON."

"MAY 14, 1895.

Mr. Leonard Lewisohn, Lewisohn Brothers, New York.

MY DEAR SIR: In reply to your telegraph of yesterday, sent to Baltimore, I would say that having just returned from the West I fear it will be impossible for me to accompany Mr. Hyams on his trip

to Globe, but I do not think that I should have been of any assistance to him; he will find everything open for inspection.

Yours very truly,

FRANK E. SIMPSON."

The WITNESS: Now this appears to be the original deed of assignment, Meredith to Leonard Lewisohn, dated the 4th day of May, 1895.

Q. 15. I will ask you whether you have the original assignment from Meredith to Leonard Lewisohn of the option of May 4?

A. Yes [producing the paper].

[The original assignment, Meredith to Leonard Lewisohn, of the option of May 4 is marked "Exhibit 2A, G. C. B., March 27, 1903."]

[For text, see Exhibits.]

277 The WITNESS: This [referring to a paper] appears to be a copy of an option which Lewisohn was advised to sign, agreeing to take the two sevenths of Keyser's at the same price, within sixty days after it was offered.

[This copy of an option, signed by Lewisohn, was marked "Exhibit 7A, G. C. B., March 27, 1903."]

[For text, see Exhibits.]

The WITNESS: The next thing appears to be the Old Dominion Copper Company's statement of June 19.

[This statement was marked "Exhibit 11, G. C. B., March 27, 1903."]

[For text, see Exhibits.]

Mr. HEMENWAY: That is objected to on the ground that it does not appear to be made by anybody or addressed to anybody, or where it came from. It is immaterial, and is not competent proof of anything

Q. 16. How do you happen to have in your possession the various letters to Lewisohn or Lewisohn Brothers, which you have produced, and the original papers which you have produced?

A. I have already answered that by saying how I got those papers: that I found them in the back of a drawer in my desk, and they were done up in a piece of paper, and they were given to me at some time; the probability is they were given me at some time when I was in New York to bring over to Boston. I carefully brought them over and put them in the drawer, and they got side-tracked.

Q. 17. How long have they been in your possession?

A. I should imagine, from the amount of dust on the package, that they had been there a long, long time. You can see they are not in relation to any one particular thing, but they were a lot of papers in a bundle tied up with a string.

Q. 18. Are those papers which you have produced the only papers which you found in that bundle?

A. Those papers, as far as I recollect, are everything I found in that bundle; at least, that is all I have.

Q. 19. Have you now produced in evidence, during your deposition, everything that you have found?

A. Yes, sir.

Q. 20. Were there not some letters subsequent in date to July 1 which were in the same package?

A. Haven't I read them?

Q. 21. No, you have not.

A. Well, do you want me to look through and see?

Q. 22. I want you to look through and see that your answer is correct; that is all. Were there not some letters subsequent
278 in date, relating to the Old Dominion Copper Company purchase, the organization of the syndicate, the organization of the Old Dominion Copper Mining & Smelting Company, or subscriptions to the syndicate or to the company, which were in that same package, and which are now in your possession?

A. I probably got other letters later than July 1; I have probably got them in here,—yes, in my letter book.

Q. 23. But you have produced everything that you have found in that package? What letters have you, subsequent to July 1, if any, from Leonard Lewisohn or Lewisohn Brothers, or any member of that concern? Just let me see if I am right. You testified you had no letters whatever from Lewisohn up to July 1: that is right?

A. I have got a letter from Leonard Lewisohn, dated July 3, as follows:—

"NEW YORK, *July* 3.

Mr. G. M. Hyams, Boston, Mass.

DEAR SIR: Please find enclosed herewith copy of letter of Mr. R. Brent Keyser dated July 2, 1895; copy of letter of Mr. William Keyser dated July 2, 1895.

Yours very truly,

LEWISOHN BROTHERS
L. LEWISOHN,
General Manager.

First, copy from R. Brent Keyser.

BALTIMORE, *July* 2, 1895.

Mr. Leonard Lewisohn, New York City.

MY DEAR SIR: We confirm our telephone conversation this morning, and in accordance with your request we have wired Mr. N. S. Berray at Globe to pay off all June pay-rolls as usual, drawing upon us here for the money, and as soon as we receive the draft we will advise you and you can then remit us. We will also forward to you the papers and documents in connection therewith should they come to us. We were under the impression from what Mr. Hyams said when he was here on the 20th that he would advise Globe in regard to this matter. In the meantime we were to pay any drafts that were drawn prior to said advice and charge same to your account. Not having heard from Globe, we supposed the matter had been arranged, and hence did nothing about it until this morning when we received advices that the June pay roll had not been provided for.

We will write you in regard to the Ladenburg, Thalmann
279 matter, and are writing you today in regard to the Commercial Company's affairs, as we agreed with you that it would be well to get these matters settled if possible before your departure.

Yours very truly,

R. BRENT KEYSER."

"BALTIMORE, *July* 2, 1895.

Mr. Leonard Lewisohn, New York City:

DEAR Mr. LEWISOHN: I write you in reference to the Old Dominion Commercial Company of Globe, thinking that you and your friends might like to purchase the stock and operate the concern which during the few years it has been in existence has been very profitable to the owners, besides being of considerable assistance to the Old Dominion Company. The capital stock of the concern is $22,500, one-third of which is owned by Mr. Simpson and myself, the balance—two-thirds—being owned by our officers and their friends in Globe. The profits earned have been as follows:

1891	$22,000
1892	19,000
1893	18,500
1894	15,800

The reduced amounts in the past two years being caused by the curtailment of the operations of the copper company. With a concern operated on the basis upon which you will doubtless start your new company, I think there is no doubt but that the profits would be larger, and that the advantage to your copper organization would be very material. The company has been used as a general banking place by the men, the cash deposits without interest being from $15,000 to $30,000; in addition to which we have paid off at the store and availed ourselves of their assistance when currency was scarce. The assets at the present time are:

Cash on deposit	$20,326 26
Bills receivable	836 86
Outstanding accounts	7,522 29
Lumber yard	500 00
Stock at lumber yard	2,000 00
Merchandise stock, say	30,000 00
	$61,187 41

280 And liabilities:

Capital stock	$32,500 00	
Due depositors	18,048 70	40,548 70

This estimate would be improved by careful inventory so that the stock at the present time could be converted into cash by closing out the business at about 200 per cent of its face value. The business is

well organized and equipped, and has, I think, the good will of the larger part of the community. We have given a good deal of attention in organizing it, and would not sell it except that we do not care to have such a small interest so far from home. We think the business should be worth, as it stands, $50,000. If you would like to buy the stock upon this basis, we can, we think, control and turn the organization over to you in its present effective condition promptly.

Yours very truly,

WILLIAM KEYSER."

Mr. BRANDEIS: Well, I do not think that has anything to do with our inquiry. Do you want it in?

Mr. HEMENWAY: I would just as soon have it go in.

[The witness produced a number of letters: one dated July 8, 1895, from Adolph Lewisohn to Hyams concerning Trippel; another from Adolph Lewisohn to Hyams, dated July 8, 1895, enclosing letter from James Colquhoun, dated Clifton, Ariz., July 3, together with copies of several bills therein mentioned, and at the request of counsel reads the following:]

"Nov. 26, 1895.

Mr. G. M. Hyams, Boston, Mass.

DEAR SIR: Confirming our conversation over the telephone this afternoon, we have looked up the papers and find the information given us by our clerk was wrong. According to the document amongst our papers, 'order of procedure for Thursday, June 20th,' we find that June 20th was the date on which the transfer of Mr. Keyser's two-sevenths interest was transferred. We believe you have copies of all the papers, and you will doubtless find this paper amongst the same if you need it.

Very truly yours,

LEWISOHN BROTHERS,
A. LEWISOHN, *General Manager.*"

281 Q. 24. Have you, in your possession, any letters from any of the subscribers to the Old Dominion Syndicate or to the stock of the Old Dominion Copper Mining & Smelting Company, relating to the syndicate, its operations or subscription to the stock of the company?

A. None except what have already been read. I have these in my possession.

Q. 25. You mean those have been already read in the deposition of Mr. Bigelow?

A. In the deposition of Mr. Bigelow. Here are the letters which were taken out of the Old Dominion letter files. [Shown to Mr. Brandeis.]

Q. 26. Have you, in your possession, the letters which were taken out of the Old Dominion Copper Mining & Smelting Company letter files before their delivery to the new management?

A. I have.

[The witness produces a file of letters from Which plaintiff's counsel takes the following, which he requests him to read:]

The WITNESS: [Reading:]

"JULY 23, 1895.

A. S. Bigelow, Esq.

DEAR SIR: I send to you by express today the minute book and secretary's files of the Old Dominion Copper Company of Baltimore City of which I was recently the secretary.

Yours very truly,

A. W. EVARTS.

To A. S. Bigelow, Esq., 199 Washington St., Boston Mass."

"NEW YORK, *Dec.* 6, 1895.

Thomas Nelson, Esq., Treasurer Old Dominion Copper Mining & Smelting Co.

DEAR SIR: We enclose herewith a bill against the Old Dominion syndicate for professional services and abstracts which we send at the request of Messrs. Lewisohn Brothers of this city.

Yours very truly,

EVARTS, CHOATE & BEAMAN."

"DEC. 9, 1895.

Thomas Nelson, Esq., Treasurer Old Dominion Copper Mining & Smelting Co., 199 Washington St., Boston.

DEAR SIR: We beg to acknowledge the receipt of your favor of Dec. 7 in reference to the sub-division of our bill for profes-
282 sional services rendered to the Old Dominion syndicate. Our Mr. Beaman who has this matter particularly in charge is now absent in the West and is not expected here again until Saturday next, when your letter will be handed to him for his personal attention.

Yours very truly,

EVARTS, CHOATE & BEAMAN."

"DEC. 18, 1895.

Thomas Nelson, Esq., Treasurer Old Dominion Copper Mining & Smelting Co., 199 Washington St., Boston.

DEAR SIR: Replying to your letter of Dec. 7th, in reply to our letter of the 6th, enclosing our account against the Old Dominion syndicate, we would say that our first employment in this matter was by Messrs. Lewisohn Brothers for account of syndicate, but that appears to be separate from Mr. Meredith's contract. Mr. Meredith's contract at that time was not in a condition satisfactory to us and we afterwards advised with Mr. Meredith and with Mr. Simpson and put the contract in such shape that it was afterwards found to be satisfactory and could not be avoided. We afterwards attended to the business of the syndicate in making the payments at Boston, and so forth, and afterwards in reference to the organization of the new company and the turning over of the property by the old company. We never, strictly speaking, considered Mr. Meredith

in any way a client, but on the other hand it may be very fair that between him and the syndicate he should pay part of our bill. Our charge for services to the syndicate, including services to Mr. Meredith, would be $5000; our charge for services in reference to the organization of the new company and the turning over of the property of the old company would be $2500. Speaking generally it would seem to us fair that the $5000 charged to Mr. Meredith and the syndicate the amount should be equally paid by Mr. Meredith and the syndicate; but as we have already stated, we never considered Mr. Meredith our client and have not felt justified in sending any bill to him. I am,

Yours very truly,

EVARTS, CHOATE & BEAMAN."

That is written by Mr. Beaman.

Q. 27. Have you at any time had access to the files of papers in the office or connected with the office, of Lewisohn Brothers relating to the Old Dominion Syndicate?

A. Not since.—well, before the death of Leonard Lewisohn.

2833 Q. 28. Has, so far as you know, everything, all papers relating to the Old Dominion Syndicate, the purchase of the Old Dominion Copper Company of Baltimore City, the Old Dominion Syndicate, and the organization, the subscription for stock in the Old Dominion Copper Mining & Smelting Company, which are in your possession or which were in the possession or control of Mr. Bigelow, been produced at this examination by you to-day or by Mr. Bigelow during the preceding days?

A. I have made a thorough search everywhere. Every paper that can be found, that we have or can get hold of, or that Mr. Bigelow can get hold of, has been produced at this hearing.

Mr. HEMENWAY: Has that indemnity bond been put in?

Mr. BRANDEIS: We will consider that as having been put in, and it will be marked "Exhibit 12, G. C. B., March 27, 1903."

[For text, see Exhibits.]

Q. 29. Were you yourself one of the subscribers to the Old Dominion Syndicate?

A. You mean on the paper? No, I was on no paper. [Inspecting.] No, sir; my name is not on the paper.

Q. 30. Did you contribute any money toward the purchase of the stock of the Old Dominion Copper Company of Baltimore City?

A. I think I was charged in my account with Lewisohn for part of that subscription. I had a running account with them for a great many years. I should have to get them to give me the facts.

Q. 31. Will you do that?

A. I will ask them, yes, sir.

Q. 32. You are going to go to New York yourself, so you can look it up.

A. Yes.

Q. 33. Now were you a subscriber to the stock of the Old Do-

minion Copper Mining & Smelting Company? If so, how many shares did you subscribe for and how many were allotted to you?

A. My name is down here for 4000 shares, and that is absolutely the extent of my knowledge; just how much I got, I have forgotten all about it, and do not know. Whatever I got, I probably sent right over to Mr. Lewisohn to be credited on my account, and I would probably have to get that same figure from them.

Q. 34. Did you have any part in the soliciting or receiving the subscriptions for the Old Dominion Copper Mining & Smelting Company stock?

A. Well, do you mean did I take a paper and go around with it? Because I do not know that any solicitation was ever made.

Q. 35. Well, the expression used was, "soliciting or receiving."

A. Whether I remember? I see I signed Mr. Lewisohn's name there, or Leonard Lewisohn's.

284 Q. 36. Have you any recollection?

A. They probably called me over the telephone, but, as for any recollection as to who I saw or what I did, I have no idea whatever.

Q. 37. Have you any recollection of any interviews or any conversations between Mr. Bigelow and any of the subscribers to the stock of the Old Dominion Copper Mining & Smelting Company?

A. No, not any.

Q. 38. Have you any recollection of any such conversations between Leonard Lewisohn, or Adolph Lewisohn, or Jesse Lewisohn, or any of the subscribers?

A. I have not the faintest idea, sir; I could not remember. That is eight years ago. I could not remember that.

Q. 39. Have you any recollection of anything that was done in connection with the purchase of the interest of the Old Dominion Copper Company of Baltimore City, or the operations of the syndicate, or the organization of the company, or the subscriptions to the stock other than what has been testified to by you or by Mr. Bigelow, or other than what has appeared by the papers which have gone in, in evidence?

A. Well, I would not want to answer that until I went over it and saw what there was, what I had done.

Q. 40. Do you recall anything now?

A. I do not recall what has been said, to tell the truth, right here in the last few days. I do not know how the thing would connect. I will tell you in the beginning. I cannot remember to-day, though I have been trying, ever since this thing started, to see how I first got into communication or connection with this thing. I cannot remember. I would like to read over. I see an expression in a letter there which you showed me from Lewisohn to me which has given me the idea that I was at an entirely different place.

Q. 41. You mean the letter of May 14?

A. Yes, which was sent to me.

Q. 42. Which indicated you were in the West at that time?

A. Yes. But I evidently went by the way of Great Falls. Now I would not like to say anything about it. I would like to read that

correspondence over to know where I stand, because I want to stand on what I say; I do not want to come back here a week after and say I recollected something that I had told you to-day I did not recollect.

Q. 43. You do not at the present time recall anything in regard to the purchase of the property or the operations of the syndicate or the organization of the company or the making of the allotment of the subscriptions that you have not testified to?

A. No, I do not want to say that I do.

Q. 44. I mean you do not now do it?

A. I have got sort of confused ideas I cannot correlate; that is absolutely the fact. I do not want to tell you I don not know
285 anything. I have ideas, and they do not match up with what I read in these letters.

Q. 45. To what points have you reference?

A. On the points of talking with Mr. Leonard Lewisohn and talking with Mr. Meredith. I see in a letter there that I was to post Mr. Meredith up about the railroad situation, that I had posted him. I should have gone on the stand and sworn I never said anything to him about it. I do not want to state that.

[The further taking of the deposition of this witness was suspended.]

[Adjourned to Friday, April 3, 1903.]

FRIDAY, *April* 10, 1903.

[The taking of the deposition of Godfrey M. Hyams was resumed at 10 a. m. at the office of Messrs. Brandeis, Dunbar & Nutter, 220 Devonshire St., Boston, Mass.]

Q. 46. Have you, since the adjournment of the taking of your deposition, found any other letters or papers in any way bearing upon the matter in controversy?

A. I have found no book or paper not already introduced in evidence; I have brought with me the record book of the Old Dominion Copper Company of Baltimore City which I had found at the time you requested me to bring the record book.

Q. 47. I call your attention to Int. 39 of your deposition and your answer thereto, which I will read:

"Q. 39. Have you any recollection of anything that was done in connection with the purchase of the interest of the Old Dominion Copper Company of Baltimore City or the operations of the syndicate or the organization of the company or the subscriptions to the stock, other than what has been testified to by you and Mr. Bigelow, other than what has appeared by the papers which have gone in evidence?

A. Well, I would not want to answer that until I went over it and saw what there was, what I had done * * *"

and ask you whether since the adjournment you have refreshed your recollection or otherwise been able to recall any such facts?

A. I have tried to piece out what I thought, what I remembered, and verify it by the letters and papers and other documents, and

think I am pretty clear; I know I am pretty clear as to my recollection of what happened in the beginning.

Q. 48. Well, do you recall any facts other than those that you have testified to?

A. Yes.

Q. 49. In what connection?

286 A. Well, in the first place, in connection with my original knowledge of the matter, and in connection with the furnishing of the money and with reference to the railroad situation. I have been able now to see, by going over all the correspondence and the letters, just the sequence of affairs, and have got considerable light on the matter in a systematic way.

Q. 50. Well, now will you state what you have been able to recall, following the order which you have indicated?

A. I was engaged in work at Lake Superior at some of our properties, and was called East about the end of April, and I had conversations with Leonard Lewisohn, and probably with Mr. Bigelow over the telephone. I find no letters from him in regard to the Old Dominion property, and the chance of its being valuable, and the desirability of taking an option or control of that stock, and the questions that would naturally be asked by a business man of an engineer who was supposed to know about mining properties. It is evident that I stayed in New York longer than I thought when I testified before. And I can remember now of meeting with Mr. Meredith before I went away to examine the property, and discussing with him the manner in which mining options were taken; something of that kind is in my mind; that we talked over the form of option, and whether it would be desirable to only get a controlling interest. I must have been in New York until after the option of May 4, and when that was obtained I evidently started West immediately to examine the property, but went by the way of Montana, for I find at least one letter on the train, one or two letters on the train, about the 14th of May. Evidently Mr. Simpson was to go with me to the property; that was the original plan. And, seeing that letter, that brought me back to remember of my talk with Mr. Meredith as to the form of the option. And I told him at the time that the property had always been very closely held and information was very hard to obtain, and I did not really think that unless one of the owners was on the ground I would get very much insight into the actual conditions. That seems to me to clear up pretty well the hiatus that existed in my mind as to how I came into connection with this thing, how I got started, and how those letters happened to be dated as they were. After I returned, which must have been later than the 1st of June, for there is a telegram referred to by me in Globe as of the 27th of May, I found preparations had been made to take over the five sevenths of stock upon which he had an option, and that the first payment had been made. And the question then came up as to operating the property. And it was in that connection that the railroad situation came to be discussed. At the time of the purchase there was a railroad whose terminus was to be in Globe, and had been constructed part of the way, and the builder of it had stopped on account of lack of funds. This road was tribu-

287 tary to the Southern Pacific. And, in talking with Mr. Meredith originally about the condition of affairs, he had told me

that he knew he could be of considerable assistance to us if we ever took the property, because he was a particular friend, I believe, in some way connected in business with Mr. Tweed, who was the confidential man and general counsel for Mr. Huntington of the Southern Pacific road. And that is undoubtedly what is referred to in some of his letters, stating that I had posted Mr. Meredith as to the railroad situation. I explained to him what we wanted, what rates we ought to have, about what could be done, and he was to take it up with Mr. Tweed, and through Mr. Tweed with Mr. Huntington, to see how much he could help us along. But naturally he had to get the facts and the data first. I did not remember anything about that until I read the letter. Even as late as my return, I had figured on operating the property as representing people who owned a control, and never expected to get anything more than a control.

Q. 51. I am asking you for what you recollect, of course, not anything as to what occurred.

A. I am trying to tell you how I recollected it.

And it was a question of most carefully considering every step so that we would not furnish any ground for a hostile minority to annoy us. And it was for that reason that I suggested getting a man of our own as a manager, and not trusting to the manager who was there and of whom we knew nothing. I remember this end of it by seeing letters in reference to their man being willing to stay until we replaced him. That is in some letters of Mr. Keyser's; you will remember that he telegraphed he would be pleased to stay until the 1st of July, or something of that kind. I remember now, although I cannot fix the exact date, of calling Mr. Lewisohn's attention to the fact that all the claims which were always supposed to be owned by the Old Dominion Company were not included in the deeds which he had furnished to Mr. Colquhoun; and I know that he must have taken some steps in the matter; for in the option from Mr. Keyser I find that these other claims are referred to and included. I remember of explaining to Mr. Lewisohn that the Old Dominion Company originally was founded and based upon the Old Dominion mine, and that the property had been considered, even before the first reorganization of the company, quite a valuable property. I may say here that many years ago I had been in Globe for some time and remembered my first memory of the property. At that time the Old Dominion mine was the principal source of ore for the Old Dominion company, but I had known nothing of the property at all for years. I also remember telling Mr. Lewisohn that the company originally, before it was the Old Dominion Company, had been formed and had located a smelter at the point called "Bloody Tanks,"

288 where the New York and Chicago claims were situated, based on the ore supplies of these mines, these claims being some miles from Globe. After the option upon the Keyser stock was obtained and exercised, I remember now my visit to Baltimore with Mr. Lewisohn, to take over the company as a company. I cannot be absolutely positive, but I am quite sure that there was no one else from our office, from the Boston office, who went with me, but I looked over the books myself. After the transfer was made, or at the time the transfer was made, it is evident that we asked to have all work stopped until we could get it commenced with our own man;

and that, evidently, explains the telegram. I remember that from seeing a telegram that was sent on Thursday by one of the directors to their manager there, to stop the work until our man came. In going over Mr. Bigelow's accounts I find, as the accounts will show,—or first I will say that in going over the accounts, I found that I had received none of the 60,000 shares of Old Dominion Copper Mining & Smelting Company, although I had subscribed for 1000,—and in going over Mr. Bigelow's figures and looking at the stock books I found I had received a certain number of shares; and that started another train of remembrance, and I remember now that up to the time I went away the idea of what was to be done or how we were going to do it was very indefinite, because we did not know whether we were going to take the property at all. But I can remember I was promised an interest in it if we took it, in lieu of fees or anything of that kind; that I was to receive no fees, and as a matter of fact I did receive no fees. I found when I came back that an arrangement for the purchase of the five sevenths had been made, and I was left out. And I can remember that I thought perhaps I had not been properly treated, and asked about it, as to why I had been left out, and I was told that the demand for a participation was so great that everybody had taken less than he wanted, and that I might expect to get something finally, and the thing was left in a very indefinite way; I do not find my name upon the first Old Dominion Syndicate paper of June, which was extended to take up the two sevenths, and therefore it is evident that I was not allowed to participate in that, undoubtedly for the same reason. I can remember, in a very general way, the notices or whatever you have a mind to call them, in the papers about the matter——

Q. 52. Just state what papers.

A. Well, all the daily papers. The Boston papers, all of the Boston papers, had so-called financial articles every day—they comment on various things going on, and in that connection they commented quite frequently on Old Dominion business, perhaps might refer to letters; you would see frequently references in the papers saying so-and-so about Old Dominion, or discussing Old Dominion; that is, the articles all pointed out——

289 Mr. BRANDEIS: I object to that testimony as to the contents of the newspaper articles because we can get those.

The WITNESS: My remembrance is that those articles all pointed out the great value that was going to come from subscriptions to this Old Dominion, and I have been trying to think who it was finally advised me to agree not to take any. What I am trying to get at in this whole thing is to tell you how I remembered not getting on that second paper. At any rate, it was decided that I should not have any of it. Later, after the formation of the company, and when it was decided that some of the shares were to be sold, it is evident that I was permitted to participate in that, from the fact that I did participate as far as signing the paper; but on looking at the stock book I find I received none of that subscription; and I remember that I was told again that it was best for the interests of everybody that I waive any rights I might have there, and that I

would be taken care of in some way. That is what I can, up to date, remember in anything like a connected way.

Q. 53. Have you now stated, together with what you testified in the earlier part of your deposition, everything that you recall?

A. I think I have stated substantially everything.

Q. 54. Do you remember how many shares you ultimately did get in the Old Dominion Copper Mining & Smelting Company?

A. I do not remember. I can only tell you now what the record shows. The stock book shows that I received, as a subscriber under Leonard Lewisohn, a certificate for 2240 shares on October 3, 1895. I did not remember that until I saw it upon the statement that was furnished me in New York in the testimony you took there in the suit of Old Dominion Copper Mining & Smelting Co. v. Bigelow; but I find that there was transferred into my name in December, 1897, a certificate for 1460 shares which had stood in Mr. Bigelow's name, and immediately transferred out of my name to Lewisohn. That is the only record I can find of any stock in my name at any time of the Old Dominion Company; and I have gone over the stock ledger, which, of course, is an absolute record, and that is confirmed.

Q. 55. Have you now stated your whole recollection as to the nature of your interest and the amount paid for it?

A. I have received from Mr. Bigelow, which will show on his statement, 3230 shares, and that shows on account of the Old Dominion, but does not seem to tell me how I got it, any more than as I have told you that was always promised me as a consideration for my giving up all sorts of participation in the syndicate and stock of the company in lieu of services, etc. Now, as I say, that is not, with me, so much a matter of recollection as it is a
290 matter of finding the facts out in going over the stock books of the company and the accounts of Lewisohn Brothers and of Mr. Bigelow.

Q. 56. Does the report of James Colquhoun and G. M. Hyams, dated Clifton, Ariz., June 18, 1895, addressed to Messrs. A. S. Bigelow and Leonard Lewisohn, which was introduced as Exhibit 13 in the deposition of Mr. Bigelow, contain a report of all of the properties which you examined in their behalf in connection with the Old Dominion purchase?

A. To the best of my knowledge, it does. I cannot tell whether everything I saw at Globe is included in this report, but I have mentioned here a certain number of claims, on the first page.

Q. 57. Then, to the best of your recollection, that report contains a list of all of the claims and properties which you examined for Messrs. Lewisohn and Bigelow in that connection, does it not?

A. I think so.

Q. 58. And the claims on which you make report are the same claims referred to in the memorandum attached to the letter of William Keyser which is in evidence, in answer to Int. 13 of your deposition?

A. Yes, sir.

Q. 59. It is a fact, is it not, that you made no examination of the

several mining claims, namely, the Old Dominion mine, the New York mine, the Chicago mine, and the Keystone mine, or of the parcel of land near Bloody Tanks, all of which were deeded by Leonard Lewisohn to the Old Dominion Copper Mining & Smelting Company, in pursuance of the vote at the directors' meeting of July 11, 1895?

A. I did not examine those claims.

Q. 60. Are those the claims that you referred to as being called the Old Dominion mine, as being called to Mr. Lewisohn's attention as not being included in the deeds and papers furnished by Mr. Keyser?

A. Yes.

Q. 61. As coming under the Simpson option?

A. Those are the claims that I called to his attention as being owned, according to common repute, by the Old Dominion Company.

Q. 62. And not being included in the list furnished by Mr. Keyser?

A. Not included in the list furnished by Mr. Keyser.

Q. 63. You speak of the Old Dominion Mining Claim Company, a claim on which the original company had been based. You refer, do you not, to a company that existed prior to the Old Dominion Company of Baltimore City?

A. Yes.

Q. 64. Which failed and was subsequently reorganized?

Mr. HEMENWAY: There is no evidence of that whatever.

Mr. BRANDEIS: I am asking what he referred to.

291 A. I cannot say about failing, or anything of that kind. I know what I wanted to say was that there was an Old Dominion Company which took its name from the Old Dominion claim.

Q. 65. And which had gone out of existence?

A. That I cannot, from knowledge, say, whether it had gone out of existence or not.

Q. 66. It was not the company known as the Old Dominion Copper Company of Baltimore City, was it?

A. I cannot tell you that, sir.

Q. 67. Now have you made any examination at any other time of these claims known as the Old Dominion mine, the New York mine, the Chicago mine, the Keyser mine, or the parcel of land situated near Bloody Tanks?

A. I have never made a technical examination of the claims, but I have passed them about, and being in the same mining camp, naturally I would know, in a general way, what claims were producing; in tonnage, I mean.

Q. 68. What do you mean when you say you have "passed" them?

A. I was engaged in work at Globe.

Q. 69. When?

A. Somewhere in the 80's.

Q. 70. How early?

A. I should say somewhere between 1884 and 1886.

Q. 71. It was then that you got such information as you had?

A. That was the first information that I had, because that was the time at which the properties were first worked. Subsequently to that I had visited Globe and the surrounding country several times.

Q. 72. When?

A. Oh, up to 189–, certainly in the early 90's, I cannot tell you the dates, but some years after I had left the town of Globe.

Q. 73. Well, did you at any time subsequent to 1884 or 1886, see any of these properties known as the Old Dominion mine, the New York mine, the Chicago mine, the Keystone mine, and the parcel of land near Bloody Tank?

A. Well, just say how long "since" refers to. Do you mean up to date?

Q. 74. Any time between 1884 and August 1895?

A. Well, I could not have helped seeing the Old Dominion mine every time I went in that part of the country, because it was right on the main road; the other mines are located on another road that was some six or seven miles away; but I am quite certain every time I went through Globe I must have seen the Old Dominion mine.

Q. 75. You mean, simply seen it in passing?

A. Yes.

Q. 76. You made no examination?

A. I made no examination.

Q. 77. Of either that or any of the other properties?

A. No, sir.

Q. 78. Do you know whether or not at any time at any of your visits between 1886 and August, 1895, any of those properties
292 were being worked; I mean either the Old Dominion mine, the New York mine, the Chicago mine, or the Keystone mine were being worked, or anything being done on that parcel of land near Bloody Tanks?

A. I could not say now, sir; I could not say whether they were being worked or not.

Q. 79. You have no recollection of their being worked?

A. I have no recollection one way or the other.

Q. 80. When you were out in Globe making an examination on which you and Mr. Colquhoun reported, under date of June 18, 1895, to Mr. Bigelow and Mr. Lewisohn, did you gather any information in regard to these properties known as the Old Dominion mine, New York mine, Chicago mine, Keystone mine, or the parcel of land near Bloody Tanks?

A. I do not now recollect of doing so.

Q. 81. Well, do you know what the character of the ores, if any, in those properties called the Old Dominion mine, the New York mine, the Chicago mine, the Keystone mine was or is?

A. Yes, sir; they are what is generally known as oxidized copper ores.

Q. 82. The same as the mines at Globe generally operated by the Old Dominion mine?

A. There is the same character of ores in those mines as in the mine now operated by the plaintiff company; there are other characters of ore in some of the mines operated by the Old Dominion Copper Mining & Smelting Company.

[The further taking of this deposition was suspended until Thursday, April 16, 1903, at 10 A. M.]

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
220 DEVONSHIRE STREET, BOSTON.
TUESDAY, *May* 5, 1903.

Deposition of Godfrey M. Hyams, Resumed.

[In answer to interrogatories propounded by Mr. Brandeis, counsel for the plaintiff, the witness further deposes and says:]

Q. 83. Mr. Hyams, you stated you would examine the records to ascertain the facts in regard to your relation to the Old Dominion Syndicate and embody that in an account. Is the account which you now present, which is marked "Exhibit 23," a statement showing your relation to the Old Dominion Syndicate?

Mr. LAUTERBACH: I object to its admission as incompetent, irrelevant, and immaterial.

293 A. That is right, sir.

Q. 84. That is correct?

A. Yes, sir.

Q. 85. Have you, since the adjournment of the taking of your deposition on April 10, 1903, found any further papers bearing upon the question at issue which you have been inquired of about?

A. No, sir.

Q. 86. Have you made any investigation of the records which has disclosed to you any facts, or recalled to you any facts, which you were not in possession of at the time you testified?

A. Well, I have gone over the record pretty carefully and every time I have gone over it I have got the thing a little clearer in my mind.

Q. 87. That is not the question. What record have you gone over?

A. The testimony; I assumed you meant, by "the records," that.

Q. 88. You mean your own testimony?

A. I mean everything that has been taken here.

Q. 89. That is, the report of your testimony and of Mr. Bigelow's testimony?

A. Yes, sir.

Q. 90. Other than that, you have not had access to any books or papers or sources of information which have in any way refreshed your recollection, have you?

A. No, I do not think so, sir.

Mr. HEMENWAY: There is one thing I do not know, whether it is included in that answer or not, and that is you requested him to go

through Mr. Bigelow's letter books and see if there were any letters indexed that were on those missing pages of the letter book.

The WITNESS: I had a purpose in not mentioning that, because that was not refreshing my recollection.

Mr. HEMENWAY: I simply suggested the inquiry whether that was in or not.

Mr. BRANDEIS: I do not see why you cannot leave in the record what you have said about that.

Q. 91. Now will you state, Mr. Hyams, what the result of your examination of that index was,—what the result of your examination of the index, which was to be made for the purpose of determining whether there was in the index any reference to any letters on pages 309–313, inclusive, was?

A. I went over the letter book and looked at the index, and found that the missing pages were in between notices sent to the members of the syndicate, and there is no index number in the index at all referring to either of those pages.

Q. 92. That is, referring either to pages 309, 310, 311, 312, or 313?

294 A. Yes, sir. They appear evidently to have been copies that for some reason or other were wrongly written or spelled in some way.

Q. 93. That is simply your inference?

A. I say that is my inference from the fact that they were between, right in the middle of, a lot of notices, and the date is the same before and after.

Q. 94. Will you state whether, in making search or otherwise, you have been able to find a letter, or a copy of a letter, to Mr. Woodhull dated August 8, 1895?

A. That is the one we did not attempt to do anything with at all.

Q. 95. Do you wish to be understood now as testifying that you have no knowledge whatsoever in regard to the existence of any copy of that letter of August 8, 1895?

A. I do not know what letter you refer to; I have never seen the letter. You read some words off of a piece of paper; that is all I know.

Q. 96. Do you now wish to be understood as testifying that you have never seen, so far as you can remember, any letter of Mr. Bigelow to Mr. Woodhull under date of August 8, 1895, or any copy of a letter of that date, containing, among other things, the passage quoted in Redirect Int. 588 of the deposition of Mr. Bigelow, viz., "I received your letter of the 7th. You are right in presuming the 20,000 shares which has been offered, to be treasury stock."

Mr. LAUTERBACH: I renew the objection made when the question referred to was put: That if the plaintiff has in his possession such a letter, it ought to be exhibited to the witness before he is required to answer concerning its contents; that if the plaintiff is not in possession of any such letter, and will so state, and desires an examination to be made to see if a copy of such a letter exists, we are perfectly willing to make it; but in the absence of such statement by the

plaintiff, we do not feel called upon to search for secondary evidence, if the best evidence exists.

Q. 97. [Int. 96 read.]

Mr. LAUTERBACH: I supopse the answer to that is, "No, sir."

A. No, sir.

Mr. LAUTERBACH: Whether you have seen such a letter.

Mr. BRANDEIS: No, that is not the question; the question is whether you wish to be understood as so testifying. Please read the question.

Q. 98. [Int. 96 read.]

A. You have simply inverted the question. The answer is, "Yes, sir."

Q. 99. Do you wish to be understood as so testifying? That is what you mean to state?

A. Yes.

Q. 100. Is it not a fact that since the examination of April 23, 1903, when this matter was called to Mr. Bigelow's attention,
295 you have made an examination of the letter-press copy books to see whether or not there was a copy of such a letter written?

A. No, sir.

Q. 101. And you wish also to be understood as testifying that, so far as you know, no examination has been made, and no search has been made for such a letter?

A. Yes, sir.

Q. 102. And that no such letter or copy thereof is in the possession of Mr. Bigelow or of his counsel?

A. Not to my knowledge.

Q. 103. Or has been at any time since this deposition has been commenced?

A. Not to my knowledge.

Cross-Examination.

[In answer to cross-interrogatories propounded by Edward Lauterbach, Esq., counsel for the defendants, the witness further deposes and says,—]

X 104. Mr. Hyams, before Redirect Int. 588 was asked by Mr. Brandeis of Mr. Bigelow, had you examined all the letter books and records and files of Mr. Bigelow, and your own so as to find the originals and copies of all letters and telegrams and papers affecting the Old Dominion Copper Company and the purchase of its stock by Bigelow and Lewisohn, and the original guarantee syndicate of May 22, 1895, and the Old Dominion Syndicate, and the stock-subscription syndicate of July 18, 1895 (Exhibit 10), and all correspondence with subscribers to the various syndicates, so as to produce them while Mr. Bigelow was being examined, and while you were being examined?

A. I examined them originally and marked them, and then, from

time to time, as you probably remember, during the examination, we were constantly going over them again, and I am quite certain Mr. Brandeis stood at my elbow while I was looking at them, trying to find everything; and I remember distinctly of looking in the index for letters to Maxwell Woodhull, and tallying them one after the other as they were indexed, with Mr. Brandeis.

X 105. And during that examination no such letter as that which Mr. Brandeis has referred to came under your observation?

A. No, sir.

X 106. Or at any other time?

A. No, sir.

X 107. Do you know of any written evidence in Mr. Bigelow's possession or yours, or under his control or yours, or in the possession of the Lewisohns, pertaining to the matters referred to in my last question that has not been produced?

A. No, sir.

296 X 108. Mr. Hyams, referring to Exhibit 13, which is the report of Mr. Colquhoun and yourself to Messrs. Bigelow and Lewisohn, was that report, so far as you know, an accurate statement concerning the mines that you examined?

A. Yes, sir.

X 109. In addition to examining the physical condition of the mines, did you examine the books and records at Globe in order to make up your report?

A. I went over them very carefully, and was obliged to do so in order to base any figures of cost of production or probable profits, costs of supplies, etc.

X 110. And the basis of your report in respect to such matters was furnished by the books of the Baltimore Company. In making that examination did you examine the books of the Old Dominion Copper Company of Baltimore?

A. I do not think they kept any books containing that information at Baltimore.

X 111. Well, I refer to Exhibit 11, which has been introduced in evidence. Was any such statement as that examined by you in order to ascertain the condition of the property and its value?

A. Well, that is a statement made June 19.

X 112. That statement had not then been made?

A. No, sir; but I did not examine the Baltimore books at all, because that would have been nonsense; the records were all at Globe, and the only books at Baltimore would be just the financial books of the company, and they would not have shown anything so far as the real value of the property was concerned.

X 113. Referring to Exhibit 11, I see that there is an item "Real Estate, Globe, $450,000." Would that have indicated to you anything concerning the value of the property if you had seen such a statement as that in the books of the Old Dominion Copper Company or on any balance sheet such as that which was made up on the 19th of June?

A. Absolutely nothing. That is simply a balance entry to cover the capital stock.

X 114. There is no indication of value?

A. Nothing whatever, absolutely nothing.

X 115. And would the exhibition of any such balance sheet, or of the books from which it was made, as is contained in Exhibit 11, have given you any information concerning the actual value of the property?

A. Well, only as far as—it would have shown me that the property had no debts, but it would not have shown me what supplies it had on hand; the supplies I would get at Globe; and the debts,—as I remember the opinion, it was stated that the property was to be turned over free of debt, so that would not interest us at all.

X 116. You are familiar with the matter of keeping books of mining companies?

A. Yes, sir.

X 117. You consider yourself an expert in that respect?

297 A. I am familiar with the books of mining companies.

X 118. And have had how many years' experience in that?

A. Ever since I have had to do with the management of mines I have naturally had to know about the keeping of books.

X 119. And a balance sheet, or the books upon which such a balance sheet would be founded, or the statement of value contained in such a balance sheet or on its books, would be no criterion of actual value, in your opinion, would it?

A. A statement of the property of any mining concern is of no value as showing its real value. For instance, a great many corporations are organized in Maine, if you please, that have only one dollar paid in—I believe that is all that is necessary—and yet their real estate and property account shows the full value of the capital stock; on the other hand, a great many of the largest mining companies in this country show a real-estate and property account of a nominal amount; that is, simply a book-keeping entry. If you took that, you would have to mark it up and down constantly if you wanted to get a true idea of the value of the concern. But, of course, as you extract the ore from any mining property, the real estate becomes less and less valuable, and you would have to keep cutting that down constantly. Do you get my idea?

Mr. LAUTERBACH: Perfectly.

The WITNESS: The value of a property is, in my judgment, best shown by an examination of the property rather than by what somebody else has been willing to put it on the books at.

X 120. Referring again to Exhibit 13, I observe that you placed you estimate upon the value of copper at the "present price of black copper, 10½ cents."

Mr. BRANDEIS: At the then present price of black copper, 10½ cents.

X 120. ([continued.] With black copper realizing 10 cents per pound, you prognosticate the profits to be $360,000 per annum, and with black copper realizing 10½ cents per pound, $420,000 per annum. What was the fact as to the increase or decrease of the market

value of black copper after the purchase of the stock by Lewisohn and Bigelow?

A. My impression is that it went up.

X 121. It went up steadily from that period, did it?

A. I think so.

X 122. How much was it, do you remember?

A. I don't, sir, but I will submit a table showing the price of copper from May 28, 1895, up to April, 1902, quarterly, which may be marked "Exhibit 24."

[For text of this exhibit see Hyams Exhibits, page 324.]

298 X 123. Now is there anything concerning that report that you want to state?

A. Well, just on that point that there are two factors in determining the profit of a copper mine. One is the value of the product, and the other is the copper contents of the ore. The profit set down here was based, as I have stated, upon a yield of 9 per cent copper. When we started up the property the yield, instead of being 9 per cent, was less. Consequently, although the price of copper might have gone much higher, the company might have still made a loss in its profits, owing to the lower yield of the copper in the rock; and that is exactly what happened.

X 124. Did the books indicate the percentage prior to your examination?

A. Yes.

X 125. What was that percentage?

A. That percentage was about 9 per cent, as I have stated.

X 126. And the basis of your calculation was 9 per cent?

A. I have stated in the report "Taking the figures of the old Company as a basis."

X 127. And that basis was about 9 per cent?

A. About 9 per cent.

X 128. But, in point of fact, after the purchase the ore turned out to be a lower grade of ore?

A. We found that the old management had made a careful selection and had only taken out the better grade of material and worked in a limited way. When we came to work in a larger way, a supply of that grade was not forthcoming, and it dropped down.

X 129. You spoke of working the mine in a larger way; was the working done under the Lewisohn and Bigelow regime, if I may call it such, conducted on a larger basis than it had been done before?

A. It was conducted on a larger basis in this way: that the old company had only run their smelting plant at intervals, and during the intervals of the closing down of the smelting plant they had continued mining and accumulated a reserve, so that, while they smelted a good deal while they ran, they did not smelt all the time. When the new management took hold, our policy was to keep on smelting continuously; and that, of course, called for a larger daily ore production.

X 130. What was the condition as to the operation of the smelter

at the time of the transfer of the control of the property by Keyser and the Simpson estate to Lewisohn and Bigelow?

A. The smelter had been closed down since the preceding year, since, I believe it was, August or September. And, just on that point, the mine had been run in the interval and was running when I went there.

X 131. That is to say, the ore production continued?

A. The ore production continued.

X 132. And the smelter was discontinued?

A. The smelter was discontinued.

299 X 133. And there was consequently a large accumulation of ore?

A. There was a large accumulation of ore, and that was the reason that I recommended the cessation of mining operations until our man could get to the mine so we could start smelting at once. They had been mining for seven or eight months and storing the ore and every nook and corner of the place was filled with ore; and that made it very expensive, making a double handling; and I recommended that they stop this mining—they were not doing anything particularly except taking out ore—that they stop this mining until we could start the smelter and get rid of this accumulation of ore.

X 134. What you desired was to send out a man competent to run the smelter?

A. He could not come until, I think it was in July, some time the end of July—he could not get there. Of course, at that time we did not know who we were going to get.

X 135. This discontinuance of the operation of the mining of ore was in consequence of your suggestions, and for the reasons you have stated?

A. Purely so, and for the reasons I have stated.

X 136. Mr. Hyams, did you, at my request, look into the subject of the payment by Whitney and by Meredith of the sum of $7000 by Whitney, and of $3500 by Meredith on May 27, 1895, referred to in Int. 84 of Mr. Bigelow's deposition, and can you tell me whether any further amounts, whether any other receipts than the receipt of $7000 and the receipt of $3500, as being part payment under the original guarantee syndicate of May 22, were ever paid by Whitney or Meredith?

A. There was no record anywhere of any further payment.

X 137. And can you tell me what, in fact, was done with the payment of $7000 and of $3500 made, apparently, on the guarantee syndicate of May 22?

A. It was treated as a first payment on the Old Dominion Syndicate.

X 138. And all subsequent payments by Whitney and Meredith were charged as contributions to the Old Dominion Syndicate?

A. Yes, sir.

X 139. And in the division of the stock finally, was this contribution of money treated as a contribution of the Old Dominion Syndicate?

A. Treated as a contribution to the Old Dominion Syndicate only.

X 140. And were they treated as subscribers to the guarantee

syndicate of May 22 in the same way as the other subscribers to the syndicate that had contributed in proportion?

A. Exactly in the same proportion.

X 141. So that their treatment was twofold; in the one capacity as subscribers to the Old Dominion Syndicate, and in the other as members of the original guarantee syndicate?

A. Yes, sir.

300 X 152. Mr. Hyams, as to Mr. Bigelow's relations to the various syndicates: he was a member of the original guarantee syndicate, was he not?

A. Yes.

X 143. And in that respect was a guarantor or underwriter?

A. As an underwriter.

X 144. He was a subscriber to the Old Dominion Syndicate?

A. Yes, sir.

X 145. And in that respect stood on the same basis as the other subscribers to the syndicate?

A. Yes, sir.

X 146. He was also a subscriber to the stock subscription or agreement of July 18, was he not?

A. Yes.

X 147. And was also part owner by purchase of the stock of the Old Dominion Company and the Keyser mining claims?

A. Yes, sir.

[In order to secure easy access to certificates, stubs, and books necessary to the inquiry, the further taking of this deposition was continued on the same day at the office of the Old Dominion Mining & Smelting Company, No. 35 Congress street, Boston, Mass., as follows:—

X 148. Mr. Hyams, I refer to Exhibit 17, it being a statement which you have called "A. S. Bigelow Old Dominion Investment Account," in which Mr. Bigelow appears to be charged with 31,425 shares, and to be credited with the disposition of part of those shares. From what sources did you obtain that information?

A. From the stock books, the stock certificates, transfers, and stock ledgers of the Old Dominion Copper Mining & Smelting Company.

X 149. Which are now before you?

A. Yes, sir.

X 150. Will you kindly explain in detail how you arrived at those figures and how you made up the account?

A. On the 18th of September, 1895, certificate No. 71 was issued to P. K. Dumaresq for 100,000 shares, stamped "Issued for property purchased."

Certificate No. 73 was issued to Thomas Nelson, treasurer, for 20,000 shares.

Certificate No. 74 was issued to A. S. Bigelow and Leonard Lewisohn for 30,000 shares. This certificate is also stamped "Issued for property purchased."

Certificate No. 71 stub contains the following:—

"No. 71.
100 Shares."

(This evidently a mistake for 100,000 shares, as the certificate calls for 100,000 shares.)

301 "Issued to Sundries
Dated September 18, 1895.
for Sundries.
Returned and cancelled
Received the above Certificate ."

Certificate No. 73 stub contains the following:—

"No. 73.
20,000 Shares.
Issued to Thomas Nelson, Treasurer.
Dated September 18, 1895.
For Vote of Syn.
Returned and cancelled
Transferred from
Received the above Certificate ."

"No. 74.
30,000 Shares
Issued to A. S. Bigelow and Leonard Lewisohn.
Dated September 18, 1895.
For
Returned and cancelled
Transferred from
Received the above certificate ."

On the same day certificate No. 71 was split up, 4 shares being transferred to each of the following persons:—

Moses T. Stevens, 4; A. S. Bigelow, 4; Leonard Lewisohn, 4; Edgar Buffun, 4; J. G. Ray, 4; H. M. Whitney, 4.

Sixteen (16) transferred shares to Thomas Nelson, and a balance certificate, No. 82, issued to P. K. Dumaresq, for 99,960 shares.

Certificate No. 73 was on the same day split up into certificates to the following persons, whose names will be found in Exhibit 25, May 5, 1903, G. C. B.

[For list see H Exhibits, p. 324.]

Certificate No. 82, in the name of P. K. Dumaresq, for 99,960 shares, was on the 19th of September, 1895, exchanged for
302 some small certificates aggregating 520 shares and a balance certificate, No. 140, issued to P. K. Dumaresq, for 99,420 shares.

On the 27th of September, 1895, this certificate was split up to the persons and in the number of shares shown in Exhibit —, May 5, 1903, G. C. B. [see H Exhibit p. —], these people being the subscribers to the Old Dominion Syndicate.

Among those certificates was one to A. S. Bigelow for 4000 shares. And that explains the first item of 4000 shares on Exhibit 17.

It appears from Mr. Bigelow's check book that, disregarding small items of interest, he paid out on Old Dominion account $50,000 more than he received from Old Dominion Syndicate subscribers, as shown by Exhibit 16. As a subscriber to this syndicate, he was entitled to receive his $50,000 back and 2000 shares of stock, or to subscribe the $50,000, on the list of July 18, to shares of the Old Dominion Copper Mining & Smelting Company for an equivalent number of shares at par, that is, 2000 shares, so that I have said here that his subscription for $50,000 entitled him to 4000 shares, which he received accordingly. And a balance certificate No. 262, was issued to P. K. Dumaresq for 20,000 shares. Upon this list, with the 4000 shares which went to Mr. Bigelow, there was also a certificate, No. 269, issued to Leonard Lewisohn for 36,190 shares.

On the 17th of October, 1895, certificate No. 74, in the name of A. S. Bigelow and Leonard Lewisohn, for 30,000 shares, and certificate No. 262, in the name of P. K. Dumaresq, for 20,000 shares, equalling 50,000 shares, were split up into certificates No. 419, in the name of Leonard Lewisohn, for 22,650 shares, and certificate No. 520, in the name of A. S. Bigelow, for 27,350 shares. This explains the second debit item on Exhibit No. 17, marked "For Underwriting Syndicate, 27,350 shares."

I find from Mr. Bigelow's check book that on the 8th of October, 1897, he purchased 25 shares, for which he paid $625, and on the 1st of December, 1900, he purchased 50 shares, for which he paid $1575. This accounts for the total amount charged to him, 31,425 shares, but does not include the 4 shares to each director taken out of certificate No. 71.

Now, coming to the other side, certificate No. 421, issued in the name of A. S. Bigelow, for 27,350 shares, on October 17, was, on the same day, split up into the following certificates, all in the name of A. S. Bigelow:—

Certificate No. 427, for 6220 shares, was retained by A. S. Bigelow.

Certificate No. 428, for 5240 shares, to J. A. Coram.

Certificate No. 429, for 5240 shares, to Matthew Luce.

Certificate No. 430, for 4240 shares, to Thomas Nelson.

303 Certificate No. 431, for 1960 shares, to J. Morris Meredith.

Certificate No. 432, for 1460 shares, G. M. Hyams.

Certificate No. 433, for 2990 shares, to Henry M. Whitney.

I have examined the stock ledger of the Old Dominion Copper Mining & Smelting Company, and find that the greatest number of shares with which Mr. Bigelow was ever charged was 31,425; which aggregate is made up of the 4000 shares, the 27,350 shares, the 25 shares, the 50 shares, and the 4 directors' shares testified to by me above.

Referring again to the credit side of Exhibit 17, it appears that on the 17th of October there was transferred to J. A. Coram, 5240 shares; to Matthew Luce, 5240 shares; to Thomas Nelson, 4240 shares; to

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J. M. Meredith, 1960 shares; to H. M. Whitney, 2990 shares; being the balance of the 27,350 shares received by Mr. Bigelow for the underwriting syndicate, less the amount reserved to himself, and the amount 1460 shares, appearing as transferred to G. M. Hyams, December 10, 1897.

On December 19, 1895, Mr. Bigelow transferred to Mrs. Bigelow, 200 shares; on the 11th of January, 1896, to C. W. Barron, 10 shares.

On the 22nd of September, 1897, it appears from Mr. Bigelow's check book that he sold to M. Fay 50 shares, for which he received $1250. That is the first sale of stock that he made. On the 9th of December, 1897, he sold to various parties 315 shares for $7870.62. On the 10th of December, 1897, as already stated, there was transferred to G. M. Hyams, 1460 shares. In 1898 he sold from February 8 to March 2, 1960 shares, aggregating $57,295; from April 28 to May 2, 2000 shares, aggregating $51,900, on May 5, 700 shares aggregating $18,168.75; on the 9th of May 500 shares, aggregating $13,957.50; on the 10th of May, 350 shares, aggregating $9656.25; on the 11th of May, 1150 shares, aggregating $31,399.25; from December 3, 1898, to January 3, 1899, 2010 shares, aggregating $74,408.69; on November 30, 1900, 1000 shares, aggregating $31,000; and he had on hand December 31, 1900, 50 shares.

This shows the total distribution of 31,425 shares, and a total receipt in cash of $296,886.06.

On the 31st of December, 1900, there was credited to G. M. Hyams the proceeds of 3230 shares at average of $29, $93,670, on B. & M. joint account, leaving a balance of $151,016.06, this balance being the difference between the two sides of the account. This credit to G. M. Hyams is merely a transfer to the credit of my account
304 on a joint account existing between Mr. Bigelow and myself and has no bearing upon the Old Dominion Syndicate transaction.

GODFREY M. HYAMS.

Subscribed and sworn to this 26th day of June A. D. 1903, before me. Right to testify further reserved.

GEORGE C. BURPEE,
[SEAL.] *Notary Public.*

SATURDAY, *February* 16, 1907.

Deposition of GODFREY H. HYAMS resumed:

[The taking of the deposition of Godfrey M. Hyams was resumed at 9 a. m., at the office of Messrs. Brandeis, Dunbar & Nutter, 161 Devonshire street, Boston, Mass.]

Mr. HEMENWAY: In the first place, you have asked us to produce a letter dated June 24, 1902 (Altmiller to Bigelow). Mr. Hyams has looked, and cannot find any such letter; but, on looking through the testimony, we find that there was testimony of Mr. Bigelow in regard to it.

Mr. MCCLENNEN: I remember Mr. Bigelow could not find it: I did not know but Mr. Hyams might.

Mr. HYAMS: I hunted all through and could not find it, and then I thought I would look at the testimony.

[In answer to further interrogatories propounded by Mr. McClennen, counsel for the plaintiff, the witness, Godfrey M. Hyams, deposes and says,—]

Q. 151. Mr. Hyams, I understand you have looked for a letter from Mr. Altmiller to Mr. Bigelow, dated June 24, 1902, and you cannot find it?

A. No, sir.

Q. 152. You have recently looked at the text of that letter?

A. I do not find any such letter.

Q. 153. I mean of a copy of it in the testimony?

A. I do not find any copy in the testimony.

Q. 154. In looking to find the text of it, did you look at a copy of Mr. Altmiller's testimony given at the last hearing?

A. I do not think I have that.

Q. 155. Well, that is the explanation of it, then. Referring to Mr. Altmiller's testimony, given on July 24, 1906, at page
305 72, will you look at the copy of a letter there which Mr. Altmiller identified, and see whether you recall having, at this time, seen a letter which was of somewhat that text?

A. I do not recall of ever seeing the original.

Q. 156. Do you remember some correspondence with the officers of the company in the summer of 1902, which called Mr. Bigelow's attention, or yours, as his lieutenant, to the fact that there were letters missing from the books or from the files?

[Objected to immaterial and irrelevant.]

A. I do not remember, sir.

Q. 157. Do you remember, in negotiations that went on from the time of the election in April, 1902, up to the time of bringing suit, that the matter of letters being missing from the files was discussed in your presence?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I do.

Q. 158. You do remember that?

A. Yes, sir.

Q. 159. Without going into detail, is it true that, from the spring of 1902 up to the time suit was brought, communications with reference to getting information were pretty constant?

A. I cannot answer that without going into details.

Q. 160. Then will you go into detail and state what occurred in that summer?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I think I have already gone into that in my testimony.

Q. 161. Well, I am not certain at the moment.

A. Then I will suggest that you look at the testimony, or permit me to do so.

Q. 162. Well, I would be very glad to have you do that. But,

without stopping now to look up the testimony, do you remember how many interviews you had with Mr. Brandeis?

[Objected to as immaterial.]

A. I do not, sir.

Q. 163. It was more than two, was it not?

A. I do not remember, sir.

Q. 164. Do you remember how many interviews you had with Mr. Altmiller?

A. No, sir.

Q. 165. Do you remember how many interviews you had with Mr. Smith?

A. I do not.

306 Q. 166. Your memory has become quite hazy on the transactions of that summer of 1902, has it?

[Objected to as immaterial and incompetent.]

A. What is that; a conclusion, an inference, or what? What do you want me to say?

Q. 167. Whatever the fact is.

A. I do not know that there is any fact. I do not see any fact.

Q. 168. You were acting in this matter for Mr. Bigelow to some extent in the summer of 1902, were you not?

A. I assisted him, yes.

Q. 169. Having a position that might properly be described as private secretary in this matter?

A. Describe it as you please, sir.

Q. 170. How would you describe it most accurately to conform to the truth?

A. Assisting Mr. Bigelow upon this matter.

Q. 171. Were the communications that were had from time to time brought to your attention?

A. Some of them.

Q. 172. Most of them?

A. I could not tell. I could only tell what was brought to my attention.

Q. 173. You have been into the thing in detail since?

A. Yes.

Q. 174. You have been present at practically all of the taking of the testimony in the case?

A. Yes.

Q. 175. Have you come across, in your experience, anything connected with those negotiations which was not at the time brought to your attention during the summer of 1902?

A. I should have to go over all the testimony to look that thing up.

Q. 176. With your recollection in its present shape you do not recall anything of the kind, do you?

A. You will have to repeat the previous question.

[Ints. 175 and 176 are read.]

The WITNESS: I cannot answer that question offhand, sir.

Q. 177. Then I will put it the other way: Will you state such things, if any, as do now come to your mind that were not known to you in the summer of 1902?

A. I cannot answer that question offhand, sir.

Q. 178. Now will you state all that you recall of your conversations with Mr. Brandeis in the summer of 1902?

[Objected to as incompetent, immaterial, and irrelevant.]

307 A. I think I have already testified to that, sir.

Q. 179. Are you indisposed to testify to it again now?

A. I do not quite understand.

Q. 180. Do you have any personal objection to testifying again to it if you have already testified to it?

A. I think my former testimony was based upon what I recalled at the time; I do not know how much of that I still remember. In other words, I should prefer to read my former testimony before I attempted to say anything which might do me an injustice.

Q. 181. Were you informed that some further testimony of yours was to be taken this morning?

A. Yes, sir.

Q. 182. Have you investigated your former testimony at all with reference to it?

A. No, sir.

Q. 183. Have you made any other effort to refresh your mind as to matters connected with this case since you learned that you were to testify this morning?

A. Only by searching for that letter.

Q. 184. Did you have a conversation with Mr. Brandeis between the period when Mr. Smith became the president of this company and the time when this suit was begun?

[Objected to as immaterial, incompetent, and irrelevant.]

A. I certainly did, sir.

Q. 185. Do you remember anything whatever that occurred in that conversation?

A. I do not think I do.

Q. 186. Did you have more than one conversation with Mr. Brandeis during that summer?

A. I do not remember. I do not remember how many conversations I had.

Q. 187. Well, your memory does not go far enough to remember even whether it was as many as two, do I understand?

A. I do not remember, really.

Q. 188. Was Mr. Bigelow present at the time of the conversations that you had with Mr. Brandeis?

A. To what period are you referring?

Q. 189. Between the election of Mr. Smith as president of the company in April, 1902, and the institution of this suit in the fall of 1902.

A. I do not remember.

Q. 190. Do you now remember and conversation you had with Mr. Brandeis when Mr. Bigelow was not present?

A. I do not, sir.

Q. 191. You are desirous, I assume, of remembering as
308 far as possible everything that occurred in that summer that I have asked about, are you not?

A. I cannot tell what you are going to assume.

Q. 192. Well, you think you are or you are not desirous of giving me the fullest benefit you can of your recollection of what occurred in that summer?

A. I am desirous of telling you all that I can remember.

Q. 193. Are you a man of fairly accurate memory?

A. I do not really know how to answer that; I might be considered somewhat conceited if I answered that question in one way.

Q. 194. I shall not object to your stating the truth even if it seems presumptuous.

A. I think I have a fair memory.

Q. 195. For instance, you thought a short time ago you remembered that you testified about all this sort of things.

A. I don't know; that is a very general question.—"all these things."

Q. 196. Conversations with Mr. Brandeis in the summer of 1902.

A. I think I remember to have testified to everything I remembered at the conversations with Mr. Brandeis.

Q. 197. What had you done by way of refreshing your recollection as to those conversations at the time you testified?

A. I had heard all that had been said before, all that had been testified before, and I had gone over all the correspondence, everything in the case that I could find, to be prepared to give you the best information I could as to my knowledge of the case.

Q. 198. Now have you exhausted entirely your present recollection as to those conversations?

A. I think so, yes.

Q. 199. Did Mr. Brandeis, in any of those conversations, request the production of any letters or papers connected with the Old Dominion Copper Mining & Smelting Company?

[Objected to as immaterial.]

A. I told you I did not remember anything further in regard to the matter.

Q. 200. You mean by that, you do not remember now that he made any such request?

A. I do not remember. I am not trying to hide anything, but I do not remember anything further than Mr. Brandeis talking at some time with me about something connected with the case; I have not any memory as to the details, but my only recollection is that I did years ago testify to what I then remembered, and I should have to stand on that.

309 Q. 201. Do you remember that your conversation with Mr. Brandeis related to the Old Dominion Copper Mining & Smelting Company?

[Objected to as immaterial.]

A. I do not remember that.

Q. 202. Is there in your mind any other matter than the Old Dominion Copper Mining & Smelting Company which was discussed in those conversations?

A. Nothing in my mind at the moment, sir.

Q. 203. Would your recollection go so far as to permit you to say that, as far as you now recall, the subject matter of those conversations was the Old Dominion Copper Mining & Smelting Company?

[Objected to as immaterial.]

A. That would simply be a matter of assuming, a matter of weeding out everything else, as you have done. I have told you I do not remember, sir. I do not remember.

Q. 204. Does it now lie in your mind that you have had any dealings with Mr. Brandeis at any time other than in connection with the Old Dominion Copper Mining & Smelting Company?

A. Not to my recollection.

Q. 205. Does it lie in your mind that any of the conversations which you have had with Mr. Brandeis related in any way to the obtaining of information by Mr. Brandeis concerning the Old Dominion Copper Mining & Smelting Company, and the facts connected with the promotion and organization thereof?

[Objected to as immaterial.]

A. He certainly asked me about that, sir.

Q. 206. But to an extent your recollection is absolutely barren whether in the course of those conversations he called attention to the fact that there were letters or papers missing from the files or the letter books which he desired to obtain?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I do not remember that, sir.

Q. 207. Was this letter, copied in the company's letter book at page 167, on January 13, 1896, written by you?

A. There are two letters there, both dated January 13.

Q. 208. The second one on the page?

A. That is my signature.

310 Q. 209. Were the facts set forth in that letter within your recollection at the time you wrote the letter?

[Objected to as incompetent, irrelevant, and immaterial.]

A. How can I tell?

Q. 210. By the exercise of your reasoning faculties, I suppose; that is what I want you to do.

A. I should assume, having signed the letter and finding it in the company's letter book, that I knew what I was writing about.

Q. 211. Have you any independent recollection at the present time of the promotion expenses of the Old Dominion Copper Mining & Smelting Company?

[Objected to as incompetent, irrelevant, and immaterial.]

A. No, sir.

Q. 212. Will you refer to the letter of January 13, 1896, to which I have just called your attention, and state in as much detail as you can, with the assistance of that letter, what they were?

[Objected to as incompetent and immaterial.]

Mr. McCLENNEN: What is the remark you are making to counsel, Mr. Hyams?

Mr. TREADWELL: He says it is a copy of a letter.

Q. 213. Mr. Hyams, what was your reason for calling to the attention of Counsel, Mr. Treadwell, that this was a copy of a letter to which your attention was directed?

A. It was really to correct your misstatement.

Q. 214. You wanted to correct my misstatement in speaking of it as a letter?

A. Yes.

Q. 215. Then I will consider that as corrected. Will you now refer to that copy of a letter—if in my first question I said "letter," I will say "copy of a letter"—in the letter book, and tell me from that what the promotion expenses were?

[Objected to as incompetent, irrelevant, and immaterial.]

A. Well, I will read from the copy the figures in the copy.

Mr. TREADWELL: Please repeat the question.

Q. 216. Then I will consider that as corrected. Will you now refer to that copy of a letter—if in my first question I said
311 "letter," I will say "copy of a letter"—in the letter book and state what were the promotion expenses of the Old Dominion Copper Mining & Smelting Company?

Mr. TREADWELL: Do you now ask the witness to state the contents of the paper before him or to give his memory of what were the promotion expenses, so far as the letter may refresh it?

Mr. McCLENNEN: I am asking the witness to exercise his best recollection, his best mental faculties, with the assistance of the letter which he wrote on January 13, 1896, and to state the facts of the promotion expenses connected with the organization of the Old Dominion Copper Mining & Smelting Company. I should like to have him use his independent recollection as far as he can, and to supplement it by an inspection of the letter referred to.

Q. 216 (continued). Now, with that explanation, will you answer the question and give us those expenses?

[Objected to as incompetent, immaterial, and irrelevant.]

A. This copy does not refresh my memory a particle. It consists of figures. I can quote from this copy what those figures are.

Q. 217. I wish you would make use of all sources of information that you have at the moment within your reach and do the best you can to give us all the expenses connected with the Old Dominion Copper Mining & Smelting Company promotion.

Mr. HEMENWAY: The defendant objects to placing upon the record figures taken from a letter if he does not remember in regard to the way those figures are made up. If, as a refreshing paper, it does not refresh his memory, it is incompetent.

A. I can only repeat; I see figures here; they do not in the slightest assist me to remember what the expenses were other than as stated in this copy. This letter is now ten years old, over ten years old.

Q. 218. I intended to convey that to you at the time I put the question and stated the date. In view of the fact that it is now over ten years old, do you entertain any doubt but what the statements contained in it were true at the time that you signed the letter?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I do not think the date of the letter has anything to do with it.

Q. 219. Why did you call my attention to the fact that it was over ten years old if you do not think the date of the letter has anything to do with it?

A. I do not think it has anything to do with the question you asked.

312 Q. 220. Were you as conversant as any one at the time of the organization of the Old Dominion Copper Mining & Smelting Company with the detail of expenses connected therewith?

[Objected to as immaterial.]

A. I do not think I was, sir.

Q. 221. Who had more specific information than yourself at that time?

A. I should say Mr. Thomas Nelson.

Q. 222. He is now deceased?

A. Yes.

Q. 223. Do you know whether or not you got the facts set out in this letter of January 13, 1896, from Mr. Nelson?

[Objected to as immaterial.]

A. I do not.

Q. 224. Have you any independent recollection of the promotion expenses connected with the formation of that company?

A. No, sir.

Q. 225. Is it a fact that the expenditures incurred by the Boston Syndicate were $1024?

[Objected to as incompetent and immaterial.]

A. I could not say, sir.

Q. 226. Is it a fact that the proportion of Evarts, Choate & Beaman's bill belonging to the syndicate was taken at $3000?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I cannot say, sir.

Q. 227. Is it a fact that the bill was divided by Mr. Bigelow in the proportion in which they took the 50,000 shares of stock, namely, 455/1000ths?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I cannot say, sir.

Q. 228. Is it a fact that the total expenses of the syndicate were $5581.31?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I cannot say.

Q. 229. You have in your recollection at the present time
313 nothing that would conflict with that being the approximate amount of the entire expenditures of the syndicate in connection with the promotion of the Old Dominion Copper Mining & Smelting Company?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I have no recollection whatever.

Mr. McCLENNEN: Now I will offer the letter.

Mr. HEMENWAY: The letter is objected to as incompetent, irrelevant, and immaterial.

Mr. McCLENNEN: I understand Mr. Treadwell does not object.

Mr. TREADWELL: If you have laid a foundation for it, I have no objection. I understood that was secondary evidence. Of course the letter itself may be incompetent.

Mr. McCLENNEN: The letter offered reads:

[The Company's Letter Book, Page 167.]

"JAN. 13*th*, 1896.

Leonard Lewisohn, Esq., Box 1247, New York.

DEAR SIR: We enclose you memorandum showing division of expenses of the Old Dominion syndicate. There is a balance due from you of $2528.35. The amount due from the syndicate, $5581.31, is made up by taking from Lewisohn Brothers' bill of $10,399.83 those items which properly belonged to the syndicate, $1557.31, and adding to this the expense incurred in Boston by the syndicate, $1024,—and the proportion of Evarts, Choate & Beaman's bill belonging to the syndicate as suggested by Mr. Evarts, namely, $3000. This amount has been divided between yourself and Mr. Bigelow in proportion to the percentages of the 50,000 shares of stock which were given to each of you; that is to say, your share was 455/1000. If this is not plain you can call me up on the telephone and I will try to make it so.

Very truly, G. M. HYAMS."

Q. 230. Is it your recollection that Mr. Lewisohn called you up on the telephone after the receipt of that letter?

[Objected to as incompetent and immaterial.]

A. I do not recollect.

314 Q. 231. Is there in your recollection any fact in conflict with the statement of facts made in that letter signed by you on or about January 13, 1896, of which a copy has just been shown you and read into the record?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I have no recollection in regard to the matter, sir.

Q. 232. Do you entertain any doubt whatever at the present time but that those items in that letter were a true statement of facts?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I assume it was a true statement.

Q. 233. Well, now, referring to the statement which you assume to be true, made at about the time, will you state all the facts that you can state from an inspection of this letter which you believe to be a true statement?

[Objected to as incompetent, immaterial, and irrelevant.]

A. The statements are all in the letter. I can read the letter again to you if you wish me to. That is all that I could do.

Q. 234. Is it a fact that the facts were as stated in that letter——

[Objected to as incompetent, irrelevant, and immaterial.]

A. I cannot say.

Q. 235. —as far as you now recollect?

A. I cannot say, sir. I have no recollection.

Q. 236. Is there within your recollection any more definite way of discovering what were the expenses of the promotion of the Old Dominion Copper Mining & Smelting Company at the present time than this letter, a copy of which I have shown you and just read into the record?

[Objected to as immaterial and incompetent.]

A. I do not know.

Q. 237. Are you willing to investigate such sources of information as you have most readily at hand that would assist your recollection in any way and see if you can tell us anything whatever as to what were the expenses of that promotion?

[Objected to as incompetent, irrelevant, and immaterial.]

315 A. Do you refer to this source?

Q. 238. Any sources.

A. I have no other source.

Q. 239. You have no other source?

A. Here.

Q. 240. Do you deem this letter of January 13, 1896, a copy of which has been shown you, as sufficiently veracious so that you would dare to trust it as a refresher of your recollection?

[Objected to as incompetent, irrelevant, and immaterial.]

A. That is a question of opinion.

Q. 241. If you answer it I will take it as being an expression of opinion.

[Objected to as incompetent.]

A. I certainly repeat what I have said already, that I do not think

I signed things that were not correct; if the figures were furnished me and I put them into a letter I took what was given me.

Q. 242. Do I understand you that the figures there were figures given to you?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I do not know; I do not remember.

Q. 243. And you do not know whether those figures were your own figures or Mr. Nelson's figures?

A. No, sir.

Q. 244. Now I show you a letter—pardon me—a letter-press copy on page 81 of the company's letter book, of what purports to be a letter of September 18, 1895, to Maxwell Woodhull: is that signature in the handwriting of Thomas Nelson?

A. It looks like his writing.

Q. 245. Was Thomas Nelson's position in the company such that he would have knowledge of the receipt of a note from Maxwell Woodhull, if one was sent to the company?

[Objected to as incompetent, irrelevant, and immaterial.]

A. Mr. Nelson was treasurer of the company.

Q. 246. And he is now deceased?

A. Yes, sir.

Mr. McCLENNEN: That letter I will offer.

Mr. HEMENWAY: Objected to as incompetent, irrelevant, and immaterial.

Mr. McCLENNEN: And the letter reads:

316 [Company's Letter Book, Page 81.]

"SEPT. 18TH, 1895.

Maxwell Woodhull, Esq., 2033 G Street, Washington, D. C.

DEAR SIR: Your favor of 17th inst. enclosing note for fifteen thousand dollars ($15,000) in favor of the Old Dominion Copper Mining & Smelting Company and two receipts as stated, has been received.

Yours truly, THOMAS NELSON, *Treas.*"

Mr. TREADWELL: How does that read,—as if it were an original letter?

Mr. McCLENNEN: No, a copy of a letter.

Q. 247. Maxwell Woodhull resides where?

A. I have not heard from him for some years.

Q. 248. So you cannot really say whether he is residing in Washington or not?

A. No, sir.

Q. 249. Was he a resident of Washington the last you heard of him?

A. Yes.

Q. 250. Do you have any recollection yourself whether Maxwell

Woodhull gave any notes to the company in connection with his subscription for stock?

[Objected to as incompetent, immaterial, and irrelevant, and as assuming a fact which does not appear.]

A. I have no recollection and no knowledge.

Q. 251. At the time of the promotion of the Old Dominion Copper Mining & Smelting Company, or, rather, from the period beginning at or about the date of the first option, about April 30, 1895, up to the 1st of October, 1895, were you in conference to some extent with Mr. Leonard Lewisohn?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I was in conference with Mr. Leonard Lewisohn on all subjects during these periods.

Q. 252. Was he apprised of what was going on in Boston, in a pretty general way, connected with the promoting of the company, getting subscriptions, and so forth?

[Objected to as incompetent, immaterial, and irrelevant, and as leading.]

317 A. I suppose so.

Q. 253. Mr. Lewisohn knew of the fact of the various syndicate agreements in Boston, did he not?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I suppose so.

Q. 254. Your conferences with him, either in person or over the telephone, were matters of perhaps almost daily occurrence during this time?

[Objected to as immaterial.]

A. I think so.

Q. 255. On these subjects?

A. I did not say that.

Q. 256. Well, do you mean to make a distinction?

A. A very marked distinction.

Q. 257. For instance, how often should you say you conferred with Mr. Lewisohn, either in his personal presence or by telephone, on the subject of Old Dominion during that summer of 1895?

[Objected to as immaterial.]

A. From recollection, I should say a very small proportion of the conferences we had had relation to this matter.

Q. 258. By that process of elimination, how often should you say, as nearly as your recollection, which you are trying to exert at present, would enable you to state?

A. I cannot say any more definitely than I have. Mr. Lewisohn was our selling agent, and questions in relation to these matters would come up constantly.

Mr. HEMENWAY: "Our selling agent"—I do not know what that means. I want him to elaborate it.

The WITNESS: Mr. Leonard Lewisohn was a member of the firm of Lewisohn Brothers, which firm was the selling agent for all the copper produced by the various mining companies in which Mr. Bigelow was interested.

——— ———.

Subscribed and sworn to this — day of —— before me,

——— ———,
Notary Public.

318 EXHIBITS.

Copies of Exhibits to be Attached to the Deposition of Godfrey M. Hyams.

[EXHIBIT 2 A. MARCH 27, 1903. G. C. B.]

In consideration of two thousand dollars ($2,000) paid to me by Leonard Lewisohn of the city of New York and the assumption by him of all and every obligation of mine under a contract made this day between me and Frank E. Simpson and William Butler, executors of Michael H. Simpson, giving to me the option to purchase seventeen thousand eight hundred and fifty seven (17,857) shares of the capital stock of the Old Dominion Copper Mining Company, I do hereby sell, transfer and assign unto the said Leonard Lewisohn, his executors, administrators and assigns, all my right, title and interest in and to the said contract or arising therefrom.

In witness whereof I have hereunto set my hand at New York this fourth day of May eighteen hundred and ninety five.

J. MORRIS MEREDITH.

Witness:
CHARLES C. BEAMAN.

[EXHIBIT 7 A. MARCH 27, 1903. G. C. B.]

For value received and for other good and valuable consideration I Leonard Lewisohn of New York City agree with Frederick E. Simpson, William Butler and others executors of Michael H. Simpson who have this day deposited seventeen thousand eight hundred and fifty seven (17,857) shares of the stock of the Old Dominion Copper Company with the Old Colony Trust Company in Boston that I Leonard Lewisohn, who have this day paid to the said Simpson and Butler one hundred thousand dollars ($100,000) on account of the purchase of said shares of stock, will at any time within sixty (60) days hereafter at ten (10) days' notice and tender, take and pay for at the same pro rata price and on the same general terms and conditions as provided in the agreement between the said Simpson and Butler and J. Morris Meredith of Boston, dated the fourth day of May 1895 any part or all of the remainder of the capital stock of said company. This agreement being given and received in performance of the sixth article of said agreement between said Simp-

son and Butler and the said Meredith; said Meredith having assigned to me all of his right title and interest in the said agreement.

May 28th, 1895.

[No signature.]

319 For value received we jointly and severally warrant and guarantee the performance by Leonard Lewisohn of the foregoing agreement between him and Frank H. Simpson and William Butler and others, executors of Michael H. Simpson.

May 28th, 1895.

[No signature.]

[Exhibit 11. March 27, 1903. G. C. B.]

Old Dominion Copper Company Statement, June 19, 1895.

Assets.

Property:		
Real estate, Globe	$450,000 00	
Saw mill	8,083 25	
Supplies	6,837 54	
Wood	3,987 80	
Lumber	1,865 12	
Coke	196 90	
Stulls	1,791 33	
		$472,761 94
Developments:		
Mine expenses	$29,704 93	
Development work	7,077 55	
Furnace expenses	183 60	
Plant	5 66	
Draft in transit	118 50	
General expenses	756 25	
Eastern office expenses	10,789 14	
Globe office expenses	921 85	
		$49,557 38
Cash items:		
Cash at Globe	$1,341 10	
Overcharge claims	705 80	
		$2,046 90
		$524,366 22

320 Liabilities.

Capital	$500,000 00	
B. C. S. & R. Co. loan	3,542 62	
		$503,542 62
Surplus		$20,823 60

[Attached to this exhibit is the following:]

BALTIMORE, *June* 20, 1895.

Ledger Balance the Old Dominion Copper Company.

	Cash at mine	$1,341 10	
3	Capital		$500,000 00
24	General expense	756 25	
62	Baltimore Copper S. & R. Co.		3,542 62
100	Real estate	450,000 00	
115	Profit & Loss		20,823 60
166	Supplies	6,837 54	
182	Wood	3,987 80	
192	Lumber	1,865 12	
204	Coke	196 90	
240	Development work	7,077 55	
244	Furnace expenses	183 60	
250	Mining expenses	29,704 93	
260	Eastern office	10,789 14	
270	Stulls	1,791 33	
286	Overcharge account	705 80	
304	Office expenses at Globe	921 85	
330	Plant	5 56	
342	Treasurer's account, draft in transit	118 50	
350	Saw mill	8,083 25	
		$524,366 22	$524,366 22

[EXHIBIT 12, MARCH 27, 1903. G. C. B.]

Know all men by these presents: That we, Frank E. Simpson, William Butler, Lucius W. Smith and Thomas C. Simpson, executors &c. of Michael H. Simpson, deceased, of Boston, Massa-
321 chusetts, and William Keyser of Baltimore, Maryland, are held and firmly bound unto Leonard Lewisohn of the city of New York and the Old Dominion Copper Company of Baltimore, a corporation organized and existing under the laws of the State of Maryland, in the sum of fifty thousand dollars lawful money of the United States of America, to be paid to the said Lewisohn, his executors, administrators and assigns and the said company, its successors or assigns for which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors firmly by these presents sealed with our seals. Dated the twentieth (20) day of June one thousand eight hundred and ninety five.

Whereas we have sold, assigned and transferred unto the said Leonard Lewisohn all the capital stock of the said Old Dominion Copper Company and as part of the consideration therefor have agreed to assume and discharge any and all claims and demands against and debts and obligations of the said company of every kind and nature whatsoever which were existing and outstanding on the 28th day of May, eighteen hundred and ninety five.

Now, the condition of this obligation is such that if the said above bounden Frank E. Simpson, William Butler and Lucius W. Smith as executors, &c., and William Keyser, their executors, administrators, assigns or successors, or any of them, shall well and truly pay or discharge all and every of said claims, demands, debts and obligations and indemnify and save harmless the said Leonard Lewisohn, his executors and administrators, and the said Old Dominion Copper Company, its successors and assigns, from and against any and all suits, actions, damages, costs, charges, expenses by reason of any such claims, demands, debts or obligations, then this obligation is to be void, otherwise to remain in full force.

FRANK E. SIMPSON. [SEAL.]
WM. BUTLER. [SEAL.]
LUCIUS W. SMITH. [SEAL.]
THOMAS C. SIMPSON. [SEAL.]
WM. KEYSER. [SEAL.]
Executors Estate of Michael H. Simpson.

In the presence of

SAMUEL P. TENNEY to all.
W. K. SIMPSON.

As to Wm. Keyser.

R. BRENT KEYSER.

322 [SUBSTITUTE FOR EXHIBIT 23, G. C. B., MAY 5, 1903.]

[The original of this exhibit having been lost or mislaid, the following is substituted therefor.

Boston, June 20, 1903.

GEORGE C. BURPEE.
Stenographer.]

JUNE 19, 1903.

Bacon & Burpee, 617 Tremont Building, Boston, Mass.

MY DEAR MR. BURPEE: I have had considerable trouble in getting the figures of average costs for past years as there was considerable discrepancy in the various tables. This accounts for the delay in answering your letter.

I enclose now the average price of electrolytic copper for the years 1895 to 1902 inclusive, given monthly.

I also enclose a statement of my Old Dominion account. I cannot tell you whether the wording is exactly the same as the former one as I cannot find it, but the figures are correct. I am still quite positive that I gave the account to Mr. Brandeis at the office of the Old Dominion Company.

Very truly, G. M. HYAMS.

323 *G. M. Hyams' Old Dominion Account.*

1895.				1897.			
Oct. 3,	Interest in.....	2,240 sh.	$28,000 00	Dec. 13,	Transferred to L. Bros.	150 sh.	
1897.				1898.			
Dec. 10,	From A. S. Bigelow..	1,460 "		Apr. 4.	" " " "	850 "	
" 13,	" " " " ..	15 "		Nov. 4.	" " " "	2,240 "	
				Dec. 24.	" " " "	300 "	
1898.				1900.			
Apr. 4,	" " " " ..	10 "		Nov. 21.	" " " "	185 "	
	Balance		65,670 00	Dec. 31.	Credit by A. S. Bigelow		$93,670 00
		3,725	$93,670 00			3,725	$93,670 00

In addition to the above, proceeds of 3,725 shares. This merged in general joint account with Leonard Lewisohn and identity lost.

	1895 E. & M. Elec.	1896 E. & M. Elec.	1897 E. & M. Elec.	1898 E. & M. Elec.	1899 E. & M. Elec.	1900 E. & M. Elec.	1901 E. & M. Elec.	1902 E. & M. Elec.
January	9 25	9 62	11 50	10 71	14 26	15 58	16 25	11 05
February	9 25	10 39	11 67	10 99	17 02	15 78	16 38	12 17
March	9 50	10 78	11 55	11 49	16 35	16 29	16 42	11 88
April	9 50	10 73	11 23	11 75	17 13	16 76	16 43	11 61
May	10	10 90	10 78	11 55	17 20	16 34	16 41	11 85
June	10 38	11 42	10 86	11 47	16 89	15 75	16 38	12 11
July	11	11 15	10 86	11 25	17 09	15 97	16 31	11 77
August	11 75	10 73	10 91	11 63	17 42	16 35	16 25	11 40
September	12	10 41	11 05	11 90	17 34	16 44	16 25	11 48
October	11 75	10 41	10 88	12 15	16 94	16 37	16 25	11 44
November	10 75	10 98	10 63	12 51	16 49	16 40	16 22	11 28
December	10 25	11 03	10 53	12 69	15 85	16 31	13 82	11 43

[Exhibit 25, G. C. B., May 5, 1903.]

Division of Certificate 73.

See Page 301 of Testimony.

	Names.	No. shares.
	Altmiller, Charles H.	145
	Anthony, D. M.	200
	Abbe, Edward P.	200
	Beal, Joseph S.	200
	Babeley, William A. L.	20
	" "	100
	" "	10
	" "	50
	Bolles, Richard F.	260
	Belches, J. W. & Co.	500
	Bond, Chas. P.	20
	Barron, Clarence W.	10
	Bissell, G. H.	100
325	Bradley, Peter B.	100
	Bartholomew, Samuel B.	100
	In red ink. Issued to Thos. Nelson, Treas., with others	350
	Chrimes, W. A. S.	140
	Cole, Charles H., Jr.	140
	Clark, Ward & Co.	1,250
	Coe, H. T.	80
	Davenport, C. L.	120
	Dodd, Edwin N.	50
	Eldredge, A.	100
	In red ink. Issued to Thos. Nelson, Treas. (See Bartholomew.)	
	Fitzgerald, Wm. F.	100
	Gray, Dewey & Co.	400
	Godell, Rufus R.	300
	Grout, W. W.	1,000
	Goodell, H. S.	50
	In Red Ink. Issued to Thomas Nelson, Treas. (See Bartholomew.)	
	Greenleaf, E. D.	200
	Head, Charles	100
	Head, Charles & Co.	100
	" "	100
	" "	100
	" "	100
	" "	100
	" "	50
	" "	50
	" "	50
	" "	50
	" "	50
	" "	50

	Hopkins, Timothy E.	175
	Howe, John G.	300
	Hayden, Stone & Co.	1,300
	Lundberg, Gustaf.	100
	Mosman, W. B.	100
326	Mead, F. S. & Co.	400
	Manning, Mrs. Abby H.	500
	Mackenzie, Charles J.	400
	Newhall, Horatio	50
	Ormond, James F.	50
	Pierce, John H.	200
	Putnam, G. A. & Co.	400
	Price & Co.	400
	Prendergast, James M.	200
	Pierce, O. N.	100
	In red ink. Issued to Thos. Nelson, Treas. (See Bartholomew.)	
	Newhall, George E.	100
	Remick, Frank W.	200
	Reed, William H.	200
	Ray, Joseph G.	700
	Richards, J. J.	250
	Smith, Albert W.	500
	Sach, A. Albert	200
	Swift, E. C.	1,000
	Sears, George O.	200
	Sturgis, J. B.	1,000
	Snow, Homer V.	500
	Stackpole, Henry	300
	Smith, F. & G. S.	100
	Tower, William A.	300
	Thayer, Eugene V. R.	500
	Towle, B. N.	60
	Towle, Amos	40
	Woodbull, Maxwell	600
	Williams, Jeremiah	400
	Webster, Frank G.	300
	Woods, Henry	600
	Wainwright, H. G. & Co.	100
	Wood, Henry	100
	Wetherbee, J. Otis	100
327	Whitney, George	50
	Winsor, W. P.	50
	Attached to transfer #15.	
		20,000

pencil.

OLD DOMINION C. M. & S. CO.,
W. H. SHEPARD, *Atty.*

[Exhibit 26, G. C. B., May 5, 1903.]

Division of Certificate 81.

(See Page 302.)

Names.	Shares.
Altmiller, Charles H.	40
Anthony, D. M.	400
Alline, John W.	40
Anthony, Harold H.	200
Anthony, Miss Annie R.	100
Bazeley, W. A. L.	40
Ball, Geo. H.	1,600
Bolles, Richard F.	480
Belches & Co., J. W.	800
Burnett, Harry	800
Billings, Robt. C.	800
Barron, —, ?	
Brown, S. N.	800
Bigelow, A. S.	1,000
Batt, Chas. R.	200
Beal, Thos. P.	200
Chrimes, W. A. S.	40
Cole, Jr., Chas. H.	120
Coe, Henry T.	640
Cole, Chas. H.	400
Coram, Jas. A.	1,520
Crosby, Stephen M.	1,600
328 Demmon, Daniel L.	800
Ely & Co.	400
Field, Robert M.	200
Fenno, Isaac	400
Goodenough, H. B.	160
Head, Chas.	800
Head & Co., Chas.	280
Hopkins, Timothy E.	650
Hayden, Stone & Co.	800
Hodge, Chas. J.	800
Hollingsworth, Zach. T.	400
Harding, Albert E.	80
Hollis, N. E.	160
" Geo. W.	160
Janes, Mrs. Mary L.	500
Kendall, Jos. S.	600
Leland, Towland & Co.	520
Lyman, Geo. H.	200
Lewisohn, Leonard	36,190
Mead, F. S. & Co.	800
Manning, Mrs. Abby H.	400

	Messervy, Benj. F.	200
	Meredith, J. Morris	2,000
	Maltman, A. S.	800
	Manning, Francis H.	800
	Moses, Henry C.	240
	Metcalf, Stephen O.	400
	Moseley, Chas. O.	800
	Mawhinney, H. H.	160
	O'Connor, John	160
	Pierce, Jno. H.	800
	Preston, Geo. M.	400
	Prince, Gordon	400
	Perkins, Thos. H.	80
	Reed, Wm. H.	400
	Ray, Jas. G.	400
329	Richardson, W. S., for Jas. S. Cunston	800
	Rust, Nancy E.	80
	Sanborn, Geo. E.	100
	Swift, E. C.	800
	Stevens, Horace H.	400
	" Moses T.	800
	" Samuel S.	200
	Smith, Albert O.	400
	Somers, Frank D.	400
	Spaulding, Samuel S.	240
	Towle, Jno. F.	200
	Woodhull, Maxwell	1,200
	Williams, Jeremiah	400
	Woods, Henry	800
	Williams, Harold	400
	Wheeler, Leonard	240
	Whitney, Henry M.	4,000
	P. K. Dutcaresque	20,000

I hereby certify that the foregoing is a true copy of the original deposition of Godfrey M. Hyams taken before me in the case of Old Dominion Copper Mining & Smelting Company v. Frederick Lewisohn et al., pending in the Circuit Court of the United States for the Southern District of New York, and of the exhibits annexed thereto.

HOWLAND TWOMBLY,
Notary Public.

[SEAL.]

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF MESSRS. BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET, BOSTON, *June* 15, 1904.

Deposition of Joseph A. Coram.

JOSEPH A. CORAM, Esq., being first duly sworn by Howland Twombly, Esq., notary public, in answer to interrogatories propounded by Louis D. Brandeis, Esq., counsel for plaintiff, deposes and says:

330 Q. 1. Will you state your full name, age, residence, and occupation?

A. Joseph A. Coram; fifty-two; Lowell, Mass.; mine owner.—I am connected with mines.

Q. 2. You are personally interested in a number of mines at the present time?

A. Yes, sir.

Q. 3. Will you state what mines and where?

A. I am connected with the Bingham Consolidated, the Bingham Copper & Gold Mining Company, the Montana Coal & Coke Company, and some others.

Q. 4. You are president of the Bingham Copper & Gold Mining Company?

A. Yes.

Q. 5. How long have you been connected with the copper-mining business, approximately?

A. Fifteen years or more.

Q. 6. Were you at any time associated with A. S. Bigelow in connection with copper mining and enterprises of a like nature?

A. You mean, associated——

Mr. BRANDEIS: In the same office.

A. Yes.

Q. 7. Were you, during any period, associated in connection in the same offices with him?

A. Yes, I made his offices my headquarters.

Q. 8. During what years?

A. Well, I do not remember exactly, but I should say from 1888 or 1889 to 1897; I do not remember exactly, but it was several years.

Q. 9. During that time were you connected with him in connection with the Old Dominion Syndicate and the Old Dominion Copper Mining & Smelting Company?

A. Merely as a stockholder.

Q. 10. What was your first connection with the Old Dominion Syndicate, so called?

A. Well, as I remember that, the first connection I had was that I subscribed for $100,000.

(By Mr. HEMENWAY:)

Q. Was that subscription in writing?

A. I am not sure, but I think it was.

Mr. HEMENWAY: Then the defendants object to the witness stating the contents, and require that the writing be produced.

Q. 11. Will you state the circumstances as nearly as you recall them—how you first became connected with this syndicate?

[The defendants object to the statement of the circumstances, on the ground that such circumstances are immaterial, provided that what was done finally resulted in a written agreement of any kind; so that it is immaterial, incompetent, and irrelevant.]

331 A. Well, I do not know that I quite understand what you mean by my "first connection with the syndicate."

Q. 12. You stated that you took a $100,000 interest in it: where were you when you took that interest?

A. I was at Mr. Bigelow's office.

Q. 13. And to whom did you indicate your purpose to take that $100,000 interest?

[Counsel for defendants objects to the question, that it does not apepar that he indicated to anybody and as assuming a fact that is not proved; and also because, if the witness is to be examined with reference to a subscription in writing, the writing should be produced; and therefore the question is irrelevant, incompetent, and immaterial.]

A. I was solicited or invited by Mr. Bigelow to be one of a few to subscribe to the raising of $300,000, or of $300,000 and some odd, towards the purchase of an interest from some estate called, I think, the Simpson estate.

[Counsel for defendants objects to this form of answer, that if it refers to a conversation between Mr. Bigelow and himself he should give that conversation as it took place, as far as he can remember it.]

Q. 14. If you can recall any of the circumstances of that conversation any further than you already have, you may do so.

A. Mr. Bigelow told me that he and Mr. Lewisohn had acquired an option, or a certain interest, from the Simpson estate in a certain mine called the Old Dominion, and wanted me to subscribe to the raising of $100,000, which I did.

Q. 15. Are you able to fix approximately when that was?

A. No; but I think it was in 1895.

Q. 16. I hand you herewith a paper marked "Exhibit 3, March 24, 1903," and dated May 21, 1895, which is an exhibit introduced in connection with the testimony of A. S. Bigelow in this suit, and ask you whether the signature of "J. A. Coram, $9000" is in your handwriting?

A. Yes.

Q. 17. Is there anything else in that paper which is in your handwriting?

A. "A. S. Maltman, by J. A. Coram," is in my handwriting.

Q. 18. $10,000?

A. Yes.

Q. 19. Are the words "twenty-first" and "May" in your handwriting?

A. Yes, I should say they were.

332 Q. 20. What, if anything, did you have to do with the procuring of the other signatures on that paper?

[Counsel for the defendants objects to the interrogatory on the ground that it is immaterial, irrelevant, and incompetent.]

A. I believe that this is my subscription for the $100,000 which I agreed to raise, and the names hereto annexed, all with the exception of that of H. H. Stevens, were obtained by me.

Q. 21. Are you able to state when, with reference to what date, you obtained those subscriptions

A. I could not state that from my memory.

Q. 22. Whether it was done on May 21, or before or after that date, as nearly as you can recall.

A. No, I could not remember.

Q. 23. Can you state whether or not the conversation with Mr. Bigelow in regard to your making a $100,000 subscription to the Old Dominion Syndicate or purchase was had before or after you commenced to get the signatures on this paper?

A. Before.

Q. 24. Do you recall whether or not, before you commenced getting the signatures on the paper which is shown you, you had made any money contribution towards the purchase, or any payment on account of the purchase, of that interest in the Old Dominion?

[Counsel for defendants objects to the question as leading, and also because it is incompetent, irrelevant, and immaterial.]

A. I could not remember that. All I remember in that connection is that I did contribute some money towards some expenses, but whether it was before I obtained the subscriptions, or whether it was before the money was paid in or not, I do not know.

Q. 25. I hand you now a paper marked "Exhibit No. 20, May 5, 1903," which was introduced in evidence as an exhibit in connection with the deposition of A. S. Bigelow in this cause, dated May 22, 1895, and ask you whether the name "J. A. Coram," signed to that paper, is in your handwriting?

A. I should say it was.

Q. 26. And the figures, "$100,000," against it?

A. Yes, sir.

Q. 27. Are you able to recall whether or not that paper was, in fact, signed before or after the paper dated May 21, 1895?

A. I could not say.

Q. 28. Are you able to state whether, at the time that you had the conversation with Mr. Bigelow already testified to by you,

333 in which you say that you agree to take a $100,000 subscription, you signed any paper, or whether this paper was signed some time after that conversation?

A. As I said before, I do not remember whether I signed the paper at that time or not, or whether it was by verbal conversation.

I remember, distinctly, that I agreed to get a subscription to the amount of $100,000.

Q. 29. State whether or not, at the time you subscribed, or at the time that you obtained this subscription, there was any agreement, any understanding, with Mr. Bigelow, as to forming at any time a corporation to take over the interest which was being purchased.

[Counsel for defendants objects to the question as leading, and also as immaterial, irrelevant, and incompetent, and that asking for an understanding is too indefinite, the witness being competent to only testify as to what was said or written by Mr. Bigelow to himself in reference to the subject inquired of.]

A. I could not say there was any definite understanding, any definite plans.

Q. 30. What do you mean by saying there were no "definite plans"?

A. Well, just as these papers would show; they do not show any definite purpose except for the temporary raising of this money.

Q. 31. When you say there were no definite plans, do you mean to be understood as saying that there was no plan or any understanding, any reference to the formation of any corporation at any time for the purpose of taking them over?

[Counsel for defendants objects to the interrogatory, for the reason stated in the objection to the last interrogatory.]

A. No, I do not mean that.

Q. 32. Will you state exactly what you do mean?

A. Well, it was understood that sooner or later we would form a corporation, or a corporation would be formed.

[Counsel for defendants objects to the question for the reasons stated in reference to the last inquiries.]

Q. 33. To take over the properties?

[Counsel for defendants objects to the question as leading.]

A. To take over these properties and to get stock for our subscription.

[Counsel for defendants objects also to the answer as being
334 a conclusion rather than a statement of what actually took place between the witness and Mr. Bigelow.]

Q. 34. When you say that it was understood, do you refer to any words spoken or acts in that connection? If so, state what, as nearly as you can remember, *what* was said or done in reference to that matter?

A. The time being so long, it is very difficult to remember accurately as to the statement. The impression in my mind is——

[Counsel for defendants objects to a mere impression.]

The WITNESS: Well, my recollection is that there was to be a corporation formed.

Q. 35. Was that a subject which was talked over between you and

Mr. Bigelow, or referred to in your conversations with him on this subject at that time?

[Counsel for defendants objects to the question as leading, and as incompetent, irrelevant, and immaterial.]

Mr. HEMENWAY: When do you mean by "at that time"?

Mr. BRANDEIS: That is, at the time of your subscribing to $100,000 of stock.

The WITNESS: That is, on May 22?

Mr. BRANDEIS: Well, in May. I do not refer to any particular date, but at the time that your subscription was made.

Mr. HEMENWAY: Whenever this subscription was made.

Mr. BRANDEIS: Or when you were obtaining these subscriptions from these persons that appear on the paper dated May 21, 1895.

[Counsel for defendants objects to the question as leading, immaterial, and incompetent, for the reason that conversations leading up to written subscriptions are of no consequence.]

A. It is impossible for me to remember the dates.

Q. 36. Please bear in mind that I am not asking specifically as to any day or dates; but I am asking whether the conversation to which you refer took place at a certain period, which is the period of the taking of these subscriptions?

Mr. HEMENWAY: That seems to be a date.

Mr. BRANDEIS: No, it is a period; it is not one date.

Mr. HEMENWAY: It refers to an act.

335 A. The conversation concerning the whole matter was between Mr. Bigelow and I, and I cannot fix the date; but my recollection is it was prior to the date of either one of these subscriptions.

Q. 37. According to your recollection, it was prior to the date of either one of these subscriptions that you talked with him of ultimately forming some corporation to take over the interest which was to be purchased?

[Counsel for defendants objects to the question as leading, not stating anything that has already been testified to by the witness, the witness having stated that he has no recollection when the alleged conversation inquired about did take place.]

A. Yes, in my judgment; my recollection is it was prior to those dates.

Q. 38. What, if anything, did you have to do with the formation of the Old Dominion Copper Mining & Smelting Company?

[Counsel for the defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I have no recollection of having had anything to do with it.

Q. 39. What, if anything, did you have to do with the transfer to the Old Dominion Copper Mining & Smelting Company of the Old Dominion properties?

[Counsel for defendants objects to the question as immaterial, incompetent, and irrelevant.]

A. I do not remember that I had anything to do with it.

Q. 40. Do you recall whether or not you were consulted by Mr. Bigelow or by Mr. Lewisohn in regard to the formation of the company?

[Counsel for defendants objects to the question as leading, and also as involving a conclusion from acts or words or writings, which, if material, should be put in evidence.]

A. I have no recollection at this time about it at all.

Q. 41. Or that you were consulted by either Mr. Bigelow or Mr. Lewisohn in regard to the fixing of the amount of the capital of the company?

[Counsel for defendants objects to the question for the reasons stated in his objection to the last interrogatory.]

336 A. I do not recollect that I was consulted about that at all.

Q. 42. Or that you were consulted by either Mr. Bigelow or Mr. Lewisohn in regard to the amount of stock to be issued by the Old Dominion Copper Mining & Smelting Company for the Old Dominion properties?

[Counsel for defendants objects to the question for the reasons stated in the objections to the last two interrogatories.]

A. I do not remember of being consulted by them at all.

Q. 43. Do you recall whether or not you were informed by Mr. Bigelow as to the amount of stock to be issued, or actually issued, by the Old Dominion Copper Mining & Smelting Company for the Old Dominion properties?

[Counsel for defendants objects to the question as leading, and also on the ground that it is immaterial, irrelevant, and incompetent.]

A. You mean by a question like that—a question like that in form means a positive statement?

Q. 44. Well, yes. If there was any information which was given to you, state what it was.

[Counsel for defendants requests that the witness, in answer to this interrogatory, should be confined to the words or substance of what was said to him, and specify by whom it was said.]

Mr. BRANDEIS: I would be glad to have you conform to Mr. Hemenway's request, so far as possible, Mr. Coram.

A. I positively cannot recollect any positive statement. The time is too far back. My recollection regarding such points as that is just general impressions I had on my mind,—fixed on my mind.

Q. 45. Do you mean by "impressions" your recollection?

A. Yes.

Q. 46. Will you state that recollection?

A. My recollection regarding that is that originally we thought of organizing a company——

Mr. HEMENWAY: You were asked to tell what was stated to you, not what "we thought," or anything of that kind. If you do not remember, that is the end of it. You are undertaking to give a recollection now of what was stated to you, and not any inference therefrom. Of course, if you have no recollection, that is an answer to the question.

337 Mr. BRANDEIS: The witness undertook to state "we thought." I suppose it could ordinarily be supposed to mean that they talked about such a subject.

Mr. HEMENWAY: That would hardly be my interpretation, and that illustrates why I insist upon the objection to conclusions rather than to testimony of what was said on the point by the respective parties.

Q. 47. Mr. Coram, will you please state as nearly as your recollection enables you to, the conversation? Of course, as you cannot probably remember the words, or any specific words, you must, as nearly as you can, state the substance of any conversation as to which you are testifying.

A. [Previous answer read] —with a capitalization of not less than 100,000 shares.

[Counsel for defendants objects to the answer as being irresponsive.]

Q. 48. Do you recall anything further in regard to the capitalization,—the fixing of the capitalization of the company that was to be formed or actually was formed?

[Counsel for defendants objects to the question on the ground that the witness has already given his whole recollection upon the point, and that it is incompetent, irrelevant, and immaterial.]

A. Of course I recollect that a corporation was formed for 150,000 shares.

Q. 49. Now do you remember when you first learned of that fact?

[Counsel for defendants objects to the question as immaterial, incompetent, and irrelevant.]

A. My recollection is that I was away West during the time.

Q. 50. During what time

A. During the time of the organization of the Old Dominion.

Q. 51. For how long a time, approximately?

A. My stays used to be from three weeks to six or seven weeks.

Q. 52. Was any stock in the Old Dominion Copper Mining & Smelting Company ever issued to you?

A. Yes, sir.

Q. 53. Are you able to state approximately, or actually, the amount of stock that was actually issued to you?

[Counsel for defendants objects to the question on the ground

that it is irrelevant, incompetent, and immaterial; also that,
338 as to the issue of any stock to the witness, that would be a matter of record that should be produced before the witness is examined with reference to it.]

A. I could not remember that; I should have to see the figures.

Q. 54. I call your attention to Exhibit 11, annexed to the deposition of A. S. Bigelow, in which it appears—particularly to the item under date of October 17, 1895—that there was transferred to you from Mr. Bigelow, 5240 shares of stock in the Old Dominion Copper Mining & Smelting Company, and ask you whether it is a fact that such stock was transferred to you by Mr. Bigelow?

[Counsel for defendants objects to the question on the ground that the exhibit shown to the witness is a mere typewritten copy, and that the only way of showing the transfer of any stock to Mr. Coram would be by the books of the corporation, which are in the possession of the plaintiff.]

[The certificates of stock were sent for, and in the mean time certain other interrogatories were put to the deponent as follows:]

Q. 55. Whether or not you ever received any stock in this company as a subscriber to the syndicate?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. As a subscriber? Yes, sir.

Q. 56. Are you able to recall how many shares of stock you received as such subscriber?

A. No.

Q. 57. Whether or not you ever received any stock from Mr. Bigelow in addition to that which you received as a subscriber?

[Counsel for defendants objects to the question as immaterial, incompetent, and irrelevant.]

A. Are you dividing any subscriptions?

Q. 58. My first question asked you whether you had received any stock as a subscriber to the syndicate?

A. And my answer is that I did.

Q. 59. And I refer to the subscription on the paper shown you, dated May 21, 1895, on which you appear as subscriber in your own name for $9000, and Mr. Maltman, by you as attorney, for $10,000. Now did you receive any stock for that subscription?

339 [Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial, and also as leading.]

A. That paper referred to as of date May 21 has my subscription completing my obligation to raise $100,000, and whatever stock distribution came to my subscription on that paper would be as a subscriber to $9000.

Q. 60. Now do you recall how much stock you received for that subscription of $9000?

A. No, I do not.

Q. 61. Or on what basis that stock was issued?

A. No, I do not.

Q. 62. Was there any other stock which you received besides that which you say you received on account of your subscription on that paper of May 21?

[Counsel for defendants objects to the question as immaterial, irrelevant, and incompetent.]

A. Yes, I remember of receiving a bonus in stock.

[Counsel for defendants objects to the answer as immaterial.]

Q. 63. Now state fully what you remember with reference to that subject.

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial, and as being also apparently matters between the witness and others than parties defendant.]

A. It is a broad question, and I cannot answer it.

Q. 64. From whom did you receive that bonus?

A. It was handed to me by Mr. A. S. Bigelow.

Q. 65. Was it handed to you at the same time, or at a different time from the time when you received the stock which you say was under the subscription paper of May 21, 1895?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I could not remember.

Q. 66. Are you able to recall the amount of this bonus that you received?

A. From memory?

Q. 67. Yes.

A. No, sir.

Q. 68. Do you recall where this bonus stock was delivered to you?

340 [Counsel for defendants objects to the question as immaterial, incompetent, and irrelevant.]

A. In Mr. Bigelow's office.

Q. 69. Are you able to recall approximately when it was?

A. No, sir.

Q. 70. Was anything said by Mr. Bigelow to you at the time of delivering to you that bonus stock?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. Yes. He said I would not need to distribute that among the rest of my subscribers.

Q. 71. Is the answer which you have given to the last question all that you remember of the conversation between you and Mr. Bigelow at that time?

[Counsel for defendants says the conversation is still objected to

as immaterial, incompetent, and irrelevant, as is also the answer of the witness to the last interrogatory.]

A. No, it is not.

Q. 72. State as nearly as you can recollect the whole of that conversation.

A. Well, I told Mr. Bigelow I would have to distribute it to my subscribers, because I had promised them that they would get their shares at the same price as I got mine, and inasmuch as I had put Mr. Maltman down without even consulting him, I would have to distribute, in equal proportions, those shares.

[Counsel for defendants objects to the answer as being irresponsive.]

Q. 73. Was anything else said at that conversation by Mr. Bigelow or by you?

[Counsel for defendants objects to the question for the reasons already stated as to this conversation.]

A. I do not remember.

Q. 74. Do you remember whether or not he stated to you at that time the amount of bonus stock which was distributed?

[Counsel for defendants objects to the question as incompetent, immaterial, and irrelevant.]

341 A. I do not.

Q. 75. Do you remember whether or not he stated at that time anything about the amount of stock which had been taken by him and his associates as a bonus?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. No, sir, I do not. That is all of that conversation that I remember.

Q. 76. Do you remember whether at any time Mr. Bigelow informed you what the amount of stock was that was taken as a bonus?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. No.

Q. 77. Did you learn at any time what amount of stock was taken by Mr. Bigelow and Mr. Lewisohn as a bonus?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I have no recollection that I ever did.

Q. 78. I hand you herewith a certificate of stock of the Old Dominion Copper Mining & Smelting Company, No. 428, for 5240 shares, dated October 17, 1895, standing in the name of A. S. Bigelow, and endorsed by A. S. Bigelow, "Assigned and transferred to J. A. Coram," "All" shares represented by that certificate, and ask

you whether or not after examining that certificate you are able to say whether certificate was delivered to you by Mr. Bigelow.

[Counsel for defendants objects to the question as incompetent, immaterial, and irrelevant.]

A. I could not say.

Q. 79. Is the handwriting on the back of that certificate, "J. A. Coram," in your handwriting?

A. It is not.

[Counsel for defendants objects to the last interrogatory as incompetent, immaterial, and irrelevant.]

Q. 80. Are you able to say in whose handwriting that is?

342 [Counsel for defendants objects to the question as incompetent, immaterial, and irrelevant.]

A. No. It is not mine.

Q. 81. Or in whose handwriting the word "All" is on the back of that certificate?

[Counsel for defendants objects to the question as incompetent, immaterial, and irrelevant.]

A. No.

Q. 82. What disposition did you make of the bonus stock which you say you received from Mr. Bigelow?

[Counsel for defendants objects to the question as to its incompetency, irrelevancy, and immateriality to the issue between these parties.]

A. I distributed it among the subscribers obtained by me who furnished the $100,000, with the exception of H. H. Stevens.

Q. 83. Was H. H. Stevens a subscriber through you?

[Counsel for defendants objects to the question as immaterial, incompetent, and irrelevant.]

A. He was not a subscriber through me, but he was a subscriber on my paper.

Q. 84. Did you have any conferences or discussions in connection with the organization of the Old Dominion Copper Mining & Smelting Company with any of the subscribers other than A. S. Bigelow to the agreement of May 22, 1895, which is Exhibit 20, introduced in connection with the deposition of A. S. Bigelow?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial, the witness being inquired of in relation to matters between himself and others than parties to the record.]

A. I do not remember that I did.

Q. 85. I call your attention to a paper dated July 18, 1895, which was introduced in evidence as Exhibit 10, in connection with the deposition of A. S. Bigelow in this cause, and particularly call your attention to the words "J. A. Coram, by Thomas Nelson, four thou-

sand shares (4000)," and ask you whether or not you have any recollection in regard to the signing of that paper?

343 A. No, I have no recollection, of course. My name does not appear on it except by Mr. Nelson.

Q. 86. Do you recall whether or not you authorized that signature?

[Counsel for defendants objects to the question on the ground that it is irrelevant, immaterial, and incompetent.]

A. I do not recall whether I did or not. If he obligated me, I would have stood to the obligation.

Q. 87. Do you recall whether or not you took any stock under that subscription paper?

[Counsel for defendants objects to the question as incompetent, immaterial, and irrelevant.]

A. I do not remember; it is too long ago.

Q. 88. Mr. Thomas Nelson is dead?

A. Yes, I believe so.

Q. 89. And Mr. Matthew Luce, whose name also appears on the paper of May 22, is dead also?

A. Yes, sir.

[Stipulation: The deposition of the witness is now closed, but it is agreed that if Mr. Lauterbach, for whom Mr. Hemenway now appears, desires to examine Mr. Coram, counsel for plaintiff will recall Mr. Coram so that he may do so with the same rights as upon cross-examination.]

JOSEPH A. CORAM.

Subscribed and sworn to before me this 22d day of June, 1904.

[SEAL.] GEORGE C. BURPEE,
Notary Public.

I hereby certify that the foregoing is a true copy of the original deposition of Joseph A. Coram taken before me in the case of Old Dominion Copper Mining & Smelting Co. v. Frederick Lewisohn et al., pending in the Circuit Court of the United States for the Southern District of New York, and of the exhibits annexed thereto.

[SEAL.] HOWLAND TWOMBLY,
Notary Public.

344 *Stipulation.*

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF MESSRS. BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET.
161 DEVONSHIRE STREET.
BOSTON, *June* 15, 1904.

Deposition of Galen L. Stone.

GALEN L. STONE, Esq., being first duly sworn by Howland Twombly, Esq., notary public, in answer to interrogatories propounded by Louis D. Brandeis, Esq., counsel for plaintiff, deposes and says,—

Q. 1. State your full name, age, residence, and occupation.

A. My full name is Galen L. Stone; I am forty-one years and seven months of age; my residence is in Brookline, county of Norfolk; my occupation is that of a stockbroker.

Q. 2. You are a member of the firm of Hayden, Stone & Company?

A. Yes.

Q. 3. And have been for how long?

A. Since February, 1892, when it was organized.

Q. 4. I hand you herewith a paper dated June 14, 1895, marked "Exhibit 5," which is an exhibit put in evidence in connection with the testimony of A. S. Bigelow in this cause, and call your attention to the words of "Hayden, Stone & Co. ten thousand dollars" affixed to that paper: will you state whether or not that is in your handwriting?

[Counsel for defendants objects to the question as being immaterial, irrelevant, and incompetent.]

A. That is in my handwriting.

Q. 5. Will you state whether or not, prior to the signing of that paper, you had any conversation with Mr. A. S. Bigelow in relation to your subscribing to the Old Dominion Syndicate?

[Counsel for defendants objects to the question on the ground of its immateriality, as relating to a conversation with a third party.]

A. I did.

345 Q. 6. Where was that conversation held?

[Counsel for defendants makes the same objection to this question as to the prior interrogatory.]

A. The first conversation with relation to a subscription to the stock of the Old Dominion Company which I recall was held in the alleyway between Washington street and Young's Hotel, right by Thompson's Spa. I have a very vivid recollection of meeting Mr. Bigelow there, and his speaking to me and telling me that they had this enterprise in view.

Q. 7. Will you state, as nearly as you can, what you remember?

[Counsel for defendants objects to this conversation as being irrelevant, immaterial, and incompetent.]

A. Mr. Bigelow told me that they had made a purchase of what

was known as the Old Dominion property, that they proposed to organize a syndicate to purchase it, and he offered me an opportunity, which I considered valuable, to subscribe to the shares.

Q. 8. What, if anything else, was said in that connection, if you recall?

A. That is all that I can recall as having been said distinctly at that time.

Q. 9. Did you have any other conversation with him before you signed the subscription paper?

[Counsel for defendants objects to the question as incompetent, immaterial, and irrelevant.]

A. I did, in his office in the Sears building.

Q. 10. How soon after the first conversation?

A. Well, it would be impossible for me to say, but I do not recall that there was any delay in closing the matter up after I heard of it.

Q. 11. State, as nearly as you can remember, the conversation that you had at Mr. Bigelow's office.

[Counsel for defendants objects to this interrogatory as calling for that which is immaterial, incompetent, and irrelevant, being a conversation with a third party.]

A. Mr. Bigelow explained to me briefly the purchase of the property, what they hoped to do with it, told me how it was to be capitalized, and invited me——

346 Mr. HEMENWAY: Well, if you remember, you are to give the conversation, what he said and what you said; not how it was to be capitalized, but exactly what he did say about the capitalization.

The WITNESS: Among other things, Mr. Bigelow stated to me that a syndicate had been formed to purchase the Old Dominion mine; that a corporation would be organized to own and operate this property; that the syndicate would raise $1,000,000; that he offered me an opportunity to subscribe for $10,000 in the syndicate, and told me for that I was to receive 400 shares of stock of the Old Dominion Company to be organized, and 400 shares were to go as a bonus; and further stated distinctly at that time that a company would be organized with a capital of $2,500,000, that is, 100,000 shares of a par value of $25 each, and 80,000 shares would be used in raising $1,000,000, exactly on the terms I have stated in my own case; and that there would be 20,000 shares left in the treasury, which would later be sold to provide a working capital; and at that time he also told me that the price at which the 20,000 shares would be sold would be considerably greater than the price at which I made the first subscription.

Q. 12. Was there anything else which he said on that occasion which you can remember?

A. I do not remember anything else.

Q. 13. Do you remember whether anything was said on that occasion to the effect that Mr. Bigelow and Mr. Lewisohn were going to

take a large block of this stock for themselves as a bonus to themselves?

[Counsel for defendants objects to the question as immaterial, irrelevant, and incompetent.]

A. Certainly nothing of that sort was said.

Q. 14. Was there anything said by Mr. Bigelow as to his and Mr. Lewisohn's having terms more favorable than those which were offered to you?

[Counsel for defendants objects to the question because it is immaterial, irrelevant, and incompetent, as well as leading.]

A. No, sir.

Q. 15. Did you have any conversation with Mr. Bigelow in reference to the Old Dominion matter other than those two that you have testified to before you signed the paper Exhibit 5?

[Counsel for defendants objects to the interrogatory because it is immaterial, irrelevant, and incompetent.]

347 A. I cannot swear that I did or that I did not; it is quite probable that I did, as I thought a great deal of Mr. Bigelow and of his judgment, and naturally would have wished to inquire about the opportunity a great deal, but I cannot recall distinctly.

Q. 16. Do you recall where it was that you put your name on that paper?

A. I do not.

Q. 17. Did you have any conversation with Mr. Bigelow at any time before you heard that the Old Dominion Copper Mining & Smelting Company had actually been organized, relating to the organization of the company, or its capitalization, other than that you have testified to?

[Counsel for defendants objects to this interrogatory because it is immaterial, irrelevant, and incompetent.]

A. I do not recall of any conversation on that subject.

Q. 18. I hand you, herewith, a paper marked "Exhibit 10," dated Boston, July 18, 1895, which is an exhibit introduced in connection with the testimony of A. S. Bigelow in this case, and call your attention specifically to the signature of "Hayden, Stone & Co., two thousand shares," and ask you whether or not that is your signature?

A. That is not.

Q. 19. Whose signature is that?

A. That is the signature of Mr. Charles Hayden.

Q. 20. Were you aware of that subscription being made to stock in the name of Hayden, Stone & Company at that time?

[Counsel for defendants objects to the question because it is incompetent, immaterial, and irrelevant.]

A. I was.

Q. 21. Whether or not that subscription was made by, or the sig-

nature to the paper signed by, Mr. Hayden in or after consultation with you?

[Counsel for defendants objects to the question as immaterial, irrelevant, and incompetent, calling for conversations between third parties.]

A. It was.

Q. 22. State whether or not, at the time of the making of that subscription on that paper, you knew, or to your knowledge Hayden, Stone & Company knew, that Bigelow and Lewisohn had caused to be conveyed to the Old Dominion Copper Mining & Smelting
348 Company the Old Dominion properties, not for 80,000 shares of the stock, but for 130,000 shares of the stock.

[Counsel for defendants objects to this interrogatory as being an inquiry about matters that are immaterial, and that the evidence is irrelevant and incompetent.]

A. I did not know that.

Q. 23. Did you, at the time of making that subscription, know that Bigelow and Lewisohn had caused to be issued to them for themselves any stock in connection with the transfer of the Old Dominion properties to that company other than the 80,000 shares of stock about which Mr. Bigelow had told you before making your subscription of June 14?

[Counsel for defendants objects to the interrogatory as immaterial, irrelevant, and incompetent.]

A. I did not.

Q. 24. Had Mr. Bigelow, up to the time of subscribing by your firm on July 18, 1895, said anything to you to the effect that he and Lewisohn, or either of them, were taking for themselves as a bonus or as compensation any stock other than what would form a part of the 80,000 shares which were to be issued by the syndicate?

[Counsel for defendants objects to the question as leading, incompetent, irrelevant, and immaterial.]

A. He had not.

Q. 25. State whether or not Hayden, Stone & Company paid the amount of $10,000 which they subscribed to the Old Dominion Syndicate, as appears by the paper of July 14, 1895, which you have examined.

[Counsel for defendants objects to this interrogatory as being immaterial, incompetent, and irrelevant.]

A. I cannot state as a fact, of course, that I remember the payment.

Q. 26. Beg pardon?

A. I should answer yes. You can look at my books, of course.

Mr. HEMENWAY: You simply say you cannot, and you immediately say you can, it appears, that is all.

349 The WITNESS: Well, I think I might ask Mr. Brandeis to be instructed about a thing like that, in answering such a question as that. That, of course, will show through a check in my office. I may have signed that check, or my partner may have signed it. I cannot testify to the actual physical act of making that payment, but my recollection is that we did make that payment.

Q. 27. And have you any recollection as to whether or not you took and paid for any stock in pursuance of the subscription, or of any part of the subscription, appearing on the paper of July 18?

[Counsel for defendants objects to the interrogatory as being immaterial, irrelevant, and incompetent.]

A. My recollection is that we paid for that stock and received it.

Q. 28. Will you state whether or not, at any time subsequent to the signing of that paper by Hayden, Stone & Company, dated July 18, 1895, you ascertained that Bigelow and Lewisohn had taken to themselves as a bonus or compensation a large amount of the stock of the Old Dominion Copper Mining & Smelting Company?

[Counsel for defendants objects to this interrogatory as being immaterial, incompetent, and irrelevant, and also leading.]

A. My recollection is that some months after——

Mr. HEMENWAY: When you testify "my recollection is," you recall a fact and swear to the fact, of course; not that you think it is so.

The WITNESS: Well, you know what "recollection" means.

Mr. HEMENWAY: You are swearing to a fact, not to the recollection of a fact. If you cannot recollect the thing, it did not take place, of course.

Mr. BRANDEIS: It is perfectly proper, of course.

Mr. HEMENWAY: Yes, if he means that.

The WITNESS: I do not know. I want to tell the truth as far as I know. Some months after the second subscription was made I became aware that the Old Dominion had capital issued amounting to 150,000 shares.

[Counsel for defendants objects to the answer as not being responsive.]

Q. 29. Had you, before that time, learned that Bigelow and Lewisohn had taken any of the Old Dominion stock as a bonus to themselves or their associates?

[Counsel for defendants objects to the interrogatory as being leading, and as inquiring for information that is immaterial and incompetent.]

350 A. May I ask you to instruct me? Do you mean before I found out there were 150,000 shares?

Q. 30. Yes.

A. No. After I found out there were 150,000 shares, that was the first I knew of it; I had not heard anything previous to that.

Q. 31. After you found out there were 150,000 shares in the Old Dominion Copper Mining & Smelting Company, what, if anything, did you do with reference to Mr. Bigelow?

[Counsel for defendants objects to this interrogatory, it being incompetent, irrelevant, and immaterial what his action was with reference to Mr. Bigelow.]

A. As soon as I learned that the company had issued a capital of 150,000 shares I went to Mr. Bigelow and stated to him that my understanding clearly was that there was to be a capital of 100,000 shares, and I asked him to explain the increase in capital.

Q. 32. What, if anything, did Mr. Bigelow say to you on that occasion?

[Counsel for defendants objects to any testimony with reference to what Mr. Bigelow said to this witness as being incompetent, immaterial, and irrelevant in this suit.]

A. I will not attempt to repeat Mr. Bigelow's words, but I came away with an——

Mr. HEMENWAY: One moment. It is the words you are asked for and not what you went away with.

The WITNESS: Shall I answer just the way I was going to and let you see how much is to go into the record?

Mr. HEMENWAY: No.

Q. 33. State, as nearly as you can, the substance of what Mr. Bigelow said to you, if you cannot state the words.

A. The substance of his statement to me was that the 50,000 shares extra had been taken as a profit by himself and associates.

Q. 34. Is that all of the conversation that you remember?

A. Well, that is the substance of it, as I say.

Q. 35. Were Hayden, Stone & Company, at that time, at the time of that conversation, stockholders in the Old Dominion Copper Mining & Smelting Company?

[Counsel for defendants objects to the interrogatory as incompetent, immaterial, and irrelevant to the issues in this suit.]

A. I cannot answer that.

351 Q. 36. That is, you do not recall whether or not——

A. —whether we had sold our stock or not. I do not know.

Q. 37. Did Hayden, Stone & Company sell their stock which they subscribed for?

[Counsel for defendants objects to the interrogatory as being immaterial, irrelevant, and incompetent.]

A. They did.

Q. 38. Have you any recollection as to when they sold their stock?

A. Only that it was within a comparatively short time.

Q. 39. What, if anything, did you say to Mr. Bigelow after he told you that he and Lewisohn had taken 50,000 shares to themselves?

[Counsel for defendants objects to the interrogatory as calling for a conversation or statements which are immaterial, incompetent, and irrelevant.]

A. I cannot recall, Mr. Brandeis.

Q. 40. Whether or not anything was said expressing satisfaction or assent or dissatisfaction with the statement that was made?

[Counsel for defendants object to the answer to the last interrogatory.]

A. I was very much dissatisfied.

Mr. HEMENWAY: That you were not asked. That I object to.

Q. 41. [Int. 40 is repeated.]
A. I cannot remember.

[STIPULATION.—The deposition of the witness is now closed, but it is agreed that if Mr. Lauterbach, for whom Mr. Hemenway now appears, desires to examine Mr. Stone, counsel for plaintiff will recall Mr. Stone so that he may do so with the same rights as upon cross-examination.]

GALEN L. STONE.

Subscribed and sworn to before me this 23d day of June, 1904.
[SEAL.] GEORGE C. BURPEE,
Notary Public.

I hereby certify that the foregoing is a true copy of the original deposition of Galen L. Stone, taken before me in the case of
352 Old Dominion Copper Mining & Smelting Co. v. Frederick Lewisohn et al., pending in the Circuit Court of the United States for the Southern District of New York, and of the exhibits annexed thereto.
[SEAL.] HOWLAND TWOMBLY,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *October* 11, 1904.

Deposition of Charles H. Altmiller.

CHARLES H. ALTMILLER, Esq., being first duly sworn by Howland Twombly, Esq., notary public, in answer to interrogatories propounded by Louis D. Brandeis, Esq., counsel for plaintiff, deposes and says:

Q. 1. Please state your full name, age, residence, and occupation.
A. Charles H. Altmiller; thirty-eight years; 86 Highland street, Roxbury; secretary and treasurer of the Old Dominion Copper Mining & Smelting Company.
Q. 2. How long have you been secretary and treasurer of that company?
A. Since about April, 1902, I believe.

Q. 3. Were you connected with the Old Dominion Copper Mining & Smelting Company prior to April, 1902?

A. Yes, I have been connected with it since the start.

Q. 4. Since the organization of the company in July, 1895?

A. Since the organization of the company.

Q. 5. In what capacity?

A. Well, clerk or bookkeeper, whatever you have a mind to call it.

Q. 6. Were you connected with Mr. A. S. Bigelow, or with his companies prior to the organization of the Old Dominion Copper Mining & Smelting Company?

A. Yes.

Q. 7. For how long a time?

A. About fifteen years.

Q. 8. For how long a time had you been head bookkeeper of those companies?

353 A. Well, I had been clerk and bookkeeper ever since I had been in there; I don't know how much head bookkeeper there was about it. I suppose the treasurer was the head bookkeeper.

Q. 9. Who were the bookkeepers under you in 1895?

A. Well, there was one that used to work for me—Mr. Beal.

Q. 10. Is he still living?

A. He is still living.

Q. 11. And in the employ of Mr. Bigelow?

A. Still.

Q. 12. Any other?

A. No, that is all that I remember.

Q. 13. In what business were you bookkeeper for Mr. Bigelow prior to the organization of the Old Dominion Copper Mining & Smelting Company?

A. I do not know that I understand what you mean.

Q. 14. Well, for him personally, or for the companies in which he was interested, or which he managed?

A. Companies in which he was interested and managed, I suppose.

Q. 15. Was there one, or more than one?

A. There were twenty, or twenty-two, I think.

Q. 16. They had an office together?

A. All in one office.

Q. 17. In Mr. Bigelow's suite of offices in the Sears building?

A. Well, previously in the Advertiser building, afterwards in the Sears building.

Q. 18. Were those companies mining companies?

A. Mining companies, water companies, electric-light companies, and land companies.

Q. 19. Were those companies in which Mr. Leonard Lewisohn was interested, any of them?

A. I think he was interested in all of them.

Q. 20. Was there any general designation by which those companies were known?

A. I think they used to be called the Bigelow & Lewisohn Syndicate.

Q. 21. Was Mr. Leonard Lewisohn consulted about the organization of the Old Dominion Copper Mining & Smelting Company at its organization?

A. Yes.

Q. 22. At that time there was a private wire between Mr. Bigelow's office and Mr. Lewisohn's office?

A. Yes.

Q. 23. [Presenting a record book.] I will ask you now to turn to the record book of the Old Dominion Copper Mining & Smelting Company: are these the records of the meetings of the stockholders and directors of the Old Dominion Copper Mining & Smelting Company?

A. They are.

Q. 24. Will you now turn to those records and give the dates of each of the meetings of the stockholders from the date of the meeting of the incorporators for organization up to the annual meeting of April, 1902? [To counsel for defendants.] If you will per-
354 mit me, I will call attention to this.

A. Well, I don't know much about that part of it.

Q. 25. Well, the meeting of the incorporators.

A. July 8, 1895.

Mr. HEMENWAY: He kept these records?

The WITNESS: No, I did not.

Mr. BRANDEIS: He didn't keep them before he was secretary.

The WITNESS: When I was at Mr. Bigelow's office I did not keep them; previous to 1902 I did not keep them.

Q. 25*a*. The 9th day of July, 1895, is the meeting for organization?

A. Yes.

Q. 25*b*. The next meeting is the annual stockholders' meeting, held April 5, 1899?

A. Yes.

Mr. LAUTERBACH: Is there no record of any intermediate meeting?

Mr. BRANDEIS: No; as a matter of fact, there was none.

The WITNESS: The next is a special meeting of the stockholders, June 15, 1899, and the next is the annual meeting of the stockholders, April 3, 1901.

Q. 26. Will you now turn to the record book and give us a list of all the meetings of the directors?

A. The first was on July 9, 1895; then on July 11, 1895, July 24, 1895, September 18, 1895, November 24, 1897, December 16, 1897, May 10, 1899, February 13, 1900, March 2, 1901, Apirl 10, 1901, October 17, 1901, March 4, 1902, March 25, 1902.

Q. 27. I call your attention to the record of the first meeting of the incorporators on July 9, 1895, at which Jesse Lewisohn, Allen W. Evarts, Edgar Buffum, Charles W. Welch, Sidney Riddlesdorffer, William B. Rowe, and William R. Montgomery were elected as directors, and ask you who Edgar Buffum was?

A. He was a clerk in the office of Lewisohn Brothers at that time.

Q. 28. Has he remained as a clerk there since?

A. As far as I know, he is there to-day.

Q. 29. I now call your attention to the meeting of the directors on July 11, 1895, and to the fact that the following directors were elected; namely, Thomas Nelson in place of Jesse Lewisohn; H. M. Whitney in place of Charles W. Welch; Joseph G. Ray in place of Sidney Riddlesdorffer; Leonard Lewisohn in place of William B. Rowe, and A. S. Bigelow in place of William R. Montgomery, and ask you how long Thomas Nelson remained a director of the company?

A. I suppose until his death.

Q. 30. Do you recall the date of his death, approximately?

A. I think it was in 1897, the fall of 1897; I do not know exactly.

355 Mr. HEMENWAY: Of course it is understood that this witness is testifying from what he finds in the books?

Mr. BRANDEIS: Yes, he is testifying as to these dates.

Mr. HEMENWAY: As appearing upon the books, only, and not as a matter of his own personal knowledge.

The WITNESS: No; it is simply what is on the books.

(By Mr. HEMENWAY:)

Q. Will you give me the date of Nelson's death again?

A. In 1897.

Q. 31. I will next call your attention to the directors' meeting of July 24, 1895, to the election of Moses T. Stevens in place of Allen W. Evarts; and to the directors' meeting of November 24, 1897, in which it appears that E. V. R. Thayer is elected a director in place of H. M. Whitney, resigned, and W. J. Ladd in place of Thomas Nelson, deceased. As far as you can remember, were all of the other persons who had been directors, elected directors previously, still on the board at that time?

A. Yes.

Mr. HEMENWAY: It is not as far as he remembers, but as far as it appears by that book?

The WITNESS: Yes.

Mr. BRANDEIS: I suppose he has some recollection, but I mean so far as it appears.

Mr. LAUTERBACH: You are not endeavoring to get his recollection?

Mr. BRANDEIS: No, not on this point. I just want to get the dates on the record.

Q. 32. And the W. J. Ladd elected at that meeting is the director who was elected secretary and treasurer of the company, and remained such until the change of management at the April meeting in 1902, after which you became secretary and treasurer?

A. Yes, sir.

Q. 33. Now, turning to the annual meeting of April 5, 1899 at which it appears that Albert S. Bigelow, William J. Ladd, Joseph G. Ray, Joseph S. Bigelow, Leonard Lewisohn, E. V. R. Thayer, and Edgar Buffum were elected directors. I ask you who Joseph S. Bigelow is, who was then elected a director?

A. A brother of A. S. Bigelow.

Q. 34. Turning now to the meeting of the directors on March 2, 1901, at which it appears that C. H. Bissell was elected a director in place of J. G. Ray, deceased, I ask who Mr. Bissell was?

A. A clerk in the office, a clerk in the employ of the Bigelow & Lewisohn Syndicate, a clerk in the office.

356 Q. 35. And Mr. Bissell is still in the employ of Mr. Bigelow, in his office?

A. Yes.

Q. 36. Now, turning to the special meeting of the stockholders on June 15, 1899, in which it appears that F. M. Stone called the meeting to order and represented A. S. Bigelow and his proxy, I will ask you who F. M. Stone is?

A. A partner of Mr. Perkins of Perkins & Stone, lawyers, counsel for Mr. Bigelow.

Q. 37. Now, turning to the annual stockholders' meeting on April 3, 1901, at which it appears that P. K. Dumaresq was elected secretary of the meeting, and represented by proxy 85,520 shares, who was P. K. Dumaresq?

A. Transfer agent of the various companies.

Q. 38. He had been transfer agent throughout the time from the time of the organization?

A. Yes, sir, he was.

Q. 39. He was the general transfer agent?

A. Of all the companies.

Q. 40. That is, the transfer agent of all the Bigelow-Lewisohn companies of which you were clerk?

A. Yes.

Q. 41. And for a time, also, assistant secretary and treasurer of the Old Dominion Copper Mining & Smelting Company?

A. Yes, I believe that was also his title,—assistant secretary and assistant treasurer of all the companies,—transfer agent and assistant secretary.

Mr. Brandeis: Now I offer in evidence, and annex hereto, the records of all of the meetings of the stockholders and of the directors which have been referred to by the witness.

Mr. Lauterbach: I object to that, of course.

Mr. Brandeis: And, subject to that objection, I assume it is agreeable to you to have annexed to the deposition a copy of the records?

Mr. Lauterbach: Perhaps I had better state the objection. It is objected to on the ground that the witness did not personally keep the records, and has no knowledge of them except from the records themselves; and on the further ground, as Mr. Hemenway suggests, that the records are immaterial and irrelevant.

Mr. Brandeis: I will furnish a copy of the records to be annexed to the deposition as an exhibit.

[A copy of the records, as furnished by Mr. Brandeis, will be found annexed to this deposition, marked "Exhibit 1, Oct. 11, 1904, G. C. B." at Exhibits p. 412.]

357 Q. 42. I will ask you now, Mr. Altmiller, to turn to the entry in the journal of the Old Dominion Copper Mining & Smelting Company relating to the issue of the stock. It is the first entry in the journal, is it?

A. The first two entries.

Q. 43. Will you read those entries?

Mr. LAUTERBACH: Do you offer them now?

Mr. BRANDEIS: Yes.

Mr. LAUTERBACH: The introduction of the entries in the books is objected to on the ground that they are irrelevant and incompetent, and especially on the further ground that the witness did not keep the record.

Q. 44. Whose handwriting is that?

A. J. S. Beal's.

Q. 45. And J. S. Beal was your assistant?

Mr. HEMENWAY: He has not stated that.

Mr. BRANDEIS: He said, "assistant under me."

Mr. HEMENWAY: He said, "He was with me."

Mr. BRANDEIS: He used the expression, "assistant under me."

A. We worked together, and he took instructions from me in making the entries.

(By Mr. LAUTERBACH:)

Q. Do you recall that you gave instructions about these particular entries?

A. No, not about these particular entries, but all of these entries on the books, every entry, I guess, is in his handwriting; I would tell him in what form to make the entries, and he would make them.

Q. 46. Now will you read those entries?

A. "Boston, 1895. Real and property account, Dr. to capital stock, $3,250,000."

"100,000 shares at $25 each, $2,500,000. This stock was part of the consideration given in payment for the real estate and property of this company."

"30,000 shares at $25 each, $750,000. This stock was part of the consideration given in payment for the real estate and property of this company."

Then there is a line or rule under that.

"Treasury stock Dr. to capital stock. 20,000 shares at $25, $500,000. This issue of stock authorized at the meeting of directors held Sept. 18, 1895."

Q. 47. Now will you turn in the ledger of the company to the account of treasury stock? In whose handwriting is that?

A. That is Mr. J. S. Beal's.

Q. 48. Also made under your direction?

A. Yes.

Q. 49. Will you read that entry?

Mr. LAUTERBACH: That is objected to as irrelevant, incompetent, and immaterial.

A. "Treasury stock."—of course this is ruled all off, you know,—on the debit side, "1895. To capital stock, $500,000.00

358 On the credit side: "1895, September. By cash, $485,350. "1897, September, By cash, $14,650."

Total under each, "$500,000."

Q. 50. From what book of the company are those entries posted in the ledger?

A. From the cash book.

Q. 51. Now will you turn to the corresponding entry in the cash book?

A. Page 2 of the cash book.

Q. 52. Will you read that entry?

Mr. LAUTERBACH: The same objection.

A. On the debit side of the cash book, under date of September, "To treasury stock, cash, $485,350."

Also on the same side, page 56, on the debit side, "September 21, To treasury stock, cash, $14,650."

Q. 53. In whose handwriting is that entry?

A. That is in my handwriting.

(By Mr. HEMENWAY:)

Q. What do you point out as being in your handwriting?

A. All this [referring to the page of the book.] Mr. Beal was sick at that time.

Q. 54. Now will you turn to the book of original entry which contains the items from which the item of $485,350, under date of September, 1895, is made up?

Mr. LAUTERBACH: The same objection.

A. They are entered first on the stub of the check book.

[Shown to counsel.]

Q. 55. Now will you give us the dates of payment, the parties by whom the payments were made, and the amounts of payment, the figures comprising the items from which this aggregate of $485,350 is made up?

Mr. LAUTERBACH: The same objection. You will insert that?

Mr. BRANDEIS: Yes, I will give it to the stenographer.

A. 1895.

Sept.	13.	Horatio Newhall	1,250
"	13.	T. G. Hopkins	4,375
	16.	Foote & French	2,500
	18.	H. T. Coe	7,000
		Oswald H. Causman	375
		Jas. Herrick	2,500
		Hy. F. Woods	2,500
	19.	D. W. Chever	625

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	Anthony, D. M.	5,000
	Beal, J. S.	5,000
	Bazeley, W. A. L.	4,500
	Belches & Co., J. W.	12,500
	Cole, Jr., C. H.	3,500
	Davenport, C. L.	3,000
	Dodd, G. M.	1,250
	Fitzgerald, W. F.	2,500
	Grey, Dewey & Co.	10,000
	Greenleaf, G. D.	5,000
	Howes, John C.	7,500
	Hayden, Stone & Co.	32,500
	Lundberg, Gustaf	2,500
	Mosman, W. B.	2,500
	Mead & Co., F. S.	10,000
	Manning, Mrs. A. H.	12,500
	Ormond, Jas. F.	1,250
	Putnam & Co., C. A.	10,000
	Remick, F. W.	5,000
	Reed, W. H.	5,000
	Richards, J. J.	6,250
	Smith, A. W.	12,500
	Sears, O. G.	5,000
	Snow, H. V.	12,500
	Stackpole, Henry	7,500
	Smith, F. & C. S.	2,500
	Tower, W. A.	7,500
	Thayer, E. V. R.	12,500
	Towle, B. N.	1,500
	" Amos	1,000
	Woods, Henry	15,000
	Wainwright & Co., H. C.	2,500
	Wetherbee, J. O.	2,500
	Whitney, Geo.	1,250
	Head & Co., Chas.	20,000
	" Chas.	2,500

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Sept. 20,	Bolles, R. F.	6,500
	Clark, Ward & Co.	31,250
	McKenzie, Chas. J.	10,000
	Sack, Albert A.	5,000
	Swift, E. C.	25,000
	Sturgis, J. B.	25,000
	Webster, F. G.	7,500
	Winsor, W. P.	1,250
	Prendergast, J. M.	5,000
	Bissell, C. H.	2,500
21,	Abbe, E. P.	5,000
	Wood, Henry	2,500

	23.	Goodell, R. R.	7,500
		Grant, W. W.	23,750
		Pierce, J. H.	5,000
		Williams, Jere	10,000
	25.	Newhall, G. G.	2,500
		Ray, J. G.	17,500
	26.	Bradley, P. B.	2,500
		Price & Co.	10,000
	16.	Bond, Chas. P.	500
	19.	Woodhull, Maxwell	15,000
Oct.	1.	Grant, W. W.	1,250
	4.	Altmiller, C. H.	3,625
		Chrimes, W. A. S.	3,500

Those items aggregate $503,750. Against those were credits aggregating $19,500, representing moneys to the people who did not take their stock, as follows:

1895, Sept.	28,	J. S. Kendall	$5,000
Oct.	1,	D. M. Anthony	5,000
Oct.	1,	A. D. Harding	2,000
Oct.	31,	M. Luce	7,500

And there was an additional item of $1000 for 40 shares of stock for C. W. Barron, which was received later; and $100 received for 4 shares issued to Edgar Buffum.

361 Q. 56. Will you state whether or not those amounts were paid by the respective parties to the Old Dominion Company on the dates named?

A. They were.

(By Mr. LAUTERBACH:)

Q. You mean you have no knowledge except as appears by the book? You do not remember the fact, do you?

A. No, I could not say that; I could not swear to that.

Mr. LAUTERBACH: It is objected to as incompetent, irrelevant, and immaterial.

Q. 57. You knew that fact at the time of the payments?

A. Oh, at the time of the payments, yes.

Q. 58. But you mean you have no recollection independent of the fact that they are entered in the books?

A. No.

(By Mr. HEMENWAY:)

Q. — That is all in your handwriting?

A. No, this is not; none of this.

Q. 59. Will you turn to the item of September 28, "J. S. Kendall, $5,000," and read the entry as it appears upon the stub of the check book?

(By Mr. LAUTERBACH:)

Q. The same is true as to all the entries, as to your knowledge?
A. Yes.

Mr. LAUTERBACH: I make the same objection.
The WITNESS: I suppose I knew at the time what was going on.

A. "Sept. 28, 1895, Suspense account. J. S. Kendall, $5000. He took 600 shares and $5000 for 200 shares which he did not take."
Q. 60. Now the entry of October 1.
A. "Oct. 1, 1895, Albert E. Harding, balance of $2000, money instead of shares.
"Oct. 1, H. H. Anthony"——
Q. 61. Are those lead-pencil entries?
A. They are.
Q. 62. In whose handwriting?
A. In the handwriting of W. A. S. Chrimes.
Q. 63. And the entries under Harding and Kendall are in Mr. Chrimes' handwriting?
A. All in Mr. Chrimes' handwriting.
Q. 64. Who is Mr. Chrimes?
A. He is Mr. Bigelow's private secretary.
Q. 65. And was at that time?
A. Yes.
Q. 66. And remains so?
A. Yes.
"H. H. Anthony, suspense account, $5000, money instead of shares.
"Oct. 31, 1895, check to Butte City Water Co. on account of subscription of Mr. Luce to Water Company bonds, $7500."

362 Q. 67. In regard to these several payments that you have testified to, did you know of them at the time they were made?
A. Yes, I suppose I did, but I have forgotten it to-day. I suppose I knew at the time.
Q. 68. Now coming to the entries under date of September, 1897, about which you were beginning to testify, did you know of those at the time?
A. Yes, I did, as near as I can remember now. It was stock which was in the treasury, and we wanted to close up that treasury account on the books, so I spoke to Mr. Nelson——

Mr. LAUTERBACH: Well, never mind that.

Q. 69. Well, the stock was sold?
A. The stock was sold.
Q. 70. That is, you had personal knowledge of the matter at the time?
A. Yes.
Q. 71. Now will you refer to the books and tell us just what was done?

Mr. LAUTERBACH: The same objection.

A. The stock was sold by Stackpole & Gay, and they gave a return for it; it was turned in and turned to the credit of the company.

Q. 72. Tell us just precisely what the transaction was.

A. —.

On September 21, 1897, 125 shares of treasury stock at 28⅛	3,515.63
450 shares of treasury stock at 28	12,600.00
Total	16,115.63
Commission	71.88
Balance	16,043.75

STACKPOLE & GAY.

September 23, sold through Stackpole & Gay 10 shares treasury stock at 25, less commission $1.25	273.75
October 1, '97, sold through Stackpole & Gay 1 share treasury stock at $25, less commission, 25 cts	24.75

That accounts for 586 shares. Do you want these 4 shares?

Q. 73. Yes.

A. Under date of January 16, 1896, in settlement with Lewisohn Brothers, they deducted "less amount due from Edgar Buffum for 4 shares of stock, $100."

Q. 74. Now I notice in the statement aggregating $485,350 a single sale on January 6, to C. W. Barron, 40 shares, $1000?

A. Yes.

Q. 75. And that was settled for on that date?

A. Settled for on that date, through Mr. Bigelow's account.

363 Q. 76. Now the amounts which you have read as being the proceeds of the sale, through Stackpole & Gay, of the 586 shares of stock, appear as to $14,750 which you have entered in the ledger or cash book under the treasury stock. What disposition was made of that difference?

A. The balance was placed to the credit of interest account; the difference between what we received for them and $25 per share was placed to the credit of interest account.

Q. 77. Will you turn to that item in the ledger?

A. Do you want the cash book and ledger?

Q. 78. Yes.

A. It appears in the cash book on page 56, three items:

Under date of September 21, interest account, cash	1,643.75
September 23, cash	273.75
October 1, cash	24.75

Q. 79. Where was that placed on the ledger; on what page?

A. On page 38. It includes other items, you see. [Exhibiting page 38 of the ledger.]

Q. 80. I hand you now a paper beginning, "New York, December 1, 1895. Old Dominion Syndicate. To Evarts, Choate & Beaman,

Dr. No. 52 Wall St.," being a bill for services and disbursements aggregating $7689.66, and ask whether or not that bill was paid by a check of the Old Dominion Copper Mining & Smelting Company; and if so, on what date?

Mr. LAUTERBACH: That is objected to on the ground that it is incompetent, immaterial, and irrelevant.

A. Yes, it was, under date of January 1, 1896.

Mr. BRANDEIS: I will introduce this in evidence, and it will be marked "Exhibit 22."

[A copy of the bill produced by Mr. Brandeis will be found annexed to this deposition, marked "Exhibit 2, Oct. 11, 1904, G. C. B." at page 462.]

Q. 81. I hand you herewith a paper entitled "Boston, January 1, 1896. Old Dominion Copper Company to Edward C. Perkins, Dr.," being a bill for services from January 1, 1895, to January 1, 1896, for $1000, and ask you whether or not that bill was paid by check of the Old Dominion Copper Mining & Smelting Company; and if so, on what date?

Mr. LAUTERBACH: That is objected to for the reasons stated above.

A. It was, on January 27, 1896.

Mr. BRANDEIS: I will introduce that bill in evidence, and it will be marked "Exhibit 3."

364 Mr. LAUTERBACH: The same objection to the bill.

[A copy of the bill produced by Mr. Brandeis will be found annexed to this deposition, marked "Exhibit 3, Oct. 11, 1904, G. C. B." at page 464.]

Q. 82. I hand you herewith a paper entitled "Old Dominion Copper Co. in account with Lewisohn Bros.," being an account showing a balance in ink of $10,393.83 with "$6" added in pencil, making $10,399.83, and ask you whether or not that account was paid by a check of the Old Dominion Copper Mining & Smelting Company; and if so, on what date?

Mr. LAUTERBACH: The same objection.

A. It was, on January 16, 1896.

Q. 83. I call your attention to the papers attached to this account of Lewisohn Brothers, and ask you whether or not those are the vouchers which accompanied that account and are referred to in it?

Mr. LAUTERBACH: The same objection.

A. They are.

Mr. BRANDEIS: I now introduce in evidence this account with the annexed papers, and ask that it be marked "Exhibit 4."

Mr. LAUTERBACH: The same objection.

[Account and vouchers produced by Mr. Brandeis will be found annexed to this deposition, marked "Exhibit 4, Oct. 11, 1904, G. C. B." at page 465.]

Q. 84. Among these vouchers I call your attention to one of July 1, 1895, of "L. Barta & Co. for 1 vol. 300 receipt- 2 to the page, with stub 1st, 2nd and 3rd and extra lettering, $6.50." What does that bill refer to?

A. If I can remember, it was receipts for payments of subscriptions, 28⅔, 28⅔, and another. I believe that is the form.

Q. 85. That is the form of the receipts which were used here in Boston?

A. Used here in Boston; I would not say for that; perhaps used in New York.

Q. 86. It was the same form?

A. The same form as those used in Boston; probably used in New York by the parties interested in the payments.

Q. 87. Now will you turn to the books and let us know whether, besides the payments made to Evarts, Choate & Beaman, Edward C. Perkins, and Lewisohn Brothers, there were any other payments made relating to the expenses of the Old Dominion Syndicate?

A. Yes, I suppose to Hyams and Bigelow.

Q. 88. What was the amount of the payment made to Mr. Hyams?

365 Mr. LAUTERBACH: The same objection.

A. Do you want the gross paid to Hyams?

Q. 89. Give the gross now.

A. $604.

Q. 90. And that is subject to a deduction?

A. A deduction of money due on these bills of $67.48.

Q. 91. Leaving a net of $536.52, for which a check was given on what date?

A. January 20, 1896.

Q. 92. What payment or credit was made to Mr. Bigelow?

A. Do you want the total amount? You see we paid him $420 as against the $604 for Mr. Hyams.

(By Mr. HEMENWAY:)

Q. Paid whom?

A. Mr. Bigelow.

Mr. BRANDEIS: A credit.

Q. 93. Will you state whether or not certain payments were made in to the Old Dominion Copper Mining & Smelting Company towards the several bills which you have just testified were paid by it?

A. The stub of the check book shows, on January 6, 1896, there was a check from J. Morris Meredith for $202.32; ditto $1500; total..... $1,702.32

Also ditto Meredith.....	20.98
Also Luce	665.56
Also Coram	665.55
Also Leonard Lewisohn.....	2,528.35
Also T. N.....	665.56

Also A. S. B.	665.55
Account Barron	1,000.00
	$16,603.53
Less	420
Net	$16,183.53

[For correction, see Altmiller recalled, 514, and Nov. 1907, page —.]

Q. 94. That is the $420 about which you have just testified?

A. Yes.

Q. 95. Now this $1000, account Barron, is an amount also that you have testified about?

A. It is.

Q. 96. A payment through Mr. Bigelow for 40 shares to Barron?

A. Yes.

Q. 97. I will ask you whether subsequent to January there was any payment made on account of a further payment made to Evarts, Choate & Beaman?

Mr. LAUTERBACH: The same objection.

366 A. Yes, there was, on April 29, 1896; $344.34.

Q. 98. For what was that paid?

A. It reads, "Evarts, Choate & Beaman, in accordance with their letter of April 28, 1896."

Q. 99. I hand you herewith a file of letters of the Old Dominion Copper Mining & Smelting Company, and ask you whether you find there this letter of April 28, 1896, referred to?

A. I do.

Mr. BRANDEIS: I will introduce that letter.

Mr. LAUTERBACH: The same objection.

[The letter referred to by Mr. Brandeis will be found annexed to this deposition, marked "Exhibit 5, Oct. 11, 1904, G. C. B." at page 469.]

Q. 100. How was this bill, or the amount paid to Evarts, Choate & Beaman for services in winding up the Old Dominion Copper Mining Company, charged upon your books?

Mr. LAUTERBACH: The same objection.

A. I suppose to expense account; it may be to suspense account. The cash book, under date of April 29, on the credit side: "Suspense account, Evarts, Choate & Beaman, $344.34." I have not that account, but later on I know it was put into the account with others. On the journal, under date of April 30, 1896, this entry was made: "Expense account, Dr. to balance account, account transferred this day, $344.34."

Q. 101. I call your attention now to the company's letter file for 1896, to a notice entitled "Old Dominion Copper Mining & Smelting

Company. 199 Washington Street, Room 303. Oct. 9, 1895," partly printed and partly written: in whose handwriting is that portion that is written?

A. Mr. Chrimes'.

Q. 102. That is, the words on it, "Mr. Nelson said call this unsold," that is in Mr. Chrimes' handwriting?

A. Yes.

Q. 103. That is in red ink. And the words in black ink "100" and $2500," and the words "are now ready and," and the words "O. N. Pierce, Esq."?

A. They are all in his handwriting.

Q. 104. In whose handwriting are the words "Grinnell Mfg. Co., New Bedford, Mass."?

A. I don't know; I do not think that is his writing.

Q. 105. Now the word "over," and the words on the back, "There was a misunderstanding as to this stock being in my name. I do not care for it. Yours truly, O. N. Pierce 10/5 95"?

A. I suppose that to be in Mr. Pierce's handwriting.

Mr. BRANDEIS: Now I will introduce that in evidence.

367 Mr. LAUTERBACH: Note the same objection.

[The letter referred to by Mr. Brandeis will be found annexed to this deposition marked, "Exhibit 6, Oct. 11, 1904, G. C. B." at page 470.]

Q. 106. Was there kept by the company as it was organized more than one line of certificates?

A. Yes, there was.

Mr. HEMENWAY: The books will show for themselves.

Q. 107. What were they?

A. A book of miscellaneous, a book of 50's and a book of 100's.

Q. 108. That is, three separate books?

A. Three separate books.

Q. 109. Were each of those sets of 50's numbered from 1 consecutively?

A. They were; the 50's had a B before the number, and the 100's had an A.

Q. 110. Will you turn to the earliest No. 1 certificate book of each of those three sets? Turn first to the book entitled "Miscellaneous," which you call the miscellaneous book, and will you proceed with that and tell us what the first seven certificates were which were issued from that book?

Mr. LAUTERBACH: The same objection.

(By Mr. LAUTERBACH:)

Q. That is not in your handwriting?

A. No.

A. [Ans. to Int. 110.] No. 1, 16 shares, issued to Jesse Lewisohn, dated July 9/95, for Articles ass'n.

No. 2, 4 shares, issued to A. W. Evarts, dated July 9/95.

No. 3, 4 shares issued to Edgar Buffum, dated July 9/95, for Articles ass'n.

No. 4, 4 shares, issued to C. W. Welch, dated July 9/95, for Articles ass'n.

No. 5, 4 shares, issued to Sidney Riddlestorffer, dated July 9/95, for Articles ass'n.

No. 6, 4 shares, issued to William P. Rowe, dated July 9/95, for Articles ass'n.

No. 7, 4 shares, issued to W. R. Montgomery, dated July 9/95, for Articles ass'n.

Q. 111. Making in the aggregate 40 shares of stock?

A. Forty shares.

Q. 112. Now I call your attention to the first entry upon the stub of the check book: "Received from Lewisohn Bros. July 12, '95, $1000, for 40 shares of stock at $25, to qualify directors," and ask you whether or not that $1000 was actually received from Lewisohn Brothers?

Mr. LAUTERBACH: The same objection.

A. It was.

Q. 113. And that was the $1000 in payment for those 40 shares that you have given us the memoranda of the certificates for?

A. Yes, sir.

368 Q. 114. Where is that $1000 entered in the books of the company?

A. Well, that is entered first in suspense account; then it is worked out later in the payment made Lewisohn Brothers, January 16, 1896.

Q. 115. What do you mean by saying it is worked out in that payment?

A. It is included in that payment.

Q. 116. Do you now refer to the item for which the bill is rendered by Lewisohn Brothers to the Old Dominion Copper Company?

A. Yes; and the item under date of July 9, 1895, "deposited in the Market and Fulton Bank, remitted to T. Nelson, $1000."

Q. 117. Will you turn to any entry upon the books covering that $1000?

A. That is on the cash book, page 2, on the debit side, "1895, July, to balance account, Lewisohn Bros., $1000."

Q. 118. Now will you follow that through suspense account and show what became of that item?

A. It is entered on the credit side, "July, cash, $1000." Then it is included in that entry there.

Q. 119. What do you mean by "included in that entry there," what do you refer to?

A. To the entry on the debit side, under date of January, 1896, "Cash, $12,032.12."

Mr. LAUTERBACH: All this is taken under the same objection.

The WITNESS: In the cash book, on the credit side of the cash book, "Jan. 31, suspense account, cash, $12,032.12."

Q. 120. It is not a fact that that $1000 for which Lewisohn

Brothers rendered their account is included in the various items for which Lewisohn Brothers rendered their account, and which is settled by a check of the Old Dominion Copper Mining & Smelting Company, under date of January——

A. January 16, 1896. In other words, it was paid back to Lewisohn Brothers in that check.

Mr. LAUTERBACH: The same objection.

Q. 121. Now, returning to the miscellaneous certificate book, will you show what the next certificates were issued by this company?

A. No. 8, 16 shares, issued to Thomas Nelson, dated July 11 '95, for certificate No. 1, transferred from Jesse Lewisohn.

Mr. BRANDEIS: Just one moment. The original certificates are here, of course, but I do not want to use them. Suppose, with your consent, Mr. Hemenway and Mr. Lauterbach, I put in here the certificate book and the original certificates therein referred to.

Mr. LAUTERBACH: Subject to our objection as to relevancy, but not as to form; any formal objection being waived.

369 The WITNESS: [Continuing his answer:]

No. 9, 4 shares, issued to Moses T. Stevens, for certificate #2, transferred from A. W. Evarts, and marked "Cancelled."

No. 10, 4 shares, issued to Henry M. Whitney, dated July 11 '95, for certificate #4, transferred from C. W. Welch.

No. 11, 4 shares issued to Joseph G. Ray, dated July 11 '95, for certificate #5, transferred from S. Riddlestorffer.

No. 12, 4 shares, issued to Leonard Lewisohn, dated July 11 '95, for certificate #6, transferred from W. P. Rowe.

No. 13, 4 shares, issued to A. S. Bigelow, dated July 11 '95, for certificate #7, transferred from W. R. Montgomery.

No. 14, 4 shares, issued to Moses T. Stevens, dated July 24 '95, for certificate #2, transferred from A. W. Evarts.

(By Mr. HEMENWAY:)

Q. Were there two transfers of #2?

A. The first one was canceled, marked "Cancelled" across the face of it. There was no delivery under that.

Q. 122. Now I call your attention to the stub of the miscellaneous certificate book covering certificates from No. 15 to No. 66, inclusive, and ask you also to look at the certificates themselves, and state whether or not any of the certificates covered by those numbers were ever actually issued.

A. No, they were all canceled. [Referring to the certificates.] They were all canceled.

Q. 123. Those were not only canceled, but were not signed?

A. No. I have examined the stub and also the certificates, as requested, and find that all of those certificates were canceled, and that none of them bear the signature of any officer of the company; also that all of those certificates are dated September 19, 1895, and that the respective numbers of those certificates, names and amount of shares, are as follows:—

Mr. LAUTERBACH: The same objection. The certificates, never having been signed and executed, have no validity or effect, and are incompetent, irrelevant, and immaterial.

[Following is the list furnished by the witness to complete his answer to the above interrogatory 123:]

No. of Certificate.	No. of Shares.	Name.	Date.
15	145	Chas. H. Altmiller	Sept. 19, 1895.
16	200	D. M. Anthony	Sept. 19, 1895.
17	200	Edward P. Abbe	Sept. 19, 1895.
70			
18	200	Jos. S. Beal	Sept. 19, 1895.
19	20	Wm. A. L. Bazeley	Sept. 19, 1895.
20	260	Richard F. Bolles	Sept. 19, 1895.
21	500	J. W. Belches & Co.	Sept. 19, 1895.
22	20	Chas. P. Bond	Sept. 19, 1895.
23	40	Clarence W. Barron	Sept. 19, 1895.
24	140	W. A. S. Chrimes	Sept. 19, 1895.
25	140	C. H. Cole, Jr.	Sept. 19, 1895.
26	1,250	Clark, Ward & Co.	Sept. 19, 1895.
27	280	Henry T. Coe	Sept. 19, 1895.
28	25	David W. Cheever	Sept. 19, 1895.
29	15	Oswald N. Causman	Sept. 19, 1895
30	120	C. L. Davenport	Sept. 19, 1895.
31	400	Gray, Dewey & Co.	Sept. 19, 1895.
32	300	Rufus R. Goodell	Sept. 19, 1895.
33	1,000	W. W. Grout	Sept. 19, 1895.
34	200	E. D. Greenleaf	Sept. 19, 1895.
35	800	Chas. Head & Co.	Sept. 19, 1895.
36	1,300	Hayden, Stone & Co.	Sept. 19, 1895.
37	175	Timothy E. Hopkins	Sept. 19, 1895.
38	300	John T. Howe	Sept. 19, 1895.
39	100	F. S. Mead & Co.	Sept. 19, 1895.
40	500	Mrs. Abby H. Manning	Sept. 19, 1895.
41	400	Chas. J. Mackenzie	Sept. 19, 1895.
42	200	John H. Pierce	Sept. 19, 1895.
43	400	C. A. Putnam & Co.	Sept. 19, 1895.
44	400	Price & Co.	Sept. 19, 1895.
45	200	James M. Prendergast	Sept. 19, 1895.
46	200	Frank W. Remick	Sept. 19, 1895.
47	200	Wm. H. Reed	Sept. 19, 1895.
48	700	Jos. R. Ray	Sept. 19, 1895.
49	250	J. J. Richards	Sept. 19, 1895.
50	500	Albert W. Smith	Sept. 19, 1895.
51	1,000	E. C. Swift	Sept. 19, 1895.
52	200	Geo. O. Sears	Sept. 19, 1895.
53	1,000	J. B. Sturgis	Sept. 19, 1895.
54	200	A. Albert Sack	Sept. 19, 1895.
55	500	Homer N. Snow	Sept. 19, 1895.
56	300	Henry Stackpole	Sept. 19, 1895.

No. of Certificate.	No. of Shares.	Name.	Date.
57	300	Wm. A. Tower.....	Sept. 19, 1895.
58	500	E. V. R. Thayer.....	Sept. 19, 1895.
59	60	B. N. Towle.....	Sept. 19, 1895.
60	40	Amos Towle	Sept. 19, 1895.
61	600	Maxwell Woodhull	Sept. 19, 1895.
62	400	Jeremiah Williams	Sept. 19, 1895.
63	300	Frank G. Webster.....	Sept. 19, 1895.
64	600	Henry Woods	Sept. 19, 1895.
65	10	Wm. A. L. Bazeley.....	Sept. 19, 1895.
66	200	A. Albert Sack.....	Sept. 19, 1895.

371 Q. 124. In whose handwriting is the writing in the body of the certificates?

A. Mr. Bazeley's.

Q. 125. Who is Mr. Bazeley?

A. He was one of the transfer clerks.

Q. 126. In Mr. Bigelow's office?

A. Yes.

Q. 127. Is he now living?

A. Yes.

Q. 128. Is he still in that office?

A. No.

Q. 129. Where is he now?

A. He is in the real-estate business, I think, in the Exchange building.

Q. 130. I call your attention, now, to the stub of certificate No. 67, and ask you what it shows.

A. No. 67, 100,000 shares, issued to P. K. Dumaresq, dated September 13, 1895, for "ctf. of orig." issue, marked "Cancelled." The original certificate also was not signed by any officer of the company.

Q. 131. And the written words in the certificate are in the handwriting of whom?

A. Mr. W. A. Shepard.

The next one is No. 68, 30,000 shares, issued to A. S. Bigelow and Leonard Lewisohn, dated September 13, 1895, for original stock issue, marked "Cancelled." The certificate, also, as far as I know, is in Mr. Shepard's handwriting, and is not signed by either the president or the treasurer.

Mr. LAUTERBACH: The same objection.

The WITNESS: No. 69, 1300 shares, issued to Hayden, Stone & Company, dated September 19, 1895, for certificate No. 36, canceled and that is canceled. The certificate is also canceled and is not signed by either the president or the treasurer.

Mr. LAUTERBACH: The same objection.

Q. 132. Now No. 70.

A. No. 70, 40 shares, issued to P. K. Dumaresq, dated September

18, 1895, for sundries. This certificate is signed by P. K. Dumaresq, assistant treasurer, canceled, and no signature of the president.

Mr. LAUTERBACH: The same objection.

Q. 133. Now will you read No. 71?

A. The stub is in Mr. Shepard's handwriting. It is made out for 100 shares, for sundries, dated September 18, 1895, and marked "Cancelled." The certificate itself is signed by P. K. Dumaresq, assistant treasurer, and C. H. Bissell, assistant president, and is registered by the Atlas National Bank; it is for 100,000 shares, while the stub is for 100 shares, and there is stamped across it in red ink the words "Issued for property purchased." There is an indorsement upon the certificate assigning and transferring unto Moses T. Stevens, 4 shares; A. S. Bigelow, 4 shares; Leonard Lewisohn, 4 shares;
372 Thomas Nelson, 16 shares; Edgar Buffum, 4 shares; Joseph G. Ray, 4 shares; Henry M. Whitney, 4 shares; "to myself" 99,960 shares, all under date of September 18, 1895.

Mr. LAUTERBACH: It is understood that my objection applies to this all through, and that I need not continue to repeat the objection.

Q. 134. Now No. 72.

A. The stub of No. 72 is as follows, the words written in ink being underscored [italicized]:—

"No. 72.
30,000 Shares.
Issued to *A. S. Bigelow.*
Dated *Sept. 18/95.*
For *Vote of Syn.*
Returned and Cancelled.
Transferred from

Received the above Certificate"

Marked across the face "*Cancelled.*"

The certificate itself is signed by C. H. Bissell, assistant president, and P. K. Dumaresq, assistant treasurer, and is marked "Cancelled." It is not registered by the Atlas Bank.

The stub of No. 73 is as follows, the words written in ink being underscored [italicized]:

"No. 73.
20,000 Shares.
Issued to *Thomas Nelson. Treas.*
Dated *Sept. 18/95.*
For *Vote of Syn.*
Returned and Cancelled.
Transferred from

Received the above certificate."

The certificate itself is signed by C. H. Bissell, assistant president, and P. K. Dumaresq, assistant treasurer, and registered by the Atlas

National Bank, and bears a transfer on the back in blank appointing W. H. Shepard attorney to make the transfer; this under date of September 19, 1895.

Mr. LAUTERBACH: Executed by Thomas Nelson, treasurer.

373 Q. 135. Are there any words printed on the face of this certificate indicating it was issued for property purchased?

A. No. The face of the certificate and the endorsement thereon are as follows:

"Incorporated under the Laws of the State of New Jersey.

Registered Atlas National Bank.

By J. L. Foster, Assist. Cash.

No. 73. 20,000 Shares.

Old Dominion Copper Mining and Smelting Company.

Capital Stock $3,750,000 in shares of $25 each full paid.

This Certifies, That Thomas Nelson, treasurer, is entitled to Twenty Thousand shares of the Capital Stock of the Old Dominion Copper Mining and Smelting Company, transferable only on the books of said Company, by the holder thereof, in person, or by Attorney, on surrender of this Certificate.

Boston, Mass., Sept. 19, 1895.

C. H. BISSELL,
Assist. President.
P. K. DUMARESQ,
Assist. Treasurer.

Old Dominion Copper Mining and Smelting Company. 1895.

'Notice.' The Signature of this Assignment must correspond with the name as written upon the Face of the Certificate in every particular without alteration or enlargement or any change whatever.

For Value Received —— —— hereby assign and transfer unto —— ——, — Shares of the Capital Stock represented by the within Certificate and do hereby irrevocably constitute and appoint W. H. Shepard Attorney to transfer the said stock on the books of the within named Company, with full power of substitution in the premises.

Dated this 19th day of Sept., 1895.

THOMAS NELSON, *Treas.*"

Witness:
W. H. SHEPARD.

Q. 136. The transfer of the certificate appears as Exhibit 25 annexed to the deposition of Godfrey M. Hyams in this case?

A. Yes.

Q. 137. Now No. 74.

A. No. 74, 30,000 shares, issued to A. S. Bigelow and Leonard Lewisohn, dated September 18, 1895. This certificate is signed by C. H. Bissell, assistant president, and registered by the Atlas
374 National Bank, and has printed across it in red ink the words "Issued for property purchased," and bears a transfer under date of September 20, 1895, assigning unto Leonard Lewisohn 2650, and to A. S. Bigelow, 27,350 shares, the transfer being signed "Leonard Lewisohn, by Adolph Lewisohn, attorney, in the presence of Sidney Riddlestorffer," and "A. S. Bigelow, in the presence of C. H. Bissell." The transfer appoints C. H. Bissell attorney to register the transfer.

Q. 138. Who is Sidney Riddlestorffer?

A. He is in Mr. Lewisohn's office.

Q. 139. A clerk or assistant there?

A. He is in their employ; I do not know in what position.

No. 75, 4 shares, issued to Moses T. Stevens, dated September 18, 1895, for part of certificate 71; transferred from P. K. Dumaresq.

No. 76, 4 shares, issued to A. S. Bigelow, dated September 18, 1895, for part of certificate 71.

No. 77, 4 shares, issued to Leonard Lewisohn, dated September 18, 1895, for part of certificate 71.

No. 78, 16 shares, issued to Thomas Nelson, dated September 18, 1895, for part of certificate 71.

No. 79, 4 shares, issued to Edgar Buffum, dated September 18, 1895, for part of certificate 71.

No. 80, 4 shares, issued to Joseph G. Ray, dated September 18, 1895, for part of certificate 71.

No. 81, 4 shares, issued to Henry M. Whitney, dated September 18, 1895, for part of certificate 71.

No. 82, 99,960 shares issued to P. K. Dumaresq, transferred September 18, 1895, for balance of certificate 71. This certificate is signed by C. H. Bissell, assistant president, and P. K. Dumaresq, assistant treasurer, and registered by the Atlas National Bank; is endorsed by Mr. Dumaresq, September 19, 1895, transferring to Foote & French, 100 shares; H. T. Coe, 200 shares; J. T. Herrick, 100 shares; Henry F. Woods, 100 shares; Oswald N. Cammann, 15 shares; David W. Cheever, 25 shares; "to myself," 99,420 shares, with W. H. Shepard as attorney, but no other transfer.

Q. 140. No. 83 is a blank, and appears never to have been issued, likewise No. 84? A. Yes.

Q. 141. Now No. 85,—this is a new list, is it?

A. That is a new list.

Certificates 85 to 138, inclusive, with the exception of 97, 104, and 122, hereafter referred to, are all certificates dated September 19, 1895, to the parties and for the number of shares as follows:

375

No. of certificate.	No. of shares.	Name.	Date.
85	145	Charles H. Altmiller	Sept. 19, 1895.
86	200	D. M. Anthony	Sept. 19, 1895.
87	200	Edward P. Abbe	Sept. 19, 1895.
88	200	Joseph S. Beal	Sept. 19, 1895.
89	20	Wm. A. L. Bazeley	Sept. 19, 1895.
90	260	Richard F. Bolles	Sept. 19, 1895.
91	500	J. W. Belches & Co.	Sept. 19, 1895.
92	20	Chas. P. Bond	Sept. 19, 1895.
93	40	Clarence W. Barron	Sept. 19, 1895.
94	140	W. A. S. Chrimes	Sept. 19, 1895.
95	140	Chas. H. Cole, Jr.	Sept. 19, 1895.
96	1,250	Clark, Ward & Co.	Sept. 19, 1895.
98	25	David W. Cheever	Sept. 19, 1895.
99	15	Oswald N. Causman	Sept. 19, 1895.
100	120	C. L. Davenport	Sept. 19, 1895.
101	400	Gray, Dewey & Co.	Sept. 19, 1895.
102	300	Rufus R. Goodell	Sept. 19, 1895.
103	1,000	W. W. Grout	Sept. 19, 1895.
105	175	Timothy E. Hopkins	Sept. 19, 1895.
106	300	John T. Howe	Sept. 19, 1895.
107	400	F. S. Mead & Co.	Sept. 19, 1895.
108	500	Mrs. Abby H. Manning	Sept. 19, 1895.
109	400	Chas. J. Mackenzie	Sept. 19, 1895.
110	200	John H. Pierce	Sept. 19, 1895.
111	400	C. A. Putnam & Co.	Sept. 19, 1895.
112	400	Price & Co.	Sept. 19, 1895.
113	200	James M. Prendergast	Sept. 19, 1895.
114	200	Frank W. Remick	Sept. 19, 1895.
115	200	Wm. H. Reed	Sept. 19, 1895.
116	700	Jos. G. Reed	Sept. 19, 1895.
117	250	J. J. Richards	Sept. 19, 1895.
118	500	Albt. W. Smith	Sept. 19, 1895.
119	1,000	E. C. Swift	Sept. 19, 1895.
120	200	Geo. O. Sears	Sept. 19, 1895.
121	1,000	J. B. Sturgis	Sept. 19, 1895.
123	300	Henry Stackpole	Sept. 19, 1895.
124	300	Wm. A. Tower	Sept. 19, 1895.
125	500	E. V. R. Thayer	Sept. 19, 1895.
126	60	B. N. Towle	Sept. 19, 1895.
127	40	Amos Towle	Sept. 19, 1895.
128	600	Maxwell Woodhull	Sept. 19, 1895.
129	400	Jeremiah Williams	Sept. 19, 1895.
130	300	Frank G. Webster	Sept. 19, 1895.
131	600	Henry Woods	Sept. 19, 1895.
132	10	Wm. A. L. Bazeley	Sept. 19, 1895.
133	200	A. Albert Sack	Sept. 19, 1895.
134	1,300	Hayden, Stone & Co.	Sept. 19, 1895.

No. of certificate.	No. of shares.	Name.	Date.
135	140	W. A. S. Chrimes	Sept. 19, 1895.
136	200	E. D. Greenleaf	Sept. 19, 1895.
137	200	H. T. Coe	
138	80	H. T. Coe	

376 Certificate No. 97 is for 280 shares, issued to Henry T. Coe, dated September 19, 1895, and was canceled.

Certificate 104,200 shares, issued to E. D. Greenleaf, dated September 19, 1895, was canceled.

Certificate 122, 500 shares, issued to Homer N. [sic V] Snow, dated September 19, 1895, was also canceled.

Certificate 139, for 99,420 shares, issued to P. K. Dumaresq, was canceled before signature by the officers.

Certificate 140, issued to P. K. Dumaresq, for 99,420 shares, is dated September 19, 1895, signed by C. H. Bissell as assistant president and P. K. Dumaresq as assistant treasurer, registered by the Atlas Bank, and bears a transfer under date of September 27, 1895, to the following persons of the number of shares set against their respective names:

Names.	Shares.
Altmiller, Chas. H	40
Anthony, D. M	400
Alline, John W	40
Anthony, Harold H	200
Anthony, Miss Annie R	100
Bazeley, W. A. L	40
Ball, Geo. H	1,600
Bolles, Richard F	480
Belches & Co., J. W	800
Burnett, Harry	800
Billings, Robt. C	800
Barron, —?	
Brown, S. N	800
Bigelow, A. S	4,000
Batt, Chas. R	200
Beal, Thos. P	200
Chrimes, W. A. S	40
Cole, Jr., Chas. H	120
Coe, Henry T	640
Cole, Chas. H	400
Coram, Jos. A	1,520
Crosby, Stephen M	1,600
Demmon, Daniel L	800
Ely & Co	400
Field, Robert M	200
Fenno, Isaac	400
Goodenough, H. B	160
Head, Chas	800

	Head & Co., Chas.	280
	Hopkins, Timothy E.	650
377	Hayden, Stone & Co.	800
	Hodge, Chas. J.	800
	Hollingsworth, Zach. T.	400
	Harding, Albert E.	80
	Hollis, N. E.	160
	" Geo. W.	160
	Jones, Mrs. Mary L.	500
	Kendall, Jos. S.	600
	Leland, Towle & Co.	320
	Lyman, Geo. H.	200
	Lewisohn, Leonard	36,190
	Mead, F. S. & Co.	800
	Manning, Mrs. Abby H.	400
	Messervy, Benj. F.	200
	Meredith, J. Morris	2,000
	Maltman, A. S.	800
	Manning, Francis H.	800
	Moses, Henry C.	240
	Metcalf, Stephen O.	400
	Moseley, Chas. O.	800
	Mawhinney, H. H.	160
	O'Connor, John	160
	Pierce, John H.	800
	Preston, Geo. M.	400
	Prince, Gordon	400
	Perkins, Thos. H.	80
	Reed, Wm. H.	400
	Ray, Jos. G.	400
	Richardson, S. W. for Jas. S. Cumston	800
	Rust, Nancy E.	80
	Sanborn, Geo. E.	100
	Swift, E. C.	800
	Stevens, Horace H.	400
	" Moses T.	800
	" Samuel S.	200
	Smith, Albert O.	400
	Somers, Frank D.	400
	Spaulding, Samuel S.	240
	Towle, Jno. F.	200
	Woodhull, Maxwell	1,200
	Williams, Jeremiah	400
	Woods, Henry	800
	Williams, Harold	400
	Wheeler, Leonard	240
	Whitney, Henry M.	4,000
	P. K. Dumaresq	20,000

W. H. SHEPARD, *Attorney.*

378 Q. 142. Certificate 141, issued to Homer V. Snow, September 19, 1895: out of what certificate does that come?

A. The other one, to Homer N. Snow, was canceled, I guess. That is the one that took the place of 122; issued to take the place of certificate No. 122, which was canceled.

Certificate 142, for 300 shares, issued to John C. Howe, dated September 19, 1895, for certificate 106.

No. 143, 30 shares, issued to William H. Reed, dated September 19, 1895, for part of certificate No. 115.

No. 144, 20 shares, issued to William H. Reed, dated September 19, 1895, for balance of certificate 115.

No. 145, 25 shares, issued to Hayden, Stone & Company, dated September 19, 1895, for part of certificate 134.

No. 146, 25 shares, issued to Hayden, Stone & Company, dated September 19, 1895, for certificate 134.

No. 147, 30 shares, issued to E. Rollins Morse & Brother, dated September 19, 1895, for part of certificate 23.

No. 148, 20 shares, issued to E. Rollins Morse & Brother, dated September 19, 1895, for certificate 23.

No. 149, 10 shares, issued to Harris & Company, dated September 19, 1895, for part of certificate 91.

No. 150, 10 shares, issued to Gould, Hall & Company, dated September 19, 1895, for certificate 91.

No. 151, 30 shares, issued to Henry Stackpole, dated September 19, 1895, for part of certificate 91.

No. 152, 10 shares, issued to Frederick Lewis Dabney, dated September 19, 1895, for certificate 132.

No. 153, 20 shares, issued to Chase & Barstow, dated September 19, 1895, for part of certificate 101.

No. 154, 25 shares, issued to C. A. Putnam & Company, dated September 19, 1895, for part of certificate 101.

No. 155, 25 shares, issued to E. Rollins Morse & Brother, dated September 19, 1895, for part of certificate 101.

No. 156, 40 shares, issued to Gray, Dewey & Company, dated September 19, 1895, for part of certificate 101.

No. 157, 40 shares, issued to Gray, Dewey & Company, dated September 19, 1895, for part of certificate 101.

379 No. 158, 20 shares, issued to Emil W. Hunzingee, dated September 19, 1895, for part of certificate B10.

No. 159, 30 shares, issued to Tucker, Anthony & Company, dated September 19, 1895, for balance of certificate 10B.

No. 160, 15 shares, issued to Harris & Company, dated September 19, 1895, for certificate 95.

No. 161, 25 shares, issued to Charles Head & Company, dated September 19, 1895, part of certificate 90.

No. 162, 10 shares, issued to Richard F. Bolles, dated September 20, 1895, for balance certificate 90.

No. 163, 30 shares, issued to Leland, Towle & Company, dated September 20, 1895, for part of certificate 24.

No. 164, 20 shares, issued to Charles Head & Company, dated September 20, 1895, for balance certificate 24.

No. 165, 30 shares, issued to F. S. Mead & Company, dated September 20, 1895, for part of certificate No. 8.

No. 166, 20 shares, issued to Clement Parker & Company, dated September 20, 1895, for part of certificate 8.

No. 167, 20 shares, issued to Elbridge Torrey, dated September 20, 1895, for sundries.

Q. 143. What is the meaning of "sundries" appearing in the stub of a certificate?

A. Well, when they transfer from one party to another if there is more than one certificate to make up the number of shares that a party buys, they might put it down "sundries;" that is, there are two or more certificates.

(By Mr. LAUTERBACH:)

Q. You aggregate them?

A. Yes.

(By Mr. HEMENWAY:)

Q. If I bought 20 shares and it belonged to you three, you would put it down "sundries"?

A. Yes [continuing to read from the certificate stubs].

No. 168, 25 shares, issued to Mrs. Helen W. Capen, dated September 20, 1895, for part of certificate 137.

No. 169, 40 shares, issued to Mrs. Elizabeth G. Bright, dated September 20, 1895, for part of certificate 137.

No. 170, 10 shares, issued to Mrs. Josephine B. Bright, dated September 20, 1895, for part of certificate 137.

No. 171, 3 shares, issued to Edward W. Capen, dated September 20, 1895, for balance of certificate 137.

380 No. 172, 30 shares, issued to Samuel B. Capen, trustee for Mrs. H. B. Woodman, dated September 20, 1895, for part of certificate 137.

No. 173, 2 shares, issued to Miss Mary W. Capen, dated September 20, 1895.

No. 174, 30 shares, issued to Clement B. Asbury, dated September 20, 1895, for part of certificate 44.

No. 175, 20 shares, issued to William Bassett, dated September 20, 1895, for balance certificate 44.

No. 176, 20 shares, issued to Clement B. Asbury, dated September 20, 1895, for certificate 166, canceled.

No. 177, 25 shares, issued to Clark, Ward & Company, dated September 21, 1895, for certificate 30.

No. 178, 20 shares, issued to Clark, Ward & Company, dated September 21, 1895, for part of certificate 30.

No. 179, 5 shares, issued to Clark, Ward & Company, dated September 21, 1895, for part of certificate 30.

No. 180, 40 shares, issued to Mrs. Caroline H. Klous, dated September 21, 1895, for certificate 156.

No. 181, 25 shares, issued to A. Albert Sack, dated September 21, 1895, for certificate 133.

No. 182, 25 shares, issued to A. Albert Sack, dated September 21, 1895, for certificate 133.

No. 183, 25 shares, issued to A. Albert Sack, dated September 21, 1895, for certificate 133.

No. 184, 25 shares, issued to A. Albert Sack, dated September 21, 1895, for certificate 133.

No. 185, 25 shares, issued to A. L. Sack, dated September 21, 1895, for certificate 133.

No. 186, 25 shares, issued to A. Albert Sack, dated September 21, 1895, for certificate 133.

No. 187, 25 shares, issued to A. Albert Sack, dated September 21, 1895, for certificate 133.

No. 188, 25 shares, issued to A. Albert Sack, dated September 21, 1895, for certificate 133.

No. 189, 20 shares, issued to Leland, Towle & Company, dated September 23, 1895, for balance of certificate 100.

384 No. 190, 25 shares, issued to Paine, Webber & Company, dated September 23, 1895, for part of certificate 46.

No. 191, 25 shares, issued to Tucker, Anthony & Company, dated September 23, 1895, for balance of certificate 46.

No. 192, 45 shares, issued to E. R. Morse & Brother, dated September 23, 1895, for certificate sundries.

No. 193, 20 shares, issued to Julius R. Albrecht, dated September 25, 1895, for part of certificate 159.

No. 194, 10 shares, issued to Thomas L. Manson, Jr., & Company, dated September 25, 1895, for balance of certificate 159.

No. 195, 10 shares, issued to Pfaelzer, Walker & Company, dated September 26, 1895, for certificate 164.

No. 196, 10 shares, issued to Charles Head & Company, dated September 26, 1895, for certificate 164.

Q. 144. Will you now turn to the 100-share certificate book and to the certificates accompanying the same, and give a list of the certificates issued bearing date prior to September 27, 1895?

A. Those certificates, being from No. 1 to No. 127, are as follows:—

No. of Certificate.	No. of Shares.	Name.	Date.
A 1	100	C. H. Bissell,	Sept. 19, 1895.
A 2	100	Wm. A. L. Bazeley,	Sept. 19, 1895.
A 3	100	P. T. Bradley,	Sept. 19, 1895.
A 4	100	Samuel B. Bartholomew,	Sept. 19, 1895.
A 5	100	A. Eldredge,	Sept. 19, 1895.
A 6	100	Wm. F. Fitzgerald,	Sept. 19, 1895.
A 7	100	Foote & French,	Sept. 19, 1895.
A 8	100	Charles Head,	Sept. 19, 1895.
A 9	100	Joseph T. Herrick,	Sept. 19, 1895.
A 10	100	Gustaf Lundberg,	Sept. 19, 1895.
A 11	100	W. B. Mossman,	Sept. 19, 1895.

No. of Certificate.	No. of Shares.	Name.	Date.
A 12	100	Geo. E. Newhall,	Sept. 19, 1895.
A 13	100	O. N. Pierce,	Sept. 19, 1895.
A 14	100	F. & C. S. Smith,	Sept. 19, 1895.
A 15	100	H. C. Wainwright & Co.,	Sept. 19, 1895.
A 16	100	Henry F. Woods,	Sept. 19, 1895.
A 17	100	Henry Woods,	Sept. 19, 1895.
A 18	100	J. Otis Wetherbee,	Sept. 19, 1895.
A 19	100	George E. Newhall, For ctf. No. A 12 cancelled.	
A 20	100	F. and C. S. Smith, For ctf. No. A 14 cancelled.	
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A 21	100	F. & C. S. Smith, For ctf. No. 14 A cancelled.	Sept. 19, 1895.
A 22	100	Charles Head & Co., For part ctf. 35 canc'd.	Sept. 19, 1895.
A 23	100	Charles Head & Co., For part ctf. No. 35 canc'd.	Sept. 19, 1895.
A 24	100	Charles Head & Co., For part ctf. No. 35 canc'd.	Sept. 19, 1895.
A 25	100	Charles Head & Co., For part ctf. 35 canc'd.	
A 26	100	Charles Head & Co., For part ctf. No. 35 canc'd.	Sept. 19, 1895.
A 27	100	E. D. Bangs & Co., For part ctf. 141.	Sept. 19, 1895.
A 28	100	E. D. Bangs & Co., For part ctf. 141.	Sept. 19, 1895.
A 29	100	E. D. Bangs & Co., For bal. ctf. 141.	Sept. 19, 1895.
A 30	100	Wm. H. Reed, For part ctf. 115.	Sept. 19, 1895.
A 31	100	Albert W. Smith, For part ctf. 118.	Sept. 19, 1895.
A 32	100	Albert W. Smith, For part 118.	Sept. 19, 1895.
A 33	100	Albert W. Smith, For part ctf. 118.	Sept. 19, 1895.
A 34	100	Albert W. Smith, For part 118.	Sept. 19, 1895.
A 35	100	Albert W. Smith, For bal. 118.	Sept. 19, 1895.
A 36	100	F. S. Mead & Co., For part 107.	Sept. 19, 1895.
A 37	100	F. S. Mead & Co., For part ctf. 107.	Sept. 19, 1895.
A 38	100	Hayden, Stone & Co., For part 134.	Sept. 19, 1895.

No. of Certificate.	No. of Shares.	Name.	Date.
A 39	100	Hayden, Stone & Co., For part 134.	Sept. 19, 1895.
A 40	100	Hayden, Stone & Co., For part 134.	Sept. 19, 1895.
A 41	100	Hayden, Stone & Co., For part 134.	Sept. 19, 1895.
A 42	100	Hayden, Stone & Co., For part 134.	Sept. 19, 1895.
A 43	100	Hayden, Stone & Co., For part ctf. 134.	Sept. 19, 1895.
A 44	100	Hayden, Stone & Co., For part 134.	Sept. 19, 1895.
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A 45	100	Hayden, Stone & Co., For part 134.	Sept. 19, 1895.
A 46	100	Hayden, Stone & Co., For part ctf. 134.	Sept. 19, 1895.
A 47	100	Hayden, Stone & Co., For part ctf. 134.	Sept. 19, 1895.
A 48	100	Clark, Ward & Co., For part ctf. 96.	Sept. 19, 1895.
A 49	100	Clark, Ward & Co., For part ctf. 96.	Sept. 19, 1895.
A 50	100	Clark, Ward & Co., For part ctf. 96.	Sept. 19, 1895.
A 51	100	Clark, Ward & Co., For part 96.	Sept. 19, 1895.
A 52	100	Clark, Ward & Co., For part 96.	Sept. 19, 1895.
A 53	100	Clark, Ward & Co., For ctf. part 96.	Sept. 19, 1895.
A 54	100	Clark, Ward & Co., For part ctf. 96.	Sept. 19, 1895.
A 55	100	Clark, Ward & Co., For ctf. 96.	Sept. 19, 1895.
A 56	100	Clark, Ward & Co., For ctf. 96.	Sept. 19, 1895.
A 57	100	Clark, Ward & Co., For ctf. 96.	Sept. 19, 1895.
A 58	100	Paine, Webber & Co., For ctf. 88.	Sept. 19, 1895.
A 59	100	Clement B. Asbury, For ctf. 91.	Sept. 19, 1895.
A 60	100	Clement B. Asbury, For ctf. 91.	Sept. 19, 1895.
A 61	100	Clement B. Asbury, For ctf. 91.	Sept. 19, 1895.
A 62	100	Clement B. Asbury, For ctf. 91.	Sept. 19, 1895.

No. of Certificate.	No. of Shares.	Name.	Date.
A 63	100	L. Herbert Taft, For ctf. 101.	Sept. 19, 1895.
A 64	100	L. Herbert Taft, For ctf. 101.	Sept. 19, 1895.
A 65	100	Richard F. Bolles, For part ctf. 90.	Sept. 20, 1895.
A 66	100	Richard F. Bolles, For part ctf. 90.	Sept. 20, 1895.
A 67	100	Philip P. Carleton, For part ctf. 111.	Sept. 20, 1895.
A 68	100	George H. Haskell, For part ctf. 111.	Sept. 20, 1895.
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A 69	100	Frederick W. Alexander, For part ctf. 111.	Sept. 20, 1895.
A 70	100	Edward G. Cook, For ctf. 111.	Sept. 20, 1895.
A 71	100	Jackson & Curtis, For ctf. 18.	Sept. 20, 1895.
A 72	100	Tower, Giddings & Co., For ctf. 124.	Sept. 20, 1895.
A 73	100	Elbridge Torrey, For Sundries.	Sept. 20, 1895.
A 74	100	Joshua W. Davis, For sundries.	Sept. 20, 1895.
A 75	100	Richardson, Hill & Co., For ctf. 47.	Sept. 20, 1895.
A 76	100	Richardson, Hill & Co., For ctf. 39.	Sept. 20, 1895.
A 77	100	Clement B. Asbury, For ctf. 123.	Sept. 20, 1895.
A 78	100	Clement B. Asbury, For ctf. 37.	Sept. 20, 1895.
A 79	100	Clement B. Asbury, For ctf. 29.	Sept. 20, 1895.
A 80	100	Clement B. Asbury, For ctf. 46.	Sept. 20, 1895.
A 81	100	Clement B. Asbury, For ctf. 42.	Sept. 20, 1895.
A 82	100	Clement B. Asbury, For ctf. 41.	Sept. 20, 1895.
A 83	100	Clement B. Asbury, For ctf. 27.	Sept. 20, 1895.
A 84	100	Clement B. Asbury, For ctf. 28.	Sept. 20, 1895.
A 85	100	Clement B. Asbury, For ctf. 43.	Sept. 20, 1895.
A 86	100	Clement B. Asbury, For ctf. 6.	Sept. 20, 1895.

No. of Certificate.	No. of Shares.	Name.	Date.
A 87	100	Clement B. Asbury, For Sundries.	Sept. 20, 1895.
A 88	100	Clement B. Asbury, For Sundries.	Sept. 20, 1895.
A 89	100	Clement B. Asbury, For ctf. 123.	Sept. 20, 1895.
A 90	100	Clement B. Asbury, For 123.	Sept. 20, 1895.
A 91	100	Wm. F. Whittemore, For part ctf. 100.	Sept. 23, 1895.
A 92	100	Josiah W. Hayden, For part ctf. 129.	Sept. 23, 1895.
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A 93	100	Josiah W. Hayden, For part ctf. 129.	Sept. 23, 1895.
A 94	100	Josiah W. Hayden, For part ctf. 129.	Sept. 23, 1895.
A 95	100	Ely & Co., For part ctf. 102.	Sept. 23, 1895.
A 96	100	Ely & Co., For part ctf. 102.	Sept. 23, 1895.
A 97	100	Ely & Co., For bal. ctf. 102.	Sept. 23, 1895.
A 98	100	Frank S. Mackenzie, For part ctf. 109.	
A 99	100	Frank S. MacKenzie, For part ctf. 109.	Sept. 23, 1895.
A 100	100	Chas. J. McKenzie, For part ctf. 109.	Sept. 23, 1895.
A 101	100	Chas. J. McKenzie, For bal. ctf. 109.	Sept. 23, 1895.
A 102	100	Frank S. Mackenzie, For ctf. 98.	Sept. 23, 1895.
A 103	100	George W. Griggs, For Sundries.	Sept. 24, 1895.
A 104	100	Joseph G. Ray, For ctf. 116.	Sept. 24, 1895.
A 105	100	Joseph G. Ray, For ctf. 116.	Sept. 24, 1895.
A 106	100	Joseph G. Ray, For ctf. 116.	Sept. 24, 1895.
A 107	100	Joseph G. Ray, For ctf. 116.	Sept. 24, 1895.
A 108	100	Joseph G. Ray, For ctf. 116.	Sept. 24, 1895.
A 109	100	Joseph G. Ray, For ctf. 116.	Sept. 24, 1895.
A 110	100	Peter B. Bradley, For ctf. 3.	Sept. 25, 1895.

No. of Certificate.	No. of Shares.	Name.	Date.
A 111	100	Price & Co., For part ctf. 112.	Sept. 26, 1895.
A 112	100	Price & Co., For part ctf. 112.	Sept. 26, 1895.
A 113	100	Price & Co., For bal. ctf. 112.	Sept. 26, 1895.
A 114	100	James S. Cumston, For ctf. 53.	Sept. 26, 1895.
A 115	100	James S. Cumston, For ctf. 48.	Sept. 26, 1895.
A 116	100	James S. Cumston, For Sundries.	Sept. 26, 1895.
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A 117	100	James S. Cumston, For ctf. 75.	Sept. 26, 1895.
A 118	100	James S. Cumston, For Sundries.	Sept. 26, 1895.
A 119	100	Charles S. Purinton, For ctf. 69.	Sept. 26, 1895.
A 120	100	W. H. Blasdell, For ctf. 103.	Sept. 26, 1895.
A 121	100	Josiah Grout, For ctf. 103.	Sept 26, 1895.
A 122	100	Josiah Grout, For ctf. 103.	Sept. 26, 1895.
A 123	100	Wm. W. Grout, For ctf. 103.	Sept. 26, 1895.
A 124	100	Wm. W. Grout, For ctf. 103.	Sept. 26, 1895.
A 125	100	Wm. W. Grout, For ctf. 103.	Sept. 26, 1895.
A 126	100	Wm. W. Grout, For ctf. 103.	Sept. 26, 1895.
A 127	100	Wm. W. Grout, For ctf. 103.	Sept. 26, 1895.

Mr. LAUTERBACH: That is admitted, subject to the same objection.

Q. 145. I call your attention to the stub of certificate A4, Samuel B. Bartholomew, particularly to the words on the stub, "Cancelled and issued to T. N." In whose handwriting are those words?

A. Well, I think that is Shepard's.

Q. 146. Will you now turn to that certificate?

A. I produce the original certificate No. A4, dated September 19, 1895, signed by C. H. Bissell, assistant president, and P. K. Dumaresq, assistant treasurer, registered by the Atlas National Bank, the certificate reading to Samuel B. Bartholomew. The certificate is marked in red ink, "Cancelled," and bears no endorsement.

(By Mr. HEMENWAY:)

Q. —. Do the by-laws provide for an assistant president?

A. Yes. They were too busy to sign certificates, and so Mr. Bissell was elected assistant president, and P. K. Dumaresq was elected assistant treasurer.

Q. 147. I call your attention also to the stub of certificate A5, to A. Eldredge, and particularly to the words "Cancelled and issued to T. Nelson, treasurer." In whose handwriting are those words?

A. Mr. Shepard's.

Q. 148. Now, turning to the original certificate A5——

A. I produce herewith the original certificate, which is signed by C. H. Bissell, assistant president, and P. K. Dumaresq,
387 assistant treasurer, registered, "Atlas National Bank," and the name "A. Eldredge," cancelled in red ink, and bearing no endorsement.

Q. 149. I call your attention to the stub of certificate A 13, issued to O. N. Pierce, and to the words "Cancelled and issued to T. Nelson, treasurer;" that is also in Mr. Shepard's handwriting?

A. Yes.

Q. 150. Will you produce the certificate?

A. I produce certificate A 13, dated September 19, 1895, signed by C. H. Bissell, assistant president, P. K. Dumaresq, assistant treasurer, registered by the Atlas Bank, in the name of O. N. Pierce, "Cancelled" in red ink, and bearing no endorsement.

Q. 151. Will you now produce certificate book B, containing 50-share lots, and furnish a list of the certificates issued prior to September 27, 1895?

A. I herewith produce the certificate book B. The 50-share lots are as follows, from B 1 to B 70, inclusive:—

No. of certificate.	No. of shares.	Name.	Date.
B 1	50	Wm. A. L. Bazeley.....	Sept. 19, 1895.
B 2	50	Edwin M. Dodd.....	Sept. 19, 1895.
B 3	50	H. S. Goodell.....	Sept. 19, 1895.
B 4	50	Horatio Newhall	Sept. 19, 1895.
B 5	50	James Ormond	Sept. 19, 1895.
B 6	50	George Whitney	Sept. 19, 1895.
B 7	50	W. P. Winsor.....	Sept. 19, 1895.
B 8	50	Charles Head & Co..... For part etf. No. 35 canc'd.	Sept. 19, 1895.
B 9	50	Charles Head & Co..... For part etf. No. 35 canc'd.	Sept. 19, 1895.
B 10	50	Charles Head & Co..... For part etf. 35 canc'd.	Sept. 19, 1895.
B 11	50	Charles Head & Co..... For etf. No. 35 canc'd.	Sept. 19, 1895.
B 12	50	Charles Head & Co..... For part etf. No. 35.	Sept. 19, 1895.
B 13	50	Charles Head & Co..... For bal. etf. No. 35.	Sept. 19, 1895.

No. of Certificate.	No. of Shares.	Name.	Date.
B 14	50	E. D. Bangs & Co. For part ctf. 14 (Should be 141)	Sept. 19, 1895.
B 15	50	E. D. Bangs & Co. Fort part ctf. 141.	Sept. 19, 1895.
B 16	50	E. D. Bangs & Co. Fort part ctf. 141.	Sept. 19, 1895.
B 17	50	E. D. Bangs & Co. Fort part ctf. 141.	Sept. 19, 1895.
B 18	50	Wm. H. Reed. For part ctf. 115.	Sept. 19, 1895.
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B 19	50	F. S. Mead & Co. For part ctf. 107.	Sept. 19, 1895.
B 20	50	F. S. Mead & Co. For part 107.	Sept. 19, 1895.
B 21	50	F. S. Mead & Co. For ctf. bal. 107.	Sept. 19, 1895.
B 22	50	F. S. Mead & Co. For bal. ctf. 107.	Sept. 19, 1895.
B 23	50	Hayden, Stone & Co. For part 134.	Sept. 19, 1895.
B 24	50	Hayden, Stone & Co. For part 134.	Sept. 19, 1895.
B 25	50	Hayden, Stone & Co. For part ctf. 134.	Sept. 19, 1895.
B 26	50	Hayden, Stone & Co. For part 134.	Sept. 19, 1895.
B 27	50	Hayden, Stone & Co. For part ctf. 134.	Sept. 19, 1895.
B 28	50	Clark, Ward & Co. For part ctf. 96.	Sept. 19, 1895.
B 29	50	Clark, Ward & Co. For part ctf. 96.	Sept. 19, 1895.
B 30	50	Clark, Ward & Co. For part ctf. 96.	Sept. 19, 1895.
B 31	50	Clark, Ward & Co. For ctf. 96.	Sept. 19, 1895.
B 32	50	Clark, Ward & Co. For bal. ctf. 96.	Sept. 19, 1895.
B 33	50	Richardson, Hill & Co. For part ctf. 120.	Sept. 19, 1895.
B 34	50	Richardson, Hill & Co. For part ctf. 120.	Sept. 19, 1895.
B 35	50	Richardson, Hill & Co. For ctf. 120.	Sept. 19, 1895.
B 36	50	Richardson, Hill & Co. For bal. ctf. 120.	Sept. 19, 1895.
B 37	50	E. Rollins Morse & Bro. For ctf. 23.	Sept. 19, 1895.

No. of Certificate.	No. of Shares.	Name.	Date.
B 38	50	C. H. Bissell..... For part ctf. 1.	Sept. 19, 1895.
B 39	50	C. H. Bissell..... For ctf. bal. 1.	Sept. 19, 1895.
B 40	50	C. A. Putnam & Co..... For part ctf. 88.	Sept. 19, 1895.
B 41	50	Paine, Webber & Co..... For part ctf. 88.	Sept. 19, 1895.
B 42	50	Clement B. Asbury..... For ctf. 91.	Sept. 19, 1895.
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B 43	50	Gray, Dewey & Co..... For ctf. 101.	Sept. 19, 1895.
B 44	50	Chas. Head & Co..... For ctf. 95.	Sept. 19, 1895.
B 45	50	Chas. Head & Co..... For bal. 95.	Sept. 19, 1895.
B 46	50	Richard F. Bolles..... For part ctf. 90.	Sept. 20, 1895.
B 47	50	Tower, Giddings & Co..... For part ctf. 124.	Sept. 20, 1895.
B 48	50	Tower, Giddings & Co..... For part ctf. 124.	Sept. 20, 1895.
B 49	50	Tower, Giddings & Co..... For part ctf. 124.	Sept. 20, 1895.
B 50	50	Tower, Giddings & Co..... For bal. ctf. 124.	Sept. 20, 1895.
B 51	50	Jackson & Curtis..... For part ctf. 38.	Sept. 20, 1895.
B 52	50	Jackson & Curtis..... For bal. ctf. 38.	Sept. 20, 1895.
B 53	50	Chas. Head & Co..... For part ctf. 24.	Sept. 20, 1895.
B 54	50	F. S. Mead & Co..... For bal. ctf. 8.	Sept. 20, 1895.
B 55	50	Samuel B. Capen..... For part ctf. 137.	Sept. 20, 1895.
B 56	50	Clement B. Asbury..... For part ctf. 44.	Sept. 20, 1895.
B 57	50	William Basset..... For ctf. 8.	Sept. 20, 1895.
B 58	50	Josiah W. Hayden..... For part ctf. 129.	Sept. 23, 1895.
B 59	50	Wm. M. Bunting..... For bal. ctf. 129.	Sept. 23, 1895.
B 60	50	Kinnicutt & De Witt..... For ctf. 15.	Sept. 24, 1895.
B 61	50	H. C. Wainwright & Co... For ctf. 15.	Sept. 24, 1895.

No. of certificate.	No. of shares.	Name.	Date.
B 62	50	Joseph G. Ray..... For part ctf. 116.	Sept. 24, 1895.
B 63	50	Joseph G. Ray..... For ctf. 116.	Sept. 24, 1895.
B 64	50	Price & Co..... For part ctf. 112.	Sept. 26, 1895.
B 65	50	Price & Co..... For part ctf. 112.	Sept. 26, 1895.
B 66	50	Walter P. Smith..... For ctf. 103.	Sept. 26, 1895.
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B 67	50	Angus H. McLeod..... For ctf. 103.	Sept. 26, 1895.
B 68	50	Stocker Bros. ..... For ctf. 103.	Sept. 26, 1895.
B 69	50	F. T. Dwinell..... For ctf. 103.	Sept. 26, 1895.
B 70	50	Tower, Giddings & Co.... For ctf. 45.	Sept. 26, 1895.

Q. 152. I call your attention to the stub of certificate B3, H. A. Goodell, under date of September 19, 1895, 50 shares. The words thereon, "Cancelled and issued to Thomas Nelson, treasurer," in whose handwriting are they?

A. Mr. Shepard's.

Q. 153. Will you now produce the original certificate No. B3?

A. I herewith produce such certificate. It is signed by C. H. Bissell, assistant president, and P. K. Dumaresq, assistant treasurer; registered by the Atlas Bank, in the name of H. A. Goodell, and marked in red ink "Cancelled." The certificate bears no endorsement.

Q. 154. Will you now produce the certificate issued in place of these certificates of 350 shares, namely, transferred to Nelson from Bartholomew Eldridge, O. N. Pierce, and H. A. Goodell?

A. I herewith produce certificate No. 409, duly signed and registered for 350 shares, dated October 10, 1895, in the name of Thomas Nelson, treasurer. The assignment on the back of the certificate, under date of September 21, 1897, is signed by Thomas Nelson, treasurer, his signature being witnessed by W. A. S. Chrimes. The assignment is to Stackpole & Gay, of the whole 350 shares, E. J. Young being appointed attorney to make the transfer.

Q. 155. Proceeding now in the miscellaneous certificate book, I call your attention to certificate 197, and ask you to read the stub of the same.

A. "No. 197, 40 shares, issued to Charles H. Altmiller, dated Sept. 27, 1895, for certificate 140, original subscription."

Q. 156. Certificate 140 being a certificate to P. K. Dumaresq for 99,420 shares?

A. Yes.

Q. 157. Will you now furnish us a list of all the certificates issued under date of September 27, 1895, other than certificate 140 for 99,420 shares?

A. Yes.

No. of certificate.	No. of shares.	Name.	Date.
197	40	Charles H. Altmiller	Sept. 27, 1895.
198	400	D. M. Authony	Sept. 27, 1895.
199	40	John W. Alline	Sept. 27, 1895.
200	40	W. A. L. Bazeley	Sept. 27, 1895.
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201	200	Harold M. Authony	Sept. 27, 1895.
		Cancelled.	
202	1,600	John H. Ball	Sept. 27, 1895.
		Cancelled.	
203	480	Richard F. Bolles	Sept. 27, 1895.
204	800	J. W. Beleher & Co.	Sept. 27, 1895.
205	800	S. N. Brown	Sept. 27, 1895.
206	4,000	A. S. Bigelow	Sept. 27, 1895.
207	200	Thomas P. Beal	Sept. 27, 1895.
208	40	W. A. S. Chrimes	Sept. 27, 1895.
209	120	Charles H. Cole	Sept. 27, 1895.
210	640	Henry P. Coe	Sept. 27, 1895.
211	400	Charles H. Cole	Sept. 27, 1895.
212	1,520	Joseph A. Coram	Sept. 27, 1895.
213	1,600	Stephen M. Crosby	Sept. 27, 1895.
214	800	Daniel L. Demmon	Sept. 27, 1895.
215	400	Ely & Co.	Sept. 27, 1895.
216	200	Robert M. Field	Sept. 27, 1895.
217	400	Isaac Fenno	Sept. 27, 1895.
218	800	Robert C. Billings	Sept. 27, 1895.
219	160	H. B. Goodenough	Sept. 27, 1895.
220	800	Charles Head	Sept. 27, 1895.
221	280	Charles Head & Co.	Sept. 27, 1895.
222	650	Timothy E. Hopkins	Sept. 27, 1895.
223	800	Hayden, Stone & Co.	Sept. 27, 1895.
224	400	Zachary T. Hollingsworth	Sept. 27, 1895.
225	80	Albert E. Harding	Sept. 27, 1895.
226	160	N. E. Hollis	Sept. 27, 1895.
227	160	George W. Hollis	Sept. 27, 1895.
228	500	Mrs. Mary L. Jones	Sept. 27, 1895.
229	600	Joseph S. Kendall	Sept. 27, 1895.
230	320	Leland, Towle & Co.	Sept. 27, 1895.
231	200	George H. Lyman	Sept. 27, 1895.
232	36,190	Leonard Lewisohn	Sept. 27, 1895.
		Cancelled.	
233	400	Mrs. Abby H. Manning	Sept. 27, 1895.
234	200	Benjamin F. Messervy	Sept. 27, 1895.
		Cancelled.	
235	2,000	J. Morris Meredith	Sept. 27, 1895.

No. of certificate.	No. of shares.	Name.	Date.
236	800	A. S. Maltman	Sept. 27, 1895.
237	800	Francis H. Manning	Sept. 27, 1895.
238	240	Henry C. Moses	Sept. 27, 1895.
239	400	Stephen O. Metcalf	Sept. 27, 1895.
240	160	H. H. Mawhinney	Sept. 27, 1895.
241	160	John O'Connor	Sept. 27, 1895.
242	400	George M. Preston	Sept. 27, 1895.
243	400	Gordon Prince	Sept. 27, 1895.
244	80	Thomas H. Perkins	Sept. 27, 1895.
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245	400	William H. Reed	Sept. 27, 1895.
246	400	Joseph G. Ray	Sept. 27, 1895.
247	80	Nancy E. Rust	Sept. 27, 1895.
248	800	E. C. Swift	Sept. 27, 1895.
249	400	Horace H. Stevens	Sept. 27, 1895.
250	800	Moses T. Stevens	Sept. 27, 1895.
251	200	Samuel S. Stevens	Sept. 27, 1895.
252	400	Albert O. Smith	Sept. 27, 1895.
253	400	Frank D. Somers	Sept. 27, 1895.
254	240	Samuel S. Spaulding	Sept. 27, 1895.
255	200	John F. Towle	Sept. 27, 1895.
256	400	Jeremiah Williams	Sept. 27, 1895.
257	800	Henry Woods	Sept. 27, 1895.
258	400	Harold Williams	Sept. 27, 1895.
259	240	Leonard Wheeler	Sept. 27, 1895.
260	800	S. W. Richardson agent for James S. Cumston.	Sept. 27, 1895.
261	4,000	Henry M. Whitney	Sept. 27, 1895.
262	20,000	P. K. Dumaresq	Sept. 27, 1895.
263	200	Maxwell Woodhull	Sept. 27, 1895.
264	200	Maxwell Woodhull	Sept. 27, 1895.
265	200	Maxwell Woodhull	Sept. 27, 1895.
266	200	Maxwell Woodhull	Sept. 27, 1895.
267	200	Maxwell Woodhull	Sept. 27, 1895.
268	800	John H. Pierce	Sept. 27, 1895.
269	36,190	Leonard Lewisohn	Sept. 27, 1895.
270	200	Harold H. Anthony	Sept. 27, 1895.
271	1,600	George H. Ball	Sept. 27, 1895.
272	200	Benjamin F. Messervy	Sept. 27, 1895.

Q. 158. Referring to miscellaneous certificate book, comprising certificates 197 to 269, A certificate book, comprising Nos. 128 to 161, and B certificate book, comprising Nos. 72 to 79, all of said certificates being dated September 27, I call your attention in miscellaneous certificate book to certificate No. 201, 200 shares, issued to Harold M. Anthony, dated September 27, 1895, for certificate 140 sundries, and ask you to produce that certificate.

A. I herewith produce the original certificate No. 201. The certificate is dated September 27, 1895, signed by C. H. Bissell, assistant president, and P. K. Dumaresq, assistant treasurer, in the name of

Harold M. Anthony, marked "Cancelled" on the face. It is not registered, and is not endorsed.

Q. 159. I call your attention to the stub No. 202, for 1600 shares, issued to John H. Ball, dated September 27, 1895, for certificate 140 subscription, marked "Cancelled," and ask you to produce the original of that certificate.

A. I herewith produce certificate No. 202. It is dated Sep-
393 tember 27, 1895, signed by C. H. Bissell, assistant president, and P. K. Dumaresq, assistant treasurer, in the name of John H. Ball, and is marked "Cancelled." It is not registered, and bears no endorsement.

Q. 160. I call your attention to the stub of certificate No. 232, for 36,190 shares, issued to Leonard Lewisohn, and marked "Cancelled," dated September 27, 1895, and ask you to produce the original certificate.

A. I produce the original certificate in the name of Leonard Lewisohn for 36,190 shares. The certificate is not signed nor dated, nor registered nor endorsed in any way.

Q. 161. I call your attention to the stub of certificate No. 234, for 200 shares, issued to Benjamin F. Messervy, dated September 27, 1895, and marked "Cancelled," and ask you to produce the original certificate.

A. I herewith produce the certificate. It is signed by C. H. Bissell, assistant president, and P. K. Dumaresq, assistant treasurer, dated September 27, 1895, in the name of Benjamin F. Messervy, and marked "Cancelled." It is not registered nor endorsed.

Q. 162. Will you please produce the original certificate A143?

A. I produce, as requested, the orignal certificate A143, dated September 27, 1895, in the name of Miss Annie R. Anthony, signed by C. H. Bissell, assistant president, and by P. K. Dumaresq, assistant treasurer, registered at the Atlas National Bank. A. On the back of the certificate are endorsed the words, "This stock was unclaimed and unpaid for, and therefore is returned to the treasurer. William H. Shepard, transfer clerk."

Q. 163. Will you also produce certificate A 161, in the name of George E. Sanborn?

A. I produce, as requested, the original certificate A 161, dated September 27, 1895, to George E. Sanborn. The certificate is signed by C. H. Bissell, assistant president, P. K. Dumaresq, assistant treasurer, registered by the Atlas National Bank. This certificate bears on the back, in writing, "Oct. 31, 1895. This stock was uncalled for and not paid for, and for that reason returned to the treasurer. W. H. Shepard, transfer clerk."

Q. 164. Will you refer to the transfer book and state out of what certificate the 36,190 shares were taken?

A. Out of certificate 140.

Q. 165. Will you please produce the original certificate No. 269 (miscellaneous), dated September 27, 1895, in the name of Leonard Lewisohn, for 36,190 shares?

A. I herewith produce that certificate dated September 27, 1895, signed by C. H. Bissell, assistant president, and P. K. Dumaresq,

assistant treasurer, registered by the Atlas National Bank, for 36,190 shares. The certificate is endorsed to transfer as follows, the transfer being signed "Leonard Lewisohn, by Adolph Lewisohn, attor-
394 ney," with Sidney Riddlestorffer as witness, on the date of September 28, 1895, and attached thereto is a letter of Lewisohn, which appears to be signed by Adolph Lewisohn, general manager, as follows:

"Lewisohn Brothers, 81 & 83 Fulton Street.

Cable Address 'Lohengrin.'
P. O. Box 1247, New York.

NEW YORK, *Sep. 27th*, 1895.

A S. Bigelow, Esq., Boston, Mass.

DEAR SIR: As arranged over the telephone, we herewith beg to hand you power of attorney and would ask you to have 9,500 shares of the Old Dominion Copper Mining & Smelting Company's stock transferred in the following names:

2,000 shares in the name of Lewisohn Brothers.
1,000 shares in the name of Lewisohn Brothers.
200 shares in the name of Lewisohn Brothers.
2,000 shares in the name of E. L. Oppenheim & Co.
1,000 shares in the name of Waldemar Caspary.
500 shares in the name of E. Lataste.
500 shares in the name of L. Nachmann.
500 shares in the name of H. Wallerstein.
500 shares in the name of Jacob Cahn.
400 shares in the name of J. D. Probst & Co.
400 shares in the name of Ladenburg, Thalmann & Co.
200 shares in the name of C. S. Henry & Co.
200 shares in the name of C. S. Henry & Co.
100 shares in the name of C. S. Henry & Co.

Total 9,500 Shares

Please send the certificates to us as soon as made out and oblige
Very truly yours,

LEWISOHN BROTHERS,
ADOLPH LEWISOHN,
General Manager."

H. E./F.

395 Addresses:

E. Lataste, 64 rue des Mathurins, Paris.
L. Nachmann, 59 William street, New York.
J. D. Probst & Company, 50 Exchange place, New York.
H. Wallerstein, 32 Spruce street, New York.
Waldemar Caspary 502-504 Broadway, New York.
E. L. Oppenheim & Company, 35 New street, N. Y.

Ladenburg, Thalmann & Company, 46 Wall street, New York.
C. S. Henry & Company, 46 St. Mary avenue, London, England.
Jacob Cahn, 50 Broadway, New York.
Lewisohn Brothers, 81-83 Fulton street, New York.

Q. 166. Now, Mr. Altmiller, will you give us a list of the certificates issued out of this certificate No. 269?
A. Yes.

No. of certificate.	No. of shares.	Name.	Date.
278	2,000	Lewisohn Bros.	Sept. 28, 1895.
279	1,000	Lewisohn Bros.	Sept. 28 1895.
280	200	Lewisohn Bros.	Sept. 28, 1895.
281	2,000	E. L. Oppenheim & Co.	Sept. 28, 1895.
282	1,000	Waldemar Caspary	Sept. 28, 1895.
283	500	E. Lataste	Sept. 28, 1895.
284	500	L. Nachmann	Sept. 28, 1895.
285	500	H. Wallerstein	Sept. 28, 1895.
286	500	Jacob Cahn	Sept. 28, 1895.
287	400	J. D. Probst & Co.	Sept. 28, 1895.
288	400	Ladenburg, Thalmann & Co.	Sept. 28, 1895.
289	200	C. S. Henry & Co.	Sept. 28, 1895.
290	200	C. S. Henry & Co.	Sept. 28, 1895.
291	26,690	Leonard Lewisohn	Sept. 28, 1895.
A 173	100	C. S. Henry & Co.	Sept. 28, 1895.

Q. 167. I call your attention to the stub of the miscellaneous certificate book No. 419, under date of October 17, 1895, for 22,650 shares, issued to Leonard Lewisohn, for certificate sundries, and ask you in exchange for what certificates this certificate No. 419 was issued?
A. Well, part of 74 and part of 262, or 262 and part of 74.
Q. 168. To the extent of 20,000 shares from certificate 262 and 2650 shares from certificate 74. Now will you produce certificate No. 419?
A. I herewith produce certificate 419 for 22,650 shares, dated October 17, 1895, which certificate is duly signed and registered, and is endorsed under date of September 23, 1897, by Leonard Lewisohn, by Adolph Lewisohn, attorney, as per a letter of September 23, 1897, thereto attached, which is as follows:

396 "Lewisohn Brothers, 81 & 83 Fulton Street,

Cable Address, 'Lohengrin.'
P. O. Box, 1247, New York.

NEW YORK, *Sept.* 23, 1897.

Mr. Thomas Nelson, Secretary, Old Dominion Copper Mining & Smelting Co. Boston, Mass.

DEAR SIR: In accordance with our telephonic conversation with you, we have sent you per Adams Express, prepaid, Certificate No.

419 for 22,650 shares Old Dominion stock in the name of our Mr. Leonard Lewisohn, and for which you will please send us Certificates made out as follows:

Two Certificates of 5000 each in name of Leonard Lewisohn	10,000
One Certificate of 1000 in name of Arthur David	1,000
Two Certificates of 500 / One Certificate of 50 \ in name of C. E. Baker	1,050
Six Certificates of 100 each / One Certificate of 1000 \ in name of Thomas F. Lynch	1,600
One Certificate of 1000 in name of N. E. Daly	1,000
One Certificate of 1000 / Five Certificates of 100 each \ in name of Henry Lang	1,500
One Certificate of 500 / One Certificate of 1000 \ in name of Eugene Scharff	1,500
Two Certificates of 1000 / Six Certificates of 500 each \ in name of Theodore Gaden	5,000
Total	22,650

You will kindly give this matter your early attention and return these certificates to us. By so doing you will greatly oblige.

Yours truly,

LEWISOHN BROTHERS,
ADOLPH LEWISOHN,
General Manager."

J. R./N.

Q. 169. I call your attention to the stub (miscellaneous) No. 420, to A. S. Bigelow, 27,350 shares, for sundries, marked "Cancelled," and ask you to produce that certificate.

A. I herewith produce that canceled certificate No. 420; it is unsigned, undated, and not registered.

397 Q. 170. I ask you now to produce certificate No. 421 to A. S. Bigelow for 27,350 shares, dated October 17, 1895.

A. I herewith produce that certificate, dated October 17, 1895, duly signed and registered. The certificate bears on itself no endorsement, but there is noted upon it in pencil a memorandum showing the disposition of the 27,350 shares.

Q. 171. I call your attention to the stub of miscellaneous certificate No. 409, for 350 shares, issued October 10, 1895, to Thomas Nelson, treasurer, and ask you to examine the transfer book to ascertain whether that certificate was issued in exchange for the certificates to Bartholomew, Eldredge, Pierce, and Goodell, as above testified to by you?

A. I do not think you can find any transfer for that; they simply canceled the old certificates and issued new ones.

Q. 172. Will you now produce the original of miscellaneous certificates No. 8, to Thomas Nelson, for 16 shares; No. 10, to Henry M. Whitney, 4 shares; No. 11, to Joseph G. Ray, for 1 shares; No. 12, to Leonard Lewisohn, for 4 shares; No. 13, to A. S. Bigelow, for 4 shares, and No. 14, to Moses T. Stevens, for 1 shares?

A. I do not think you can find all of them here. You see, these are the first ones, and if the others remained directors they would be held there for some time. I herewith produce the certificates called for. They are all duly signed and registered, and are endorsed, by the respective parties, under date of September 16 or 18, 1895.

Mr. LAUTERBACH: They appear to be transferred to Dumaresq.

Q. 173. Will you now produce certificate No. 75, issued to Moses T. Stevens, for 4 shares; No. 76, to A. S. Bigelow, for 4 shares; No. 77, to Leonard Lewisohn, for 4 shares; No. 78, to Thomas Nelson, for 16 shares; No. 79, to Edgar Buffum, for 4 shares; No. 80, to Joseph G. Ray, for 4 shares, and No. 81, to Henry M. Whitney, for 4 shares?

A. I do not think you will find any of those here. Those were qualifying shares. They are not here; they are at the office.

[The further taking of this deposition was postponed until Tuesday, the 18th day of October, at the same time and place, and was then resumed, as follows:]

Q. 174. Have you now the certificates called for in Int. 173?

A. Yes. I herewith produce the original certificates. They are all dated September 18, 1895. Nos. 75, 76, 77, 78, 80, and 81 are endorsed by the respective parties in whose names the certificates stood, and are assigned to Thomas Nelson, treasurer; and all of those, except certificate 81, are stamped on the back "Transferred Nov. 4, 1895." The transfer of certificate No. 75 is dated November 2, 1895; that of No. 76, October 31, 1895; that of 77, November 2, 1895; that of No. 78, October 31, 1895; that of 80,
398 November 2, 1895; the transfer on the back of 81 is not dated. Certificate No. 79, to Edgar Buffum, is endorsed by Edgar Buffum, under date of January 17, 1896, to Laurent Oppenheim, and is stamped "Transferred April 8, 1897."

Q. 175. Will you now produce the certificate which was issued to Thomas Nelson, treasurer, for the 36 shares transferred to him from the certificates referred to in Ints. 173 and 174?

A. I herewith produce the original certificate, No. 466, dated November 4, 1895, for 36 shares, to Thomas Nelson, treasurer, under date of September 21, 1897, transferring 25 shares to Stackpole & Gay and 11 shares "to myself."

Q. 176. Will you now produce certificate No. 409, for 350 shares, to Thomas Nelson, treasurer, referred to in Int. 171?

A. I herewith produce the original certificate No. 409, endorsed Thomas Nelson and Thomas Nelson, treasurer, transferring the same, under date of September 21, 1897.

Q. 177. Will you now produce the original certificate issued to Thomas Nelson, treasurer, in exchange for certificate A143 referred to in Int. 161, and A161 referred to in Int. 163?

A. I herewith produce the original certificate No. 465, dated October 31, 1895, in the name of Thomas Nelson, treasurer, for 200 shares. This certificate is endorsed by Thomas Nelson, treasurer,

transferring the same to Stackpole & Gay, under date of September 21, 1897.

Q. 178. Will you now produce the original certificate for 11 shares, issued to Thomas Nelson, treasurer, being the balance remaining of the 36 shares issued to him by certificate 466, after transferring 25 shares to Stackpole & Gay?

A. I herewith produce the original certificate No. 1203, dated September 20, 1897, to Thomas Nelson, treasurer, endorsed by him, under date of September 24, 1897, as follows: "To Stackpole & Gay, 10 shares; to myself, 1 share."

Q. 179. Will you now produce the certificate for 1 share to Thomas Nelson, treasurer, being the balance remaining out of certificate No. 1203 after transferring 10 shares to Stackpole & Gay?

A. I now produce the original certificate No. 1255, dated September 23, 1897, to Thomas Nelson, treasurer, for 1 share, and endorsed by Thomas Nelson, treasurer, assigning this 1 share to Stackpole & Gay.

Q. 180. Referring to the printed circular referred to in Int. 101, of which a copy is annexed to your deposition as Exhibit 6, I ask you whether or not the printing of that circular was paid for by the Old Dominion Copper Mining & Smelting Company.

A. I find that it was.

Mr. LAUTERBACH: All these questions are taken subject to our general objection, are they?

399 Mr. BRANDEIS: Well, I suppose so. I do not know what the general objection is.

Mr. LAUTERBACH: That they are immaterial, incompetent, and irrelevant, and that the witness has no personal knowledge.

Mr. BRANDEIS: That, I think, we cannot have as a general objection.

Mr. LAUTERBACH: No, but I make that objection specifically.

Q. 181. Will you state under what date that circular was paid for?

A. October 30, 1895.

Q. 182. How is it paid for?

A. By check from the Old Dominion Copper Mining & Smelting Company.

Q. 183. Of what amount?

A. With other items, $269.

Q. 184. To whom was that check paid?

A. Well, I suppose it was paid to the Old Dominion Copper Mining & Smelting Company.

Q. 185. That is your handwriting?

A. No, sir, that is T. C. Cummings'.

Q. 186. Who is T. C. Cummings?

A. He used to be a clerk there.

Q. 187. Where is he now?

A. At Towle & Fitzgerald's, 18 Post Office square. I suppose that was paid for by the check of the Montana Mining & Smelting Company.

Q. 188. Explain why your check was made to the Boston & Montana Mining Company; that is, how this account was kept.

A. The Boston & Montana had a general expense book, and the small sundry bills of various companies in which Mr. Bigelow was interested were paid for by petty cash and charged in this book. Then at the end of the month the various charges were itemized on a statement such as you have here, and a check given by that company to the Boston & Montana Company.

Q. 189. Now will you read the statement which you have here to which you have just referred?

A.—

"Old Dominion Copper Mining & Smelting Company.

1895.

Oct.	5,	W. H. A. Parks, transfer book		$16 50
"	7,	L. Barta & Co.,—bill		2 25
"	7,	W. H. A. Parks, "		38 75
"	15,	"	3000 certificates, 6 books	206 75
"	18,	"	trial balance book	4 75
		Total		$269 00"

400 (By Mr. LAUTERBACH:)

Q. Where is the item for this circular?

A. The item of $2.25.

Q. 190. Is this paper which you have just read in answer to Int. 189, the original voucher of the Old Dominion Copper Mining & Smelting Company?

A. It is.

Q. 191. Do you know in whose handwriting that voucher is?

A. I think that is Charles H. Coe's; I would not say for sure; I do not know.

Q. 192. Have you, and will you produce, also the original voucher of L. Barta & Company for printing these circulars?

A. I have, and I produce the same.

[Voucher introduced in evidence, as follows:]

"L. Barta & Co. Printers. 144 and 148 High Street.

BOSTON, MASSACHUSETTS, *Oct.* 1, 1895.

In account with Old Dominion Copper & Silver Mining Co.

Sept. 11, 100 ½ note circular, 5½ x 8½ 2.25

Received Payment Oct. 7, 1895.

L. BARTA & CO.,
Per COLLAMORE."

Q. 193. Have you measured the circular introduced as Exhibit 6, and attached to your deposition, and can you state—if so, please state—what the dimensions of the circular are?

A. I have not measured it, but so far as I saw you measure it, it is 5½ x 8½.

Q. 194. Well, that is the measurement, is it not?

A. Yes.

Q. 195. Will you now give a list of the certificates issued in exchange for certificate 419 in pursuance of the transfer set forth in Int. 168?

A. I herewith present such a list.

No. of certificate.	No. of shares.	Name.
1256	5000	Leonard Lewisohn.
1257	5000	Leonard Lewisohn.
1258	1000	Arthur David.
1259	500	C. E. Baker.
1260	500	C. E. Baker.
B 1384	50	C. E. Baker.
A 1387	100	Thomas F. Lynch.
A 1388	100	Thomas F. Lynch.
A 1389	100	Thomas F. Lynch.

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A 1390	100	Thomas F. Lynch.
A 1391	100	Thomas F. Lynch.
A 1392	100	Thomas F. Lynch.
1262	1000	Thomas F. Lynch.
1263	1000	N. E. Daly.
1264	1000	Henry Lang.
A 1393	100	Henry Lang.
A 1394	100	Henry Lang.
A 1395	100	Henry Lang.
A 1396	100	Henry Lang.
A 1397	100	Henry Lang.
1265	500	Eugene Scharff.
1266	1000	Eugene Scharff.
1267	1000	Theodore Gaden.
1268	1000	Theodore Gaden.
1269	500	Theodore Gaden.
1270	500	Theodore Gaden.
1271	500	Theodore Gaden.
1272	500	Theodore Gaden.
1273	500	Theodore Gaden.
1274	500	Theodore Gaden.

Q. 196. It appears by an examination of the stubs of the miscellaneous certificate book and of certificate book A, and of certificate book B that the stub, in referring to the certificate for which a given certificate is issued, does not distinguish, in giving the num-

ber, between the three certificate books. In what manner can you determine whether a certificate referred to on the stub of any one of these books is an original certificate taken out of the miscellaneous certificate book, or out of A, or out of B?

A. By referring to the transfer book.

Q. 197. Will you compare the stubs of those three certificate books with the transfer book, and furnish a list which shall show as follows:

First, what certificates in the miscellaneous book are issued for certificates in A book and what in B book?

Second, what certificates in A are issued for certificates from the miscellaneous book and what from book B?

Third, what certificates in book B are issued from certificates in miscellaneous book, and what from book A?

Mr. LAUTERBACH: There is no objection to the form of the interrogatory, or to the method of proof, but we object to it because it is immaterial, incompetent, and irrelevant.

A. First. The following certificates in the miscellaneous book were issued for certificates appearing in A book and B book:

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147	E. Rollins Morse & Bro.	for	part	A	23.
148	E. Rollins Morse & Bro.	"	"	A	23.
158	Emil W. Hunzinger	"	"	B	10.
159	Tucker, Anthony & Co.	"	"	B	10.
163	Leland, Towle & Co.	"	"	A	24.
164	Charles Head & Co.	"	"	A	24.
165	F. S. Mead & Co.	"	"	A	8.
176	Clement B. Asbury	"	"	A	8.
174	Clement B. Asbury	"	"	A	44.
175	William Basset	"	"	A	44.
177-78-79	Clark, Ward & Co.	"	"	B	30.
190	Paine, Webber & Co.	"	"	B	46.
191	Tucker, Anthony & Co.	"	"	B	46.
314	Kinnicutt and De Witt	"	"	A	193.
315	J. W. Beleher & Co.	"	"	A	193.
316	Tucker, Anthony & Co.	"	"	A	193.
317	Mrs. Eilzabeth G. Bright	"	"	A	193.
318	Parkinson & Burr	"	"	A	193.
319	Pearmain & Brooks	"	"	A	193.
320	William H. Breed	"	"	B	76.
321	James M. W. Hall	"	"	B	76.
322	J. W. Beleher & Co.	"	"	A	171.
323	Charles Sprague	"	"	A	171.
324	Charles H. Hooke	"	"	A	171.
325-326	Benjamin F. Messervy	"	"	A	171.
399-400	Richard F. Bolles	"	"	A	199.
401	Charles H. Cole, Jr.	"	"	A	164.
402-403	Charles H. Cole	"	"	A	164.
425-426	Edward D. Williams	"	"	B	193.

455	F. S. Mead & Co.	"	"	B	61.
459	Charles Head & Co.	"	"	B	97.
460	Leland, Towle & Co.	"	"	B	97.
485-486	Chas. H. Cole	"	"	B	143.
492	M. Bolles & Co.	"	"	A	391.
493	F. S. Mead & Co.	"	"	A	391.
496-97-98-98	Mrs. Laura E. Wilkins	"	"	B	227.

Second. The following certificates in A book were issued for certificates from the miscellaneous book and B book:

A 27-28-29	E. D. Bangs & Co.	part of	Miscellaneous		141.
B 14-15-16-17	E. D. Bangs & Co.	"	"	"	141.
A 30	William H. Reed	"	"	"	115.
B 18	William H. Reed	"	"	"	115.
A31-32-33-34-35	Albert W. Smith	"	"	"	118.
A 36-37	F. S. Mead & Co.	"	"	"	107.
B 19-20-21-22	F. S. Mead & Co.	"	"	"	107.
A 38-47	Hayden, Stone & Co.	"	"	"	134.

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B 23-27	Hayden, Stone & Co.	part of	Miscellaneous		134
A 48-57	Clark, Ward & Co.	"	"	"	96.
B 28-32	Clark, Ward & Co.	"	"	"	96.
B 40	C. A. Putnam & Co.	"	"	"	88.
B 41	Paine, Webber & Co.	"	"	"	88.
A 58	Paine, Webber & Co.	"	"	"	88.
A 59-60-61-62	Clement B. Asbury	"	"	"	91.
B 42	Clement B. Asbury	"	"	"	91.
A 63-64	L. Herbert Taft	"	"	"	101.
B 43	Gray, Dewey & Co.	"	"	"	101.
A 65-66	Richard F. Bolles	"	"	"	90.
B 46	Richard F. Bolles	"	"	"	90.
A 67-68-69-70	Philip P. Carleton	"	"	"	111.
	George A. Haskell	"	"	"	111.
	Frederick W. Alexander	"	"	"	111.
	Edward G. Cook	"	"	"	111.
A 72	Tower, Giddings & Co.	"	"	"	124.
B 47-48-49-50	Tower, Giddings & Co.	"	"	"	124.
A 77-89-90	Clement B. Asbury	"	"	"	123.
A 91	William F. Whittemore	"	"	"	100.
A 92-93-94	Josiah W. Hayden	"	"	"	129.
B 58	Josiah W. Hayden	"	"	"	129.
B 59	Wm. M. Bunting	"	"	"	129.
A 95-96-97	Ely & Co.	"	"	"	102
A 102-99	Frank S. Mackenzie	"	"	"	109.
A 100-101	Chas. J. McKenzie	"	"	"	109.
A 104-109	Joseph G. Ray	"	"	"	116.
B 62-63	Joseph G. Ray	"	"	"	116.
B 64-65	Price & Co.	"	"	"	112.
A 111-112-113	Price & Co.	"	"	"	112.

B 66	Walter P. Smith	"	"	"	103.
A 120	W. H. Blasdell	"	"	"	103.
B 67	Angus H. McLeod	"	"	"	103.
B 68	Stocker Bros.	"	"	"	103.
B 69	F. T. Dwinell	"	"	"	103.
A 121-122	Josiah Grout	"	"	"	103.
A123-124-125-126-127	Wm. W. Grout	"	"	"	103.
B 80-81-82-83	C. H. Cole	"	"	"	211.
A 162-163	C. H. Cole	"	"	"	211.
A164-165-166-167-168-169-170	C. H. Cole	"	"	"	212.
A 171-172	Benjamin F. Messervy	"	"	"	272.
B 84	Albert N. Baudin	"	"	"	121.
B 85	H. Stewart Goodell	"	"	"	121.
B 86	Henry Stackpole	"	"	"	121.
A 175-176-177	Henry Stackpole	"	"	"	121.
B 87	John H. Rice	"	"	"	121.
B 178	John L. Rees	"	"	"	121.
A 179-180	James H. Seager	"	"	"	121.
A 181	Chas. H. Rodi	"	"	"	121.
A 174	Albert I. Lawbaugh	"	"	"	121.

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A 182-183-184-185-186	Hayden, Stone & Co.	part of	Miscellaneous		223.
B 88-89-90-91-92-93	Hayden, Stone & Co.	"	"	"	223.
A 187-188-189-190	Ely & Co.	"	"	"	215.
A 191-192-193-194-195	J. W. Belches & Co.	"	"	"	204.
B 94-95-96-97-98-99	J. W. Belches & Co.	"	"	"	204.
A 196-197-198-199	Richard F. Bolles	"	"	"	203.
B 100	Richard F. Bolles	"	"	"	203.
A 200-201	M. Bolles & Co.	"	"	"	254.
A 212-213-214-215	Hayden, Stone & Co.	"	"	"	253.
A 216	Joseph F. Green	"	"	"	261.
A 217	William E. Barrett	"	"	"	261.
B 101	William Bunting	"	"	"	256.
A 218-219-220	Jeremiah Williams	"	"	"	256.
B 102	Jeremiah Williams	"	"	"	256.
B 103	Morton Prince	"	"	"	243.
A 221-222-223	Gordon Prince	"	"	"	243.
A 224-225	Elbridge Torrey	"	"	"	210.
A 226	Samuel B. Capen	"	"	"	210.
B 104	Samuel B. Capen	"	"	"	210.
B 105	Joshua W. Davis	"	"	"	210.

A 227	Mrs. Laura E. Wilkins..	"	"	"	210.
A 228	Mrs. Frances M. Perkins..	"	"	"	210.
A 229-230-231-232	Henry D. Hyde.....	"	"	"	213.
A 233-234-235-236	Henry D. Hyde.....	"	"	"	213.
A 237-238-239-240-241-242-243-244	Stephen M. Crosby.....	"	"	"	213.
A 245-246-247-248-249	Charles Head & Co.....	"	"	"	220.
B 120-121-122-123-124-125	Charles Head & Co.....	"	"	"	220.
A 262-263-264	Hayden, Stone & Co....	"	"	"	281.
B 126	Hayden, Stone & Co....	"	"	"	281.
B 127	Herbert H. Barnes.....	"	"	"	281.
A 265 to 274	E. L. Oppenheim & Co...	"	"	"	281.
A 276 to 280	E. L. Oppenheim & Co...	"	"	"	281.
A 286	E. L. Oppenheim & Co...	"	"	"	281.
A 281-282	Richardson, Hill & Co...	"	"	"	260.
B 128 to 138	Spencer W. Richardson..	"	"	"	260.
A 285	Charles H. Altmiller....	"	"	"	85.
B 158	Otis S. Wilbur.....	"	"	"	230.
A 287-288	Leland, Towle & Co.....	"	"	"	230.
B 159	Leland, Towle & Co.....	"	"	"	230.
A 291-292	Thomas B. Eaton.....	"	"	"	273.
A 293	Benjamin F. Stevens....	"	"	"	273.
A 294	George W. Ball.....	"	"	"	273.
A 295-296-297-298	Horace H. Stevens.....	"	"	"	249.
A 299-300	George H. Flint.....	"	"	"	275.
A 301-302	George H. Ball.....	"	"	"	275.
A 303	Kinnicutt & DeWitt.....	"	"	"	364.
B 166-167-168-169	J. W. Belches & Co.....	"	"	"	364.
A 304	Charles T. Baker.....	"	"	"	364.
A 305-306-307-308	Louis G. Schiffer.....	"	"	"	367.

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A 309	Emil Marx.....	part of	Miscellaneous		398.
A 310	Paul Bernhard.....	"	"	"	398.
A 311-312	Sidney Riddlestorffer....	"	"	"	398.
B 178-179	Sidney Riddlestorffer....	"	"	"	398.
A 313-323	John Flynn.....	"	"	"	349.
A 324	William S. Mitchell....	"	"	"	349.
B 189-190	Herbert L. Boyer.....	"	"	"	130.
A 325-326	Herbert L. Boyer.....	"	"	"	130.
B 191	Edward K. Butler.....	"	"	"	252.
B 192	Albert Pratt Smith.....	"	"	"	252.
A 327-328	Albert Oliver Smith.....	"	"	"	252.
A 330 to 339	August Belmont & Co...	"	"	"	279.

A 350-354	Joseph A. Coram	"	"	"	292.
A 357	Joseph A. Coram	"	"	"	292.
A 358 to 365	D. L. Demmon	"	"	"	214.
A 366-367-368	Mrs. Alice Cary Williams	"	"	"	258.
B 194	Albert L. Lincoln, Jr.	"	"	"	258.
A 371	Matthew Luce	"	"	"	429.
B 196-197-198-199	M. Bolles & Co.	"	"	"	239.
A 372-373	M. Bolles & Co.	"	"	"	239.
A 374	Mrs. Julia Henry	"	"	"	350.
A 375	C. S. Henry Gdn to Cyril Henry	"	"	"	350.
A 376	Sam Lewisohn	"	"	"	350.
A 377	Joseph Rechert	"	"	"	350.
B 202-203	Stephen M. Crosby	"	"	"	448.
A 378-379-380-381	Stephen M. Crosby	"	"	"	448.
A 384-385-386-387	J. A. Coram	"	"	"	450.
B 220 to 229	F. S. Mead & Co.	"	"	"	298.
A 388 to 392	F. S. Mead & Co.	"	"	"	298.
A 406-407	Imanuel de la Penha	"	"	"	375.
B 250 to 253	Richardson, Hill & Co.	"	"	"	236.
A 408 to 413	Richardson, Hill & Co.	"	"	"	236.
A 418	Leland, Towle & Co.	"	"	"	361.
A 419 to 421	John Stanton	"	"	"	361.
A 424 to 431	Curtis & Motley	"	"	"	248.
A 435 to 444	C. Henry Knapp	"	"	"	453.
B 274 to 293	C. Henry Knapp	"	"	"	454.
A 445	Emile Paraf	"	"	"	283.
A 446-447	Mrs. Mary DeFord Bigelow	"	"	"	427.
A 449 to 453	C. Henry Knapp	"	"	"	452.
B 294 to 303	C. Henry Knapp	"	"	"	452.
B 306 to 308	Sutton & Bowen	"	"	"	117.
A 456	Sutton & Bowen	"	"	"	117.
B 309	John F. Souther	"	"	"	369.
A 457	Charles F. Brooker	"	"	"	369.
B 310	Richardson, Hill & Co.	"	"	"	369.
A 458 to 462	C. Henry Knapp	"	"	"	297.
B 311 to 320	C. Henry Knapp	"	"	"	297.
A 463	H. C. Wainwright & Co.	"	"	"	114.
B 321 to 322	Wm. B. Stearns	"	"	"	114.

406 Third. The following certificates in B book were issued for certificates from the miscellaneous book and A book:

B 14 to 17	E. B. Bangs & Co.	part of	Miscellaneous		141
B 18	Wm. H. Reed	"	"	"	115
B 19 to 22	F. S. Mead & Co.	"	"	"	107
B 23 to 27	Hayden, Stone & Co.	"	"	"	134
B 28 to 32	Clark, Ward & Co.	"	"	"	96

B 33 to 36	Richardson, Hill & Co.	"	"	"	120
B 37	E. Rollins Morse & Bro.	"	"	A	23
B 38-39	C. H. Bissell	"	"	"	1
B 40	C. A. Putnam & Co.	"	"	Miscellaneous	88
B 41	Paine, Webber & Co.	"	"	"	88
B 42	Clement B. Asbury	"	"	"	91
B 43	Gray, Dewey & Co.	"	"	"	101
B 44-45	Chas. Head & Co.	"	"	"	95
B 46	Richard F. Bolles	"	"	"	90
B 47 to 50	Tower, Giddings & Co.	"	"	"	124
B 51 to 52	Jackson & Curtis	"	"	A	38
B 55	Samuel B. Capen	"	"	Miscellaneous	137
B 56	Clement B. Asbury	"	"	A	41
B 58	Josiah W. Hayden	"	"	Miscellaneous	129
B 59	Wm. M. Bunting	"	"	"	129
B 60	Kinnicutt & DeWitt	"	"	A	15
B 61	H. C. Wainwright & Co.	"	"	"	15
B 62-63	Joseph G. Ray	"	"	Miscellaneous	116
B 64-65	Price & Co.	"	"	"	112
B 66	Walter P. Smith	"	"	"	103
B 67	Angus H. McLeod	"	"	"	103
B 68	Stoker Bros.	"	"	"	103
B 69	F. T. Dwinell	"	"	"	103
B 80 to 83	C. H. Cole	"	"	"	211
B 84	Albert N. Baudin	"	"	"	121
B 85	H. Stewart Goodell	"	"	"	121
B 86	Henry Stackpole	"	"	"	121
B 87	John H. Rice	"	"	"	121
B 88 to 93	Hayden, Stone & Co.	"	"	"	223
B 94 to 99	J. W. Belches & Co.	"	"	"	204
B 100	Richard F. Bolles	"	"	"	203
B 101	William Bunting	"	"	"	256
B 102	Jeremiah Williams	"	"	"	256
B 103	Morton Prince	"	"	"	243
B 104	Samuel B. Capen	"	"	"	210
B 105	Joshua W. Davis	"	"	"	210
B 106-107	H. C. Wainwright & Co.	"	"	"	187
B 108	H. C. Wainwright & Co	"	"	"	188
B 119	Chas. Head & Co.	"	"	"	244
B 120 to 125	Chas. Head & Co.	"	"	"	220
B 126	Hayden, Stone & Co.	"	"	"	281
B 127	Herbert H. Barnes	"	"	"	281

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B 128 to 138	Spencer W. Richardson	part of		Miscellaneous	260
B 155-156	Charles H. Cole, Jr.	"	"	"	209
B 158	Otis S. Wilbur	"	"	"	230
B 159	Leland, Towle & Co.	"	"	"	230
B 161	Charles G. White	"	"	"	276
B 162	Francis Hollis	"	"	"	276
B 163	Thomas Hollis	"	"	"	276

B 164	James L. Wesson	"	"	"	276
B 165	Arthur Wheelock	"	"	A	199
B 166 to 169	J. W. Belches & Co.	"	"	Miscellaneous	364
B 171-172	M. Bolles & Co.	"	"	A	244
B 173	R. L. Day & Co.	"	"	Miscellaneous	207
B 174 to 176	Thomas P. Beal	"	"	"	207
B 177	Charles H. Cole, Jr.	"	"	A	164
B 178-179	Sidney Riddlestorffer	"	"	Miscellaneous	398
B 180 to 183	M. Bolles & Co.	"	"	"	224
B 184 to 187	Zachary T. Hollingsworth	"	"	"	224
B 189-190	Herbert L. Boyer	"	"	"	130
B 191	Edward K. Butler	"	"	"	252
B 192	Albert Pratt Smith	"	"	"	252
B 194	Albert L. Lincoln, Jr.	"	"	"	258
B 195	William A. L. Bazeley	"	"	"	417
B 196 to 199	M. Bolles & Co.	"	"	"	239
B 200-201	Hayden, Stone & Co.	"	"	A	262
B 203-202	Stephen M. Crosby	"	"	Miscellaneous	148
B 204 to 216	Frank Seabury & Bro.	"	"	"	467
B 220 to 229	F. S. Mead & Co.	"	"	"	298
B 233-234	Harry H. Gay	"	"	A	132
B 236	Harry Bronner	"	"	"	281
B 237	Ewald Balthasar	"	"	"	281
B 238	J. W. Belches & Co.	"	"	"	391
B 250 to 253	Richardson, Hill & Co.	"	"	Miscellaneous	236
B 268	Chase & Barstow	"	"	A	417
B 269	Richardson, Hill & Co.	"	"	"	417
B 270	J. W. Belches & Co.	"	"	"	255
B 271	Charles Head & Co.	"	"	"	255
B 274 to 293	C. Henry Knapp	"	"	Miscellaneous	454
B 306 to 308	Sutton & Bowen	"	"	"	117
B 309	John F. Souther	"	"	"	369
B 310	Richardson, Hill & Co.	"	"	"	369
B 311 to 320	C. Henry Knapp	"	"	"	297
B 321-322	Wm. B. Stearns	"	"	"	111
B 323	Chas. B. Porter	"	"	"	580
B 324 to 327	J. B. Stowell & Son	"	"	A	438-439
B 328	Charles H. Cole	"	"	Miscellaneous	479
B 329	Brewster, Cobb & Estabrook	"	"	A	289
B 331	Richardson, Hill & Co.	"	"	Miscellaneous	549
B 338 to 339	Ely & Co.	"	"	A	97
B 340-341	J. W. Belches & Co.	"	"	"	254

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B 345	William W. Bailey	part of Miscellaneous			550-486
B 349	Matthew Luce, Jr.	"	"	"	142
B 350	E. R. Morse & Bro.	"	"	"	397
B 351 to 355	F. H. Prince & Co.	"	"	"	397
B 359	Chas. Head & Co.	"	"	A	112

B 360	Paine, Webber & Co.	"	"	112
B 363	Ely & Co.	"	"	453
B 364	Jackson & Curtis.	"	"	453
B 365	Chas. Head & Co.	"	"	249
B 367 to 372	Charles D. Coffin	"	"	119
B 374 to 377	M. Bolles & Co.	"	" Miscellaneous	437
B 381-382	W. A. L. Bazeley	"	" A	2
B 383	Charles H. Cole	"	"	A 215 & A 535
B 384	William W. Bailey	"	"	
B 385-386	Sutton & Bowen	"	"	
B 387-388	William W. Bailey	"	" A	517
B 391	J. B. Stowell & Son	"	" "	523
B 395-396	Tower, Giddings & Co.	"	" "	147
B 397	M. Bolles & Co.	"	" "	204
B 398	Leland, Towle & Co.	"	" "	204
B 400 to 411	M. Bolles & Co.	"	" Miscellaneous	229
B 414-415	J. W. Belches & Co.	"	" A	442
B 416 to 425	M. Bolles & Co.	"	" "	490-494
B 431 to 434	J. W. Belches & Co.	"	"	168 & 168
B 441	Chas. H. Cole	"	" "	353
B 442	J. W. Belches & Co.	"	" "	353
B 443	Devens, Lyman & Co.	"	" Miscellaneous	614, 619 & 190
B 444	Devens, Lyman & Co.	"	" Miscellaneous	376
B 451	D. L. Demmon	"	" "	445
B 452	Harry H. Gray	"	" A	144
B 453	Paine, Webber & Co.	"	" "	144
B 454-455	Chase & Barstow	"	" "	179
B 458-459	Charles Head & Co.	"	" "	451
B 452-463	J. W. Belches & Co.	"	" "	354
B 470 to 473	Hornblower & Weeks	"	" Miscellaneous	255
B 474	Jackson & Curtis.	"	" A	420
B 476-477	C. Henry Knapp	"	" Miscellaneous	677 & 566
B 482 to 486	A. L. Sweetser & Co.	"	" A	549 & 550
B 487	Sutton & Bowen	"	" Miscellaneous	399 & 400
B 488 to 491	Devens, Lyman & Co.	"	" A	592 & 593
B 497-498	Chas. Head & Co.	"	" "	180
B 499	Chas. F. Crowell	"	" "	601
B 501	Leland, Towle & Co.	"	" "	601
B 342	Mrs. Mary V. Clark	"	" Miscellaneous	565 & 569

409 [The further taking of this deposition was postponed without date, subject to the right of defendants' counsel to cross-examine.]

[Cross-examination waived.]

CHARLES H. ALTMILLER.

Subscribed and sworn to this 2d day of January, 1905, before me.

GEORGE C. BURPEE,
Notary Public.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET, BOSTON,
TUESDAY, *July* 24, 1903.

Deposition of Charles S. Altmiller Resumed.

HARLES S. ALTMILLER, having been again duly sworn by E. F. lennen, Esq., a notary public, in answer to interrogatories pro- ded by Edward F. McClennen, Esq., of counsel for plaintiff, ner deposes and says,—

198. Your name is Charles H. Altmiller?
It is.
199. You are treasurer of the Old Dominion Copper Mining melting Company?
Yes.
200. You have heretofore testified in this case, on October 11 October 18, 1904?
I have.
201. On page 19 of that testimony, in the answer to Int. 93, your attention been called to an apparent error in a footing?
It has.
202. From what source were the figures taken which you gave he answer to that interrogatory?
From the stub of the check book.
203. Have you that stub of the check book here?
I have.
204. Will you refer again to the stub of the check book, and whether the items in that answer to Int. 93 are correct?
They are.
205. Now will you compute for us what the footing should be?
There should be a gross footing of $7913.87, and a net footing 7493.87.
206. Now, Mr. Altmiller, will you refer to your answer, in testimony of October, 1904, to Int. 184, page 59? Is the ver as there given correct?
It is not.
207. What should the answer be?
Boston & Montana Consolidated Copper & Silver Mining Company.

Q. 208. That is, this check of the Old Dominion Copper Mining & Smelting Company for this disbursement was given he Boston & Montana Consolidated Copper & Silver Mining pany, which you have just mentioned?

A. Yes, to the Montana Company.

Q. 209. How long were you connected with Mr. Bigelow's office with all the companies in which he was interested prior to April, 2?

A. About fifteen years.

Q. 210. Did you observe the method adopted by those companies which he was interested, or by him, in their organization, as to issue of treasury stock?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I did.

Q. 211. Will you describe the method pursued in the issue of treasury stock in the companies in which Mr. Bigelow was interested at the time you were in his office?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant, it being a matter concerning which there could be no habit or usage.

A. At any time when an authorization of treasury stock was made, for the total number of shares authorized a certificate was issued in the name of the treasurer for that number of shares, and from that certificate were issued to the various subscribers to the stock the number of shares they subscribed for, and at the end of each day the total number of shares so issued was deducted from the total number of shares of the treasury stock certificate, and the balance made out for that number of shares.

Q. 212. Did you, on or about June 24, 1902, write Mr. Bigelow a letter?

Mr. HEMENWAY: Objected to as immaterial.

A. I did.

Q. 213. Have you a copy of that letter?

Mr. HEMENWAY: Objected to as immaterial.

A. I have.

Q. 214. Where was that sent to Mr. Bigelow?

Mr. HEMENWAY: Objected to as immaterial.

A. To room 303, Sears building.

Q. 215. Is this a copy of that letter?

Mr. HEMENWAY: Objected to as immaterial.

A. It is.

Mr. MCCLENNEN: I will offer that copy.

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

[The copy of letter offered in evidence reads as follows:]

411 "JUNE 24, 1902.

A. S. Bigelow, Boston, Mass.,

DEAR SIR: On looking through four of the books containing the files of letters of the Old Dominion Copper Mining & Smelting Company, which you sent us on June 13th, 1902, we were surprised to find that a number of letters were taken out of the books before you sent them to us, although we wrote you under date of June 12th, 1902:

'I must also protest against your taking from the books or the files of the Company anything that is in them. There would be nothing in those files that does not properly appertain to the Com-

pany's business, and I believe that the Company is entitled to all the information and assistance which any matter upon its files would give.'

We find that letters received sometime about the following dates have been taken out of the books:

One or more between July 17th and July 24th, 1895.
One or more between Sept. 13th and Sept. 18th, 1895.
One or more about October 5th, 1895.
One or more between Nov. 2nd and Nov. 11th, 1895.
One or more between Nov. 27th and Nov. 29th, 1895.
One about December 7th, 1895.
One or more between Dec. 27th and Dec. 28th, 1895.
One or more between Jan. 8th and Jan. 15th, 1896.
One or more about January 20th, 1896.
One or more about February 24th, 1896.
One or more between March 18th and March 25th, 1896.
One or more about April 1st, 1896.
One or more between December 11th and Dec. 16th, 1896.

We must request you to send these letters to us at once.

Yours very truly,

C. H. ALTMILLER, *Treas.*"

[No cross-examination.]

Subscribed and sworn to this — day of ——, 1906, before me.

——— ———,
Notary Public.

412 [EXHIBIT 1, OCTOBER 11, 1904. G. C. B.]

Minutes of the first meeting of the Old Dominion Copper Mining and Smelting Company, held at the office of the New Jersey Corporations Agency, at No. 243 Washington Street, in Jersey City, on the ninth day of July, 1895, at three o'clock in the afternoon, pursuant to waiver of notice and appointment of the time and place duly signed by all the parties named in the certificate of incorporation.

Present: Messrs. Jesse Lewisohn, Allen W. Evarts, Edgar Buffum, Charles W. Welch, Sidney Riddlestorffer, William V. Rowe and William R. Montgomery, being all of the incorporators and all of the stockholders of the Company.

The meeting was called to order by Mr. Lewisohn and thereupon Mr. Evarts was elected Chairman and Mr. Buffum, Secretary.

Mr. Lewisohn presented a certified copy of the certificate of organziation of the Company and a waiver of notice of the first meeting which were read and by resolution directed to be spread upon the minutes and are as follows:

This is to certify that We, the undersigned, Jesse Lewisohn and Allen W. Evarts, of the City, County and State of New York; Edgar Buffum of Newark in the county of Essex in the State of New Jersey, Charles W. Welch of the City of Brooklyn in the State of New

York, Sidney Riddlestorffer, William V. Roe and William R. Montgomery of the City, County and State of New York, do hereby associate ourselves into a company under and by virtue of the provisions of an Act of the Legislature of the State of New Jersey entitled "An Act concerning corporations" approved April 7, 1875 and the several supplements thereto and acts amendatory thereof for the purposes hereinafter mentioned, and to that end we do by this our Certificate set forth:

First. That the name which we have assumed to designate such Company and to be used in its business and dealings is "Old Dominion Copper Mining and Smelting Company."

Second. That the place in the State of New Jersey where the business of such Company is to be conducted is the City of Jersey City in the County of Hudson. That the principal part of the business of such Company within said State of New Jersey is to be transacted at said Jersey City in the County of Hudson and the places out of said State where the same is to be conducted are the town of Globe and other places in the Territory of Arizona, the City of Boston in the State of Massachusetts, the City of New York, the States of Massachusetts and New York and such other States and Territories of the United States and such foreign countries
413 as shall, from time to time, be deemed necessary or convenient for any of the purposes of the Company.

That the objects for which such Company is formed are the purchase, acquisition and sale of copper and other mines and mining property and the working, operation and maintenance of the same, the holding, purchase and conveyance of real property useful or convenient for the purposes of its business either in or out of the State of New Jersey and the mortgaging or leasing thereof; the construction and maintenance of water works, reservoirs, dams and aqueducts; the erection and maintenance of works, mills, factories, shops and other structures, engaging in and carrying on the business of treating, smelting and refining copper and other ores; manufacturing, buying, selling, and dealing in copper, copper ores and other metals and ores and articles made wholly or in part of the same; issuing bonds, debentures or other obligations and securing the same by mortgage of any of the property, rights and franchises of the Company the acquisition, purchase and sale or other disposition of the stocks, bonds or other securities of other companies; and in general doing all acts and transacting all business necessary for and incident to the objects aforesaid or in any wise connected therewith.

That the portion of the business of such Company which is to be carried on out of the State of New Jersey is the owning and operation of mines and such other part of its business as may be lawful and as may, from time to time, be deemed necessary or convenient by reason of locality or other conditions or circumstances.

That the principal office and place of business of such Company out of the State of New Jersey is to be situated in the town of Globe in the County of Gila in the Territory of Arizona. That such Company proposes to carry on operations in the town of Globe and other places in the Territory of Arizona, the States of Massachusetts and

New York and in such other States and Territories of the United States and in such foreign countries as shall from time to time, be deemed necessary or convenient for any of the purposes of the Company.

Third. That the total amount of the capital stock of such Company is to be three million seven hundred and fifty thousand dollars, divided into one hundred and fifty thousand shares of the par value of twenty five dollars each.

That the amount with which said Company will commence business is one thousand dollars divided into forty shares of the par value of twenty five dollars each as aforesaid.

Fourth. That the names and residences of the stockholders and the number of shares held by each are as follows, to wit:

414 Jesse Lewisohn, of the City, County and State of New York, sixteen shares.

Allen W. Evarts, of the City, County and State of New York, four shares.

Edgar Buffum, of Newark, Essex County, New Jersey, four shares.

Charles W. Welch, of the City of Brooklyn in the State of New York, four shares.

Sidney Riddlestorffer, of the City, County and State of New York, four shares.

William V. Rowe, of the City, County and State of New York, four shares.

William R. Montgomery, of the City, County and State of New York, four shares.

Fifth. That the period at which such Company shall commence is the eighth day of July, One thousand eight hundred and ninety-five and the period at which it shall terminate is the eighth day of July one thousand nine hundred and forty-five.

In witness whereof, we have hereunto set our hands and seals the eighth day of July, one thousand eight hundred and ninety-five.

JESSE LEWISOHN.	[SEAL.]
ALLEN W. EVARTS.	[SEAL.]
EDGAR BUFFUM.	[SEAL.]
CHARLES W. WELCH.	[SEAL.]
SIDNEY RIDDLESTORFFER.	[SEAL.]
WM. V. ROWE.	[SEAL.]
WM. R. MONTGOMERY.	[SEAL.]

STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered that on this eighth day of July one thousand eight hundred and ninety-five, before me the subscriber, a Commissioner of Deeds for the State of New Jersey, personally appeared Jesse Lewisohn, Allen W. Evarts, Edgar Buffum, Charles W. Welch, Sidney Riddlestorffer, William V. Rowe and William R. Montgomery, who I am satisfied are the persons named in and who executed the foregoing certificate and I, having first made known to them the

contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year last aforesaid.

[SEAL.] GEO. H. COREY,
Commissioner of Deeds for the State of New Jersey in New York.

415 [Endorsed.]

"Received in the Hudson Co. N. J. Clerk's office July 8, A. D. 1895 and recorded in the Clerk's Record No. 25 on Page —.
JOHN G. FISHER. *Clerk.*"

"Filed Jul- 8, 1895.
HENRY C. KELSEY,
Secretary of State."

We, the subscribers being all the parties named in the certificate of organization of the "Old Dominion Copper Mining and Smelting Company" do hereby waive notice of the time, place and purpose of the first meeting of said Company and do fix the ninth day of July A. D. One thousand eight hundred and ninety-five at three o'clock in the afternoon as the time and the office of the New Jersey Corporations Agency at Number 243 Washington Street in Jersey City as the place of the first meeting of said Company; and we do also hereby consent that said Company may at such meeting increase its capital stock and the number of shares therein to any amount not exceeding the amount named in the original certificate of organization viz:—three million seven hundred and fifty thousand dollars ($3,750,000.) with the same validity and effect as it might or could so increase the same at a meeting specially called for that purpose, notice of which such meeting we do hereby waive.

Jersey City, July 8th, 1895.

JESSE LEWISOHN.
ALLEN W. EVARTS.
EDGAR BUFFUM.
CHARLES W. WELCH.
SIDNEY RIDDLESTORFFER.
WM. V. ROWE.
WM. R. MONTGOMERY.

Mr. Lewisohn reported that he had received the sum of one hundred dollars in money each from Messrs. Evarts, Buffum, Welch, Riddlestorffer, Rowe and Montgomery for their subscriptions to the stock of the Company and had in hand the sum of four hundred dollars for his own subscription thereto and now held the total amount thereof viz: one thousand dollars for the use of the Company and he was thereupon by resolution duly passed requested to turn over such amount to the treasurer of the Company when
416 elected.

Mr. Evarts presented a draft of proposed By-laws of the

Company which were read and adopted and directed to be spread upon the minutes and are as follows:—

I. Annual Meetings.

The annual meeting of the Company for the purpose of electing Directors, and for the transaction of such other business as may legally come before the meeting, shall be held at the office of the Company at Jersey City, in the County of Hudson, State of New Jersey, on the first Wednesday of April in each year, at twelve o'clock noon.

II. Special Meetings.

Special meetings of the Company may be called at any time by order of the President or of the Board of Directors, or upon the request in writing of holders of record of one fifth of the outstanding capital stock of the Company.

III. Notices.

Notice of the time and place of all meetings of the Company shall be given by mailing at least ten days before the date thereof, a written or printed notice, addressed to each stockholder of record appearing on the books of the Company at the address given in such books.

IV. Votes and Proxies.

At all meetings of the Company each stockholder shall be entitled to one vote for each share of stock standing in his name on the books of the Company and absent stockholders may vote by proxy authorized in writing.

V. Quorum.

A majority in interest of the stockholders represented either in person or by proxy shall constitute a quorum at all meetings of the Company, and if, at any meeting duly called there is no quorum present, or if for any reason the holders of a majority of the capital stock represented thereat desire to adjourn the meeting, the same may be adjourned from time to time, and no further notice shall be necessary for the holding of such adjourned meeting.

VI. Board of Directors.

The Directors shall be seven in number and shall be chosen by ballot at each annual meeting of the Company after the year 1895, and shall hold their offices for one year and until others are chosen and qualified in their stead. The first Board of Directors shall be chosen at the first meeting of the Company at which these By-laws are adopted, and shall hold office until their successors are chosen

and qualified at the next succeeding annual meeting. At
417 every election the persons receiving the greatest number of votes shall be chosen as Directors, but each must be a stockholder of record at the time of his election. When any vacancy occurs among the Directors or officers by death, resignation, removal or otherwise it shall be filled for the remainder of the year by a majority vote of the remaining Directors. The Board of Directors shall be invested with the management, control and direction of the Company and its affairs. They shall render an account of the annual meetings of the Company showing the condition of its property and financial affairs.

VII. Officers.

The officers shall be a President, a Vice President, a Treasurer and a Secretary, who shall be chosen annually by the Directors and hold their offices until others are chosen and qualified in their stead. All of them must be Directors of the Company. The offices of Secretary and Treasurer may be held by one person. The Directors may also in their discretion appoint and fix the compensation of a General Manager or Superintendent and such other officers, agents and committees with such powers and duties respectively as they may from time to time deem proper.

VIII. Quorum of Board of Directors.

Four of the Directors shall constitute a quorum at all meetings thereof. Regular meetings of the Directors shall be held on the second Wednesdays of the months of January, April, July and October in each year. Special meetings of the Directors may be called at any time by order of the President, or on the written request of any of their number of which one day's notice in writing shall be given.

IX. President.

The President shall be the chief executive officer of the Company. He shall preside at all meetings of the Company and of the Directors. He shall sign all stock certificates and it shall be his duty to exercise a careful supervision over the business and affairs of the Company.

X. Vice President.

The Vice President shall exercise all the authority and perform all the duties of the President during his absence or incapacity.

XI. Treasurer.

The Treasurer shall be the custodian of the funds of the Company
and shall deposit the same in its name in such banks or trust
418 companies as the Directors shall direct; he shall sign all checks, drafts, orders or other obligations for the payment or

borrowing of money, and pay out and dispose of the same under direction of the Directors. He shall sign all certificates of stock and perform such other duties as may be prescribed by law, or as shall be from time to time required by the Directors. He shall, if required by the Board of Directors, give a bond for the faithful discharge of his duties in such amount and with such sureties as said Board may require and approve.

XII. Secretary.

The Secretary shall keep the minutes of the meetings of the Directors and of the meetings of the Company, and attend to giving and serving all notices required by law and by these By-laws; he shall affix the seal of the Company to all certificates of stock when signed by the President and Treasurer; shall have the charge and custody of all the books and papers of the Company, subject to the supervision of the Directors, and to the inspection thereof by them at all reasonable times. He shall perform all other duties incident to his office and such as are required by law or as may from time to time be directed by the Directors. He shall be sworn to the faithful discharge of his duties as required by statute.

XIII. Acting Officers.

In the event of the absence or incapacity for any cause, of both the President and Vice President or of the Treasurer or Secretary respectively, the Board of Directors may appoint an acting President, Treasurer or Secretary who shall have and exercise all the powers of such officers respectively during their absence or incapacity.

XIV. Certificates of Stock.

Each holder of stock shall be entitled to a certificate under the seal of the Company signed by the President and by the Treasurer stating the capital stock of the Company, the number of shares into which it is divided, the par value of each share, the number of shares to which such holder is entitled, and the manner in which said certificate is transferable. All certificates shall be issued in order from certificate books and duly numbered and registered in the order of their issue opposite each certificate in the margin of said books; it shall be the duty of the Treasurer to enter the name and address of the owner thereof, and in case of the transfer or cancellation of such certificate, the date of such transfer or cancellation in said margin; and at the time of issue of any certificate it shall be receipted for on said margin by the owner thereof or by his duly authorized agent.

419 Shares may be transferred upon the books of the Company by the holder or owner either personally or by power of attorney on the surrender of the certificates thereof.

XV. Seal.

The seal of the Company shall be circular in form with th words "Old Dominion Copper Mining and Smelting Company" o the circumference, and the figures "1895" in the centre.

XVI. Principal Office.

The Company shall maintain a principal office or place of bus ness at Jersey City in the State of New Jersey, and shall have a agent in charge thereof, and the stock and transfer books of th Company shall be kept in said office for the inspection of all wh are authorized to inspect the same, and for the transfer of stock and the meetings of the stockholders shall be held at said principa office.

XVII. Directors' Meetings, etc.

The Directors may hold their meetings and have an office and kee the books of the Company outside of the State of New Jersey.

XVIII. Amendments.

These By-laws may be altered, amended or repealed by th unanimous vote of the Directors present at any meeting thereo or by a majority vote of all the stockholders of the Company a any annual meeting, or at a special meeting called for the purpos by order of the Directors, of the time, place and object of th holding of which meeting ten days' previous notice shall be give to each stockholder of record, by mailing such notice, addressed t such stockholders at the address given on the books of the Company

An election of Directors by ballot was then had and the followin named persons were duly chosen and declared to be Directors of th Company to hold office until the next regular annual meeting of th Company and until their successors should be chosen and qualified Messrs. Jesse Lewis-ohn Allen W. Evarts Edgar Buffum Charle W. Welch Sidney Riddlestorffer William V. Rowe William R Montgomery.

The following resolution was then duly passed:

Resolved that the Company do and it hereby does increase it capital stock and the number of shares therein to three millio seven hundred and fifty thousand dollars in one hundred an fifty thousand shares of twenty-five dollars each the amoun 420 authorized by the certificate of organization and that th Directors of the Company be and they hereby are authorize and directed to make such increase and issue the same and make an file the certificate of such increase prescribed by statute.

The meeting then took a recess.

EDGAR BUFFUM, *Secretary.*

Minutes of a Meeting of the Directors of the "Old Dominion Copper Mining and Smelting Company," Held at the Office of the New Jersey Corporation Agency, at No. 243 Washington Street, in Jersey City, on the Ninth Day of July 1895.

Present: Messrs. Jesse Lewisohn, Allen W. Evarts, Edgar Buffum, Charles W. Welch, Sidney Riddlestorffer, William V. Rowe and William R. Montgomery.

Mr. Buffum called the meeting to order and reported that at a meeting of the Company held on the ninth day of July, 1895, at which he had acted as Secretary Messrs. Jesse Lewisohn, Allen W. Evarts, Edgar Buffum, Charles W. Welch, Sidney Riddlestorffer, William V. Rowe and William R. Montgomery had been elected Directors and submitted and read the By-laws of the Company duly adopted at the meeting aforesaid.

The meeting then proceeded to organize and an election of officers was had and the following officers were duly chosen: Mr. Allen W. Evarts, President, Mr. Sidney Riddlestorffer, Vice President, Mr. Jesse Lewisohn, Treasurer, Mr. Edgar Buffum Secretary.

Mr. Evarts thereupon took the chair as President and the statutory oath was administered to the Secretary and directed to be filed by him.

A seal was produced and its form and style duly approved and an impression thereof was directed to be placed in the minutes and is accordingly made hereon.

A resolution increasing the capital stock passed by the stockholders at the first meeting of the Company was reported and read and directed to be spread upon the minutes and is as follows:

Resolved that the Company do and it hereby does increase its capital stock and the number of shares therein to three million seven hundred and fifty thousand dollars in one hundred and fifty thousand shares of twenty-five dollars each the amount authorized by the certificate of organization and that the Directors of the Company be and they hereby are authorized and directed to make such increase and issue the same and make and file the certificate of such increase prescribed by Statute.

The following resolution was then offered and duly passed:

421 Resolved that the increase of the capital stock of the Company authorized and directed by resolution of the stockholders duly passed at the first meeting of the Company and reported to this meeting and directed to be spread upon the minutes be made and that such increased stock be issued as full paid stock and not subject to assessment in such amounts and in such manner as may be determined hereafter by resolution of this board.

A form of Certificate of Stock was submitted and approved and directed to be spread upon the minutes and is as follows:

Incorporated under the Laws of the State of New Jersey.

No. —. — Shares.

Capital Stock $3,750,000.

Old Dominion Copper Mining and Smelting Company.

Divided into 150,000 shares of $25. each.

This certifies that —— —— is entitled to — shares of the Capital Stock of the Old Dominion Copper Mining and Smelting Company, transferable only on the books of the Company in person or by attorney on surrender of this certificate.

Dated Jersey City, New Jersey, ——, 189—.

—— ——, *Treasurer.* —— ——, *President.*

Mr. Jesse Lewisohn as Treasurer reported that he had the sum of one thousand dollars heretofore received by him for account of the subscription of the original stockholders named in the Certificate of Organization and held the same as Treasurer for account of the Company.

The following resolution was then duly passed:

Resolved that certificates of stock be duly issued to the original subscribers for the amounts of their subscriptions respectively as follows: a certificate for sixteen shares to Mr. Jesse Lewisohn: one for four shares each to Messrs. Evarts, Buffum, Welch, Riddlestorffer, Rowe and Montgomery.

The following resolution was then duly passed:

Resolved that the Market and Fulton National Bank of the City of New York be selected and named as one of the depositories of the funds of the Company and that the Treasurer deposit the sum of one thousand dollars reported by him as in his hands in said bank.

The following resolution was then duly passed:

Resolved that the proper certificate of the issue of increased
422 capital stock be executed under the seal of the Company by the President and Secretary and filed in the office of the Secretary of State as prescribed by the statutes of the State of New Jersey.

The following resolution was then duly passed:

Resolved that this Company continuously maintain a principal office and place of business within the State of New Jersey and that such office and place of business be at the office of the New Jersey Corporations Agency, Nos. 243 and 245 Washington Street, Jersey City, N. J.

That in said office be kept the stock and transfer books of the Company for the inspection of all who are authorized to see the same and for the transfer of stock.

That the New Jersey Corporations Agency be and hereby is ap-

pointed and duly authorized transfer Agent for this Company in New Jersey.

That Charles N. King (Secretary of the New Jersey Corporations Agency) who resides in Jersey City, New Jersey, and whose office and place of business is 243 and 245 Washington Street in said City be and hereby is appointed the Agent of the Company in charge of its aforesaid business in Jersey City and is designated as the person upon whom process against the corporation may be served within the State of New Jersey.

The meeting then adjourned to meet subject to the call of the President.

EDGAR BUFFUM,
Secretary.

Company Meeting.

JULY *9th*, 1895.

Upon re-assembling after the recess the Minutes of a meeting of the Directors held in the meantime were read and the following resolution was duly passed:

Resolved that all the acts, proceedings and resolutions of the meeting of the Board of Directors of this Company held this day now reported to and read at this meeting be and the same are hereby in all respects, approved, ratified and confirmed. The meeting then adjourned.

EDGAR BUFFUM,
Secretary.

Minutes of a Meeting of the Directors Duly Called, Held at the Office of Lewisohn Brothers, at 81 Fulton Street, in the City of New York, on the Eleventh Day of July, 1895, *at* 12 *o'clock noon.*

Present: Messrs. Lewisohn, Evarts, Buffum, Welch, Riddlestorffer, and Rowe.

The President Mr. Evarts in the chair.

423 The resignation in writing of Mr. Montgomery as a Director of the Company was presented and read and on motion duly accepted and Mr. A. S. Bigelow of Cohasset, Massachusetts was duly elected a Director in his place and being present took his seat as such.

The resignation in writing of Mr. Rowe as a Director of the Company was presented and read and on motion duly accepted and Mr. Leonard Lewisohn of New York was duly elected a Director in his place and being present took his seat as such.

The resignation in writing of Mr. Welch as a Director of the Company was presented and read and on motion duly accepted and Mr. Henry M. Whitney of Boston, Massachusetts was duly elected a Director in his place.

The resignation in writing of Mr. Jesse Lewisohn as Treasurer was presented and read and Mr. Thomas Nelson was duly elected as Treasurer in his place.

The resignation in writing of Mr. Jesse Lewisohn as a Dire
of the Company was presented and read and on motion duly
cepted and Mr. Thomas Nelson of Boston, Massachusetts was
elected a Director in his place.

The resignation in writing of Mr. Evarts as President was
sented and read, and on motion duly accepted and Mr. Bigelow
thereupon duly elected as President in his place and thereupon
the chair.

The resignation in writing of Mr. Riddlestorffer, as Vice Presid
was presented and read, and on motion duly accepted.

The resignation in writing of Mr. Riddlestorffer as a Director
presented and read and on motion duly accepted and Mr. Josep
Ray of Franklin, Massachusetts was duly elected a Director in
place.

Mr. Evarts presented and read a proposition from "The Old
minion Copper Company of Baltimore City" as follows:

To the Old Dominion Copper Mining and Smelting Company, a
poration organized and existing under the laws of the State
New Jersey:

The Old Dominion Copper Company of Baltimore City, a corp
tion organized and existing under the laws of the State of Maryl
being the owner of certain mines and mining properties at Globe
the Territory of Arizona described in the annexed Schedule and
machinery, lumber, wood, tools, implements and other perso
property for use for and in connection with the operation and ma
tenance thereof hereby makes the following proposition: To con
assign and transfer all its property, both real and personal of ev
kind and nature whatsoever and wheresoever situated by good
sufficient deeds and instruments properly executed so as
424 confer absolute title thereto to the Old Dominion Copper M
ing and Smelting Company upon receiving from said C
pany one hundred thousand shares of its capital stock to be iss
to said Old Dominion Copper Company or to its nominees.

It being understood that the Old Dominion Copper Mining
Smelting Company shall assume all obligations of The Old Domin
Copper Company of Baltimore City incurred since the first day
June 1895, and shall be entitled to all earnings and profits of
Company since that date.

July eleventh 1895.

A. S. BIGELOW, *Presiden*

A. W. EVARTS, *Secretary.*

Schedule.

First. The Globe Mine, patented by the United States Governm
to B. W. Reagan on the 18th day of October 1881, by patent recor
in the office of the Recorder of Pinal County, Territory of Ariz
on the 19th day of November 1881, to which record reference is m
for a fuller description of said Mine.

Second. The Globe Ledge Mine, patented by the United St

Government to Benjamin W. Reagan on the eighteenth day of October, 1881, by patent recorded in the office of the Recorder of Pinal County, Territory of Arizona, on the nineteenth day of November, 1881, to which record reference is made for a fuller description of said Mine.

Third. The Copper Jack Mill Site, of which the location is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 311, and to which record reference is hereby made for a fuller description of said Mill Site, and upon which the Smelting Works, formerly owned by the Old Dominion Copper Mining Co. are situated.

Fourth. The Globe Mill Site, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at Page 311, to which record reference is hereby made for a fuller description of said Mill Site.

Fifth. The Globe Ledge Mill Site, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 310, to which record reference is hereby made for a fuller description of said Mill Site.

Sixth. The South-east Globe Mine, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 312, and reference is
425 hereby made to said records for a fuller description of said Mine.

Seventh. All of that certain Mining Claim known as the Interloper in Globe District, County of Gila, Territory of Arizona, and recorded in Globe District Records on pages 116 and 117 in Book 3, reference to which will more fully show, being the same property conveyed to William Keyser by Thomas H. Mason, by deed bearing date January 3rd, 1887, and recorded at page 568, Book 2, record of deeds to Mines Gila County, Arizona Territory.

Eighth. The Fraction Mine, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 569, to which record reference is hereby made for a fuller description of said mine.

Ninth. The Alice Mine or lode, located October 10th, 1875, by A. R. Hammond and J. W. Reed and notice of location recorded in Book 1, page 131, Globe District Mining Records (now a part of the records of Gila County) and re-located February 28th, 1879, and notice of location recorded in Book 5, Globe District Mining Records (now a part of the Records of Gila County) on pages 184 and 185, said Mine or Lode being more particularly described in the last mentioned notice of location, as follows, to wit: Commencing at this monument of stones in a gulch, being the centre of Southwest end of claim, and upon which this notice is posted, thence Southeast 300 feet to a monument of stones; thence Northeast 1400 feet to a monument of stones; thence Northwest 300 feet to a monument of stones, being the center of the Northeast end of claim; thence Northwest 300 feet to a monument of stones; thence Southwest 1400 feet to a monument of stones under a tree; thence Southeast 300 feet to the place of beginning, being the same mining claim

conveyed to Michael H. Simpson, deceased, by deed of the Globe City Mining Company dated July 1st, 1884, and recorded with Gila County Deeds to Mines, Book 2, page 227, et seq.

Tenth. The Mining Claim called and known as the Hypatia Mine, situate, lying and being in Globe Mining District, Gila County, Territory of Arizona, and more particularly described in the notice of location recorded at page sixty-six (66) Book 2, Records of Mines, Gila County Records, to which record reference is made for a more definite description of said Mine; said Mine was formerly known as the South-west Alice Mine, being the same mining claim conveyed to said Michael H. Simpson, lately deceased, by deed of William H. Cook, dated November 18th, 1884, and recorded with Gila County Deeds, Book 2, page 305.

Whereupon Mr. Lewisohn moved and Mr. Evarts seconded the adoption of the following resolutions:

426 Whereas the Old Dominion Copper Company of Baltimore City has made and submitted a proposition to convey all of its property to this Company which has just been presented and read; and

Whereas it is reported and appears that such property is reasonably and fairly worth the par value of the stock proposed to be paid and issued and received therefor.

Resolved; that said proposition be and the same is hereby accepted and that this Company do purchase and acquire all said property upon the terms contained in said proposition and in payment therefor issue one hundred thousand shares of its capital stock to said The Old Dominion Copper Company of Baltimore City or to its nominees, all such stock to be full paid and not subject to assessment; and

Resolved that Messrs. Bigelow and Nelson be appointed a Committee to supervise and carry out the details of such purchase and issue of stock, which were thereupon duly adopted.

Mr. Lewisohn presented and read a written proposition as follows:

To the Old Dominion Copper Mining and Smelting Company:

I hereby offer to convey the following described property now owned and held by me upon receiving thirty thousand shares of the capital stock of the Old Dominion Copper Mining and Smelting Company to be issued to me or to my nominees:

1st. The Old Dominion Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1883 in the United States Land Office at Tucson, Arizona, Entry No. 267, Lot No. 15, situated in Globe Mining District, Gila County, Arizona.

2nd. The New York Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1883, in the United States Land Office at Tucson, Arizona, Entry No. 268, Lot No. 16 in Globe Mining District in Gila County, Arizona.

3rd. The Chicago Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1883, in the United

States Land Office at Tucson, Arizona, Entry No. 269, Lot No. 51 in Globe Mining District, Gila County, Arizona.

4th. The Keystone Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1885 in the United States Land Office at Tucson, Arizona, Entry No. 384, Lot No. 54 in Globe Mining District, Gila County, Arizona.

5th. A lot or parcel of land situate near the Bloody Tanks
427 and deeded by E. A. Saxe to the Old Dominion Copper Mining Company. Deed recorded in Book 1 of Deeds to Real Estate at page- 126 & 127 in the office of the Recorder of Gila County, Arizona, and reference is hereby made to said record for a fuller description of said parcel of land.

New York, July 11th, 1895.

LEONARD LEWISOHN.

Please issue said 30,000 shares of stock to Mr. A. S. Bigelow & myself.

LEONARD LEWISOHN.

Whereupon Mr. Evarts moved and Mr. Buffum seconded the adoption of the following resolutions:

Whereas Mr. Leonard Lewisohn of the City of New York has made and submitted a proposition to convey certain mining properties in Arizona to this Company which has just been presented and read: and

Whereas it is reported and appears that such properties are reasonably and fairly worth the par value of the stock proposed to be paid and issued and received therefor:

Resolved that said proposition be and the same is hereby accepted and that this Company do purchase and acquire said properties upon the terms contained in said proposition and in payment therefor issue thirty thousand shares of its capital stock to said Leonard Lewisohn or to his nominees all such stock to be full paid and not subject to assessment: and

Resolved that Messrs. Bigelow and Nelson be appointed a Committee to supervise and carry out the details of such purchase and issue of stock, which were thereupon duly adopted.

The following resolution was thereupon on motion duly adopted.

Resolved that Niles S. Berray of Globe, Gila County, in the Territory of Arizona, be and he is hereby appointed the Agent of the Old Dominion Copper Mining and Smelting Company in and for said Territory, upon whom all notices and processes, including service of summons, may be served, which when so served may be deemed taken and held to be a lawful personal service on said Company for all purposes whatsoever.

And the President and Secretary were requested to attend to the proper filing of a copy thereof in the office of the Recorder of Gila County, Arizona.

The Secretary reported that he had caused the statement of officers, directors, etc., required by law to be filed in the office
428 of the Secretary of State of New Jersey on the 10th instant and had received an official certificate to that effect and that

he had caused to be filed in said office on the same day a certificate as to issue of additional stock.

The resignation in writing of Mr. Buffum as Secretary was presented and read and on motion duly accepted to take effect at close of meeting and Mr. Thomas Nelson was duly elected as Secretary in his place.

EDGAR BUFFUM, *Secretary.*

BOSTON, MASS., *July 24th*, 1895.

A called meeting of the Directors of the Old Dominion Copper Mining and Smelting Company was held this day at Room 301 Sears Building, 199 Washington Street, Boston, Mass., at 11 o'clock a. m.

Present: Messrs. Bigelow, Nelson, Whitney and Ray.

The President called the meeting to order and at his request the Secretary read the record of the last Directors' Meeting which was, upon motion, approved.

Mr. Ray presented the resignation in writing of Mr. Evarts as a Director of this Company, which was, upon motion, accepted. Mr. Nelson then presented the name of Mr. Moses T. Stevens of North Andover, Mass., as a Director of this Company to fill the place made vacant by the resignation of Mr. Evarts. Mr. Nelson was appointed to collect, assort and count the votes and he reported the whole number of votes to be four, all of which were for Mr. Moses T. Stevens of North Andover, Mass., and he was declared duly elected.

Upon motion, duly seconded, it was

Voted: To proceed to the election of a Vice President. Mr. Ray was appointed to collect, assort and count the *[votes] and he reported the whole number of votes to be four, all of which were for Mr. Henry M. Whitney and he was declared duly elected.

Upon motion, duly seconded, it was

Voted: That the salary of the President be at the rate of Seventy-five hundred dollars per annum; and that the salary of the Secretary and Treasurer be at the rate of Seventy-five hundred dollars per annum, to date from the time of their appointment.

Upon motion, duly seconded, it was

Voted: That at this and at all future meetings of the Board
429 of Directors each member present be paid the sum of Ten dollars, and that the travelling expenses of non-resident Directors be paid.

Mr. Nelson presented the written resignation of Mr. Niles S. Berray as agent of this Company at their Mines in Arizona, which was, upon motion, voted to be accepted and placed on file.

The following resolution, presented by Mr. Whitney, being duly seconded, was thereupon unanimously adopted.

Resolved that S. A. Parnall of Globe, Gila County, in the Territory of Arizona, be and he is hereby appointed the agent of the Old Dominion Copper Mining and Smelting Company in and for said

[*The word "votes" was ommitted in the records.]

Territory upon whom all notices and processes, including service of summons, may be served, which when so served may be deemed taken and held to be a lawful personal service on said Company for all purposes whatsoever. And the President and Secretary were requested to attend to the proper filing of a copy thereof in the office of the Recorder of Gila County, Arizona.

No other business coming before the meeting it was dissolved.

Attest:

THOMAS NELSON, *Secretary.*

BOSTON, MASS., *Sept. 18th*, 1895.

A called meeting of the Directors of the Old Dominion Copper Mining and Smelting Company was held this day at Room 301 Sears Building, No. 199 Washington Street, Boston, Mass., at 10 o'clock a. m.

Present: Messrs. Bigelow, Nelson, Whitney, Stevens and Ray.

The President called the meeting to order and at his request the Secretary read the record of the last Directors' Meeting which was, upon motion, approved.

Upon motion, duly seconded, it was

Voted: That the By-laws of the Company be and hereby are repealed, altered and amended and are to be as follows:—

By-Laws of the Old Dominion Copper Mining and Smelting Co.

Article 1. Annual Meetings.

The annual meeting of the Company shall be held at the office of the Company in Jersey City in the County of Hudson and State of New Jersey, on the first Wednesday of April in each year at 12 o'clock noon.

430 Article 2. Special Meetings.

Special meetings of the Company may be called at any time by order of the President or the Board of Directors, or upon the request in writing of holders of record of one fifth of the outstanding capital stock of the Company.

Article 3. Notices.

Notice of the time and place of all meetings of the Company shall be given by mailing at least ten days before the date thereof, a written or printed notice, addressed to each stockholder of record appearing on the books of the Company at the address given in such books.

Article 4. Votes and Proxies.

At all meetings of the Company each stockholder shall be entitled to one vote for each share of stock standing in his name on the books of the Company and absent stockholders may vote by proxy authorized in writing.

Article 5. Quorum.

At all meetings of the stockholders, a majority in interest, represented in person or by proxy, shall constitute a quorum; and all meetings may be adjourned from time to time without further notice.

Article 6. Directors.

The Directors shall be seven in number; and all vacancies either among the Directors or officers of the Company, shall be filled by the vote of the remaining members of the Board of Directors.

Article 7. Officers.

The officers shall be a President, a Vice President, a Treasurer and a Secretary, all of whom shall be chosen annually by the Directors. The offices of Secretary and Treasurer may be filled by one person.

Article 8. Treasurer's Bond.

The Treasurer, if required so to do by the Directors, shall execute to the Company a bond in such an amount and with such sureties as shall be approved by the Directors.

Article 9. Powers of Directors.

The Directors shall have the control, management and direction of the affairs of the Company, shall elect and appoint its officers, and determine their duties and responsibilities and fix their compensation.

431 Article 10. Executive Committee.

The Directors may at any time appoint from their number an Executive Committee of three, who shall possess all the powers of the full Board when said Board is not in session.

Article 11. Quorum of Directors.

Four of the Directors shall constitute a quorum at all meetings of the Board.

Article 12. Acting Officers.

In case of the absence of any of the officers of the Company or in case such an officer or officers cannot, for any reason attend to his or their duty, the Board of Directors shall have power to appoint a person or persons to act in the place of such officer or officers with full powers.

Article 13. Seal.

The seal of the Company shall be circular in form with the words "Old Dominion Copper Mining and Smelting Company" in the circumference, and the figures "1895" in the centre.

Article 14. Principal Office.

The principal office shall be in Jersey City in the State of New Jersey.

Article 15. Directors' Meetings.

The Directors may hold their meetings and have an office and keep the books of the Company outside of the State of New Jersey.

Article 16. Amendments.

These By-Laws may be altered, amended or repealed by the unanimous vote of the Directors present at any meeting thereof or by a majority vote of all the stockholders of the Company at any annual meeting, or at a special meeting duly called for the purpose by order of the Directors.

Upon the report of the Committee appointed at a meeting of the Stockholders of the Old Dominion Copper Company of Baltimore City held in New York July 11th, 1895, on motion of Mr. Ray, seconded by Mr. Stevens, it is

Voted: That one hundred thousand (100,000) shares of this Company's full paid stock be issued to Mr. Philip K. Dumaresq.

432 Upon the report of Messrs. Bigelow and Nelson the Committee appointed at the meeting of the Directors of the Old Dominion Copper Mining and Smelting Company, held at New York, July 11th, 1895, on motion of Mr. Ray, seconded by Mr. Stevens, it is

Voted:—That Thirty thousand (30,000) shares of this Company's full paid stock be issued to Messrs. A. S. Bigelow and Leonard Lewisohn.

Upon motion of Mr. Ray, seconded by Mr. Stevens, it was

Voted:—That the Treasurer of this Company is hereby authorized and instructed to issue Twenty thousand (20,000) shares of the full paid Capital Stock of this Company to such parties as have subscribed for the same on their payment of Twenty-five dollars ($25.) per share.

The following preamble and resolution presented by Mr. Whitney, and seconded by Mr. Ray, was unanimously adopted:

"Whereas,—the important work of the President of this company is seriously interfered with by the time taken in signing certificates of Stock,

"Now, Therefore, it is voted, that Mr. C. H. Bissell be and hereby is appointed assistant to the President of this Company with power to sign all Certificates of Stock."

The following preamble and resolution presented by Mr. Whitney, and seconded by Mr. Ray, was unanimously adopted:

"Whereas,—the important work of the Secretary and Treasurer of this Company is seriously interfered with by the time taken in countersigning Certificates of Stock and accepting drafts,

"Now, Therefore, it is voted, that Mr. Philip K. Dumaresq be and hereby is appointed assistant to the Treasurer and Secretary of this Company with power to countersign all Certificates of Stock and to accept all drafts drawn upon the Treasurer of this Company."

No other business coming before the meeting it was dissolved.

Attest:

THOMAS NELSON, *Secretary.*

433 All action taken by Directors at above meeting is fully confirmed and approved of in all respects.

A. S. BIGELOW.
THOMAS NELSON.
M. T. STEVENS.
LEONARD LEWISOHN.
HENRY M. WHITNEY.
JOSEPH G. RAY.
EDGAR BUFFUM.

The undersigned, stockholders of the Old Dominion Copper Mining and Smelting Company, do hereby approve of the action of the Directors shown by the above record of meeting held on the 18th day of September, 1895.

	30,000	Shs.
In pencil	20,000	"
	100,000	"
	150,000	"

{ LEONARD LEWISOHN,
{ A. S. BIGELOW.
THOMAS NELSON, *Treas.*
PHILIP K. DUMARESQ.

BOSTON, MASS., *November* 24, 1897.

A called meeting of the Directors of the Old Dominion Copper Mining and Smelting Company was held this day at Room 301 Sears Building, No. 199 Washington Street, Boston, Mass., at 11 o'clock a. m.

Present: Messrs. Bigelow, Ray, Stevens and Lewisohn.

The President called the meeting to order.

Upon motion, Mr. C. H. Bissell was appointed Secretary of the Meeting.

At the request of the President, the Secretary read the record of the last Directors' Meeting which was, upon motion, approved.

The President presented the registration of Mr. H. M. Whitney as Director and Vice President of this Company, which was upon motion of Mr. Ray

Voted:—To be accepted and placed on file.

The President presented the name of Mr. E. V. R. Thayer as a director of this Company to fill the place made vacant by the resignation of Mr. Whitney.

Mr. Lewisohn was appointed to collect, assort and count the votes and he reported the whole number of votes to be four, all of which were for Mr. Thayer and he was declared duly elected.

434 The President notified the Board of the death of Mr. Thomas Nelson, Secretary and Treasurer, and one of the

Directors of this Company, which necessitated the filling of the vacancies caused by his decease.

The President presented the name of Mr. W. J. Ladd to fill said vacancies.

Mr. Lewisohn was appointed to collect, assort and count the votes for a Director of this Company, and he reported the whole number of votes to be four, all of which were for Mr. Ladd and he was declared duly elected.

Mr. Lewisohn was appointed to collect, assort and count the votes for a Secretary of this Company, and he reported the whole number of votes to be Four, all of which were for Mr. Ladd and he was declared duly elected.

Mr. Lewisohn was appointed to collect, assort and count the votes for a Treasurer of this Company, and he reported the whole number of votes to be Four, all of which were for Mr. Ladd and he was declared duly elected.

The President then presented to the Board the resignation of Mr. Philip K. Dumaresq as Assistant Secretary and Assistant Treasurer of this Company, which was, upon motion,

Voted:—To be accepted and placed on file. This resignation to go into effect at such time as in the discretion of the President it shall be deemed to be best for the interests of the Company.

The President presented the name of Mr. B. Preston Clark, as Assistant Secretary of this Company, to fill the vacancy caused by the resignation of Mr. Dumaresq.

Mr. Lewisohn was appointed to collect, assort and count the votes, and he reported the whole number of votes to be Four, all of which were for Mr. Clark, and he was declared duly elected; this election to go into effect at such time as in the discretion of the President it shall be deemed to be best for the interests of the Company.

The President presented the name of Mr. B. Preston Clark as Assistant Treasurer of this Company, to fill the vacancy caused by the resignation of Mr. Dumaresq.

Mr. Lewisohn was appointed to collect, assort and count the votes, and he reported the whole number of votes to be Four, all of which were for Mr. Clark, and he was declared duly elected; this election to go into effect at such time as in the discretion of the President it shall be deemed to be best for the interests of the Company.

The President presented the name of Mr. Philip K. Dumaresq as Transfer Agent of this Company, he to have power to sign Certificates of Stock heretofore signed by the Assistant Secretary.

Mr. Lewisohn was appointed to collect, assort and count
435 the votes, and he reported the whole number of votes to be Four, all of which were for Mr. Dumaresq, and he was declared duly elected.

Upon motion of Mr. Ray, duly seconded, it was,

Voted:—That in the absence of either the Transfer Agent or the Assistant to the President, Mr. B. Preston Clark, Assistant Secretary, shall have power to sign all Certificates of Stock in the place of the one so absent, but not to sign for both on the same Certificate.

Upon motion of Mr. Stevens, duly seconded, it was,

Voted:—That beginning with December 1st next, the combined

salaries of the President, Treasurer and Secretary, Assistant Treasurer and Assistant Secretary and Transfer Agent of this Company shall be at the rate of Fifteen thousand dollars ($15,000) per annum, and that the President be and he is hereby authorized to adjust the salaries of said officers as he shall deem to be for the best interests of the Company.

Upon motion of Mr. Lewisohn, seconded by Mr. Stevens, it was

Voted:—That the following resolution be spread upon the records of this Company, and a copy of the same be sent to the family of the late Mr. Nelson.

"Whereas, death has removed our friend and associate, Thomas Nelson, the Director of the Boston and Montana, Tamarack, Osceola, Old Dominion, Butte and Boston, and Merced Mining Companies, and of the Butte City Water Company, desire to place on record a testimonial of their sorrow and regret, and to express the high esteem in which they each and all held him, as well as their appreciation of his wise counsels, ability and untiring energy in all measures calculated to promote the best interests of the different Companies.

His sterling honesty and christian character endeared him to all who knew him, and his irreparable loss will be deeply mourned by them and his associates, who wish to tender their heartfelt sympathy to his family in its great bereavement."

Upon motion of Mr. Stevens, seconded by Mr. Bigelow, it was

Voted: That the salary paid to Mr. Nelson, the late secretary and treasurer of this Company, be continued at one half the usual rate until April 1st, 1898, and paid to his legal representatives.

No other business coming before the meeting, it was upon motion of Mr. Ray dissolved.

Attest:

A. H. BISSELL,
Secretary of the Meeting.

436 BOSTON, MASS., *December* 16, 1897.

A called meeting of the Directors of the Old Dominion Copper Mining and Smelting Company was held this day at Room 301 Sears Building, No. 199 Washington Street, Boston, Mass., at ten thirty o'clock A. M.

Present: Messrs. Bigelow, Ladd, Ray and Stevens.

The President called the meeting to order, and at his request the Secretary read the record of the last Directors' Meeting, which was, upon motion, approved.

The Secretary then read copy of proposed contract of this Company dated December 16, 1897, with the Gila Valley, Globe and Northern Railway Company.

After discussion, the following resolution was offered by Director Ray:

"Resolved:—That the contract just read dated December 16, 1897, copy of which is hereinafter more fully set out be approved, and that the President and Secretary be and they are hereby instructed to execute the same in behalf of this Company."

This resolution was duly seconded by Director Stevens and unanimously adopted.

The Secretary then read copy of proposed contract of this Company dated December 16, 1897, with the Southern Pacific Company.

After discussion, the following resolution was offered by Director Ray:

"Resolved: That the contract just read dated December 16, 1897, copy of which is hereinafter more fully set out be approved, and that the President and Secretary be and they are hereby instructed to execute the same in behalf of this Company."

This resolution was duly seconded by Director Stevens and unanimously adopted.

No other business coming before the meeting, it was adjourned.

Attest:

W. J. LADD, *Secretary.*

Minutes of the Annual Meeting of the Stockholders of the Old Dominion Copper Mining and Smelting Company of New Jersey, held at the office of the Company, 243-245 Washington Street, Jersey City, New Jersey, on Wednesday, the fifth day of April, 1899, at 12 o'clock noon, pursuant to the following notice, which was read and ordered to be entered in the minutes.

437 "Notice is hereby given that the annual meeting of the stockholders of the Old Dominion Copper Mining and Smelting Company will be held at the office of the Company, 243–245 Washington Street, Jersey City, New Jersey (office of New Jersey Corporations Agency) on Wednesday, the fifth day of April, 1899, at 12 o'clock noon, for the election of a Board of Seven (7) Directors and for all other business that may properly come before the meeting.

The transfer books will be closed for this purpose at the close of business on March 15, 1899, and will be opened in the morning of April 6, 1899.

Dated Boston, Mass., March 10, 1899.

W. J. LADD, *Secretary.*"

There were present in person Mr. George W. Crampton holding 300 shares, and Percy Lansburgh representing by proxy 100,710 shares being a total of 101,010 shares present in person or by proxy, being a majority of the outstanding 150,000 shares of stock issued.

In the absence of the President, Mr. George W. Crampton was, on motion of Percy Lansburgh (representing A. S. Bigelow by proxy) elected Chairman of the meeting, and in the absence of the Secretary, Mr. Charles N. King was, on like motion, elected Secretary of the meeting.

On motion the meeting proceeded to the election of Directors, pursuant to the notice. The chair appointed Robert S. Jordan and Harold J. Hockin Inspectors, who took and subscribed to their oath of office before Augustus C. Kellog, Master in Chancery of New Jersey, which oath was duly filed.

The meeting proceeded to the election by ballot, the polls having been declared open by the Chairman for one hour; nominations for the office were made, and the Inspectors reported that 101,010 votes were cast, all for the following named persons, who were thereupon declared by the Chairman duly elected Directors of the Company for the ensuing year and until their successors are chosen and qualified, to wit: A. S. Bigelow, W. J. Ladd, Joseph G. Ray, Joseph S. Bigelow, E. V. R. Thayer, Leonard Lewisohn and Edgar Buffum.

The report of the Inspectors was ordered filed with the Secretary.

On motion the meeting thereupon adjourned.

CHAS. N. KING,
Secretary of the meeting.

438 BOSTON, MASS., *May* 10, 1899.

A called meeting of the Directors of the Old Dominion Copper Mining and Smelting Company elected at the annual meeting of the stockholders held at Jersey City, New Jersey, April 5th, 1899,—being the first since said election, and for the organization of the Board,—was held this day at room 301 Sears Building, No. 199 Washington Street, Boston, Mass., at ten thirty o'clock a. m.

Present Messrs. A. S. Bigelow, W. J. Ladd, Joseph G. Ray, Leonard Lewisohn and J. S. Bigelow.

Upon motion, Mr. A. S. Bigelow was called to the Chair, who called the meeting to order.

At the request of the Chairman, the Secretary then read the record of the last Directors' Meeting which was upon motion duly seconded approved.

Upon motion of Mr. Ray, seconded by Mr. J. S. Bigelow it was

Voted: To proceed to the election of a secretary.

Mr. J. S. Bigelow was appointed to collect, assort and count the votes, and he reported the whole number of votes to be Five (5), all of which were for Mr. Ladd, and he was declared duly elected.

Upon motion of Mr. Ray, seconded by Mr. J. S. Bigelow, it was

Voted: To proceed to the election of a treasurer.

Mr. J. S. Bigelow was appointed to collect, assort and count the votes, and he reported the whole number of votes to be Five (5), all of which were for Mr. Ladd, and he was declared duly elected.

Upon motion of Mr. Ray, seconded by Mr. J. S. Bigelow, it was

Voted: To proceed to the election of a President.

Mr. J. S. Bigelow was appointed to collect, assort and count the votes, and he reported the whole number of votes to be Five (5), all of which were for Mr. A. S. Bigelow, and he was declared duly elected.

Upon motion of Mr. Ray, seconded by Mr. J. S. Bigelow, it was

Voted: To proceed to the election of a Vice President.

Mr. J. S. Bigelow was appointed to collect, assort and count the votes, and he reported the whole number of votes to be Five (5), all of which were for Mr. J. G. Ray, and he was declared duly elected.

Upon motion of Mr. Ray, seconded by Mr. J. S. Bigelow, it was

Voted: To proceed to the election of an assistant-secretary and as-

sistant treasurer in one person, who shall exercise the powers conferred upon the holder of that office by vote of the Directors at a meeting held September 18, 1895.

439 Mr. J. S. Bigelow was appointed to collect, assort and count the votes, and he reported the whole number of votes to be Five (5), all of which were for Mr. P. K. Dumaresq, and he was declared duly elected.

Upon motion of Mr. Ray, seconded by Mr. J. S. Bigelow, it was

Voted: To proceed to the election of an assistant president, who shall exercise the powers conferred upon the holder of that office by vote of the Directors at a meeting held September 18, 1895.

Mr. J. S. Bigelow was appointed to collect, assort and count the votes, and he reported the whole number of votes to be Five (5), all of which were for Mr. C. H. Bissell, and he was declared duly elected.

The President makes the following statement:—

"Arrangements have been made for the purchase of a large group of mining claims located near Globe, and known as the Continental Group, containing thirteen claims.

"This group contains, already developed, quite large sized ore bodies of copper sulphides, which is the character of ore that has been anxiously sought for in the mines of this Company, not so much for the copper values contained as for the fluxing qualities which will render more economical the treatment of the Old Dominion Ores, and make possible a closer saving of the copper values.

"In order to properly develop these claims, it will be necessary to build about seven miles of railroad, and also to erect a concentrating and converting plant later on. This will call for a large amount of money; and at a meeting of the Directors held May 10, 1899, it was voted to call a special meeting of the stockholders for June 15, 1899, to authorize the increase of the capital stock of the Company to 200,000 shares, by issuing 50,000 new shares, a portion of which, if authorized, are to be offered to the stockholders at par.

"The railroad from Bowie to the Mines at Globe is completed, and the new furnaces are now running smoothly, so that the Company from this time forward should make a handsome profit on its operations. With the new stock authorized, there will be no further need of accumulating these profits towards the creation of a surplus fund to cover future improvements."

"Whereas, it is considered by the Board advisable for the purposes of this Company to purchase a group of mining claims located near Globe known as the Continental Group: and

440 Whereas, for the purchase of such group, developing the same and other necessary expenses, a large amount of money will be needed.

Voted: That is is advisable for the purposes connected with such purchase that the Capital Stock of this Company be increased from one hundred and fifty thousand shares of twenty-five dollars each to two hundred thousand shares, and

Voted: That a special meeting of the stockholders be called for the fifteenth day of June, 1899, at the office of the Company, 243

Washington Street, Jersey City, New Jersey, at 11 o'clock in forenoon, to consider and act upon the question of making suc increase of the capital stock from one hundred and fifty to two dred thousand shares, and that notice be sent to all stockho signed by the President for the Directors.

Upon motion of Mr. Lewisohn, seconded by Mr. Ray, it was

Voted: That the Secretary be and is hereby instructed to the President's statement sent to the stockholders in the form circular, accompanied by a notice for a Special Meeting.

Upon motion, duly seconded, it was

Voted: To adjourn.

Attest:

W. J. LADD, *Secretary.*

JERSEY CITY, NEW JERSEY, *June* 15, 189

A special meeting of the Stockholders of the Old Dominion Co Mining and Smelting Company of New Jersey was held this d the office of the Company, the New Jersey Corporations Age Number Two hundred and forty-three (243) Washington St Jersey City, New Jersey, at 11 o'clock in the forenoon, pursuant call and notice of such meeting voted by the Directors of said C pany at their meeting duly held on May 10, 1899.

Mr. F. M. Stone called the meeting to order, and called the of stockholders of the Company, and appointed Messrs. Charle King and Frank J. Sheehan as Tellers to report how many st holders were present in person or by proxy. Messrs. King Sheehan reported that the following stockholders, owning the fol ing number of shares, were present at the meeting in person or resented by their attorneys, constituted by written proxies, w proxies were duly filed, to wit:

441

A. S. Bigelow	owning	965	shares,	represented by	F. M. Stone
Erick Abrahamson	"	100	"	"	" Chas. N. Kin
Edward H. Jacobs	"	200	"	"	" Frank J. She
Abare, Wilbur L.	"	10	"	"	" P. K. Dunn
Adams, William F.	"	25	"	"	" " "
Alexander, Noble D.	"	15	"	"	" " "
Ames, James H.	"	10	"	"	" " "
Amory, Copley	"	50	"	"	" " "
Anthony, D. M.	"	200	"	"	" " "
Andrews, Mrs. Susie A.	"	20	"	"	" " "
" J. Munn	"	110	"	"	" " "
Baker, Edward H.	"	40	"	"	" " "
" George F.	"	100	"	"	" " "
Ball, George H	"	100	"	"	" " "
Barron, Clarence W.	"	5	"	"	" " "
Barnard, Charles	"	10	"	"	" " "
Basset, William	"	555	"	"	" " "
Bancroft, Samuel P.	"	14	"	"	" " "
Ball, Miss Alice W.	"	10	"	"	" " "
Bartlett, Miss Ella A.	"	10	"	"	" " "
Belches, J. W. & Co.	"	505	"	"	" " "
Belcher, Mrs. Mary E.	"	1	"	"	" " "
Bemis, Miss Julia A.	"	75	"	"	" " "
Benjamin, Mrs. Annie L.	"	30	"	"	" " "

Berry, Henry C.	"	5	"	"	"	"	"	"
Benson, Henry P.	"	250	"	"	"	"	"	"
Beney, Frank M.	"	26	"	"	"	"	"	"
Bishop, Arthur W.	"	5	"	"	"	"	"	"
Bice, Edward S.	"	60	"	"	"	"	"	"
Bicknell, John Q.	"	10	"	"	"	"	"	"
Bigelow, Maurice W.	"	100	"	"	"	"	"	"
Blanchard, Miss Rebecca S.	"	10	"	"	"	"	"	"
Blodget, Merritt & Co.	"	50	"	"	"	"	"	"
Blanchard, Frederick	"	75	"	"	"	"	"	"
" Charles F.	"	100	"	"	"	"	"	"
Blackwood, Adam A.	"	20	"	"	"	"	"	"
Bolles, M. & Co.	"	9,455	"	"	"	"	"	"
Bosworth, Homer L.	"	1,500	"	"	"	"	"	"
Bowers, Charles M.	"	15	"	"	"	"	"	"
Bolles, Richard F.	"	450	"	"	"	"	"	"
Borden, Jr., Spencer	"	10	"	"	"	"	"	"
Bradlee, Arthur T.	"	25	"	"	"	"	"	"
Bright, Elizabeth G., Mrs.	"	200	"	"	"	"	"	"
Bright, Sears & Co.	"	2,196	"	"	"	"	"	"
Briggs, Lloyd	"	10	"	"	"	"	"	"
Brown, Samuel N.	"	100	"	"	"	"	"	"
Brown, Riley & Co.	"	860	"	"	"	"	"	"
" Charles H.	"	200	"	"	"	"	"	"
" John P.	"	10	"	"	"	"	"	"
" Maynard P.	"	10	"	"	"	"	"	"

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Brigham, Miss Ella J.	owning	5	shares,	represented	by	P.	K.	Dumaresq
Brown, Frank M.	"	100	"	"	"	"	"	"
Bradley, Oliver B.	"	10	"	"	"	"	"	"
Brayton, William L. S.	"	25	"	"	"	"	"	"
Buffum, George A.	"	150	"	"	"	"	"	"
Burke, John M.	"	400	"	"	"	"	"	"
Burns, Miss Cora A.	"	10	"	"	"	"	"	"
" Mrs. Katherine F.	"	10	"	"	"	"	"	"
" B. Walter	"	15	"	"	"	"	"	"
Burgess, Edward B.	"	50	"	"	"	"	"	"
Burns, Robert	"	15	"	"	"	"	"	"
Burroughs, Arthur E.	"	25	"	"	"	"	"	"
Cady, Alfred E.	"	100	"	"	"	"	"	"
Cammann, Mrs. Mary H.	"	100	"	"	"	"	"	"
Campbell, William H.	"	100	"	"	"	"	"	"
Cannon, Martin J.	"	100	"	"	"	"	"	"
Chase, Leverett M.	"	10	"	"	"	"	"	"
Chase & Barstow	"	3,205	"	"	"	"	"	"
Chaveriat, Narcisse	"	10	"	"	"	"	"	"
Churchill, Miss Nellie L.	"	8	"	"	"	"	"	"
Chandler, George R.	"	40	"	"	"	"	"	"
" Seth D.	"	100	"	"	"	"	"	"
Chase, Anthony T.	"	46	"	"	"	"	"	"
Claflin, Frederick L.	"	10	"	"	"	"	"	"
Clapp, Edwin	"	800	"	"	"	"	"	"
Clark, Frank E.	"	100	"	"	"	"	"	"
" Miss Eleonor V.	"	75	"	"	"	"	"	"
Clement, Parker & Co.	"	705	"	"	"	"	"	"
Cloudman, Marcellus C.	"	300	"	"	"	"	"	"
Clark, John H.	"	10	"	"	"	"	"	"
Clews & Co., Henry	"	100	"	"	"	"	"	"
Clogston, Charles H.	"	5	"	"	"	"	"	"
Clark, John C.	"	200	"	"	"	"	"	"
Cline, Frank	"	20	"	"	"	"	"	"
Clews, James B.	"	250	"	"	"	"	"	"
Clark, Charles A.	"	30	"	"	"	"	"	"
" Mrs. Sarah J.	"	15	"	"	"	"	"	"

Coe, Herbert R.	"	35	"	"	"	"	"	"
" Robert T.	"	30	"	"	"	"	"	"
" Miss Fannie E.	"	25	"	"	"	"	"	"
Cole, Charles H.	"	101	"	"	"	"	"	"
Cottle, Henry C.	"	250	"	"	"	"	"	"
Corbett, James F.	"	550	"	"	"	"	"	"
Cotton & Deckrow	"	5	"	"	"	"	"	"
Crane, Roman A.	"	185	"	"	"	"	"	"
Crosby, Stephen M.	"	450	"	"	"	"	"	"
Crawford, John L.	"	700	"	"	"	"	"	"
Cunston, James S.	"	200	"	"	"	"	"	"
Curtis & Motley	"	4,881	"	"	"	"	"	"
Cushing, Henry W.	"	15	"	"	"	"	"	"

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Cushing, George S.	owning	100	shares,	represented	by	P.	K.	Dumaresq
Culbertson, Miss Emma B.	"	10	"	"	"	"	"	"
Daniels, Joseph E.	"	10	"	"	"	"	"	"
Davis, Joshua W.	"	30	"	"	"	"	"	"
Davidson, Albert L.	"	20	"	"	"	"	"	"
Day, R. L. & Co.	"	1,880	"	"	"	"	"	"
" Charles M.	"	10	"	"	"	"	"	"
Davis, Frederic	"	200	"	"	"	"	"	"
De Lorica, Joseph F.	"	375	"	"	"	"	"	"
Demmon, Daniel L.	"	1,150	"	"	"	"	"	"
Devens, Frank W.	"	10	"	"	"	"	"	"
Derby, Henry C.	"	100	"	"	"	"	"	"
Denison, Charles E.	"	25	"	"	"	"	"	"
Dillaway & Starr	"	2,385	"	"	"	"	"	"
Ditson, Charles H.	"	100	"	"	"	"	"	"
Diviney, Mrs. Margaret	"	3	"	"	"	"	"	"
Dooley, William J.	"	330	"	"	"	"	"	"
Downer & Co.	"	395	"	"	"	"	"	"
Doyle, Thomas L.	"	100	"	"	"	"	"	"
Drury, Mrs. Sarah L.	"	45	"	"	"	"	"	"
Dymock, John S.	"	200	"	"	"	"	"	"
Eaton, Fred S.	"	25	"	"	"	"	"	"
" Warren E.	"	10	"	"	"	"	"	"
Eggleston, Charles B.	"	300	"	"	"	"	"	"
Edgerly & Crocker	"	1,050	"	"	"	"	"	"
Ede, Frederick	"	5	"	"	"	"	"	"
Eliason, Thomas W.	"	100	"	"	"	"	"	"
Elliott, Mark	"	150	"	"	"	"	"	"
Ellson, William J.	"	100	"	"	"	"	"	"
Emery & Tucker	"	300	"	"	"	"	"	"
Estabrook & Co.	"	2,129	"	"	"	"	"	"
Eustis, George P.	"	100	"	"	"	"	"	"
Everett, Charles	"	25	"	"	"	"	"	"
" Fred E.	"	50	"	"	"	"	"	"
" Arthur G.	"	10	"	"	"	"	"	"
Fabens, Benjamin F.	"	50	"	"	"	"	"	"
Faulkner, Joseph	"	200	"	"	"	"	"	"
Fay, Miss Alice A.	"	5	"	"	"	"	"	"
Farley, William A.	"	7	"	"	"	"	"	"
" Mrs. L. Mabel	"	5	"	"	"	"	"	"
Field, Zibeon C.	"	25	"	"	"	"	"	"
" Wm. De Yough	"	10	"	"	"	"	"	"
Fiske, George W.	"	50	"	"	"	"	"	"
Fisk, George R.	"	50	"	"	"	"	"	"
Firth, Jr., Thaddeus	"	10	"	"	"	"	"	"
Finney, Charles E.	"	25	"	"	"	"	"	"
Fletcher, Frank E.	"	100	"	"	"	"	"	"
Flynt, Lyman C.	"	10	"	"	"	"	"	"
Foote & French	"	325	"	"	"	"	"	"
Fowler, Mrs. Helen M.	"	50	"	"	"	"	"	"

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Freeman & Co., F. P.	owning	100	shares,	represented	by	P.	K.	Dumaresq
French, George W.	"	50	"	"	"	"	"	"
Freitag, Joseph K.	"	10	"	"	"	"	"	"
Gerhard, Ludwig	"	10	"	"	"	"	"	"
Gill, Augustus H.	"	12	"	"	"	"	"	"
Gould, George	"	30	"	"	"	"	"	"
" Mrs. Lydia W.	"	10	"	"	"	"	"	"
Grierson, William	"	10	"	"	"	"	"	"
Greenwood, Othello	"	50	"	"	"	"	"	"
" Marcella	"	50	"	"	"	"	"	"
Guild, George A.	"	50	"	"	"	"	"	"
Hall, Mrs. Mary D.	"	50	"	"	"	"	"	"
Hannum, James W.	"	50	"	"	"	"	"	"
Hanson, Charles H.	"	100	"	"	"	"	"	"
Hardy, Arthur S.	"	200	"	"	"	"	"	"
" Mrs. Elizabeth B.	"	5	"	"	"	"	"	"
Hayden, Stone & Co.	"	2,436	"	"	"	"	"	"
Haire, Norman W.	"	200	"	"	"	"	"	"
Hanchett, Frank	"	400	"	"	"	"	"	"
Hall, Horace E.	"	100	"	"	"	"	"	"
Halloran, Michael J.	"	100	"	"	"	"	"	"
Hale & Co.	"	15	"	"	"	"	"	"
Harris, Mrs. Mary W.	"	50	"	"	"	"	"	"
Handren, Mrs. Adeline E.	"	8	"	"	"	"	"	"
Hall, Mrs. Mary E.	"	10	"	"	"	"	"	"
Head & Co., Charles	"	805	"	"	"	"	"	"
Hersey, Mrs. Sarah A.	"	100	"	"	"	"	"	"
Hedge, Daniel	"	20	"	"	"	"	"	"
" Joseph	"	10	"	"	"	"	"	"
Hildreth, Reuben E.	"	25	"	"	"	"	"	"
Hodge, Charles J.	"	880	"	"	"	"	"	"
Hoffses, Mrs. Ellen M.	"	100	"	"	"	"	"	"
Hollis, W. Thatcher	"	10	"	"	"	"	"	"
Holden, S. Herbert	"	50	"	"	"	"	"	"
Holt, J. Frederick	"	80	"	"	"	"	"	"
Hornblower & Weeks	"	1,739	"	"	"	"	"	"
Howard, Walter F.	"	25	"	"	"	"	"	"
Howison, William R.	"	15	"	"	"	"	"	"
Holman, John B.	"	30	"	"	"	"	"	"
Hoadley, Miss Charlotte E.	"	10	"	"	"	"	"	"
Holmes, Edmund G.	"	5	"	"	"	"	"	"
Holzberger, Frank	"	28	"	"	"	"	"	"
Holman, William J.	"	30	"	"	"	"	"	"
Howard, Arthur M.	"	8	"	"	"	"	"	"
Hohner, Michael M.	"	100	"	"	"	"	"	"
Hughes, Thomas F.	"	50	"	"	"	"	"	"
Hyde, William L.	"	150	"	"	"	"	"	"
Hyatt, Charles M.	"	75	"	"	"	"	"	"
Jackson & Curtis	"	150	"	"	"	"	"	"
Jenks, Manville	"	50	"	"	"	"	"	"

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Jenks, George	owning	15	shares,	represented	by	P.	K.	Dumaresq
Jennison, Frank J.	"	40	"	"	"	"	"	"
Jones, W. Clifton	"	10	"	"	"	"	"	"
Jordan, August F.	"	50	"	"	"	"	"	"
Kendall, Amos	"	5	"	"	"	"	"	"
" Francis H.	"	15	"	"	"	"	"	"
Kelsey, Frederick	"	50	"	"	"	"	"	"
Kilburn, Mrs. Abbie B.	"	25	"	"	"	"	"	"
Kimball, Miss Lucy J.	"	5	"	"	"	"	"	"
Kneeland, Frederick N.	"	10	"	"	"	"	"	"
Keuchle, Paul	"	11	"	"	"	"	"	"
Lane, Enos H.	"	20	"	"	"	"	"	"

Lawrence, Mrs. Caroline E..	"	10	"	"	"	"	"	"
Lathrop, Joseph H.....	"	50	"	"	"	"	"	"
Lee, Joseph	"	100	"	"	"	"	"	"
" Mrs. Mary A.....	"	100	"	"	"	"	"	"
Lichtenaeur, Joseph M.....	"	25	"	"	"	"	"	"
Lockwod, Homer	"	100	"	"	"	"	"	"
" Mrs. Emmeline D.	"	25						
" Thomas S.	"	50	"	"	"	"	"	"
Lodge, William	"	200	"	"	"	"	"	"
Lowenstein, Judel	"	100	"	"	"	"	"	"
Loveland, Winslow	"	50	"	"	"	"	"	"
Maitland, Alexander	"	300	"	"	"	"	"	"
" Leslie	"	5	"	"	"	"	"	"
Manson, Thos. L., Jr. & Co..	"	1,000	"	"	"	"	"	"
Mansfield, Miss Mary.....	"	10	"	"	"	"	"	"
Maitland & Yates.....	"	200	"	"	"	"	"	"
Martel, Charles E.....	"	30	"	"	"	"	"	"
Matheson, Murdock R.....	"	50	"	"	"	"	"	"
Meredith, J. Morris.....	"	300	"	"	"	"	"	"
Messinger, Mrs. Hetty A....	"	5	"	"	"	"	"	"
Metz, Joseph G.....	"	900	"	"	"	"	"	"
Merryweather, Charles	"	90	"	"	"	"	"	"
Meader, Miss Eunice S.....	"	10	"	"	"	"	"	"
Miller, Miss Nellie L.....	"	8	"	"	"	"	"	"
" George E.....	"	25	"	"	"	"	"	"
" Mrs. Sarah J.....	"	7	"	"	"	"	"	"
Mills, Mrs. Emily W.....	"	10	"	"	"	"	"	"
Moore, Frederic H.....	"	300	"	"	"	"	"	"
Moors & Cabot.....	"	1,803	"	"	"	"	"	"
Morison, George B.....	"	20	"	"	"	"	"	"
Morse, E. Rollins & Bro.....	"	2,450	"	"	"	"	"	"
Moseley, F. S. & Co.....	"	4,410	"	"	"	"	"	"
Morgan, William	"	70	"	"	"	"	"	"
" Richard	"	20	"	"	"	"	"	"
Morse, Justin N.....	"	50	"	"	"	"	"	"
McVichie, Donald	"	333	"	"	"	"	"	"
McKechnie, Benjamin F....	"	10	"	"	"	"	"	"
" William T.	"	25	"	"	"	"	"	"

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Nash, Henry A.....owning 100 shares, represented by P. K. Dumaresq								
Nankervis, James L.....	"	200	"	"	"	"	"	"
Neely, Benjamin	"	200	"	"	"	"	"	"
Nelson, Mrs. Hortense C....	"	20	"	"	"	"	"	"
" Henry W., Jr.....	"	25	"	"	"	"	"	"
" Mrs. Sophie L. B....	"	5	"	"	"	"	"	"
Newbigging, Thomas	"	700	"	"	"	"	"	"
Nelson, William H.....	"	200	"	"	"	"	"	"
Nourse, Franklin	"	200	"	"	"	"	"	"
Oakes, Josiah	"	50	"	"	"	"	"	"
O'Connor, John	"	250	"	"	"	"	"	"
Oliver, James F.....	"	20	"	"	"	"	"	"
Olney, Jeremiah	"	1,000	"	"	"	"	"	"
Packer, Miss Mary Cordelia.	"	10	"	"	"	"	"	"
Paine, Webber & Co.....	"	1,576	"	"	"	"	"	"
" Rene	"	100	"	"	"	"	"	"
Parkinson & Burr.....	"	395	"	"	"	"	"	"
Paull & Co., J.....	"	200	"	"	"	"	"	"
Payson, Mrs. Margaret Milliken	"	20	"	"	"	"	"	"
Parsons, Marcus L.....	"	20	"	"	"	"	"	"
Pearce, Mrs. Elizabeth L....	"	50	"	"	"	"	"	"
Perkins, T. H. & Co.....	"	400	"	"	"	"	"	"
Phelps, George	"	200	"	"	"	"	"	"
Phillips, Charles	"	75	"	"	"	"	"	"
Phelps, Peter W.....	"	300	"	"	"	"	"	"
Pickering, John & Moseley..	"	455	"	"	"	"	"	"

Pierce, John H.....	"	1,000	"	"	"	"	"	"
Pingree, David	"	50	"	"	"	"	"	"
Pope, Mrs. Emily O.....	"	10	"	"	"	"	"	"
" Thomas E.....	"	45	"	"	"	"	"	"
Prendergast, James M.....	"	700	"	"	"	"	"	"
Preston, John	"	15	"	"	"	"	"	"
Prince, F. H. & Co.....	"	3,078	"	"	"	"	"	"
" Mrs. Lillian C.....	"	5	"	"	"	"	"	"
Preston, Charles F.....	"	10	"	"	"	"	"	"
Prior, Leland F.....	"	150	"	"	"	"	"	"
Putnam, W. F. & Co.....	"	10	"	"	"	"	"	"
Ray, Joseph G.....	"	100	"	"	"	"	"	"
" Charles J. R.....	"	10	"	"	"	"	"	"
Raynes, Harry	"	50	"	"	"	"	"	"
Reed, William H.....	"	20	"	"	"	"	"	"
Reeder, John T.....	"	150	"	"	"	"	"	"
Richardson, William A.....	"	200	"	"	"	"	"	"
Richardson, Hill & Co.....	"	430	"	"	"	"	"	"
Riddlestorffer, Sidney	"	200	"	"	"	"	"	"
Ring, Constant Q.....	"	200	"	"	"	"	"	"
Richmond, Mrs. Deborah H..	"	14	"	"	"	"	"	"
Richards, William F.....	"	50	"	"	"	"	"	"
Ripley, Edward J.....	"	10	"	"	"	"	"	"

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Robinson, Miss Lucilla.....owning		9	shares, represented by P. K. Dumaresq					
" Miss Vena G.....	"	2	"	"	"	"	"	"
Rollins, Mrs. Mattie E.....	"	100	"	"	"	"	"	"
Root, Charles J.....	"	200	"	"	"	"	"	"
Rowe, Thomas	"	200	"	"	"	"	"	"
" Henry M.	"	100	"	"	"	"	"	"
Ronk, Alfred	"	50	"	"	"	"	"	"
Robin, George O.....	"	7	"	"	"	"	"	"
Rochester, Montgomery H..	"	25	"	"	"	"	"	"
Robinson, James	"	20	"	"	"	"	"	"
" Calvin F.....	"	16	"	"	"	"	"	"
" Joshua D.....	"	20	"	"	"	"	"	"
Royce, Frank A.....	"	50	"	"	"	"	"	"
Russell, Cyrus W.....	"	25	"	"	"	"	"	"
Sampson, Azel E.....	"	10	"	"	"	"	"	"
Safford, James S.....	"	20	"	"	"	"	"	"
Sawtelle, William H.....	"	20	"	"	"	"	"	"
Sawyer, Edward E.....	"	50	"	"	"	"	"	"
Schlichting, Rhino	"	20	"	"	"	"	"	"
Seabury, Frank & Bro.....	"	4	"	"	"	"	"	"
Seaverns, Franklin T.....	"	8	"	"	"	"	"	"
" Almer F.....	"	1	"	"	"	"	"	"
Sears, Isaiah C.....	"	10	"	"	"	"	"	"
" Mrs. Julia F.....	"	10	"	"	"	"	"	"
Shannon, Donald	"	100	"	"	"	"	"	"
Shattuck, Jefferson J.....	"	50	"	"	"	"	"	"
" Mrs. Estelle M....	"	10	"	"	"	"	"	"
Sheldon, Horace W.....	"	300	"	"	"	"	"	"
Shaw, William	"	25	"	"	"	"	"	"
Sharman, Charles	"	25	"	"	"	"	"	"
Siter, Mrs. Susan H.....	"	100	"	"	"	"	"	"
Slater, Horatio N.....	"	200	"	"	"	"	"	"
Smith, Arthur A.....	"	50	"	"	"	"	"	"
" Albert Oliver.....	"	100	"	"	"	"	"	"
" Walter L.	"	50	"	"	"	"	"	"
" Edward F.	"	100	"	"	"	"	"	"
" H. Eugene	"	100	"	"	"	"	"	"
" Miss Mary A.....	"	10	"	"	"	"	"	"
Snook, James Curtis.....	"	100	"	"	"	"	"	"
Snow, Charles H.....	"	50	"	"	"	"	"	"
Souther, John F.....	"	50	"	"	"	"	"	"
Spaulding, William B.....	"	10	"	"	"	"	"	"

Spiller, Joseph B.	"	50	"	"	"	"	"	"
Spear, John W.	"	150	"	"	"	"	"	"
Stackpole & Gay	"	1,685	"	"	"	"	"	"
Starbuck, Charles	"	10	"	"	"	"	"	"
Stewart, James C.	"	10	"	"	"	"	"	"
Stone, Albert	"	200	"	"	"	"	"	"
Stowell & Son, J. B.	"	15	"	"	"	"	"	"
Stephen, John W.	"	100	"	"	"	"	"	"

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Strong, Mrs. Carrie R.	owning	10	shares,	represented	by	P.	K.	Dumaresq
Stone, Frederick G.	"	80	"	"	"	"	"	"
Stowe, Luke S.	"	100	"	"	"	"	"	"
Stoddard, Wm. J.	"	20	"	"	"	"	"	"
Sutton, David	"	200	"	"	"	"	"	"
Sutton & Bowen	"	810	"	"	"	"	"	"
Swallow, A. Moreton	"	100	"	"	"	"	"	"
Sweetser, A. L. & Co.	"	610	"	"	"	"	"	"
" Frank E.	"	250	"	"	"	"	"	"
Taft, Mrs. Lydia B.	"	20	"	"	"	"	"	"
Taylor, Frederick W.	"	200	"	"	"	"	"	"
" James E.	"	100	"	"	"	"	"	"
Tailby, Francis S.	"	30	"	"	"	"	"	"
Farbell, George G.	"	75	"	"	"	"	"	"
Tapley, Amos P.	"	100	"	"	"	"	"	"
Tewksbury, Charles W.	"	120	"	"	"	"	"	"
Thayer, Eugene V. R.	"	10	"	"	"	"	"	"
" Frank H.	"	5	"	"	"	"	"	"
Thompson, Alexander C.	"	25	"	"	"	"	"	"
Tiffany, Charles H.	"	10	"	"	"	"	"	"
Tower, Giddings & Co.	"	1,565	"	"	"	"	"	"
Tourtellotte, L. Holbrook	"	10	"	"	"	"	"	"
Torrey, Alexis	"	200	"	"	"	"	"	"
Trull, Mrs. Martha F.	"	10	"	"	"	"	"	"
Truettner, Louis H.	"	10	"	"	"	"	"	"
Tucker, Anthony & Co.	"	1,000	"	"	"	"	"	"
" Miss Mary P.	"	5	"	"	"	"	"	"
" Charles H.	"	10	"	"	"	"	"	"
Usher, Samuel	"	10	"	"	"	"	"	"
Vanness, Theodore F.	"	400	"	"	"	"	"	"
Vaughn, George T.	"	10	"	"	"	"	"	"
Wainwright, H. C. & Co.	"	4,430	"	"	"	"	"	"
Wales, Miss Lella M.	"	11	"	"	"	"	"	"
Walker, Mrs. Helen M.	"	10	"	"	"	"	"	"
Warren, Nathan	"	30	"	"	"	"	"	"
Wales, Mrs. Mary F.	"	10	"	"	"	"	"	"
Watson, Ashley & Co.	"	25	"	"	"	"	"	"
Walker, James E.	"	10	"	"	"	"	"	"
Weld, A. Davis	"	1,000	"	"	"	"	"	"
" Aaron D's Sons	"	1,000	"	"	"	"	"	"
Wentworth, George A.	"	100	"	"	"	"	"	"
Webster, Granville S.	"	25	"	"	"	"	"	"
Westervelt, Edward C.	"	500	"	"	"	"	"	"
Weld, William E.	"	50	"	"	"	"	"	"
Wheeler, Leonard	"	600	"	"	"	"	"	"
" Mrs. Harriet F.	"	400	"	"	"	"	"	"
Whitney, William E.	"	170	"	"	"	"	"	"
Whelan, William H.	"	50	"	"	"	"	"	"
Wheelock, Arthur	"	50	"	"	"	"	"	"
Wilbur, John	"	25	"	"	"	"	"	"

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Wiley, H. C.	owning	1,076	shares,	represented	by	P.	K.	Dumaresq
Wing, Mrs. Ellen E.	"	30	"	"	"	"	"	"
Wise, Mrs. Fidelia	"	50	"	"	"	"	"	"
Williams, Charles H.	"	10	"	"	"	"	"	"

Wind, Howard B.....	"	1	"	"	"	"	"	"
Williams, Clarence R.....	"	50	"	"	"	"	"	"
Wilder, Edward F.....	"	100	"	"	"	"	"	"
Wood, Henry	"	350	"	"	"	"	"	"
" Granby	"	15	"	"	"	"	"	"
Woodhull, Maxwell	"	4,005	"	"	"	"	"	"
Woodman, Charles H.....	"	10	"	"	"	"	"	"
Wortley, Clark S.....	"	55	"	"	"	"	"	"
" Alfred C.	"	5	"	"	"	"	"	"
Wood, Francis W.....	"	10	"	"	"	"	"	"
Wright, Mrs. Helen M. C...	"	10	"	"	"	"	"	"
" William E.	"	10	"	"	"	"	"	"

In all 107,348 shares out of a total of 150,000 shares, the total capitalization of the Company.

The meeting was organized by unanimously choosing Mr. F. M. Stone as Chairman and Mr. P. K. Dumaresq as Secretary.

Mr. King presented to the meeting the affidavit of Mr. Edmund Grinnell showing that according to law in such case made and provided, he had himself served the notice of said meeting by depositing in the Post Office in the city of Boston, Massachusetts, with the legal postage prepaid, on May 12, 1899, at least ten (10) days before June 15, 1899, the date fixed for holding such meeting, a written or printed copy of said notice, addressed to each stockholder of record appearing on the books of the Company at the address given in such books, specifying the objects of the meeting, the vote of the Board of Directors, the time and place, when and where such meeting would be held, and the amount to which it would be proposed to increase the capital stock of the Company; and he presented to the meeting a copy of the notice that had been so sent to each stockholder.

On motion of Mr. King, duly seconded by Mr. Sheehan, it was

Voted:—That a copy of said notice together with a copy of said affidavit be spread upon the minutes of this meeting, which are as follows:

"ROOM 303, SEARS BUILDING,
BOSTON, *June* 13, 1899.

Edmund Grinnell being duly sworn deposes and says:

That he is Clerk of the Old Dominion Copper Mining and Smelting Company of New Jersey, and that by order of the Board of Directors of said Company, he served the notice of the special meeting of the stockholders of said Company, called for June 15, 1899, of which the annexed is a true copy, upon all the stockholders of said Company in accordance with the law in such case made and provided, at least Ten (10) days before the date of the meeting, to wit: on May 12th, 1899.

That he served said notice himself by depositing on May 12th, 1899, in the Post Office in the City of Boston, Mass., with the legal postage prepaid thereon, a copy of said notice addressed to each stockholder of record to his, her or their Post Office address, as appeared on the books of said Company at the close of business on said May 12th, 1899.

EDMUND GRINNELL.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

On this 13th day of June, A. D. 1899, before me, the subscriber, a Commissioner for the State of New Jersey, resident in Massachusetts, personally appeared Edmund Grinnell, known to me to be the person who signed the foregoing affidavit and made oath that the above affidavit signed by him is true.

In testimony whereof I hereunto set my hand and affix my official seal.

[COMMISSIONER'S SEAL.] CLARENCE H. BISSELL,
Commissioner for the State of New Jersey."

"To the Stockholders of the Old Dominion Copper Mining and Smelting Company:

Notice is hereby given that a special meeting of the stockholders of this Company will be held on Thursday, June 15, 1899, at eleven o'clock in the forenoon at the office of the Company, 243 Washington Street, Jersey City, New Jersey, to consider and act upon the question of increasing the capital stock of the corporation pursuant to the following vote of the Board of Directors passed at their meeting on May 10, 1899, to wit:

'Whereas, it is considered by the Board advisable for the purposes of this Company to purchase a group of mining claims located near Globe, known as the Continental Group; and

'Whereas, for the purchase of such group, developing the same and other necessary expenses, a large amount of money will be needed,

'Voted:—That it is advisable for the purposes connected with such purchase that the capital stock of this Company be increased
451 from One hundred and fifty thousand shares of Twenty-five dollars each to two hundred thousand shares, and

'Voted:—That a special meeting of the stockholders be called for the fifteenth day of June, 1899, at the office of the Company, 243 Washington Street, Jersey City, New Jersey, at eleven o'clock in the forenoon, to consider and act upon the question of making such an increase of the capital stock from One hundred and fifty thousand to Two hundred thousand shares, and that notice be sent to all stockholders signed by the President for the Directors.'

The stock books of the Company for the transfer of stock will be closed from May 20, 1899, to June 15, 1899, both days inclusive.

By order of the board of directors:

A. S. BIGELOW,
President."

Boston, Mass., May 10, 1899.

Mr. Sheehan then read the circular issued from the office of this Company signed by order of the Board of Directors with reference to the proposed plan for the increase of the capital stock of the Company from One hundred and fifty thousand (150,000) shares of Twenty-five ($25.) each to Two hundred thousand (200,000) shares of Twenty-five Dollars ($25.) each.

On motion of Mr. King, duly seconded by Mr. Sheehan, it was Voted:—That a copy of said circular be spread upon the records of the meeting. Said copy is as follows:

"Old Dominion Copper Mining and Smelting Company.

Circular to Stockholders.

Arrangements have been made for the purchase of a large group of mining claims located near Globe, and known as the Continental Group, containing thirteen claims.

This group contains, already developed, quite large sized ore bodies of copper sulphides, which is the character of ore that has been anxiously sought for in the mines of this Company, not so much for the copper values contained as for fluxing qualities which will render more economical the treatment of the Old Dominion ores, and make possible a closer saving of the copper values.

In order to properly develop these claims, it will be necessary to build about seven miles of railroad, and also to erect a con-
452 centrating and converting plant later on. This will call for a large amount of money; and at a meeting of the Directors, held May 10, 1899, it was voted to call a special meeting of the stockholders for June 15, 1899, to authorize the increase of the capital stock of the Company to 200,000 shares, by issuing 50,000 new shares, a portion of which, if authorized, are to be offered to the stockholders at par.

The railroad from Bowie to the mines at Globe is completed, and the new furnaces are now running smoothly, so that the Company from this time forward should make a handsome profit on its operations. With the new stock authorized, there will be no further need of accumulating these profits towards the creation of a surplus fund to cover future improvements.

By order of the board of directors.

A. S. BIGELOW,
President."

On motion of Mr. King, duly seconded by Mr. Sheehan, the following votes were passed by a stock-vote, 107,348 shares voting in favor and no shares voting against the same, out of One hundred and fifty thousand (150,000) shares, the total stock of the Company, to wit:

In accordance with the vote of the Board of Directors passed at their meeting held May 10, 1899.

Voted:—That the Company does hereby increase its capital stock from One hundred and fifty thousand (150,000) shares of Twenty-five dollars ($25.) each, to Two hundred thousand (200,000) shares of Twenty-five dollars ($25.) each, that is from the present capitalization of Three million seven hundred and fifty thousand dollars ($3,750,000) to a capitalization of Five million dollars ($5,000,000.) said additional Fifty thousand (50,000) shares to be disposed of by the Board of Directors.

Voted:—That the President and Secretary are hereby authorized and directed to execute and file for record any and all certificates required by the laws of the State of New Jersey with reference to the increase of the capital stock of the Company as voted at this meeting, and to take any other steps that may be necessary to make the action of this meeting effectual.

Whereupon it was declared that the said votes were passed by more than two-thirds (2/3) of the entire capital stock of this Company according to the law in such case made and provided.

On motion of Mr. King, duly seconded by Mr. Sheehan, it was

453 Voted:—That all acts, matters and things which have been entered into or performed by the Board of Directors are hereby approved, ratified and confirmed.

No other business coming before the meeting, the meeting was then dissolved.

P. K. DUMARESQ,
Secretary of the Meeting.

BOSTON, MASS., *February* 13, 1900.

A meeting of the Directors of the Old Dominion Copper Mining and Smelting Company was held this day at Room 301 Sears Building, No. 199 Washington Street, Boston, Mass., at eleven ten o'clock a. m.

Present: Messrs. A. S. Bigelow, W. J. Ladd, J. S. Bigelow and E. V. R. Thayer.

The President called the meeting to order and at his request the Secretary read the record of the last Directors' Meeting, which was upon motion duly seconded — approved.

The President presented an assignment by Lewisohn Bros. to the United Metals Selling Company, transferring all existing contracts between this Company and Lewisohn Bros., for the sale of copper and other metals, also an assent by this Company to said assignment.

Whereupon, on motion of Mr. Thayer, seconded by Mr. J. S. Bigelow, it was

Voted: That the President and Secretary of this Company be and they are hereby authorized and instructed to sign such papers as may be necessary to transfer to the United Metals Selling Company said contracts now existing between this Company and said Lewisohn Bros.

On motion of Mr. Thayer, duly seconded by Mr. J. S. Bigelow, the following was unanimously adopted as an amendment to the By-laws of this Company, to go into effect immediately, to wit:

"Dividends shall be declared and paid as voted by the Board of Directors."

The President then presented a Bond of Indemnity for $140 from Eva Kildreth Foster of Boston, Mass.; also affidavit in regard to the loss of certificate No. 2857, for one share of the capital stock of the Old Dominion Copper Mining and Smelting Company standing in her name; also letter from Mr. William A. Tucker, of Tucker,

Anthony and Company, Boston, Mass., in relation to the financial standing of the sureties upon said Bond; whereupon, on motion of Mr. Thayer, seconded by Mr. J. S. Bigelow, it was unanimously

454 Voted: That the proper officers of this Company be and they are hereby authorized to issue a duplicate certificate to said Eva Kildreth Foster for said stock.

No other business coming before the meeting, upon motion of Mr. Bigelow, seconded by Mr. Thayer, it was

Voted: To adjourn.

Attest:

W. J. LADD,
Secretary.

BOSTON, MASS., *March* 2, 1901.

A called meeting of the Directors of the Old Dominion Copper Mining and Smelting Company was held this day at Room 301 Sears Building, 199 Washington Street, Boston, Mass., at eleven o'clock a. m.

Present Messrs. A. S. Bigelow, W. J. Ladd, E. V. R. Thayer and J. S. Bigelow.

The President called the meeting to order, and at his request the Secretary read the record of the last Directors' Meeting, which was approved.

Upon motion, duly seconded, it was

Voted: To proceed to the election of a Director to fill the vacancy occasioned by the death of the late Joseph G. Ray.

Mr. Ladd was appointed to collect, assort and count the votes, and he reported the whole number of ballots to be four, all of which were for Mr. C. H. Bissell, and he was declared duly elected.

Upon motion duly seconded, it was

Voted: To proceed to the election of a vice-president to fill the vacancy occasioned by the death of the late Joseph G. Ray.

Mr. Ladd was appointed to collect, assort and count the votes, and he reported the whole number of ballots to be four, all of which were for Mr. E. V. R. Thayer, and he was declared duly elected.

Upon motion of Mr. Thayer, seconded by Mr. J. S. Bigelow, it was

Voted: That the Secretary be and he is hereby authorized and instructed to mail to the stockholders notices for the annual meeting substantially as follows:

"Old Dominion Copper Mining and Smelting Co.

Notice is hereby given that the annual meeting of the stockholders of the Old Dominion Copper Mining and Smelting Company will be held at the office of the Company 243-245 Washington Street, Jersey City, New Jersey (office of New Jersey Corporations
455 Agency) on Wednesday the third day of April, A. D. 1901, at twelve o'clock noon, for the election of a Board of

seven (7) Directors for the ensuing year, and for all other business that may properly come before the meeting.

The transfer books will be closed from March 14, 1901, to April 3, 1901, both days inclusive.

W. J. LADD, *Secretary.*

Dated Boston, Mass., March 6, 1901."

The President stated that the contract with the United Metals Selling Company expired by limitation January 1, 1901, and that since that time we had made a provisional arrangement and contract with said Company and also with the Raritan Copper Works for the refining of our product, subject to ratification by the Directors.

The contracts as provisionally agreed to were then read, and upon motion

Resolved: That the President and Secretary be and are hereby instructed to execute said contracts with such modifications, if any, as they may deem for the best interests of the Company.

Upon motion of Mr. J. S. Bigelow, seconded by Mr. Thayer, it was

Voted: That the President Mr. A. S. Bigelow be and he is hereby authorized to sign checks and accept drafts on this Company during the absence of the Treasurer.

Upon motion of Mr. Thayer, seconded by Mr. J. S. Bigelow, it was

Voted: That the President during the absence of the treasurer, or the treasurer, during the absence of the President, be and is hereby authorized at his discretion to appoint in writing Mr. P. K. Dumaresq to sign as assistant-treasurer the checks of this Company during such time as the President and Treasurer are both absent from the office.

No other business coming before the meeting, upon motion duly seconded, it was

Voted: To adjourn.

Attest:

W. J. LADD, *Secretary.*

JERSEY CITY, NEW JERSEY, *April* 3, 1901.

Pursuant to notice the Annual Meeting of the Stockholders of the Old Dominion Copper Mining and Smelting Company of New Jersey was held this day at the office of the Company, No. 243 Washington Street, Jersey City, New Jersey, at 12 o'clock noon.

The meeting was called to order by Mr. Charles N. King and in the absence of the Secretary Mr. Philip K. Dumaresq was elected Secretary of the meeting.

456 In the absence of the President, Mr. Charles N. King was elected Chairman of the meeting.

The Secretary of the meeting read the call for the meeting with evidence that a copy of the same had been sent to each stockholder in accordance with law.

Mr. N. L. Amster moved that the roll of stockholders be called

for the purpose of ascertaining whether one half of the capital stock of the Company was represented in person or by proxy.

Thereupon the roll of stockholders was called, and it appeared that more than one half of the total outstanding stock of the Company was represented at the meeting in person or by proxy as follows, viz:

Mr. N. L. Amster representing in person.....	1,400 shares
Mr. G. W. Crampton representing in person.....	300 shares
Mr. P. K. Dumaresq representing by proxy.....	85,520 shares
Mr. Charles S. King representing by proxy.....	100 shares
Mr. N. B. McKelvie, representing by proxy, Hayden, Stone & Co.....	4,458 shares
Mr. F. A. Russell, representing by proxy, Mr. C. W. Barron	5 shares
Total	91,783 shares

being a majority of the outstanding 150,000 shares of the capital stock of the Company.

The Chairman of the meeting then read a statement of the operations of the Company signed by the President by order of the Board of Directors, a copy of which he stated was to be mailed to each of the stockholders.

Upon motion of Mr. P. K. Dumaresq duly seconded it was

Voted: That said report be accepted and placed on file.

Upon motion duly seconded the following resolution was adopted:

Resolved that all acts, matters and things entered into and performed by the Officers and Directors of this Company since the organization of the Company, be and they hereby are fully and in all respects ratified, confirmed and approved.

The meeting then proceeded to the election of Directors by ballot, and the Chairman appointed Messrs. Le Grand Bouker and Stephen C. Smith Inspectors. They reported that the total number of votes cast was Ninety one thousand, seven hundred eighty three
457 (91,783) all of which were cast for the following Board of Directors, who were duly chosen and declared to be Directors of the Company to hold office until the next regular annual meeting and until their successors should be chosen and qualified:—

A. S. Bigelow of Massachusetts.
W. J. Ladd of Massachusetts.
Joseph S. Bigelow of Massachusetts.
E. V. R. Thayer of Massachusetts
C. H. Bissell of Massachusetts.
Leonard Lewisohn of New York.
Edgar Buffum of New Jersey.

At 1.15 p. m., no other business coming before the meeting, it was dissolved.

A true record.

Attest:

P. K. DUMARESQ,
Secretary of the Meeting.

BOSTON, MASS., *April* 10, 1901.

A called meeting of the Directors of the Old Dominion Copper Mining and Smelting Company elected at the annual meeting of the stockholders held at Jersey City, New Jersey, April 3, 1901,—being the first since said election and for the organization of the Board,—was held this day at Room 301 Sears Building, No. 199 Washington Street, Boston, Mass., at ten forty-five o'clock a. m.

Present: Messrs. A. S. Bigelow, W. J. Ladd, E. V. R. Thayer, Joseph S. Bigelow and C. H. Bissell

Upon motion, Mr A. S. Bigelow was called to the Chair, who called the meeting to order.

At the request of the Chairman, the Secretary then read the record of the last Directors' meeting, which was approved.

Upon motion duly seconded, it was

Voted: To proceed to the election of a treasurer.

Mr. Bissell was appointed to collect, assort and count the votes, and he reported the whole number of votes to be four (4), all of which were for Mr. W. J. Ladd, and he was declared duly elected.

Upon motion duly seconded, it was

VoVted: To proceed to the election of a treasurer.

Mr. Bissell was appointed to collect, assort and count the
458 votes, and he reported the whole number of votes to be four (4), all of which were for Mr. W. J. Ladd, and he was declared duly elected.

Upon motion duly seconded, it was

Voted: To proceed to the election of a president.

Mr. Bissell was appointed to collect, assort and count the votes, and he reported the whole number of votes to be four (4), all of which were for Mr. A. S. Bigelow, and he was declared duly elected.

Upon motion duly seconded, it was

Voted: To proceed to the election of a vice-president.

Mr. Bissell was appointed to collect, assort and count the votes, and he reported the whole number of votes to be four (4), all of which were for Mr. E. V. R. Thayer, and he was declared duly elected.

Upon motion duly seconded, it was

Voted: To proceed to the election of an assistant secretary and assistant-treasurer in one person, who shall exercise the powers conferred upon the holder of that office by vote of the Directors at the meeting held September 18th, 1895.

Mr. Bissell was appointed to collect, assort and count the votes, and he reported the whole number of votes to be five (5), all of which were for Mr. P. K. Dumaresq, and he was declared duly elected.

Upon motion duly seconded, it was

Voted: To proceed to the election of an assistant-president, who shall exercise the powers conferred upon the holder of that office by vote of the Directors at a meeting held September 18, 1895.

Mr. Bissell was appointed to collect, assort and count the votes, and he reported the whole number of votes to be four (4), all of

which were for Mr. C. H. Bissell, and he was declared duly elected.

Upon motion duly seconded, the following resolutions were unanimously adopted:

"Resolved: That this Corporation hereby appoints the Commissioner of Corporations of the Commonwealth of Massachusetts, or his successor in office, to be its true and lawful Attorney, in and for said Commonwealth, upon whom all lawful processes in any action or proceeding against this corporation in said Commonwealth may be served in like manner and with the same effect as if this Corporation existed therein. And this Corporation hereby stipulates and agrees that any lawful process against it, which is served on its said attorney, shall be of the same legal force and validity as if served on this Corporation. This appointment, and the au-
459 thority of said attorney, shall combine in force so long as any liability remains outstanding against this Corporation in said Commonwealth; and the President and Clerk or Secretary are hereby authorized to execute, in the name of the Corporation, and under its corporate seal, a certificate of authority or power of attorney to the said Commissioner of Corporations in conformity with this resolution and the laws of said Commonwealth."

No other business coming before the meeting, upon motion duly seconded, it was

Voted: To adjourn.

Attest:

W. J. LADD, *Secretary.*

BOSTON, MASS., *October* 17, 1901.

A called meeting of the Directors of the Old Dominion Copper Mining and Smelting Company was held this day at Room 301 Sears Building, No. 199 Washington Street, Boston, Mass., at eleven-twenty o'clock a. m.

Present: Messrs. A. S. Bigelow, W. J. Ladd, J. S. Bigelow, E. V. R. Thayer and C. H. Bissell.

The President called the meeting to order, and at his request the Secretary read the record of the last Directors' meeting, which was approved.

The President presented the resignation of Mr. P. K. Dumaresq as assistant-secretary and assistant-treasurer of this Company, to take effect at the close of business October 31, 1901.

Upon motion, duly seconded, the resignation was accepted and ordered to be placed on file.

On motion, duly seconded, it was

Voted: That Mr. W. A. S. Chrimes be and hereby is appointed assistant-secretary and assistant-treasurer of this Company, to take effect November 1st, 1901, with power to countersign all Certificates of stock, to sign all dividend checks and to accept all drafts drawn upon the treasurer of this Company.

Upon motion, duly seconded, it was

Voted: That the President, during the absence of the Treasurer, or the Treasurer, during the absence of the President, be and is hereby authorized at his discretion to appoint in writing Mr. W. A.

S. Chrimes to sign as assistant-treasurer the checks of this Company during such time as the President and Treasurer are both absent from the office.

The President then presented a bond of indemnity for fourteen hundred (1400) dollars from Towle and Fitzgerald of Bos-
460 ton, Mass.; also affidavit in regard to the loss of certificate No. 6546 for twenty shares of the capital stock of the Old Dominion Copper Mining and Smelting Company standing in the name of E. D. Bangs and Company.

Whereupon, on motion, duly seconded, it was

Voted:—That the proper officers of this Company be and they are hereby authorized to issue at their discretion a duplicate certificate to said E. D. Bangs and Company for said stock.

The President then presented a bond of indemnity for fifteen hundred (1500) dollars for Schofield, Whicher and Company of Boston, Mass.; also affidavit in regard to the loss of certificate No. 7066 for twenty-five shares of the capital stock of the Old Dominion Copper Mining and Smelting Company standing in the name of John P. Roach; also affidavit signed by said Roach declaring that said stock had been sold by him to Schofield, Whicher and Company.

Whereupon, on motion duly seconded, it was

Voted: That the proper officers of this Company be and they are hereby authorized at their discretion to issue a certificate for said 25 shares of stock in the name of said Schofield, Whicher and Company.

No other business coming before the meeting, upon motion duly seconded, it was

Voted: To adjourn.

Attest:

W. J. LADD, *Secretary.*

BOSTON, MASS., *March* 4, 1902.

A called meeting of the Directors of the Old Dominion Mining and Smelting Company was held this day at Room 301 Sears Building, 199 Washington Street, Boston, Mass., at 11.15 o'clock a. m.

Present: Messrs. A. S. Bigelow, W. J. Ladd, J. S. Bigelow and C. H. Bissell.

The President called the meeting to order, and at his request the Secretary read the record of the last Directors' Meeting, which was approved.

The President then presented proof sheets of the Annual Report containing the Directors' Report, (which he read to the meeting) the Superintendent's report and a statement of the business of the Company for the year ending December 31st, 1901, showing a balance of cash assets on that date of $337,205 95/100.

Whereupon, on motion duly seconded, it was,

461 Voted:—That the Treasurer have the Annual Report, substantially as presented at this meeting printed, and a copy of it mailed to each stockholder without delay.

Upon motion duly seconded, it was,

Voted:—That the Secretary be and is hereby authorized and instructed to mail to the stockholders notice for the Annual Meeting substantially as follows:—

"Notice of Annual Meeting of Old Dominion Copper Mining and Smelting Company.

The Annual Meeting of the stockholders of this Company will be held on the second day of April, 1902, at 12 o'clock noon, at the office of the Company, Hudson County National Bank Building, Nos. 243 and 245 Washington Street, Jersey City, New Jersey (office of New Jersey Corporations' Agency) for the purpose of electing a Board of Directors and receiving and acting upon the reports of the officers, and for the transaction of such other business as may lawfully come before the meeting.

In accordance with the laws of the State of New Jersey, no stock can be voted on which has been transferred on the books of the Company, within twenty days next preceding this election.

The transfer books will be closed from March 13, 1902, to April 2, 1902, both days inclusive.

Dated Boston, Mass., March 5, 1902.

W. J. LADD, *Secretary.*"

No other business coming before the meeting, upon motion duly seconded, it was,

Voted:—To Adjourn.

Attest:

W. J. LADD, *Secretary.*

BOSTON, MASS., *March* 25, 1902.

A called meeting of the Directors of the Old Dominion Copper Mining and Smelting Company was held this day at Room 301 Sears Building, No. 199 Washington Street, Boston, Mass., at ten thirty o'clock a. m.

Present: Messrs. E. V. R. Thayer, W. J. Ladd, J. S. Bigelow, Edgar Buffum, and C. H. Bissell.

In the absence of the President, the Vice-President called the meeting to order, and at his request the Secretary read the record of the last Directors' meeting, which was approved.

462 Upon motion duly seconded, it was unanimously

Voted: That Article V of the By-laws is hereby amended to read as follows:

"At all meetings of the stockholders a majority in interest represented in person or by proxy shall constitute a quorum. The President, Vice-President, Treasurer, or in their absence any person named in writing by either of them shall call the meeting to order, and before any business is transacted shall appoint two or more inspectors of election who shall ascertain the amount of stock represented at the meeting in person or by proxy and their report shall be at once presented to the meeting. If a quorum is present, nominations for permanent Chairman and Secretary shall then be made and the temporary chairman shall present the various names to the meeting and call for a stock vote, and shall declare elected persons having a majority of the votes present.

"All meetings at which a quorum is present may be adjourned from time to time by a stock vote without further notice."

No other business coming before the meeting, upon motion duly seconded, it was

Voted: To adjourn.

Attest:

W. J. LADD, *Secretary.*

[EXHIBIT 2, OCTOBER 11, 1904. G. C. B.]

NEW YORK, *December* 1, 1895.

Old Dominion Syndicate, to Evarts, Choate & Beaman, Dr. No. 52 Wall Street.

1895.

July. To fee for advice and services relating to the matter of the purchase of the entire capital stock of the Old Dominion Copper Company of Baltimore City and the transfer of the Company's property to the Old Dominion Copper & Smelting Company, including consultation with and advice and services of Mr. Beaman during negotiation for purchase of stock from the estate of Michael Simpson and William Keyser and others and drawing contracts therefor; attendance of Mr. Beaman in Boston at time of making first payment, attendance of Mr. Evarts in Baltimore
463 upon turning over the management of the old company, drawing certificate of organization of new company, minutes of meetings of its stockholders and directors and other necessary certificates and papers connected with its organization, drawing deed from William Keyser to Leonard Lewisohn, drawing offers to convey property to the new company from Leonard Lewisohn and the old company, resolutions accepting the same and deeds to carry them into effect; procuring and attending to filing of copies of certificates in Arizona, attendance at meetings of the directors of the old and new companies, attending to transcribing minutes, and generally supervising and advising as to all matters involved in the transfer of the property from the old company to the new $7,500.00

To cash disbursements as per statement annexed 189.66

$7,689.66

Received Payment,

EVARTS, CHOATE & BEAMAN.

Statement of Disbursements re Old Dominion Syndicate.

Cert'd copies certificates organization	$3 00	
Recording " "	3 00	
Seal	3 50	
Filing Certf. increase capital stock	5 00	
" list officers &c	1 00	
" copy certif. organization in Arizona	5 00	
Copying and engrossing	22 98	
" minutes in book	9 00	
Telegrams	2 13	
2 copies New Jersey Corporation laws	2 00	
Express	1 45	
Commissioners' fees	3 00	
Expenses to & at Boston	15 00	
" " " Trenton	13 60	
Fee of Baltimore counsel on question of winding up the old company organization	100 00	
		$189 66

464 [EXHIBIT 3, OCTOBER 11, 1904. G. C. B.]

BOSTON, *January* 1*st*, 1896.

Old Dominion Copper Company to Edward C. Perkins, Dr.

To Professional Services from January 1, 1895, to January 1, 1896, as follows:

Stock of M. H. Simpson Estate.

Examination of the will of Michael H. Simpson and the Probate proceedings on the same.

Examination of the law and opinion that the Executors had a right to transfer the stock standing in the name of the Estate.

Examination of the law and opinion that three out of the four Executors could make the transfer.

Preparing a letter of notice from Leonard Lewisohn to Frank E. Simpson, Lucius W. Smith and William Butler that he had purchased the rights of J. Morris Meredith under a contract between him and the Executors relating to the sale of 17,857 shares of the stock of the Old Dominion Mining Company.

Serving this letter of notice on the various parties.

Consultations with Mr. Shepard in regard to the form of certificate to be issued by the Company.

Consultations with Mr. Nelson in regard to the appointment of an Assistant President and an Assistant Treasurer with powers of signing and countersigning certificates and signing dividend cheques, and opinion in regard to that matter.

General services and opinions in connection with the organization of this Company, including examination of the laws of New Jersey and Arizona, and the various organization papers.

New By-Laws.

Various consultations with Mr. Bissell and Mr. Nelson in regard to drawing new by-laws.

Careful examination of the old by-laws.

Examination of the general law and of the [illegible] of New Jersey and of the Articles of Organization in regard to changing the by-laws.

Opinion on the same.

465 Preparation of a set of new by-laws and consultations as to same.

Consultations with Mr. Nelson and Mr. Bissell as to certain changes in draft of by-laws.

Further examination of the law and re-drafting the by-laws as finally passed.

Consultation with Mr. Nelson and Mr. Bissell in regard to meeting of Directors and meeting of Stockholders in regard to what votes should be passed at such meeting.

Preparation of votes to be passed.

Consultation with Mr. Nelson in regard to stock standing in his name on the company's books and advice in regard thereto.

Consultations with Mr. Bissell in regard to signature of Directors and Stockholders to Records of Company.

Examination of contracts between Lewisohn Brothers and the Company. $1000.00.

Rec'd Paym't.

EDWARD C. PERKINS.

[Exhibit 4, October 11, 1904. G. C. B.]

Old Dominion Copper Co. in Account with Lewisohn Bros., Dr.

1895.			
Jan'y	18,	To cash, Traveling Expenses Mr. Leonard Lewisohn and Mr. Evarts	67 60
	29,	" cash Typewriter Expense	10 00
	30,	" Expense a/c Sundry telegrams to Mr. Hyams	50 00
July	8,	" Cash, Incorporation New Jersey, Evarts, Choate & Beaman	750. 00
	8,	" Cash Mr. Colquhoun, as per " voucher beneath	52 25
	9,	" " Deposited Market & Fulton Bank and remitted to T. Nelson.	1,000 00
		" Cash Services Old Colony as per vouchers herewith	175 00
	8,	" " Mr. Colquhoun and others as per vouchers herewith	195 60
	22,	" Cash Rubber Stamps	40

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Aug.	5.	To Cash L. Barta & Co., as per voucher herewith ..		6 50	
		" " Mr. Colquhoun as per voucher herewith.....		1,000 00	
Nov.	5.	" Wm. Keyser, cash paid by Baltimore Copper Smelting and Refining Co. for a/c Old Dominion Copper Co.' as per statement	8,938 00		
		Less amt. due, as per his letter dated June 20, '95.....	1,495 72		
			7,442 28		
		Overcharges collected	705 80	6,736 48	
	6.	" Cash. Examining Title Old Dominion Copper Co. and 9 days' expenses. M. J. Egan.....		350 00	
					10,393 83
		Due L. Bros			6 00
					10,399 83

L. Barta & Co., Printers.

144 and 148 High Street.
Boston Massachusetts, *July* 1, 1895.

In Account with Lewisohn Bros., Box 1247 New York City.

Passenger Elevator at No. 144 High Street.

June 3, 1 Vol. 300 Receipts 2 to p. with stub 1st & 3rd & extra lettering, $6.50.
Received Payment Aug. 6, 1895.

L. BARTA & CO.,
Per COLLAMORE.

Original.

$1000.00 Clifton, A. T., *6th Novr.*, 1895.

Received of Mess. Lewisohn Brothers One thousand Dollars in payment of services rendered in examining and reporting on the property of the Old Dominion Copper Co. of Globe, Arizona.

JAMES COLQUHOUN.

467 The Arizona Copper Company, *Ld.*

Jas. Colquhoun, Gen'l Supt.
J. G. Hopkins, Cashier.
L. Fraissinet, Store Manager.

CLIFTON, ARIZONA, *3rd July*, 1895.

Messrs. Lewisohn Brothers to James Colquhoun,

for expenses incurred in the examination of the Old Dominion Copper Co.'s property at Globe, Arizona, including part of expenses of 3 officers:—

Railroad tickets, Lordsbuy to Bowie	7 50
Breakfast at Thomas	2 50
Expenses at Globe	1 50
Team from Globe to Thomas	22 00
Pullman car	75
Breakfast at Thomas	3 00
Bill, Bowie Hotel	7 50
	$44 75
Add Railroad tickets, Bowie to Lordsbuy	7 50
	$52 25

The Arizona Copper Company, Ld.

Jas. Colquhoun, Gen'l Supt.
J. G. Hopkins, Cashier.
L. Fraissinet, Store Manager.

CLIFTON, ARIZONA, *October* 28, 1895.

Lewisohn Bros. in Account with J. Egan, Dr.

To examining the title to the Old Dominion Copper Mining Co., and to the passing of an opinion thereon	$300 00
Expenses for nine days	50 00
	$350 00

State of New Jersey, Department of State.

No. 6139. TRENTON, *July* 8, 1895.

Received from Messrs. Evarts, Choate & Beaman Seven hundred and fifty Dollars, the State fee for filing this day Certificate of Organization of Old Dominion Copper Mining and Smelting Company. $750.

Secretary of State.

468 The Arizona Copper Company, Ld.

Jas. Colquhoun, Gen'l Supt.
J. G. Hopkins, Cashier.
L. Fraissinet, Store Manager.

CLIFTON, ARIZONA, *July* 3*d*, 1895.

Messrs. Lewisohn Bros., New York.

DEAR SIRS: Enclosed herewith find bills as follows, which we have paid at request of Judge Egan.

May	2, G. M. Allison, Recorder	$122	25
"	24, C. M. Bruce, Sec'y	12	00
Jan'y	7, J. M. Ochoa, Recorder	61	35
		$195	60

for which please send us your draft to order.

I have, as requested, asked Judge Egan to send his own bill direct to you.

Yours truly,

JAMES COLQUHOUN,
Gen'l Sup't.

GLOBE, ARIZONA, *May* 25, 1895.

Col. M. J. Egan to G. M. Allison, Co. Recorder.

To Abstract of Title, The O. D. Copper Co.'s property

Noting 106 Muniments of Title, at 75c	$79	50
110 folios, at 20c	$22	00
Searching Records 20 years, at 1.00	$20	00
Certificate and Seal	$	75
	$122	25

Received Payment.

G. M. ALLISON,
Co. Recorder.

PHŒNIX, ARIZONA, *May* 24, 1895.

Mr. M. J. Egan to C. M. Bruce, Secretary of the Territory of Arizona, Dr.

Four Certificates of Filing $12

Paid.

CHAS. M. BRUCE,
By F. B. DEVEREUX, *Secretary.*

469 FLORENCE, ARIZ., *June 7th*, 1895.

Chas. T. Martin to J. M. Ochoa.

Abstract To Alice Mine	
21 years' search	21 00
16 Monuments	12 00
30 Folios	6 00
Certificate	75
Abstract Globe Mine	
17 years' search	17 00
3 Monuments	2 25
8 Folios	1 60
Certificate	75
	$61 35

Jose M. Ochoa, G. S. H. Drachman, Tucson, Ariz.

Rec'd Florence, Ariz., June 26th, 1895.

JOSE M. OCHOA.

[EXHIBIT 5, OCTOBER 11, 1904. G. C. B.]

Office of Evarts, Choate & Beaman, No. 52 Wall Street.

NEW YORK, *Apl.* 28, 1896.

A. S. Bigelow, Esq., Prest. Old Dominion Copper M. & S. Co., Boston, Mass.

DEAR SIR: We learn from Mr. Brent of Baltimore that he has obtained an order discharging the Receiver of the Old Dominion Copper Co. of Baltimore City and that this completes all that needs to be done in the matter of the formal dissolution of the Company. Mr. Brent encloses to us his bill for services and disbursements in the matter amounting to $344.34 which seems to us to be satisfactory.

Yours very truly,

EVARTS, CHOATE & BEAMAN.

470 [EXHIBIT 6, OCTOBER 11, 1904. G. C. B.]

Old Dominion Copper Mining and Smelting Company.
199 Washington St., Room 303.

Please address P. O. Box 5104.

Oct. 9, 1905
Mr. Nelson said call this unsold.

BOSTON, MASS., *September* 10, 1895.

You are hereby notified that your subscription to 100 shares of the Capital Stock of the Old Dominion Copper Mining and Smelting

Company, at $25.00 per share, amounting to $2500, is payable on Thursday, September 19, 1895. Stock Certificates are now ready and will be issued to subscribers upon the payment by them of the amounts due.

Checks for payment should be drawn on New York or Boston Banks, payable to my order.

THOMAS NELSON,
Treasurer.

To O. N. PIERCE, Esq., Grinnell Mfg. Co., New Bedford, Mass.

[*Over.*]

There was a misunderstanding as to this stock being in my name. I do not care for it.

Yours truly,

O. N. PIERCE.
10/5 95

I hereby certify that the foregoing is a true copy of the original deposition of Charles Altmiller taken before me in the case of Old Dominion Copper Mining & Smelting Co. v. Frederick Lewisohn et al., pending in the Circuit Court of the United States for the Southern District of New York, and of the exhibits annexed thereto.

[SEAL.] HOWLAND TWOMBLY,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

471 OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET.
BOSTON, *July* 19, 1905.

Deposition of William Howard Reed.

WILLIAM HOWARD REED, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by E. F. McClennen, counsel for the plaintiff, deposes and says,—

Q. 1. What is your full name?
A. William Howard Reed.
Q. 2. And you reside where?
A. Brookline, Mass.
Q. 3. You are in business in Boston, Mass.?
A. Yes, sir.
Q. 4. In 1885 what was your business, Mr. Reed?
A. Wool broker.
Q. 5. I show you a paper marked "Exhibit 6," of March 24, 1903, of the deposition of Mr. Bigelow in this case——

A. Excuse me, is the date 1903?

Q. 6. No; being an undated paper in 1895. I call your attention to the words, "W. H. Reed, $5,000;" is that in your handwriting?

A. Wool broker?

Q. 7. Have you any recollection of when you signed that paper?

A. No, sir.

Q. 8. Have you any recollection of where you signed that paper?

A. No, sir.

Q. 9. I now show you a paper marked "Exhibit 10, March 27, 1903," of the deposition of Mr. Bigelow, being a paper dated July 18, 1895, and call your attention to the words and figures, "William H. Reed, 400:" is that signed by you?

A. Yes, sir.

Q. 10. Have you any recollection of when and where you signed that?

A. No, sir.

Q. 11. Will you refer to your check stubs and inform us whether, in the summer of 1895, you gave any checks to Albert S. Bigelow?

Mr. HEMENWAY: Objected to as immaterial, incompetent, and irrelevant. This line of testimony is objected to as though the objection was repeated to each question, the objection being in the same general form.

A. Yes, sir; May 27, payment of $700.

Q. 12. That was by a check to whose order?

A. On my stub, "A. S. Bigelow."

Q. 13. And for what was that payment made?

A. I have on my stub, "First payment on subscription of Old Dominion Syndicate, $700."

Q. 14. Now what is the next?

A. June 19, 1895, "Second assessment on Dominion, $1437.91."

Q. 15. That check was made payable also to the same or-
472 der?

A. Presumably; that is the way it is on the stub.

Q. 16. Now the next payment?

A. The next payment, July 16, 1895, "A. S. Bigelow, for balance of subscription on Dominion Copper, $2886.58. This is the total subscription of $5,000 with interest added at 5% from May 28 to July 17." I presume on the balance, but that I don't know.

Q. 17. For convenience, that makes what total by the three checks?

A. That makes the total by the three checks, $5024.49.

Q. 18. Did you during 1895 give to Mr. Nelson any check?

A. Yes, sir.

Q. 19. And when was that, and for what amount, and how was it drawn?

Mr. HEMENWAY: This is also objected to for the same reason as stated.

A. "September 19, 1895. Thomas Nelson, Treasurer, subscription for 200 shares O. D. copper, $5,000."

Q. 20. It appears, Mr. Reed, from the Exhibits 25 and 26 of the deposition of Mr. Hyams, that there was issued to you in September 200 shares, and 400 shares additional, on certificates therefor, of the stock of this company; have you any recollection about the receipt of those?

A. No, sir.

Q. 21. You mean you have no recollection one way or the other about them?

A. No, sir.

Q. 22. Prior to making your first subscription on this Exhibit 6, which we have referred to, had you had any conversation with any one with reference to subscribing?

Mr. HEMENWAY: Objected to as immaterial.

A. I presume that I had.

Q. 23. Do you mean by that that you have no definite recollection of that conversation?

A. No, sir.

Q. 24. Do you remember whether it was stated to you by any one what the terms were by which you were subscribing?

A. No, sir.

Q. 25. Do you remember, as a matter of fact, how many shares of stock you received for your $5000 subscription; that is, your first subscription on Exhibit 6?

A. No, sir.

Q. 26. Did you at any time have any conversation with Mr. Bigelow or Mr. Lewisohn relative to the company or the syndicate?

A. No, sir.

Q. 27. Were you informed by them, or either of them, at any time, that they had taken, or intended to take, any profits for the promotion of this company, or in any other way?

Mr. HEMENWAY: Objected to as leading and immaterial and incompetent?

473 A. No, sir.

Q. 28. Did you at any time in 1895 receive from any source any information relating to the question of any profit in connection with the promotion of this corporation?

Mr. HEMENWAY: Objected to as immaterial, incompetent, and irrelevant.

A. Not to my recollection.

Q. 29. Putting it specifically, do you recollect of having heard from any source in 1895 that Mr. Bigelow or Mr. Lewisohn, or any one connected with them, had taken, or intended to take, 50,000 shares of the stock of the company as a profit, or for their services?

Mr. HEMENWAY: Objected to as immaterial and incompetent.

A. No, sir.

Q. 30. Do you recall having heard anything relating to the general subject matter to which my last question refers?

Mr. HEMENWAY: Objected to as immaterial.

A. No, sir.

Q. 31. Have you at any time been informed of the fact that any profit was taken by the promoters of the corporation?

Mr. HEMENWAY: Objected to as immaterial, incompetent, and irrelevant.

A. No, sir. How do you mean in regard to that; simply newspaper talk?

Q. 32. Well, I mean anything that has come to your attention recently.

A. Directly?

Q. 33. Yes.

Mr. HEMENWAY: Objected to as immaterial.

A. No, sir; except through a newspaper.

Q. 34. Do you recall when that was?

A. The newspaper?

Q. 35. Yes.

A. No, sir; I do not.

Q. 36. Well, could you fix at all the time; whether it is recently or not?

A. No; I saw an account,—I think it was a decision of the court in a newspaper.

Q. 37. That is, a decision in this very case?

A. Yes, sir.

Q. 38. That was some time during the current year?

A. Yes, I should say so.

Q. 39. And that, I understand you, was the first intimation you had of this?

A. Yes, sir.

Mr. MCCLENNEN: That is all.

[Counsel for the defendant reserves the right of cross-examination, and will notify counsel for the plaintiff within a week whether
474 they desire such cross-examination.]

[Counsel for the plaintiff agrees to this, but does not stipulate to produce the witness, and the deposition shall be considered as closed if he is not produced.]

WILLIAM HOWARD REED.

Subscribed and sworn to before me this 12th day of September, 1905.

GEORGE C. BURPEE,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *July* 19, 1905.

Deposition of Samuel N. Brown.

SAMUEL N. BROWN, being first duly sworn by Howland Twombly, q., in answer to interrogatories propounded by Louis D. Brandeis, unsel for the plaintiff, deposes and says,—

Q. 1. Your full name, Mr. Brown?
A. Samuel N. Brown.
Q. 2. And you reside in Boston?
A. Yes.
Q. 3. And your occupation?
A. Merchant and manufacturer.
Q. 4. What is your business?
A. Scale business.
Q. 5. Fairbanks Scale Company?
A. Yes, sir.
Q. 6. And was that your business in 1895?
A. Always has been.
Q. 7. How many years?
A. Sixty-two.
Q. 8. I call your attention to the paper marked "Exhibit 3," of arch 24, 1903, put in evidence in connection with the deposition Albert S. Bigelow in this cause, and ask you whether the "Samuel Brown, $10,000," which appears on that paper is in your hand-iting?
A. It is.
Q. 9. Can you recall when your signature was put to that paper?
A. No.
Q. 10. Or where you signed it?
A. No.
Q. 11. Do you recall whether or not prior to the signing of your name to that paper you had any conversation with y one in regard to the Old Dominion Syndicate or the proposed ganization of the Old Dominion Mining Company?

Mr. HEMENWAY: Objected to as incompetent, irrelevant, and immaterial.

A. I will answer as nearly as I can remember. Mr. Bigelow came me and asked me if I would like to join in a new copper company, d I presume this was the name of it at that time,—the Old Dominion Copper Company, whatever it may be, and I said "Yes," and finally settled with him upon agreeing to take $10,000 of the interest in it.
Q. 12. Now have you stated all that you remember of that conversation with Mr. Bigelow?
A. Yes, except that I have an impression that he said that most of eir business heretofore in copper had been in Montana, and he was clined to go into this Old Dominion region on account of being a

little different sort of ore; but that is a very indefinite recollection. That is all I remember about it.

Q. 13. Do you recall whether anything was said in that interview by Mr. Bigelow as to whether or not he, or he and Mr. Lewisohn, were to have any compensation, or to take any special part of the stock for their services in promoting the enterprise?

Mr. HEMENWAY: Objected to.

A. I don't think anything was ever said about it at all; I have no recollection whatever of anything of that sort.

Q. 14. Did you have any conversation with Mr. Bigelow about that time, shortly after the signing?

A. Not that I recollect of.

Q. 15. Now you subsequently paid your contribution of $10,000?

A. Yes, sir.

Q. 16. Can you give us the dates?

A.—

May 27, 1895	$1,400.00
June 19, 1895	2,875.83
July 15, 1895	5,772.35
Making in all	$10,048.18

The $48.18, I take it, included interest; I probably had deferred payments.

Q. 17. Did you subsequently receive certificates of stock representing your interest in the Old Dominion Copper Mining & Smelting Company?

A. Yes, sir.

Q. 18. Have you anything to show when you received those certificates?

A. I don't recollect them at all.

Q. 19. Can't you recall whether or not at any time you heard anything from Mr. Bigelow or from Mr. Lewisohn in regard to
476 their taking a part of the stock of that company as compensation for their services for promoting it?

Mr. HEMENWAY: Objected to as immaterial, incompetent, and irrelevant.

A. No.

Q. 20. Can you recollect whether at any time you heard, whether from them or any one else, that they had taken such stock?

A. No, except as I have seen it in the papers of late.

Q. 21. What do you mean "of late;" within what period?

A. Since the matter was talked about.

Q. 22. That is, since this suit was in litigation?

A. Yes, sir.

Q. 23. Since the suit was begun?

A. I presume it was since then; it was quite lately, in the papers,—only as I have seen it in the newspapers.

Q. 24. And that is within the last year or two?

A. I should say so.

Q. 25. Are you able to state to whom these checks were paid?

Mr. HEMENWAY: Objected to as immaterial.

A. No, I cannot say now.

Q. 26. That is, you have no memoranda here that would enable you to tell?

A. No, I don't think the checks are in existence, but I am not sure; I don't know where to find them.

Q. 27. From what source have you taken this memorandum which you have here?

A. My memorandum book.

Q. 28. Of that date?

A. At the time that those were made.

Q. 29. Is that memorandum book here?

A. Yes. That first one, $1400, is there.

[Witness shows counsel memorandum book.]

Mr. HEMENWAY: Counsel objects to the admission of the memorandum book as being incompetent and irrelevant testimony, to be used as refreshing the witness' memory.

Q. 30. I call your attention——

A. Do you want to see the check stubs?

Q. 31. Yes.

A. The first one, I think, was on the Merchants Bank, and I cannot find that, but this second one is here.

Q. 32. Will you read what appears on the stubs of the check book?

Mr. HEMENWAY: Objected to as immaterial.

A. "June 19, 1895. $2875.83." The check book says, "A. S. Bigelow for Old Dominion Copper Co."

Q. 33. Are you able to say from that stub to whom the check was made payable?

A. Not absolutely, but I should think, from the writing of it, it was A. S. Bigelow—made to A. S. Bigelow; but I am not sure about it.

477 Q. 34. I call your attention now to Exhibit No. 10, dated March 27, 1903, introduced in evidence in connection with the deposition of A. S. Bigelow in this cause, and will ask you whether the following on that paper, "S. N. Brown, 400," is in your handwriting?

A. No, it is not.

Q. 35. Do you know in whose handwriting it is?

A. I do not.

Q. 36. Do you remember whether or not you made any subscription to the Old Dominion enterprise other than the $10,000 which you have testified to?

Mr. HEMENWAY: Objected to as immaterial.

A. No; have no recollection of any.

Q. 37. Do you remember whether or not you took all of the shares that you had a right to take under that subscription?

A. I find on that memoranda 800 shares; and as I have sold 600 and have 200 left, that verifies it.

Q. 38. I will call your attention, Mr. Brown, to a letter of August 19, 1895, from you to Mr. Bigelow, which appears on page 106 of the testimony of Mr. Bigelow in this cause, and a reply to that letter under the date of August 21, and your reply to Mr. Bigelow under date of August 21, 1895, and ask you whether or not those letters were written by you?

A. Yes.

Mr. BRANDEIS: That is all.

Cross-examination.

(By Mr. HEMENWAY:)

X 39. Let me see that memorandum book from which you have testified.

A. [Witness handing book to Mr. Hemenway] I have turned the page down there in three places.

[Mr. Hemenway examines the memorandum book presented by Mr. Brown.]

Mr. HEMENWAY: That is all.

SAMUEL N. BROWN.

Subscribed and sworn to before me this 16th day of September, 1905.

GEORGE C. BURPEE,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

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OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *July* 19, 1895.

Deposition of Richard Fairfax Bolles.

RICHARD FAIRFAX BOLLES, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by Louis D. Brandeis, counsel for the plaintiff, deposes and says:

Q. 1. Your age, residence, and occupation?

A. Forty-nine; stockbroker; my legal residence is Cohasset.

Q. 2. And your business is in Boston?

A. Yes, sir.

Q. 3. I show you the paper marked "Exhibit 6," introduced in evidence as an exhibit, dated March 4, 1903, in connection with the testimony of Albert S. Bigelow, in this cause, and call your attention

to the signature "Richard F. Bolles, $6,000," and ask you whether that is your signature?

A. It is.

Q. 4. Are you able to state when you signed that paper?

A. No; I cannot.

Q. 5. Are you able to state where you signed it?

A. No.

Q. 6. Can you state whether or not previously, or about the time of signing the paper, you had any conversation with Albert S. Bigelow?

A. No.

Q. 7. Can you state whether or not you had any conversation at or about that time with Leonard Lewisohn?

A. Never.

Q. 8. Do you mean by that that you do not recall having any conversation with Mr. Bigelow or Mr. Lewisohn, or that you know that you did not?

A. I think I never saw Mr. Lewisohn but once in my life, and that had nothing whatever to do with any business; I merely happened to meet him.

Q. 9. You were acquainted with Mr. Bigelow?

A. Yes.

Q. 10. And had been long previously to signing that paper?

A. Yes.

Q. 11. Had you any conversation with Mr. Bigelow with relation to your subscription?

A. Not that I recollect.

Q. 12. Did you make the payment called for by the paper?

A. I did; that is, I presume I did; I cannot show you the stub.

Q. 13. Did you receive the certificates of stock?

A. Yes, I think I did.

Q. 14. Can you recall whether, at or about the time that you received the certificates of stock under this subscription, you had information from any source that Lewisohn and Bigelow were to take any part of the stock in the Old Dominion Copper Mining & Smelting Company as compensation for their services?

479 Mr. HEMENWAY: Objected to as incompetnet, immaterial, and irrelevant.

A. I never heard of it.

Q. 15. You say you never heard of it?

A. No, not on or about that time.

Q. 16. Do you mean that you did hear of it subsequently?

A. Afterwards; some time afterwards.

Q. 17. Some time after you had paid your money and received your certificates?

A. Yes, sir.

Q. 18. How long after?

Mr. HEMENWAY: Objected to as immaterial, incompetent, and irrelevant.

A. No; I cannot tell how long.

Q. 19. Do you recall whether or not your subscription was put upon that paper at the invitation of any person?

Mr. HEMENWAY: Objected to as immaterial, incompetent, and irrelevant.

A. I think Matthew Luce called my attention to it.
Q. 20. Mr. Luce died some years ago?
A. Yes, sir, three years ago.
Q. 21. Do you recall what Mr. Luce said in regard to the matter?

Mr. HEMENWAY: Objected to as immaterial, irrelevant, and incompetent.

A. No, I cannot tell exactly, except the company was to be gotten up, and I was invited to subscribe.
Q. 22. What company was to be gotten up?
A. The Old Dominion Mining Company, or the mine was to be purchased that I was invited to underwrite.
Q. 23. Whether anything was said about forming a corporation to take over the mine?
A. I don't remember about that.
Q. 24. Do you recall whether or not, at the time that you made your subscription, you were told that the mine was to be purchased?

Mr. HEMENWAY: Objected to as immaterial, incompetent, and irrelevant.

A. I don't know.
Q. 25. Are you able to fix the date of your first payment?
A. No.
Q. 26. Would you be able to give us that from books and furnish it to the stenographer later?
A. I might possibly have my check stub, and if you could give me the dates I could look that up and see. That is all I can say about that. If you will give me the dates I will see if I have check stubs, and that is all could give you. I have no ledger account.

Mr. BRANDEIS: We will furnish you with the probable dates, and if you will look that up, and you can furnish it later to the stenographer.

480 Cross-examination.

(By Mr. HEMENWAY:)

X 27. Do you remember, Mr. Bolles, just how many shares of stock you got for this subscription to the Old Dominion Syndicate?
A. What do you mean?
X 28. How many shares of stock did you get?
A. I could not tell that from memory; I suppose I received what I subscribed for.
X 29. You have no memory whatever about it, as a matter of fact?
A. No. I don't quite understand your question, Mr. Hemenway.
X. 30. It appears by your subscription here that it was $6000,

and it says, in the heading, "We, the undersigned, propose to form a syndicate to be called the Old Dominion syndicate, and we hereby agree to pay A. S. Bigelow the sums set against our respective names." Now you paid that sum of $6,000?

A. Yes.

X 31. Now the question I asked is, eventually how many shares of stock in a corporation subsequently formed did you receive for your $6000?

A. Exactly what I subscribed for, $6000, I presume.

X 32. That doesn't answer the question. You simply subscribed $6000 to the syndicate, but it does not state here what you were to get for the $6000.

A. I could not tell, except that I received the par of my subscription in stock.

X 33. Did you not receive double your par?

A. I underwrote so much; I understand I underwrote $6000, and there was a commission.

X 34. Here is where you wrote your signature and $6000. Now what I want to know is what you received for your $6000. If you can determine from any memoranda you have,—and as you are going to look up to see when you paid your $6000 by check, you might at the same time look that up.

A. I will look and see, certainly.

Redirect examination.

(By Mr. BRANDIES:)

Q. 35. I call your attention, Mr. Bolles, to another paper, introduced as Exhibit 10, dated July 18, 1895, and to the name, "Richard F. Bolles, 500 shares," on that paper: is that in your handwriting?

A. Yes, sir.

Q. 36. I show you herewith a certificate, No. 203, for 480 shares, to Richard F. Bolles, and appearing to be endorsed by Richard F. Bolles under date of September 28, 1895, and ask you whether that is your signature?

A. Yes, sir.

Q. 37. Do you recall whether or not that certificate of 480 shares is the certificate representing the amount of stock received by you on your subscription paper, first named, of $6000?

A. I should say it was.

481 Q. 38. The subscription stock being issued to you at the rate of $12.50 a share?

A. Yes, I should say it was; that is what it should be.

[On July 20, 1905, Mr. Bolles was recalled, and in reply to interrogatories by Mr. McClennen further deposed and said:]

Q. 39. Since the early part of your testimony have you looked over your check stubs?

A. I have.

Q. 40. From them will you tell me the dates, and the amounts of payments which you made in connection with the Old Dominion

Syndicate, and in connection with your subscription to the Old Dominion stock?

A. On the 28th day of May, 1895, I paid $840; on the 18th day of June I paid $1725. The first one is a Metropolitan Bank check, and this, the second one, is a National Bank of the Republic check. On August 22, 1895, I paid $3481.57. There was one more payment: in September, on the 20th of September, 1895, I paid $6500.

Q. 41. That makes a total, apparently, of $12,547.07?

A. Well, I have not added it.

Q. 42. Your subscription to the syndicate paper was $6000?

A. $6000.

Q. 43. Your subscription to the paper of July 18 was 500 shares?

A. Five hundred shares at $25 a share.

Q. 44. You received in all, including what you said in your first testimony, a certificate of the company which I now show you, No. 203, for 480 shares in your name?

A. Yes.

Q. 45. And certificate No. 90 for 260 shares in your name?

A. Yes.

Q. 46. And those two cretificates are endorsed by you?

A. That is my signature.

Cross-examination de bene:

[In answer to cross-interrogatories put de bene by Mr. Hemenway, of counsel for the defendants, the witness further deposes and says:]

X 47. The first payment of $840 was made to A. S. Bigelow by a check payable to A. S. Bigelow?

A. Yes.

X 48. The second payment of $1725.50 was made June 18, 1895, to A. S. Bigelow?

A. Yes.

X 49. The third payment of $3481.57 was by check made payable to A. S. Bigelow?

A. Yes, on August 22, 1895.

482 X 50. And the payment of $6500 on September 20, 1895, was also made payable to A. S. Bigelow?

A. Yes.

Mr. HEMENWAY: That is all.

RICHARD FAIRFAX BOLLES.

Subscribed and sworn to before me this 16th day of September, 1905.

GEORGE C. BURPEE,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *July* 19, 1905.

Deposition of Charles R. Batt.

CHARLES R. BATT, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by Louis D. Brandeis, Esq., counsel for the plaintiff, deposes and says,—

Q. 1. Your full name?
A. Charles R. Batt.
Q. 2. You are president of the National Security Bank of Boston?
A. I am.
Q. 3. And were president of that bank in 1895, were you?
A. No,—cashier.
Q. 4. Were you a subscriber to the Old Dominion Syndicate?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I should not be able to answer that I was or was not from my memory.
Q. 5. Are you able to testify from any memoranda which you have?
A. Well, I did have some stock, I find, and I did pay some money.
Q. 6. To whom did you pay money?
A. I cannot tell.
Q. 7. Are you able to state when you paid money?
A. I cannot find even when I paid the whole of it, but I think I paid some in June, and some July 19.
Q. 8. I show you herewith certificates numbered 78 and 79, each for 50 shares in the name of Charles R. Batt, and certificate No. 152 for 100 shares in the name of Charles R. Batt, all these certificates being dated Septemebr 27, 1895, and ask you whether the signatures on those certificates are in your handwriting?
A. They are: that is my name, and my writing.
483 Q. 9. I call your attention to Exhibit No. 5, introduced as evidence in this cause, under date of March 24, 1903, as a part of the testimony of A. S. Bigelow, and call your attention to the name on that of "C. R. Batt, by H. H. S., $2500," and ask you in whose handwriting that is?
A. I could not swear to it, I could only guess. I have no doubt about it; I should say Horace H. Stevens wrote it for all these names that are given. H. H. S. stands for Horace H. Stevens, and the nearest I can guess is that Horace H. Stevens suggested that I should do something or other, which I did.
Q. 10. That is, you mean by "doing something or other," making an investment in this syndicate?
A. That is right, whatever it may be.
Q. 11. And these 200 shares of stock which appear in your name under date of September 27, 1895, was stock received by you in pursuance of that subscription?

A. It might or might not have been. I have no reason to doubt it. You might show me somewhere that I bought some stock, but I don't know.

Q. 12. You do know you made some payments in June and July preceding the September when you got the certificates?

A. I do.

Q. 13. What payments do you find you made?

A. I see a payment of $368.94.

Q. 14. What is the date of that?

A. That, I think, is June 24, and July 19, $1443.68. In running my eye over it I do not find anything else. Of course I know I paid for anything I had, but that makes only about $1800.

Q. 15. The balance of the $2500 you do not find any memorandum of?

A. No. And then I find I sold some within twelve days.

Mr. HEMENWAY: That is objected to as inadmissible.

Q. 16. Now I ask you whether or not you had any conversation with A. S. Bigelow at any time?

A. Never.

Q. 17. In regard to this matter?

A. Never.

Q. 18. Or with Leonard Lewisohn?

A. Never.

Q. 19. Or with anybody connected with the promotion of this company other than Mr. Stevens, if he was connected?

A. No, sir; I have no remembrance of anything, or even of any talk with Mr. Stevens.

Q. 20. Do you recall being informed at or about the time you subscribed, or when you paid in your money under this subscription, that A. S. Bigelow or Leonard Lewisohn, or those associated with them, were to take any amount of this stock as compensation for their services in promoting the enterprise?

Mr. HEMENWAY: Objected to as irrelevant, immaterial, and incompetent.

A. I have no remembrance of anything about it.

Q. 21. Did you at any time before testifying here, hear
484 that Bigelow or Lewisohn had taken any part of the stock of this company as compensation for their services in promoting the enterprise?

Mr. HEMENWAY: Objected to as immaterial, irrelevant, and incompetent.

A. Nothing more than a vague reading of something in the paper.

Q. 22. How recently was that reading?

A. I am sure I don't know, it was not of enough moment to me to impress my mind.

Q. 23. Well, I mean was it within a month, or a year, or two years?

A. Perhaps you might say two months.

Q. 24. Within two months?

A. Yes; but it is all indefinite hazy; it meant nothing to me, so I have no memory about it.

Q. 25. Is what you refer to some report of a decision, or reference to a decision, in the case of the Old Dominion Copper Mining & Smelting Company against Bigelow?

A. I really cannot tell you; I don't know anything about it. I do remember indistinctly that there was something about a suit of Mr. Bigelow about Old Dominion. That is all the interest I took in it, and all I cared about it, and I forgot it.

Q. 26. And that is what you refer to now as something you saw within two months?

A. Yes, I think so.

Mr. BRANDEIS: That is all, Mr. Batt.

Mr. HEMENWAY: No questions.

CHAS. R. BATT.

Subscribed and sworn to before me this 6th day of September, 1905.

GEORGE C. BURPEE,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET, BOSTON, *July* 19, 1905.

Deposition of W. B. Mossman.

W. B. MOSSMAN, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by E. F. McClennen, counsel for the plaintiff, deposes and says:

485 Q. 1. What is your full name?

A. W. B. Mossman.

Q. 2. You reside where?

A. In Brookline.

Q. 3. And what is your business?

A. Merchant.

Q. 4. What was your business in 1895?

A. The same.

Q. 5. And your place of business was in Boston?

A. Yes.

Q. 6. I show you, on Exhibit 10, of March 27, 1903, to Mr. Bigelow's deposition, the subscription paper of July 18, 1895, the words and figures, "W. B. Mossman, 100," is that in your handwriting?

A. I should judge so.

Q. 7. And do you recall paying the sum of $2500 in the fall of 1895?

A. I do not recall it.

Q. 8. Do you remember, on seeing that signature, that you did subscribe to stock of this company?

A. This signature here?

Q. 9. Yes.

A. That signature, I think, is mine.

Q. 10. Do you remember when you signed that, or where?

A. No. I have nothing by which I could find any facts in regard to it; so much so that I denied that I had subscribed to it until you proved the contrary to me.

Q. 11. Do you remember having any conversation with Mr. Bigelow or Mr. Lewisohn with reference to the matter?

A. No, I do not.

Q. 12. Were you ever informed by them that they had taken, or proposed to take, any profit in connection with the promotion of this corporation?

Mr. HEMENWAY: Objected to as irrelevant, immaterial, and incompetent.

A. No.

Q. 13. Did you ever learn that fact from any source?

A. No.

Q. 14. You have this morning seen here a certificate for 100 shares issued in September, 1895, to you?

A. Yes, sir, whatever the date was.

Q. 15. And the endorsement on it is in your handwriting?

A. Yes.

Q. 16. And from that it is apparent to you that you received 100 shares?

A. Yes, that is right.

Q. 17. You have no means at present of stating how much you did in fact pay?

A. No, I have no memory about it.

Mr. MCCLENNEN: I think that is all.

Mr. HEMENWAY: No cross-examination.

W. B. MOSSMAN.

Subscribed and sworn to before me this 6th day of September, 1905.

GEORGE C. BURPEE,
Notary Public.

486 *Stipulation.*

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET, BOSTON, *July* 19, 1905.

Deposition of Charles L. Davenport.

CHARLES L. DAVENPORT, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by E. F. McClennen, Esq., counsel for the plaintiff, deposes and says:

Q. 1. What is your full name?
A. Charles L. Davenport.
Q. 2. And you reside where?
A. In Malden.
Q. 3. Your place of business is where?
A. Boston.
Q. 4. What is your business?
A. The salt business.
Q. 5. What is it at the present time?
A. The salt business.
Q. 6. On this paper, marked "Exhibit 10" in the deposition of Albert S. Bigelow, on March 27, 1903, I show you the words, "C. L. Davenport, 120:" is that your handwriting?
A. No, sir; it is not.

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

Q. 7. Do you know whose handwriting it is?
A. No, I do not.
Q. 8. Do you have any recollection of subscribing to the stock of the Old Dominion Copper Mining & Smelting Company?
A. All my transactions were done through Mr. Fitzgerald.
Q. 9. He is a broker?
A. Yes. I think that was done under Leland, Towle & Company after Mr. Fitzgerald went there.
Q. 10. I show you a certificate of stock of the Old Dominion Copper Mining & Smelting Company, No. 100, for 120 shares, September 19, 1895: is the endorsement upon that in your handwriting?
A. It is.
Q. 11. Do you recall that you received 120 shares?
A. Yes, I do.
Q. 12. Do you remember what amount you paid therefor?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

487 A. Twenty-five dollars a share.
Q. 13. In connection with your subscription and the receipt of the stock, did you have any talk with Mr. Bigelow or Mr. Lewisohn?
A. I never saw either of them in my life.
Q. 14. Did you, from any source, hear anything in 1895 with respect to either Mr. Bigelow or Mr. Lewisohn, or any one, taking promoter's profits?

[Counsel for defendants objects to the question as incompet irrelevant, and immaterial.]

A. I never heard of it.

Q. 15. Specifically did you hear, from any source, that Mr. B low or Mr. Lewisohn, or any one associated with them, were go to take, or had taken, 50,000 shares, or any other number of sha as promoter's profits?

[Counsel for defendants objects to the question as incompet irrelevant, and immaterial.]

A. I did not.

Q. 16. Or that they intended to or had taken such number, any other number, of shares for their services as promoters?

[Counsel for defendants objects to the question as incompet irrelevant, and immaterial.]

A. I did not.

Q. 17. When, if at all, did you first hear of anything of this k before this hearing today?

[Counsel for defendants objects to the question as incompet irrelevant, and immaterial.]

A. I think I read it in the paper, as near as I can recall.

Q. 18. When was that?

A. It might have been within a year; I did not pay much att tion to it, and did not fix my mind on it.

Q. 19. Were the things which you read in the paper, and to wh you refer, some references to the suit which has been brought?

[Counsel for defendants objects to the question as incompet irrelevant, and immaterial.]

488 A. My impression is that they were.

[No cross-examination.]

CHARLES L. DAVENPORT

Subscribed and sworn to before me this 6th day of Septemb 1905.

GEORGE C. BURPEE,
Notary Public

Stipulation.

It is agreed that the deposition of this witness shall be tak stenographically; also, that either party may use this deposit when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *July* 19, 1905.

Deposition of Homer V. Snow.

HOMER V. SNOW, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by E. F. McClennen, Esq., counsel for the plaintiff, deposes and says.—

Q. 1. What is your full name?
A. Homer V. Snow.
Q. 2. You reside where?
A. 1661 Beacon street, at the present time.
Q. 3. What is your business?
A. Real estate.
Q. 4. In 1895 what was your business?
A. I was out of business then, sir.
Q. 5. You then resided where?
A. I think at the Nottingham Hotel, in 1895. There was one year I was away from there, in Newbury street; I went back the next year; I forget what year that was.
Q. 6. I show you Exhibit 10 in the deposition of Albert S. Bigelow, March 27, 1903, being a subscription of July 18, 1895, the words "Homer N. Snow, 500:" is that your handwriting?
A. No, sir; I should say not.
Q. 7. That is not your handwriting. Do you recall having authorized a subscription for that amount?
A. Yes. My recollection of the affair, which is very meagre at the present time—I had not thought of it until Mr. Smith called my attention to the fact that I subscribed for this stock through Joseph G. Ray——

[Counsel for defendants objects to the answer as not responsive.]

489 THE WITNESS: I am not sure whether the transaction was completed through Mr. Ray or taken up at the office; but my impression is I paid Mr. Ray for the stock. I have no data to substantiate my statement.
Q. 8. That is simply an impression?
A. That is all.
Q. 9. I show you a certificate of stock of the Old Dominion Copper Mining & Smelting Company, No. 141, for 500 shares, dated September 19, 1895; is the endorsement upon that in your handwriting?
A. That is made in my handwriting, yes, sir.
Q. 10. Do you recall that you did get 500 shares of the stock of the company? A. Yes, sir; I have no doubt about it.
Q. 11. Do you recall what you paid for it?
A. My impression is $25 a share, the par value of the stock.
Q. 12. Mr. Ray is dead?
A. He is dead; yes, sir.
Q. 13. It appearing from the deposition of Mr. Altmiller, the treasurer of the company in this case, that on the stub of the check

book of the company, on September 19 a check of H. V. Snow for $12,500 was deposited for 500 shares, would that affect at all your testimony as to whether you gave the check to Mr. Ray?

A. No, sir; for I really cannot remember whether I gave the check to Mr. Ray. It does not state whether Mr. Ray's endorsement is on that check?

Q. 14. No; it simply appears it was a check you signed.

A. I might have passed the check to Mr. Ray, and I might have passed it to Mr. Bigelow; I cannot say.

Q. 15. In connection with this subscription and the receipt of this stock, did you have any talk with Mr. Bigelow?

A. I do not think so. I think as far as I can remember the entire transaction was with my friend, Mr. Ray, who advised me to buy the stock.

Q. 16. Did you have any talk with Mr. Lewisohn?

A. No; I never met Mr. Lewisohn.

Q. 17. Did Mr. Bigelow say anything to you at any time with reference to taking any promoter's profits or shares for services in forming the corporation?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. Never in the slightest degree.

Q. 18. Did Mr. Ray give you any such information?

490 [Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. Never.

Q. 19. Did you, from any source, hear in 1895 that it was the intention to take, or that there had been taken, any shares, either as a profit or for promoter's services in connection with the promoting or organization of the company?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. Never, sir.

Q. 20. Specifically was it called to your attention in any way that Mr. Lewisohn or Mr. Bigelow had taken 50,000 shares of the stock for any of these reasons?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I have no recollection of anything of the kind, and I am very positive that nothing of the kind ever occurred.

Q. 21. When, if at all, prior to the hearing to-day did this matter come to your attention?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. This hearing? Well, I have heard it during the last—since Mr. Smith's coming into the presidency of the company, perhaps, in an indirect way.

Q. 22. What do you mean by that?

A. That there was some irregularity; I might as well state it in that way.

[Counsel for defendants objects to the answer as incompetent and not responsive.]

Q. 23. It being the fact that Mr. Smith became president in 1902, do I understand that prior to that you had never heard?

A. Prior to that time I had never heard anything of the kind.

By Mr. LAUTERBACH:

Q. Although you knew about it at the time, and say that Mr. Ray advised you to subscribe for and to take so much stock, you took it?

A. I took it on his recommendation and advice; yes, sir.

491 [No cross-examination.]

HOMER V. SNOW.

Subscribed and sworn to before me this 12th day of September, 1905.

GEORGE C. BURPEE,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *July* 19, 1905.

Deposition of Arthur W. Hale.

ARTHUR W. HALE, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by E. F. McClennen, Esq., counsel for the plaintiff, deposes and says:

Q. 1. What is your full name?

A. Arthur W. Hale.

Q. 2. You reside where?

A. Winchester.

Q. 3. Your place of business is where?

A. 53 State street.

Q. 4. Boston, Mass.?

A. Boston, Mass.

Q. 5. In 1895 were you connected with the firm of C. A. Putnam & Company?

A. I was.

Q. 6. I show you Exhibit 10 of the deposition of A. S. Bigelow, March 27, 1903, being a subscription purporting to be dated July 18, 1895, the words "C. A. Putnam & Co., 500;" is that your handwriting?

A. No; that is Mr. Middleton's handwriting.

Q. 7. Was he connected with the firm?

A. He was a partner in it, yes.

Q. 8. I show you a certificate of stock of the Old Dominion Copper Mining & Smelting Company, in the name of C. A. Putnam & Company, No. 111, for 400 shares, endorsed on the back "C. A. Putnam & Co.;" in whose handwriting is that endorsement?

A. Mr. Middleton's.

492 Q. 9. Did you have anything to do with this subscription for this stock?

A. Yes; I think I made all the arrangements with Mr. Bigelow.

Q. 10. Do you have any knowledge of when and where the subscription paper was signed?

A. I do not know about that; I think it was sent into the office and my partner signed it.

Q. 11. Did you, as far as you now recall, see any one other than Mr. Bigelow in connection with this subscription or the organization of this corporation?

A. I think not.

Q. 12. Do you know whether it was before or after this subscription was signed that you saw Mr. Bigelow?

A. Before.

Q. 13. Have you any idea how long before?

A. I cannot remember.

Q. 14. Was it a matter of days, weeks, or months?

A. I really cannot say.

Q. 15. Do you recall anything of the conversation which you had?

A. No; it was so long ago I cannot tell what was said.

Q. 16. Was anything said with reference to Mr. Bigelow and Mr. Lewisohn, or any of those associated with them, taking 50,000 shares of the stock of the corporation either as profits or for promoters' services or otherwise?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I do not remember any conversation of that sort.

Q. 17. Do you remember any conversation with Mr. Bigelow with reference to profits or any number of shares?

A. No.

Q. 18. Or about his taking any compensation in any way?

A. No.

Q. 19. When you say you do not recollect, do you mean that your mind is barren on that subject or that no such conversation took place?

A. What I mean to say is this: I made arrangements with Mr. Bigelow to take this number of shares purely as a speculation, and I went in, as I suppose others did, on the street, believing that it was a good thing and that the prestige of the office would carry it up—purely as a speculation.

Q. 20. Now during the entire year of 1895 did you learn from Mr. Bigelow, or from any source, that it was intended to take any

profit, anything for promoters' services, or that any such profit had been taken by Bigelow and Lewisohn?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

493 A. I might have heard about it, but it did not make any impression on me.

Q. 21. When prior to to-day's hearing did you first hear of any profit having been taken or of any shares having been taken for services?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. In the papers, I think.

Q. 22. Do you now refer to the items that have appeared in the papers relative to this present suit?

A. Yes. I might say this, that in talking with Mr. Belches I remember at the time——

[Counsel for defendants objects to the answer as not responsive and as purely hearsay.]

Q. 23. I will ask you this: Do you recall the price which you paid for this stock?

A. It is so long ago I cannot say certainly, but it was either $20 or $25.

Q. 24. You mean by that $20 or $25 per share?

A. $20 or $25 per share, yes.

Cross-examination:

[In answer to interrogatories propounded by Edward Lauterbach, Esq., of counsel for defendants, the witness further deposes and says:]

X 25. Were you or your firm later on subscribers to the syndicate?

A. No, this is all that we had anything to do with.

X 26. The only transaction?

A. Yes, that is the only thing I know about.

ARTHUR W. HALE.

Subscribed and sworn to before me this 12th day of September, 1905.

GEORGE C. BURPEE,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

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OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET.
BOSTON, *July* 19, 1905.

Deposition of Samuel B. Capen.

SAMUEL B. CAPEN, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by Louis D. Brandeis, Esq., counsel for the plaintiff, deposes and says,—

Q. 1. What is your full name?
A. Samuel B. Capen.
Q. 2. You are of the firm of Torrey, Bright & Capen?
A. I was; it is now a corporation, of which I am the treasurer.
Q. 3. Formerly it was a firm?
A. Yes.
Q. 4. Of Boston?
A. Yes.
Q. 5. In 1895 you were also a member of that firm?
A. Yes, sir.
Q. 6. I show you an exhibit marked 3, Exhibit No. 3, which was put in evidence on March 24, 1903, in connection with the deposition of Albert S. Bigelow in this case, and I call your attention to the words in this paper in ink "Henry T. Coe," then in pencil, "S. B. Capen," then in ink again "$6000," and ask you in whose handwriting the words that I have read are?
A. "Henry T. Coe" is in his own handwriting; I do not know whose the "S. B. Capen" in pencil is. The figures, I suppose, are Mr. Coe's; they look like it.
Q. 7. I call your attention to another exhibit, being Exhibit 5, which was put in evidence as part of the deposition of A. S. Bigelow, under date of March 24, 1903, in this case; and call your attention to the words "Henry T. Coe by S. B. C., $2000."
A. Yes, that is my own handwriting.
Q. 8. That is your own handwriting?
A. Yes.
Q. 9. You are the "S. B. C." there referred to?
A. Yes.
Q. 10. The words in the witness clause "fourteenth" and "June:" are those also in your handwriting?
A. Yes, sir.
Q. 11. I also call your attention to Exhibit No. 10, which was introduced in evidence in connection with the deposition of A. S. Bigelow on March 27, 1903, and call your attention to the words and figures "Henry T. Coe, six hundred shares, 600:" in whose handwriting is that?
A. That is Mr. Coe's.
Q. 12. Who is Henry T. Coe?
A. He was the bookkeeper of Torrey, Bright & Capen.
Q. 13. Where is Mr. Coe at present?
A. He is on his way from Vermont to Boston; he will be here tomorrow; he is on his vacation.

495 Q. 14. He was then and is now a bookkeeper in the employ of Torrey, Bright & Capen?

A. Yes, sir.

Q. 15. Whether or not you personally had any part in taking the subscription or this interest in the syndicate or in the subscription for the stock referred to in the several papers which were shown to you?

A. Yes, sir, I did.

Q. 16. Now will you tell what part you had?

A. In the first subscription I had personally 50 shares.

Q. 17. If you will pardon me, before you answer that I will ask you whether or not you caused Mr. Henry T. Coe to sign for you on that subscription?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I did, yes, sir.

Q. 18. And why?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. Because this was for six or eight different people, and this paper was to be shown to many people, and I did not care to have my own personal affairs put on a piece of paper; and instead of doing as some people do, act through a broker, I had our clerk do it. It would not have been a fair statement if I had put it that I subscribed for it all, because I had only 50 shares of it. So he signed for us all.

Q. 19. Referring to the paper earliest in date, in which the name of Henry T. Coe, and in pencil "For S. B. Capen, six thousand" appears, which paper is dated May 21, 1895, I will ask you whether prior to the signing by Mr. Coe of that paper you had had any conversation with Mr. Bigelow in regard to taking an interest in the syndicate?

A. I had.

Q. 20. State what that was.

A. I applied to him or to Mr. Nelson for it, I don't know which; I presume to Mr. Bigelow in the first instance. I heard of this mine, so I subscribed, and asked if I might be interested for myself and friends.

Q. 21. Where did you see Mr. Bigelow?

A. At his office.

Q. 22. Was the subscription in Mr. Coe's name for $6000 taken immediately after that interview?

A. Yes, sir.

Q. 23. Whether or not at the time of that interview, or at any time before the making of the subscription, anything was said to you by Mr. Bigelow as to his or Mr. Lewisohn's, or any one associated with him, taking any specific number of shares, or
496 any shares, as compensation for services as promoter or as profits, or promoter's profits?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I have no recollection of any such conversation.

Q. 24. Now whether or not, between the time of the signing of the first paper and the time when you signed, in Mr. Coe's name, the paper dated June 14, 1895, there was anything said to you by Mr. Bigelow that he and Mr. Lewisohn, either of them, or any one associated with them in getting up the company, would take any number of shares as any compensation for services in promotion?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. No, sir.

Q. 25. Whether between that time and the signing of the third paper dated July 18, Mr. Bigelow stated to you anything as to his or Mr. Lewisohn's or any one associated with him, intending to take, or that they had taken as compensation for their services as promoters any number of shares of stock in this company?

A. No, sir.

Q. 26. Or that they would do it?

A. No, sir.

Q. 27. I call your attention to a certificate dated September 27, 1895, No. 210, for 640 shares of stock in the name of Henry T. Coe, which certificate bears an endorsement as follows: "Transferred to Elbridge Torrey, 200 shares; Samuel B. Capen, 160 shares; Joshua W. Davis, 80 shares; Mrs. Laura E. Wilkins, 100 shares; Mrs. Frances M. Perkins, 100 shares."

I also call your attention to certificate No. 137, dated September 19, 1895, for 200 shares, in the name of Henry T. Coe, and to certificate dated September 19, 1895, for 80 shares, certificate No. 138, in the name of H. T. Coe; and on certificate No. 137 an endorsement, H. T. Coe to Samuel B. Capen, trustee, 30 shares; Miss Mary W. Capen, 2 shares; Elbridge Torrey, 120 shares; Samuel B. Capen, 50 shares; Mrs. Helen W. Capen, 25 shares; Miss Elizabeth G. Bright, 40 shares; Miss Josephine B. Bright, 10 shares; Edward W. Capen, 3 shares; and ask you whether any parts of the assignments on the backs of these certificates are in your handwriting?

A. Yes, the fillings in there are mine,—all of these.

Q. 28. That is, all of the names and the number of shares?

A. Yes, all of them.

497 Q. 29. The names and the number of shares which they represent are all in your handwriting?

A. Yes, sir.

Q. 30. Whether or not you acted, in subscribing for an interest in the syndicate and for the shares, as appears by the exhibits,—whether you acted on that occasion for the persons who appear as the transferees of the shares from the assignment of H. T. Coe?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I did.

Q. 31. Now will you state whether the payment for those 280 shares represented by the two certificates 137 and 138, dated September 19, 1895, was made by you?

A. Yes, sir.

Q. 32. To what amount?

A. $7000.

Q. 33. To whom was the check made payable?

A. To Thomas Nelson, treasurer.

Q. 34. Now whether the payment to the syndicate for the interest in the syndicate which was afterwards represented by the 640 shares shown by certificate No. 210 was made by you?

A. I presume it was. There are so many of these different ones I can only trace my own. I have got that here, worked out.

Q. 35. What are the payments that you made personally?

A. You mean from this check book? There are 160 shares that belong to me in the second lot. I paid May 27, $140; June 14, $140—those were 14 per cent of the $2000. Then June 20, 28⅝ per cent on the $2000, or $575.17; on August 22 I paid the balance of that $2000, or 57½ per cent and interest; $1160.52 is that payment, making a total of $2015.69, which was the whole amount for 160 shares with interest.

Q. 36. To whom were those checks made payable?

A. To A. S. Bigelow, treasurer, or to A. S. Bigelow, not the treasurer.

Q. 37. Whether at any time before any of these payments which you have referred to were made, the certificates which have been shown to you were delivered, anything was said to you by Mr. Bigelow in regard to his taking, or Lewisohn's taking, or any of his associates taking, any shares of stock in this Old Dominion Copper Mining & Smelting Company, or in a company to be formed, as compensation for his profits or services as promoter?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

498 A. No, sir.

Q. 38. Whether or not, at any time prior to the receipt of these certificates by you, any such information or statement of intention was made to you by any one of Mr. Bigelow's — having that intention,—was made to you by any one, or any information came to you from any source to that effect?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. No, sir.

Q. 39. Whether at any time during the year 1895 any such information came to you from any source?

A. No, sir.

Q. 40. When, if ever, prior to your being called upon to testify in this case did you hear that Bigelow, Lewisohn, either of them, or their associates, had taken 50,000 shares, or any number of shares,

as compensation for their profits in connection with their promotion of this company?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I should say within a year or two.

Q. 41. That is, from the newspapers?

A. Yes.

Q. 42. Within a year or two of the present time?

A. Yes, sir.

Q. 43. Was that reference in the papers in connection with litigation that had been brought by the company against Bigelow and Lewisohn?

A. Yes, sir.

Cross-examination:

[In answer to cross-interrogatories propounded by EDWARD LAUTERBACH, Esq., counsel for defendants, the witness further deposes and says:]

X 44. As I understand it, then, you were a subscriber to the syndicate arrangement to the extent of $6000, and to another syndicate subscription to the extent of $2000, and a purchaser of stock to the extent of $7000?

A. I think that is correct; yes, sir.

X 45. This was in about June, 1895?

A. Yes, sir.

X 46. The only one that you saw with reference to these matters was Mr. Bigelow, was it not?

A. I might have seen Mr. Nelson, possibly, and probably Mr. Bigelow together.

499 X 47. And Mr. Nelson was associated with Mr. Bigelow?

A. Yes, sir.

X 48. Did Mr. Bigelow call upon you at that time, or did you call upon him?

A. I called upon him.

X 49. Did he solicit you or did you ask him?

A. I asked him, sir.

X 50. You thought it a favor to be permitted to become a member of the syndicate?

A. Yes.

X 51. Copper-stock subscriptions at that time were thought to be good investments and speculations?

A. Yes.

X 52. And you were content, in making your subscriptions, to have Mr. Bigelow act in the matter as he thought proper?

A. Yes, I had no criticism to make.

X 53. You asked him no question concerning the nature of the investment?

A. Well, probably I asked some question about the mine there.

X 54. And he spoke well of the mine?

A. He did.

X 55. But whether or not he was to make a profit or not was a matter that was immaterial to you?

A. Not immaterial; I supposed when I put my money in I was to make profit.

X 56. And, in fact, you did make a profit, didn't you; I mean that, as to that $6000 and $2000 subscription, you received two for one in securities finally?

A. Yes, my 160 shares, I think, I received two for one.

X 57. That is, assuming the stock to be par, for your $8000 subscription you received 640 shares; now if that had been subscribed for at par you would only have received 320 shares for your participation in the syndicate?

A. Yes.

X 58. And that was entirely satisfactory to you?

A. Yes.

X 59. Your subscription to the $25 a share stock was that made with Mr. Bigelow as well?

A. Yes.

X 60. And you saw him only in respect to that?

A. Yes.

X 61. You had nothing to do with the Old Dominion Copper Company, as such, only with Mr. Bigelow?

A. No.

X 62. And your transactions in all three matters were entirely with him?

A. Yes, sir.

X 63. Did he decline to answer any question that you asked him in respect to the matter?

A. No, sir.

Redirect examination:

[On redirect examination, in answer to further questions by Mr. BRANDEIS, of counsel for plaintiff, the witness further deposes and says:]

500 Q. 64. Do you remember whether you saw Mr. Bigelow after that first interview you had prior to Mr. Coe's signing the paper of May 21,—whether or not you personally saw Mr. Bigelow after that?

A. I could not tell you; I should think I would, the second time

Q. 65. That is, you think the time that you signed yourself this June 14 paper, when you wrote in a part on the 14th of June?

A. I have no knowledge, but I guess so.

Q. 66. Do you know whether or not you saw Mr. Bigelow subsequently?

A. Probably not when I made the payments.

Q. 67. There was a paper afterwards, the July 18 paper, which was not signed by you, but was signed by Mr. Coe; do you have any recollection of seeing Mr. Bigelow at that time?

A. I have no recollection; no, sir.

SAMUEL B. CAPEN.

Subscribed and sworn to before me this 7th day of September, 1905.

GEORGE C. BURPEE,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *July* 19, 1905.

Deposition of Walter A. S. Chrimes.

WALTER A. S. CHRIMES, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by Louis D. Brandeis, counsel for the plaintiff, deposes and says,—

Q. 1. State your full name, age, residence, and occupation.

A. Thirty-eight; residence, Hingham; occupation, assistant secretary and assistant treasurer of mining companies.

Q. 2. What mining companies are you assistant secretary and assistant treasurer of?

A. Tamarack, Osceola, Ilse Royale, Ahmeek, and Seneca.

501 Q. 3. Are these all mining companies in which Mr. A. S. Bigelow is interested as an officer and stockholder?

A. Yes, sir.

Q. 4. And what was your occupation in 1895?

A. I was clerk in the office of those mining companies.

Q. 5. And were they mining companies controlled by A. S. Bigelow and Leonard Lewisohn?

A. I don't know that they were controlled by them; they were stockholders.

Q. 6. What other companies were there besides the ones you have named?

A. Boston & Montana and Butte & Boston.

Q. 7. And afterwards in the Old Dominion Copper Company?

A. Yes.

Q. 8. How long had you been with Mr. A. S. Bigelow prior to July, 1895?

A. About twelve years.

Q. 9. Twelve years prior to that time; so you have been with Mr. Bigelow twenty-two years?

A. Twenty-two years last January.

Q. 10. And you acted to a certain extent as secretary to him individually, personally, did you not?

A. Yes.

Q. 11. And did at that time—1895?

A. Yes, but in a small way.

Q. 12. But since that time you have to an increased extent?

A. Yes.

Q. 13. To what extent, in 1895, did you have access to, or charge of the books and papers in relation to Mr. A. S. Bigelow's mining enterprises, and particularly that of the Old Dominion Syndicate and Old Dominion Copper Mining & Smelting Company?

A. Mr. Bigelow did not keep any books; I did some writing in his check book. The general books of the office were kept by the other clerks, and I had no control of and knew nothing about them.

Q. 14. What did you have to do with Mr. Bigelow's letter book?

A. Nothing; that is, if you mean by filing away the letters, or copying the letters, I had nothing to do with them; that was done by some boy in the office.

Q. 15. Under you?

A. No, not particularly; things were done under his direction.

Q. 16. What do you mean by "his direction," who is "his"?

A. Mr. Bigelow.

Q. 17. Well, in Mr. Bigelow's absence, the correspondence was conducted by you, was it not?

A. Yes.

Q. 18. Now what books, letter-press copy books, did Mr. Bigelow have at that time, 1895,—keep regularly?

A. Well, he kept an ordinary business man's file.

Q. 19. You mean an ordinary file in which letters received were pasted in?

A. Pasted in, and an ordinary copy book in which letters were copied.

502 Q. 20. How many copy books were kept?

A. I think one; possibly two.

Q. 21. Have you not brought with you here certain letter-press copy books?

A. I have brought a lot of books. I have not looked to see what is in the package yet.

Q. 22. Will you look and let me know what letter-press copy books you have brought here relating to 1895, in which any letters from Mr. Bigelow are copied?

A. There are two [producing two letter-press copy books].

Q. 23. There are two letter books, and how are they designated?

A. One is marked "Letters. 6. Private." The other is marked "Letters. 4. A. S. B."

Q. 24. What is the first and last date in the letter book marked "Letters. 6. A. S. B. Private."?

A. May 29, 1893, is the first. October 20, 1896, is the last.

Q. 25. And are the pages in that book numbered?

A. They are.

Q. 26. What is the number of the first and last page?

A. The first is numbered "1" and the last "728." The last date is October 20, 1896.

Q. 27. Is that letter book indexed?

A. Yes, or partly so.

Q. 28. What do you mean by the statement "or partly so"?

A. Well, I thought there might have been omissions by the person who might have indexed that book.

Q. 29. Are you able to tell from the handwriting who it was who indexed that letter book?

A. No, there are three on the first page.

Q. 30. You mean three different handwritings?

A. Yes, sir.

Q. 31. Do you recognize any of them?

A. No.

Q. 32. Now will you give me the earliest date in the letter book marked "letters. 4. A. S. B.," and the last date; and also the first and last page?

A. Page 1 is December 24, without any year, so I don't know when that was.

Q. 33. Well, will you look at the next date?

A. The next is December 27, 1892, on page 1.

Q. 34. What is the last page in the book?

A. April 15, 1893. That is apparently wrong. I will explain here were little things not relating to business was sometimes put in the back of these books, and had no bearing on business matters. For instance, here is a telegram to Mrs. Bigelow away out of date; so you better take a date at some time when the real business was finished.

Q. 35. Will you look through and let me know the last date on the last page when any matters are regularly copied in the book?

A. February 11, 1897.

Q. 36. Will you state with reference to letter book "4. A. S. B." whether that book is indexed?

A. It is.

Mr. LAUTERBACH: I object to this line of testimony on be-
503 half of the defendant Lewisohn, to the letters of Mr. Bigelow except as they may have been addressed to and received by Mr. Lewisohn and answered by him, as irrelevant and incompetent and immaterial. My objection is to the whole line of testimony.

Q. 37. What is your answer?

A. It is indexed with possibly exceptions or omissions.

Q. 38. Well, are there any omissions from the index, to your knowledge?

A. Not to my knowledge.

Q. 39. Is there in letter book No. 6 any omission from the index, to your knowledge?

A. No.

Q. 40. Will you now turn to the index of letter book "4 A. S. B." to the name of Maxwell Woodhull, and give me the number of the page of letters addressed to Maxwell Woodhull?

A. There is one on page 637, 645, 649, 191, 298, 307, 338, 364, 374, 381, 428, 434, 498, and 544.

Q. 41. Were all of those numbers of pages against the single name of Maxwell Woodhull, or does he appear in several places in the index?

A. He appears in two places, the name appears in two places; the line was filled out and it had to be dropped below here.

Q. 42. Now will you turn to page 191, and let me see the date of that letter?

A. It is a telegram.

Q. 43. A telegram of April 13, 1894?

A. Yes.

Q. 44. Turn now to page 298: that is a letter of what date?

A. Of June 12, 1895. This is the letter which appears in the deposition of A. S. Bigelow, Int. 120.

Q. 45. Now if you will turn to page 307.

A. That is a telegram dated June 15, 1895. This is the telegram referred to in deposition of A. S. Bigelow, Int. 119.

Q. 46. Now turn to page 338.

A. That is a letter dated June 24, 1895, which is as follows:—

"JUNE 24, 1895.

Maxwell Woodhull, Esq., 2035 G St., Washington, D. C.

DEAR SIR: I have yours of June 22nd. Your receipts for the Old Dominion syndicate were made non-negotiable for special purposes, which, however, now longer exists. A copy of agreement made by you with Riggs & Co. was duly received and we are pleased to notify you that we confirm and recognize that agreement and will hold it binding.

Yours truly,

OLD DOMINION SYNDICATE,
By A. S. BIGELOW."

504 Q. 47. Now turn to page 366.

A. A telegram as follows:—

"JULY 26, 1895.

Maxwell Woodhull, care of Chesbrough, 24 State St., New York:

825 a share cash on or before October 1. Due notice will be given when it is required. A. S. BIGELOW."

Q. 48. Now page 374.

A. This is a letter dated July 31, 1895, appearing on page 81, in Int. 173, in the deposition of A. S. Bigelow in this cause.

Q. 49. Now page 381.

A. Letter dated August 7, 1895, which is as follows:—

"SEARS BUILDING, BOSTON, MASS., *August* 7, 1895.

Maxwell Woodhull, Esq., The Abdine, Spring Lake Beach, N. J.

DEAR SIR: I am in receipt of your favor of August 5 enclosing release from Riggs & Co. of their interest in your subscription to the Old Dominion syndicate. I have made a note of the same upon our books and return you said release herewith.

Yours very truly, A. S. BIGELOW.

Your suggestion anent Tamarack is a good one, but not practical, as I know some of them would not agree to it."

Q. 50. What page of the letter book is this on?

A. 381.

Q. 51. Now will you turn to letter dated August 8 in that letter book? The first one is on page 383.

A. There isn't any letter to Woodhull on that page.

Q. 52. What is the next letter to Woodhull?

A. It appears to be November 18, 1895, by this book, on page 428.

Q. 53. That is a letter written by Mr. Bissell for Mr. Bigelow?

A. It is for him. This letter appears to relate to some mining operations.

Q. 54. Now give me the next letter to Mr. Woodhull.

A. November 26, 1895, on page 434; that is a letter of C. H. Bissell by W. A. S. Chrimes, and relates also, apparently, to mining operations.

Q. 55. Now the next.

A. April 9, 1896, page 498, which is a letter which relates to other matters; it does not relate to Old Dominion matters.

505 Q. 56. Now the next, page 544.

A. Telegram dated July 11, 1896; a telegram of mine to Mr. Woodhull.

Q. 57. Now the next, page 637.

A. Letter dated December 5, 1895, acknowledging receipt of check.

Q. 58. Now page 645.

A. A letter dated December 18, 1896, which does not relate to Old Dominion matters.

Q. 59. Now page 649.

A. Letter dated December 21, 1896. This letter also does not relate to Old Dominion matters.

Q. 60. Now will you turn to this letter book No. 4, and state whether or not from that book any pages have been torn out; and if so, what is the earliest page in the book that has been torn out?

A. There is no way for me to know that except to go through this one page at a time.

Q. 61. I wish you would do it.

A. I find there is no page 88.

Q. 62. Will you give, then, the date of the letter before and after it?

A. The letter preceding is dated July 13, 1893, and the one succeeding is July 18, 1893.

Q. 63. Now if you will proceed.

A. I find an unpaged sheet between 149 and 150 as of the date of about March 6, 1894.

I find an unnumbered page, marked "157 A," as of the date of March 23, 1894, between page 157 and 158.

I find another unnumbered page between 521 and 522, numbered 521½, and bears date June 12, 1895.

I find, after page 545, that 546, 547, and 548 are missing, and ap-

parently torn out, between the date of July 17, 1896, and July 20, 1896.

I find a page without a number; I suppose it is 595; the corner is torn off. The date is September 23, 1896.

I find an extra page, numbered in pencil 6050, between 604 and 605, and between September 30, 1896, and October 1, 1896.

I find also an extra page between 655 and 656, which is numbered 655², between December 31, 1896, and January 4, 1897.

I find that page 657 is apparently missing; it is between January 5, 1897, and January 6, 1897.

There is an extra page numbered in ink 691A, and it is between 690 and 691B, in ink, and between February 11, 1897, and February 13, 1897.

I find that page 694 is missing, and appears to have been torn out. The last letter on page 693 is dated February 11, 1897; the letter on page 695 is dated October 6, 1896.

506 After page 697 the pages have disappeared up to the next page, 715, and that page is dated July 11, 1894; and the previous one, on page 697, is dated October 5, 1896.

There are three pages cut out and one unnumbered page. The next numbered page after 715 is 719, and the date of that is April 1, 1894.

There are again after 719 pages missing up to page 725.

Page 725 has a letter on it dated December 21, 1893.

After page 727 again pages are missing to page 732, and there is on that page a letter dated August 15, 1893.

Pages 733 and 734 are missing. The next is page 735, and the last page is 737 dated April 15, 1893.

After that there are again a number of pages which have been apparently torn out at the end of the book.

Q. 64. Now will you turn to letter book No. "6, A. S. B. Private," and give us the pages appearing in the index of letters to Maxwell Woodhull?

A. Page 92, 210, 214, 216, 220, 222, 228, 233, 235, 238, 240, 241, 263, 270, 278, 280, 298, 304, 326, 332, 338, 354, 360, 378, 382, 390, 410, 412, 414, 421, 432, 433, 443, 449, 474, 495, 559, 587, 601, 609, 649, 659, 680, 689, 697, 717.

Q. 65. What is the last page in the book?

A. 728.

Q. 66. Now will you turn to the first page, 92?

A. That is a letter dated September 11, 1893.

Q. 67. Now turn to the next one, page 210.

A. That is a letter dated June 19, 1894.

Q. 68. Page 214?

A. That is a letter dated June 22, 1894.

Q. 69. Page 216?

A. June 26, 1894.

Q. 70. Page 220?

A. July 6, 1894.

Q. 71. Page 222?

A. July 23, 1894.

Q. 72. Page 228?
A. August 7, 1894.
Q. 73. Page 233?
A. August 9, 1894.
Q. 74. Page 235?
A. August 10, 1894.
Q. 75. Page 238?
A. Letter dated in lead pencil August 13, 1894.
Q. 76. Page 240?
A. Apparently August 17, 1894.
Q. 77. Page 241?
A. August 24, 1894.
Q. 78. Page 263?
A. October 1, 1894.
Q. 79. Page 270?
A. November 12, 1894.
Q. 80. Page 278?
A. November 27, 1894.
507 Q. 81. Page 280?
A. December 3, 1894.
Q. 82. Page 308?
A. January 16, 1895.
Q. 83. Page 304?
A. On page 304 I find the second page of a letter to Frank B. Prentiss of Philadelphia, relating to the Merced Gold Mining Company, but nothing to Woodhull. I find on page 324 a letter of February 9, 1895.
Q. 84. Page 326?
A. A letter dated in pencil, February 18, 1895.
Q. 85. Page 332?
A. March 23, 1895.
Q. 86. Page 338?
A. March 29, 1895.
Q. 87. Page 354?
A. April 20, 1895.
Q. 88. Page 360?
A. April 23, 1895.
Q. 89. Page 378?
A. May 23, 1895. This letter relates to Boston & Montana and Merced.
Q. 90. Page 382?
A. June 11, 1895. This letter referred to in Int. 115, in the deposition of Albert S. Bigelow.
Q. 91. Page 390?
A. Letter dated June 15, 1895. This is the letter referred to in Int. 119 of the deposition of Albert S. Bigelow.
Q. 92. Page 410?
A. July 1, 1895. This letter refers to Boston & Montana.
Q. 93. Page 412?
A. Letter dated July 6, 1895. This letter also relates to Boston & Montana.

Q. 94. Page 414?

A. Letter dated July 12, 1895. This letter also relates to Boston & Montana and other matters, and not to Old Dominion.

Q. 95. Page 421?

A. July 15, 1895. This is the letter referred to in the deposition of A. S. Bigelow, Int. 175, at page 82.

Q. 96. Page 432?

A. Letter dated July 22, 1895. This is the letter referred to in the deposition of A. S. Bigelow, Int. 175, page 82.

Q. 97. Page 433?

A. Letter dated July 24, 1895. This is the letter referred to in the deposition of A. S. Bigelow, Int. 175, page 82.

Q. 98. Page 443?

A. August 20, 1895.

Q. 99. Will you look through the pages and see if there is any letter between pages 433 and 443?

A. There is no letter in the letter book between pages 433 and 443 addressed to Maxwell Woodhull, and no pages are missing. The letter of August 20, 1895, relates to the general conditions of the market.

Q. 100. Page 449?

A. Letter dated August 22, 1895. This letter also relates to general matters.

Q. 101. Page 474?

A. Letter dated October 24, 1895. This letter relates to Boston & Montana.

508 Q. 102. Page 495?

A. Letter dated November 26, 1895; a letter relating to the copper market.

Q. 103. Page 559?

A. Letter dated February 28, 1896, relating to Tamarack.

Q. 104. Page 587?

A. Letter dated March 23, 1896, and relates to Tamarack, with a postscript with regard to Mr. Woodhull's $15,000 note to the Old Dominion.

Q. 105. Page 601?

A. Letter dated April 30, 1896. This is a letter in which Mr. Bigelow reports on the various mining properties in which Mr. Woodhull is interested. The only paragraph relating to the Old Dominion is as follows:—

"Now, as to Old Dominion, which was the next property which we visited: I was exceedingly well pleased with that property. One sure thing about it is that it is a mine well opened for a number of years ahead and rich, and it is only a question of time when it will come to the front as a good dividend payer. On the comparatively small product which we are making today, we are earning quite a nice profit."

Q. 106. Page 609?

A. Letter dated May 8, 1896, relating to Boston & Montana and other matters, and not relating to Old Dominion.

Q. 107. Page 649?

A. A letter dated June 1, 1896, about Tamarack, Merced, and Butte & Boston.

Q. 108. Page 659?

A. Letter dated June 19, 1896. This letter relates to various matters. The only reference to Old Dominion is as follows:—

"The bears are of course about trying to make a dishonest dollar. They made a drive at Old Dominion the other day and knocked it to $15.50, the price yesterday. As to the value of the property, I have no doubt whatever. It is a large, rich mine well opened up ahead and capable of being worked very cheaply. We had to close down the mines on account of the strike by the men, but in my opinion this is a matter of small importance, and I think we shall be running again next month. In May, with a product of only *of* about 700,000 lbs. we made a profit of $20,000. New furnaces are on the way and should be ready to run next month, by which we can increase our product to from 900,000 lbs. to 1,000,000 lbs. a month, and when run even without the railroad should be able to make from $30,000 to $40,000 profit."

Q. 109. Page 680?

A. A letter dated July 14, 1896, about Boston & Montana.

Q. 110. Page 689?

A. Letter dated July 27, 1896. The only reference to Old Dominion in that letter is as follows:—

509 "Old Dominion looks cheap to me, but, as you know, it is not yet a dividend payer, and the stock will probably fluctuate a good deal until it does become one."

Q. 111. Page 697?

A. A telegram to Woodhull, dated September 10, 1896, which does not relate to Old Dominion.

Q. 112. Page 717?

A. Letter dated September 28, 1896, and does not relate to Old Dominion.

[Recess until 2 p. m. and resumed.]

Mr. LAUTERBACH: Before Mr. Chrimes is further examined, I want to call your attention and his to the fact that you will recall that Mr. Hyams pointed out that among these receipts, among these formal notifications in the month of June, some error must have occurred and some three or four pages eliminated from the book.

Mr. BRANDEIS: Why didn't we find that?

Mr. LAUTERBACH: It was before lunch; we did it unanimously.

* * * * * * *

Mr. BRANDEIS: Mr. Lauterbach calls attention to the fact that Mr. Chrimes, in going over the letter book "4, A. S. G." in the presence of all of us, as to the pages that were missing, omitted to state that the pages between No. 308 and 314 were missing and appear to have been cut out.

Mr. LAUTERBACH: That is right.

Q. 113. Mr. Chrimes, I call your attention to the memorandum

in pencil, June 15, 1895, "pages 309 and 313 were spoiled," the above memorandum in pencil being written on what appears to be the part remaining in the book on page 315. Will you please state in whose handwriting that memorandum is?

A. That is in my handwriting.

Q. 114. Are you able to recall when you made that memorandum?

A. I cannot.

Q. 115. Are you able to state approximately the year within which you made that memorandum?

A. No.

Q. 116. Have you any recollection whatsoever in regard to that memorandum?

A. None whatever.

Q. 117. When did you first see that memorandum, so far as you can remember?

A. About five minutes ago, two minutes ago.

Q. 118. You mean just before Mr. Lauterbach called attention to this fact?

A. I do, just this minute.

510 Q. 119. How do you account for the fact that that memorandum was put upon those pages by you?

A. I cannot account for it.

Q. 120. There is not any other instance in that book, is there, where pages torn out bear any notation of any kind?

A. I do not remember of seeing any when I went through it before.

Q. 121. Can you account in any way for the fact that you did not notice this omission of pages when you went through it before?

A. No.

Mr. LAUTERBACH: It is conceded by all counsel present that all were present and looking over the book while it was being examined by Mr. Chrimes, and while he was giving his testimony, and that no one observed the absence of the pages at that time.

Q. 122. The question you were asked was, "Now will you look through this letter book, and let us know what pages in this letter book are missing 'this letter book' being entitled 'Letters, 6, A. S. B., Private'?"

A. I have been through it.

Q. 123. You have examined it?

A. I have examined it.

Q. 124. Since this question was put?

A. Yes, I examined it after lunch.

Q. 125. Now go ahead.

A. And I find page 4 is out.

Mr. MCCLENNEN: Page 3 being dated May 29, 1893, and page 5 being dated May 29, 1893.

Q. 126. Now go ahead.

A. It was an insertion between pages 8 and 9.

Q. 127. It is between pages 8 and 9, an insertion. What does it consist of?

A. It is evidently something copied in the book.

Q. 128. Being a half page of a letter addressed to J. A. Coram. And pages 243, 244, 245, and 247 from some other letter book, is it not?

A. From some other letter book.

Mr. McCLENNEN: And all bearing date June, 1893.

The WITNESS: Yes.

Q. 129. Now go on.

A. No. 108 is out.

Q. 130. There is a memorandum on the stub of the page between 107 and 109, reading, "One of Mr. Nelson's private letters copied here; see Mr. Nelson's private book." In whose handwriting is that, Mr. Chrimes?

A. I think it is C. H. Bissell's.

Q. 131. What next?

A. There is an insertion at 232½ and 232⅝—pages appearing that way.

Mr. McCLENNEN: Being a letter dated August 9, 1894.

The WITNESS: Pages 287, 288, 289, and 290 are out.

511 Mr. McCLENNEN: 286 being a letter of December 7, 1894, and 291 being a letter of December 11, 1895.

The WITNESS: 293, 294, and 295 are out.

Mr. McCLENNEN: 292 being a letter of December 21, 1894, and a letter of December 29, 1904.

The WITNESS: Pages 300 and 301 are out.

Mr. McCLENNEN: 299 being a letter of January 2, 1895, and 302 a letter of January 3, 1895.

The WITNESS: There is an insertion at 418½.

Mr. McCLENNEN: That being a letter of July 15, 1895, to Brewster & Company.

The WITNESS: About carriages. After 728, which is the last page, there are a number of pages missing.

Q. 132. Will you look now at the pages covering the period from August 1 to August 10, 1895, and see whether there is any letter to Maxwell Woodhull that has not been indexed?

A. I find no such letter to Maxwell Woodhull; I do find letters written by Mr. Bigelow to others, written August 5 and August 8.

Mr. HEMENWAY: That is not responsive.

Mr. BRANDEIS: All right. I will put a question.

Q. 133. Do you find any letters of Mr. Bigelow on August 5 or August 8, 1895, in this book?

A. I do, on pages 438, 439, and 440.

Q. 134. And the next letter to that is dated August 15, on page 441. Now, Mr. Chrimes, the letter of August 5, which I refer to as being on page 438, is a letter appearing in the deposition of A. S. Bigelow, Int. 181; then, I ask you, is not there a letter of August 7, 1895?

A. I do not see any.

Q. 135. You mean to say: I do not find it in that book; but there is in the letter book marked "A. S. Bigelow, Letters, 4," a letter of

August 7 to Mr. Grant, which appears also in the deposition of Mr. Bigelow at Int. 181?

A. Yes; I should say yes.

Q. 136. Is there not, Mr. Chrimes, some other letter book of Mr. Bigelow's in which letters relating to the matters connected with the Old Dominion may have been copied?

A. Not that I know of.

Q. 137. There were kept in the same office other letter books, were there not, at the same time that these letter books cover?

A. Yes.

Q. 138. What other letter books?

A. Books of other companies, the other mining companies.

512 Q. 139. What letter-press copy books were at that time in use in the office?

A. I should say there might have been fifteen or twenty.

Q. 140. Where are those letter books?

A. In the safe in the Sears building, I suppose.

Q. 141. And those were all letter books relating to different companies in which Mr. A. S. Bigelow was interested?

A. Yes.

Q. 142. And in which you acted in connection with him in one capacity or another?

A. Yes.

Q. 143. Has any examination been made in any of those letter books to see whether there is copied in any one of them a letter of August 8, 1895, from Mr. Bigelow to Mr. Woodhull, relating to the issue of 20,000 shares of the stock of the Old Dominion Copper Mining & Smelting Company?

A. I do not know.

Q. 144. You do not know? You do not know whether any investigation has been made by any one?

A. I do not.

Q. 145. Have you made any investigation of any of these books?

A. No, I have not.

Q. 146. Have you made any search other than in these two letter books which you have produced to-day, "Letter book No. 4, A. S. B." and "Private letter book No. 6, A. S. B."?

A. I have not looked that up.

Q. 147. Was there, during the time that these two letter books were in use, so far as you know, any other letter book which appeared as "A. S. Bigelow," or "A. S. B. letter book," specifically?

A. Why, this one, No. 4.

Q. 148. Other than those two?

A. No.

Q. 149. Have you made any search to ascertain whether there was or not?

A. No, I have not.

Mr. LAUTERBACH: I recall that Mr. Hyams said he did have search made for another book.

Mr. BRANDEIS: I understand, but he did not testify that Mr. Chrimes had made search.

Mr. LAUTERBACH: You never produced that letter book, Mr. Brandeis? I am speaking from recollection.

Mr. BRANDEIS: No.

Q. 150. Will you take each of the letter books covering the period of 1895, which are in the office at Sears building, between July 1 and September 1, 1895, and see whether there is not copied in those letter books a letter from Mr. Bigelow to Maxwell Woodhull dated August 8, 1895, acknowledging the receipt of a letter from
513 Mr. Woodhull of August 7, 1895, begining as follows, substantially, "I received your letter of the 7th. You are right in presuming the 20,000 shares which has been offered to be treasury stock." And will you, in making that examination, take note of the description of each letter book as shown customarily by the designation of the book, and also if you find such letter, produce the letter book containing such letter, produce that letter book?

A. Yes.

Mr. LAUTERBACH: Have we the Woodhull letter in evidence?

Mr. BRANDEIS: No; that I want to call for.

Mr. LAUTERBACH: Was the actual letter produced from them to us?

Mr. BRANDEIS: No. He was asked for that, I do not know whether he has found it since.

Q. 151. And will you also, in examining those, look into the index of each of those letter books for letters addressed to Mr. Woodhull, to make sure whether or not there is in the letter book a letter to him bearing date August 8, as well as making specific investigation of the pages covering the letters between the dates named—July 1 and October 1?

A. Yes.

Q. 152. And also note whether between the dates named there are any pages which have been torn from the letter book, and make note of all of those so as to be able to testify in regard thereto after your examination is completed?

A. Yes, I will.

Q. 153. Now, Mr. Chrimes, will you also make search among the letters of Mr. Bigelow, to Mr. Bigelow, to see whether there is among them any letter to Maxwell Woodhull dated August 2, 1895, and if found, produce such letter; and if you do not find the same, be able to state fully what search you have made for the letter?

A. Yes.

Mr. LAUTERBACH: I think if you were to show us a letter with what purports to be Mr. Bigelow's signature, we would admit it for what it is worth. If there appears to be a letter of August 8, 1895, purporting to contain his signature, then if you have the letter which called out that letter of August 8, there you are.

[Examination of the witness suspended and subsequently resumed.]

The WITNESS: My duty between now and the — of next month is not only to make out four thousand or more checks and accounts, which must be done and handed back to the dividend clerk

to be sent out, but, in addition, to take care of Mr. Bigelow's estate, of Mrs. Bigelow's estate, and attend to the other daily work concerning the transfer of certificates that come into the office. Now if you want me to hunt this up carefully, it is a physical impossibility for me to do it until after that. For instance, Mr. Ladd is
514 going away shortly, about the 1st of August, for a few weeks; Mr. Bigelow is going away and will not be back until September, which leaves me alone in the office there, and it will be impossible for me to take up this thing for more than a month.

Mr. BRANDEIS: Well, we must give you the time which you require to make the investigation thorough and complete so that when you come to testify you will be able to testify as to having made a thorough investigation.

Mr. LAUTERBACH: Will you limit the time as far as you can, as to dates? You have now made it from——

Mr. BRANDEIS: From July till October.

Mr. LAUTERBACH: Those are the dates you have fixed.

Mr. BRANDEIS: Well, Mr. Chrimes, we must recognize that you have this work to do and that you have to do it.

The WITNESS: There is nobody else to do it.

Mr. BRANDEIS: You go on and do it as fast as you can.

The WITNESS: It is a matter of business; it involves four thousand or five thousand different people.

Q. 154. Now, Mr. Chrimes, what have you had to do, if anything, in the way of the care of letter books and other papers in connection with Mr. Bigelow's office, relating to the Old Dominion Syndicate and the Old Dominion Copper Mining & Smelting Company?

A. Very little.

Q. 155. At the time the testimony of Mr. Bigelow was taken in this case, you will recall that you brought to our office, from the offices of Mr. Bigelow, these papers. What had you had to do with collecting the papers then?

A. Well, Mr. Bigelow, I believe, told me to get what Old Dominion letter books, papers, and so on that there were in the office, and to put them in piles, which I did. Then I was ordered to bring them down here, which I did; meantime they were kept in the safe in one particular place.

Q. 156. Where had they been before you collected them then?

A. Well, if I remember right, they were kept formerly in letter files in the general office in the Sears building.

Q. 157. Were they kept separate and apart from other papers?

A. Well, only so far as—for instance, in a bookcase, Old Dominion might have had one and A. S. Bigelow might have another, and so on.

Q. 158. Did you find all of these at that time together?

A. I do not know; I do not remember.

515 Q. 159. Did you yourself at that time make any examination of these letters or papers?

A. I did not.

Q. 160. Who did make an examination of them after you had

collected, in a general way, all that you believed related to that matter?

A. Well, I should say possibly I did go through these letter books, I think, and put in these slips; I think I did put in these little slips.

Q. 161. Did you act under the instructions of Mr. Hyams in that?

A. I think I did.

Q. 162. Was it he or you who made the investigation at that time into all the papers there were relating to this case?

A. I think we did it together.

Q. 163. You worked with him?

A. Yes.

Mr. LAUTERBACH: That is after you requested us to go over them?

Q. 164. Well, do you recall whether or not the collection of the papers and investigation made by you was after you were requested, or Mr. Bigelow was requested, to appear and produce these papers for the purpose of an investigation?

A. I think it was.

Q. 165. Or did you make it earlier?

A. I think it was after the books had been here once.

Q. 166. That is, you did not make any investigation until the books were first produced by Mr. Bigelow?

A. Not that I remember.

Q. 167. Do you recall at any time of making specific search for a letter from Mr. Woodhull, dated August 7, 1895, to Mr. Bigelow?

A. I do not.

Q. 168. Or for the copy of a letter on August 8, from Mr. Bigelow to Mr. Woodhull?

A. No.

Q. 169. Will you now tell me, as well as you can remember, who were the boys or clerks who would have to do with the filing of the letters in 1895 in Mr. Bigelow's office?

A. I could not tell you; there have been so many in and out there since, I do not remember who was there then.

Q. 170. You do not remember who did the work of filing at that time?

A. I do not.

Q. 171. Are any of those who were there in 1895 there in the office now?

A. I should say not. There are only three boys there now and I think they were not there in 1895; but it was the boys' work to file letters in those years.

Q. 172. Who are the boys who are there now?

Mr. LAUTERBACH: They have become men since, I suppose.

516 A. I meant boys when I said "boys." There are three boys there now.

Q. 173. Let me put it in another way: Are there any men there now who were boys in the office in 1895?

A. Well, Mr. Brandeis, I will tell you who there were there in 1895, as far as I can remember; there were C. H. Bissell and J. H. Beal. You mean the clerks, of course, out in the general office?

Q. 174. Yes. Shepard was there?

A. Yes, but he is not there now. I think those are the only two who are there now in the office.

Q. 175. Who assisted you in getting the papers and books together at the time you collected them for Mr. Bigelow's deposition?

A. I think all hands did. I told the clerks to go to work on it to help me get them out.

Q. 176. Who were the ones who helped you?

A. I could not tell you.

Q. 177. You do not know who they were?

A. I do not know; probably Bissell.

Q. 178. What are the names of the boys or men, whoever they were, who might have helped you in the work of getting together the books and the papers?

A. I think Bissell may have been the most active.

Q. 179. Yes, but Beal may have helped you?

A. Yes.

Q. 180. Were not there any of the younger men who helped you?

A. I do not think so.

Q. 181. Do you know who the boys are now who are in subordinate positions who may have been there when you collected these books and papers?

A. There are only two men or two boys, call them what you will, who were in the office in 1895, besides myself; that is Mr. Bissell and Mr. Beal. I think the rest are all newcomers, and the others who were there before have passed out.

Q. 182. What I am referring now to is: I want to find out who the persons were, regardless of when they came into the office, who helped you at the time you collected these books and papers for Mr. Bigelow's deposition?

A. I do not think anybody did; possibly Mr. Hyams might have helped me, Mr. Bissell and Mr. Beal. I do not think of anybody else.

Q. 183. Have you here the letter books containing, or which are supposed to contain, the letters relating to the Old Dominion Syndicate, letters received by Mr. Bigelow?

A. I do not know. I have two or three letter books here, but what they contain I do not know.

Q. 184. Will you take these letter books now and make search in those letter books, and see whether you find in them a letter from Mr. Woodhull to Mr. Bigelow, under date of August 7, 1895?

517 Mr. LAUTERBACH: Mr. Hyams went all through that, you know; but, of course, you are entitled to inquire.

Mr. BRANDEIS: These letter books were not so arranged that there might not have been some error. Cross-examination, I suppose, of this witness will give us the information.

Mr. LAUTERBACH: Yes. And that being so, there will be no further witnesses to-day.

Mr. BRANDEIS: No.

Mr. LAUTERBACH: Then I might catch the 5 o'clock train?

Mr. BRANDEIS: Why, certainly.

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A. [Having examined a letter book.] This book is up to December 23, 1895, and I do not find any such letter.

Q. 185. When does it begin?

A. I have been through book "No. 25 private, A. S. Bigelow," and find no such letter.

Q. 186. You mean you find no letter of Woodhull to Bigelow of August 7, 1895?

A. Yes.

Q. 187. Did you find in this letter book any letter from Woodhull dated August 7, 1895?

A. I think I did.

Q. 188. Was that letter addressed to some person other than Mr. Bigelow?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. It was.

Q. 189. Did that letter have any reference to the Old Dominion enterprise?

A. I did not read the letter, and therefore do not know.

Q. 190. Was the letter addressed to Thomas Nelson?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I do not know.

Q. 191. Do you mean to say that you did not make any investigation as to whom that letter was addressed to?

A. I mean I do not know whether it was addressed to Thomas Nelson personally, or to Thomas Nelson, treasurer; that is what I meant by my answer.

Q. 192. It was addressed to either Thomas Nelson personally, or to Thomas Nelson as treasurer?

518 [Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I think it was.

Q. 193. Thomas Nelson was treasurer of the Old Dominion Copper Mining & Smelting Company, was he not?

A. I think so.

Q. 194. Now will you produce that letter?

Mr. HEMENWAY: I prefer that Mr. Lauterbach should have an opportunity to make any objection that he wishes to make before the letter is produced.

Mr. BRANDEIS: You mean by that, Mr. Hemenway, that you decline to permit the letter to be produced at all, or merely that you desire to reserve all objections?

Mr. HEMENWAY: No, I say I will not produce it at this time.

Q. 195. Is it not a fact, Mr. Chrimes, that that letter contained a reference to 20,000 shares of treasury's stock?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I don't know, Mr. Brandeis; I did not read the letter.

Q. 196. Will you examine the letter and see whether or not it does not relate to the Old Dominion Syndicate, or to the Old Dominion Copper Mining & Smelting Company?

Mr. HEMENWAY: Until I have consulted with Mr. Lauterbach, I decline to submit the letter to the examination of the witness at this time.

Q. 197. You stated that you found in the files letters from Mr. Woodhull, two on August 5, one on August 7, one on August 19; will you produce those letters?

A. By consent of counsel.

Mr. BRANDEIS: Do counsel consent to those letters being produced?

Mr. HEMENWAY: Not at the present time.

Mr. BRANDEIS: On what ground do you decline to have the letters produced?

Mr. HEMENWAY: Because the letters are incompetent, irrelevant, and immaterial; and also for the reason that Mr. Lauterbach is especially interested in this testimony, and that he ought to be allowed to see these letters before they are submittd to counsel on the other side or to the witness for production, these books not being in the custody of this witness. So far as any letters are addressed to Mr. Lewisohn or addressed to Mr. Bigelow, those I will produce,—written on those dates.

519 Q. 198. Is this book in which you found the letter from Mr. Woodhull dated August 7, 1895, to Thomas Nelson or to Thomas Nelson, treasurer, which I am asking you to produce and which Mr. Hemenway has refused to permit you to produce,—was this book containing that letter brought up by you to this examination as in response to the request to produce all letters and books relating to the Old Dominion matter?

A. I think it was.

Q. 199. Well, you know it was, don't you? That is one of the books which you physically brought in your bag to this office, is it not?

A. It was to-day, and I think it was on the other days.

Q. 200. It certainly was brought here to-day?

A. Yes, I brought it to-day.

Q. 201. And that same book was here when Mr. Bigelow was examined, was it not?

A. I believe so.

Q. 202. And that letter was in it at that time, was it not?

A. I do not know whether it was or not; I suppose it was.

Mr. HEMENWAY: I desire to state that the witness brought these books at my suggestion to this office for my use; that the notice was given to me requesting him to produce these books; that the witness does not produce them in accordance with that notice, but in accordance with my request, the books being the private books of Mr. Bigelow; and I do not feel authorized to submit any books or

papers that are absolutely incompetent, irrelevant, and immaterial at the present time,—in my opinion.

Mr. BRANDEIS: Do you claim this letter is absolutely immaterial and incompetent?

Mr. HEMENWAY: I do, at present.

Mr. BRANDEIS: Do you claim that it is the property of Mr. Bigelow?

Mr. HEMENWAY: I do not know.

Mr. BRANDEIS: It has been produced from Mr. Bigelow's possession, has it not?

Mr. HEMENWAY: It has not.

Mr. BRANDEIS: Where has this letter come from?

Mr. HEMENWAY: This letter was found in Mr. Bigelow's office and I decline to be further interrogated by counsel at this time.

Q. 203. I call your attention Int. No. 589 in the deposition of A. S. Bigelow and a conversation and remarks of counsel there following.

A. Are you talking to me?

Q. 204. Yes. I am calling your attention to this, as follows:—

520 "Will you make further search in your letter book for a copy of a letter of August 8, 1895, also for the original letter of August 7, 1895?

"Mr. LAUTERBACH: I think he has already made answer that he has made search and that he has no other letter.

"Mr. BRANDEIS: I still believe that the search is not complete.

"Mr. HEMENWAY: It is a matter that is not material.

"The WITNESS: How is the letter signed, Mr. Brandeis?

"Mr. LAUTERBACH: This is mythical."

I ask you now Mr. Chrimes, whether you made search at that time, when Mr. Bigelow was being examined, for a letter from Mr. Woodhull of August 7?

A. I do not know. I do not think so. I simply went through that letter book, and I do not think I searched for any particular letter.

Q. 205. Is that the letter book in which are contained the letters which were produced, having been received by Mr. Bigelow from Mr. Woodhull?

Mr. HEMENWAY: How does he know when he was not there at all?

A. I do not know.

Mr. HEMNEWAY: And I further say that if you have any letter from Mr. Bigelow on August 8, 1895, we will admit it at once and avoid all this search and all these questions.

Mr. BRANDEIS: Well, we have here a letter of August 7 from Mr. Woodhull, which is apparently a letter of August 7, which we desire to get, and you do not admit it at once, on the contrary, after having received that letter, you have sedulously refused to admit it. That does not give promise of your admitting anything unless you are obliged to.

Mr. HEMENWAY: Your remarks are entirely unnecessary. The letters of Woodhull are not admissible against Mr. Bigelow or Mr. Lewisohn's representatives unless they were received by them and answered. You assume to have the answer by your course of conduct. We do not know of and have not found such an answer; if you have in your possession any letter written by Mr. Bigelow we will not put you to the trouble of proving it, but admit it forthwith; and my declining to admit Mr. Woodhull's letters to a third person in no way connected with Mr. Bigelow, as far as this suit is concerned, is not a warrant for saying that I will refuse to admit a letter . . by Mr. Bigelow to Mr. Woodhull.

Mr. BRANDEIS: Do you now state, and wish the court to understand, that Thomas Nelson was in no way connected with
521 Mr. Bigelow in relation to the Old Dominion Syndicate, or the Old Dominion Copper Mining & Smelting Company, or in relation to the stock of the Old Dominion Copper Mining & Smelting Company which Mr. Bigelow and Mr. Lewisohn took and for which the Old Dominion Copper Mining & Smelting Company is now seeking redress in the court?

Mr. HEMENWAY: My statement is on record and I decline further discussion.

Mr. BRANDEIS: I call the attention of counsel for Mr. Bigelow and Mr. Lewisohn to the fact that Thomas Nelson was the treasurer of the Old Dominion Copper Mining & Smelting Company on August 7, 1895; that he was a director of the company; that he was associated with Mr. Bigelow, and that he received, as appears by the testimony of Mr. Bigelow and of Mr. Hyams, 4240 out of 50,000 shares of stock which are the subject of this suit and of the other suits brought against Bigelow and the Lewisohn estate for the recovery of stock wrongfully taken by the promoters, and again ask Mr. Hemenway whether he desires the court to understand that a letter addressed by Mr. Woodhull, a subscriber to the syndicate and to the treasury stock, and relating to the treasury stock, is a matter which is incompetent, irrelevant, and immaterial?

Mr. HEMENWAY: I fail to see how a statement which is made by counsel can in any way make these declarations of Mr. Woodhull, either in writing or orally, admissible in this case.

Mr. BRANDEIS: I will put one more question in relation to the search:

Q. 206. When you make that search for letters in the letter books connected with the Bigelow offices, referred to in Int. 153, will you also search for any letter or letters under date of August 8, 1895, addressed to Mr. Woodhull, signed by any one, either in the name of Mr. Bigelow or any other name, relating to the Old Dominion Syndicate, or the Old Dominion Copper Mining & Smelting Company, or which appear to be in answer to any letter of Woodhull to Thomas Nelson or to Thomas Nelson, Treasurer, dated August 7, 1895, which you have seen to-day in your examination here, which Mr. Hemenway has declined to permit you to produce?

A. I will.

Mr. BRANDEIS: I further request that this letter being written and addressed to Thomas Nelson, treasurer, should be delivered to the present officers of the Old Dominion Copper Mining & Smelting Company, or to us, as its counsel, and herewith demand the delivery of that letter as being the property of the company and not the property of Mr. Bigelow or of any one whom Mr. Hemenway is authorized to represent. Have you anything to say to that,
522 Mr. Hemenway?

[Mr. Hemenway makes no reply and Mr. Brandeis requests the stenographer to read the demand to Mr. Hemenway.]

[The last preceding paragraph of this record was read by the stenographer.]

Mr. BRANDEIS: Mr. Brandeis further calls Mr. Hemenway's attention to the fact that the letter which he demands, as above stated, is a letter of Woodhull to Nelson, dated August 7, 1895, as to which Mr. Chrimes has just testified.

Q. 207. Mr. Chrimes, Mr. Nelson is dead, is he not?
A. He is.
Q. 208. How long has he been dead?
A. I do not know.
Q. 209. Well, about how many years?
A. I should say about seven; I do not remember the date, Mr. Brandeis, any nearer than that; I think about seven years.

[The further examination of Mr. Chrimes was postponed to a date not fixed.]

OFFICE OF BRANDEIS & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *October* 27, 1905.

[The taking of the deposition of Walter A. S. Chrimes was resumed, Mr. Brandeis continuing his direct examination.]

Q. 210. Will you now produce the letter of August 7 from Mr. Maxwell Woodhull to Mr. Nelson, which you found in the course of your examination of the letter book at your examination on July 19?
A. Shall I do it, Mr. Hemenway?

[At this point the examination of the witness was suspended for a short time, and upon being resumed Int. 210 and answer were read by the stenographer.]

Mr. HEMENWAY: Your answer to that may be—you have asked me the question—the letter is not in my possession.
THE WITNESS: I haven't the letter to produce, and therefore cannot produce it.
Mr. HEMENWAY: I have the letter in my possession on the table before me.
Mr. BRANDEIS: Mr. Hemenway, will you now produce that letter of August 7, 1895, so that I may put it in evidence?
Mr. HEMENWAY: The defendant produces the letter, but objects

to its admissibility, on the ground that it is incompetent, irrelevant, and immaterial, it being a letter written by Maxwell Woodhull to Thomas Nelson, Esq., neither Woodhull nor Nelson being
523 parties to this suit.

Mr. BRANDEIS: I offer in evidence the letter, subject, of course, to defendant's objection. The letter is as follows:

"The Aldine,
Spring Lake Beach, N. Jersey,
AUGUST 7th, 1895

Thomas Nelson, Esquire, Treasurer, &c., Old Dominion Syndicate, Boston, Mass.,

DEAR Mr. NELSON: I beg to acknowledge the receipt of your letter of the 6th of August, in which you say:

'We have changed our minds somewhat since then' (when I was last in Boston, August 1st) 'and have pretty much decided—in fact, I suppose we have decided, as it has been left to me to settle—to give up all our rights to the 20,000 shares which we subscribed for in the first place. Now, under these circumstances, I think it is only right to let you increase your subscription to the amount you had intended and requested. Will you please let me know how much that was as soon as possible, as I have to make up my mind about the allotment right off.'

I presume these 20,000 shares are the treasury shares intended to be sold to produce the necessary $500,000 of cash working capital. Is it not so?

In reply to your letter of the 6th I beg to say that I wished when in Boston to subscribe for six hundred shares (600) additional, and, therefore now subscribe firm for six hundred shares (600 shares) additional to my former subscription, to this issue of 20,000 shares of treasury stock of Old Dominion Syndicate stock. This subscription will give 1800 shares.

I am exceedingly sorry that I did not know of this arrangement on August 1st as I had my money arrangements then made to pay for the additional Old Dominion stock. On learning that the subscription was closed, I at once, i. e., before leaving Boston, last Thursday, bought 300 shares of Rock Island, and I have also bought 300 shares C. B. & Q. through Riggs & Co., taking out of my collateral with them my Old Dominion receipts in order to make said purchase. This purchase of 600 shares of R. R. stock within the past few days will make it necessary for me to have as much time as you can give me to arrange for the money to pay you for the six hundred shares of Old Dominion herein subscribed for.

I am going to Narragansett Pier on Thursday, August 15, whence, after settling my mother and sister for a few weeks' stay I
524 shall go West on my usual yearly trip. I shall probably have to run on to Boston to arrange money matters to pay for these new shares of Old Dominion, but don't want to do so before I go hence on the 15th of August for Narragansett Pier, as I should have so soon to retrace my steps.

Please therefore telegraph me tomorrow latest date at which payment on this six hundred share subscription, amounting to $15,000 can be made, and write me fully in the premises, by the same day's mail.

Please note the subscription of my young cousin, Mr. Oswald N. Cammann for (15) fifteen shares Old Dominion Syndicate. I presume that he can get this stock under the present issue.

When will the Old Dominion stock certificates be ready for issue? It's very difficult to do anything with the receipts in the way of collateral. It will be a decided convenience to have the certificates issued as soon as possible.

I am arranging all my money matters so that I can go West a little after the middle of the month. Can you tell me what Dividend Boston & Montana will pay in November? With the increased price of copper, I don't suppose there is any doubt about the December Tamarack dividend.

Very truly yours,

MAXWELL WOODHULL."

Q. 211. Have you found, Mr. Chrimes, a copy of the letter of August 8, addressed to Mr. Woodhull, which contains the reply to this letter of August 7?

A. No, sir.

Q. 212. Have you made any search for such letter?

A. I have.

Q. 213. Will you now describe in detail exactly what search you have made since your examination on July 19 for the letter or copy of the letter of August 8?

A. I will say, Mr. Brandeis, that my wife has been very sick all summer, and I took her away for a month to Europe. A copy of my testimony was given to me on the 4th of October, and, having been away a month, naturally I was busy, and I didn't get to work on it till the 10th of October. I made some notes as I went along, which I have here.

I commenced by numbering our various receptacles for books, and I numbered the different receptacles, and called them cases, from 1 to 6. I also numbered four safes, and called them 1, 2, 3, and 4. I began by counting the books in the different cases. I found 91 books in No. 1, and a miscellaneous lot of certificate books, but no letter books in No. 2 receptacle.

525 Q. 214. Were there any letter books in No. 1?

A. 91 of various kinds, mostly letter books; there were 91 books by count. In case No. 3 there were 207 books and letter books; in No. 4 there were 3 books; in No. 5 there were 50 books, and in No. 6 there were 38 books.

Q. 215. By "books" you mean letter books in each instance, I suppose?

A. Yes; letters copied and received.

Q. 216. Were all the books letter books?

A. No. Some were certificate books; there might have been one or two, or a dozen, but they were principally letter books, and they

concerned the Tamarack, the Tamarack agent's book, Kearsarge Mining Company books, Butte Water Company books, Tamarack-Osceola Manufacturing Company; Merced Gold Mining Company, Iroquois Copper Company, Lake Superior Smelting Company.

This is as of October 10. I searched Tamarack book No. 34 from July 1, 1895, to August 19, 1895, and found nothing. I also examined No. 35 Tamarack from September 2 to September 30. Those were both letter books in which were pasted letters received, and they contained nothing on the subject.

October 10. Examined No. 12, letters received, Tamarack-Osceola Copper Manufacturing Company, from July, 1895, to September, 1895, and found nothing.

October 10. Examined Merced No. 2, July, 1895, to September, 1895; found nothing. "Examined books between above dates as fast as found"—that is the note I made as I went along.

October 10. Examined No. 11, Tamarack letters received July to September, 1895. Letters to Woodhull April to October, 1895, pp. 187, 218, 233, 361, 387, 521, 711. Found an extra unnumbered page between 523 and 524, which had been numbered 523½. Nothing concerning O. D. in any of above letters for Woodhull. Spent two and a half hours to-day in research.

The next day is October 12. Continued search of books in case No. 1. Examined Butte Water book, letters received, No. C, between July and September, 1895; found nothing. Examined clerk Tamarack No. 2, July to September, 1895; found nothing. Examined Merced No. 1, received July 1 to 13, 1895; found nothing. Examined Kearsarge No. 5, received; found nothing.

October 12. Examined Iroquois Copper Company, letters received, No. 1; nothing found. Spent about four hours to-day in research, particularly looking for a letter from Woodhull to A. S. Bigelow, dated August 7, 1895. Finished case No. 1.

The next date is October 13. Began on case No. 2; mostly old certificate books; nothing bearing on the subject.

526 Began on case No. 3,—contains Laurium, Dollar Bay, Hancock & Calumet Railroad, Albany & Boston, Osceola, Beaver Mining Company, Detroit & Lake Superior Copper Company. Examined Osceola, letters received, No. 13, and Osceola received, No. 14, July to September, 1895; found nothing. Examined Osceola clerk's, No. 10; found nothing between July and September. Examined Iroquois letters; no number on book; contained copies of letters July to September, 1895; found nothing.

October 13. Still working on case No. 3. Examined agent Kearsarge No. 2, July to September, 1895; found nothing. Examined clerk's No. 2, Kearsarge, July to September, 1895; found nothing. Examined Tamarack, Nos. 30 and 31, letters received; found nothing. Examined Tamarack Junior, letters copied, No. 2. Letters to Woodhull on pages 217 and 378, the first being date November 6, 1891, signed by A. S. Bigelow, president; the second being dated January 23, 1893, from T. Nelson. Found nothing from June 28, 1895, to September 5, 1895. There were no pages missing, neither were there any insertions.

Working on case No. 3. Examined letters copied, No. 14, Osceola, June 29, 1895, to September 3, 1895. No letters indexed to Woodhull, and none copied between June 29 and September 3, 1895. No pages missing and no insertions.

Finished with No. 3 and began work in safe No. 1. Didn't find any letter books dated July to September, 1895.

October 13. Began work in safe No. 2; finished this safe. Didn't find any letter books bearing date July to September, 1895. Spent four hours to-day in research.

October 16. Search began with case No. 4; finished with No. 4; found nothing. Began on No. 5, between June 30, 1895, and September, 1895. Hulbert Mining Company, letters received, no number; found nothing. Letters received, letter A, Butte City Water Company, July 2, 1895, to September 3, 1895; nothing indexed to Woodhull between those two dates, and found nothing. No pages missing and no extra pages. In case No. 5 the books principally were letters received and copied, A. S. B., C. M. H., Tamarack-Osceola Manufacturing Company, advices of sales of wire, etc.; nothing found. Finished with No. 5.

October 16. Began on No. 6. Contains principally letters in files later than 1895, and also letters copied, Osceola, Tamarack, Isle Royale, Ainneek, Butte Water, Merced, W. J. Ladd, Laurium, Seneca, Boston & Lake Superior Mineral Land Company, Kearsarge, and Lake Superior Smelting Company. Examined Lake Superior Smelting Company, July to September, 1895, letters copied, No. 1; nothing indexed to Woodhull; nothing missing nor inserted
527 between those dates. Examined letters copied, No. 3, Kearsarge; nothing indexed to Woodhull in book, and no letters copied between above dates.

October 16. Still on No. 6. Examined letters copied, No. 2, Tamarack-Osceola Copper Manufacturing Company; nothing indexed to Woodhull. Page 551, letter of G. Stellway, treasurer, to W. H. Rowe, dated August 29, 1895, had been torn out and pasted in between pages 549 and 550. Found nothing relating to Old Dominion. Examined letters copied, Dollar Bay Land & Improvement Company; back binding of this book had been removed; found nothing in relation to Woodhull between July and September.

Examined letters copied Boston & Lake Superior Mineral Land Company, without number; nothing found between July and September.

Still on No. 6, October 16. Examined Merced letters copied; back binding of book removed. Found letters indexed to Woodhull on pages 25, 27, 53, 131, 195, 255, 296, 361, 411, 580, 589, 634, 638, 644, 660, 666. The only letter to Woodhull between July 1 and September 4, 1895, was one dated August 6, 1895, signed "Thomas Nelson, by Bissell." This letter was marked "Cancelled" in two places across the face, and had not been indexed, and appeared on page 374. There were no pages missing and no insertion between above dates.

October 16. Still on No. 6. Found nothing further, and finished with No. 6. Examined vault in 311; nothing bearing on subject there. Examined vault in 309; nothing bearing on subject here

excepting books which had been brought to the hearings. Spent about four hours in research to-day, and I have made a note at the bottom: "I can think of no other receptacle for books, and therefore discontinue my search."

Q. 217. Do you wish to be understood as saying that you have examined all of the books that are in the Bigelow offices, or the offices of the companies with which Mr. Bigelow is connected, which cover the year 1895?

A. I have done so.

Q. 218. And that you have examined all of those books specifically to see what letters there were between July, and October 1 to Maxwell Woodhull?

A. I have examined all the books in that office.

Q. 219. Do you wish to be understood as testifying that the only copy of any letter that was sent to Maxwell Woodhull that you found, during that period, was this letter of August 6, 1895, signed "Thomas Nelson, by Bissell," and which you said was marked "Cancelled"?

A. During that search, yes.

Q. 220. What do you mean by saying "During that search"?

A. During the search which I have referred to in these notes.

528 Q. 221. What other letters have you found at any other time than during this recent search?

A. Have you any reference to the letters which were found in these books here?

Q. 222. You mean by that the books which have been previously introduced in evidence?

A. I will state that I haven't touched those books since we left here.

Q. 223. When you say that you haven't touched those books since you left here, you refer to letter-press copy books marked "A. S. B. letters 4," and "A. S. B. private letters 6," now shown you?

A. I refer to the letter books which have been brought here to-day; those are a part of them, I suppose.

Q. 224. There is another letter book here marked on the back "Merced;" do you refer, also, to that letter book?

A. That is one that contains the letter which is marked "Cancelled," that I referred to in my notes.

Q. 225. Was that letter of August 6, which you say was marked "Cancelled," the only letter in the letter book marked "Merced," which you have now before you, that is addressed to Mr. Woodhull?

A. That is the only letter to Woodhull that I found relating to Old Dominion in that book.

Q. 226. Were those marks in the book now before you put in by you,—the papers marking place, were they put in by you?

A. The only mark which I put in is this mark which is beside page 374, where the letter to Woodhull is.

Q. 227. Will you now turn to that letter to Woodhull of August 6, and show me the letter?

A. Certainly.

[Counsel for defendant objects to the showing of the letter to counsel, but as a matter of courtesy allows him to inspect it.]

Mr. BRANDEIS: I offer that letter in evidence.

[Counsel for defendant objects to the admissibility of the letter as incompetent, irrelevant, and immaterial, being correspondence between other parties than parties to the suit.]

Mr. BRANDEIS: The letter is as follows:—

"BOSTON, MASS., *August 6th*, 1895.

Maxwell Woodhull, Esq., The Aldine, Spring Lake Beach, New Jersey.

MY DEAR SIR: I remember you wished to increase your subscription to the Old Dominion, over and above what you
529 had a right to take from your original subscription, and, if I remember rightly, we told you that we could not allow you to do it as there would not be any stock to divide up.

We have changed our minds since then and have pretty much decided,—in fact, I suppose we have decided, as it has been left to me to settle,—to give up all our rights to the 20,000 shares which we subscribed for in the first place. Now, under these circumstances, I think it is only right to let you increase your subscription to the amount that you had intended and requested. Will you please let me know how much that was as soon as possible, as I have to make up my mind about the allotment right off.

Yours very truly,

THOMAS NELSON,
By BISSELL."

[Across the face of the letter is written "Cancelled" "Cancelled."]

Q. 228. Is this Merced letter book indexed?

A. Yes.

Q. 229. This letter of August 6 is on page 374?

A. Yes.

Q. 230. On what page is the next letter to Mr. Woodhull?

[Objected to as immaterial.]

A. By the index it is 411.

Q. 231. What is the date of that next letter?

A. July 8, 1896.

Q. 232. What search did you make, prior to October 10, for letters bearing in any way upon this controversy?

A. No search excepting that which we made at the last hearing.

Q. 233. You mean at the hearing on July 19?

A. Yes.

Q. 234. When you were examined?

A. Yes.

Q. 235. Hadn't you, previous to that time, made an examination, either alone or in connection with some other person, of the books and papers relating to Old Dominion Syndicate or Old Dominion Copper Mining & Smelting Company matters?

A. I don't know as I made any examination of any papers.

Q. 236. Did you have anything to do with any papers; and if so, what,—or books, of course?

A. I think there was a search made for some letters, and I believe I assisted in putting some of those papers in at those various pages; what they were I am unable to say.

Q. 237. Did you make that examination alone or in connection with some other person?

A. I believe Mr. Hyams and I did that together.

530 Q. 238. When did you do it?

A. A short time after we were asked to produce these books, I believe; soon after this suit was started.

Q. 239. Did you at that time examine any letter-press copy book except those marked "A. S. B., No. 6, private," and "A. S. B., letters 4"?

A. Did I look at any others?

Q. 240. Yes, at that time.

A. No, I don't think I did.

Q. 241. Why not?

A. I don't know why I didn't.

Q. 242. Why did you select those books for your examination?

A. Which? Those which are on the table now?

Q. 243. The letter-press copy book marked "A. S. B., 4," and the letter-press copy book marked "A. S. B., private No. 6."

A. I don't think I had any hand in the selection of them.

Q. 244. Who did select those books for examination?

A. I don't know.

Q. 245. By whom were they handed to you for examination?

A. My recollection is that they were never handed to me.

Q. 246. Where did you get them?

A. I believe they were on a table in Mr. Bigelow's office; I believe we went through them there.

Q. 247. You were invited by Mr. Hyams to go through them with him?

A. Either Mr. Hyams or Mr. Bigelow, I don't know which.

Q. 248. And those are the only letter-press copy books that you had examined prior to October 10?

A. I think so; I don't remember any others.

Q. 249. Now were there among the books which you examined on October 10 and subsequently, any letter books of Thomas Nelson?

A. I don't remember seeing a letter book of Thomas Nelson in any of those cases. I believe I made a note of every book that there was in those cases as I went along.

Q. 250. Do you recall that Thomas Nelson had any letter book, or used any book for making copies of letters written by him, other than the books in the office which you examined October 10 and subsequently, and these two letter books marked "A. S. B. No. 4" and "A. S. B. private No. 6," covering this period of 1895?

A. I know that years ago he had a private letter book, of course.

Q. 251. What has become of that private letter book?

A. How do I know? Mr. Nelson has been dead for seven or eight years, and I presume the executors of his estate took those things which belonged to him which were in the office.

Q. 252. You have no knowledge on that subject?

A. No.

Q. 253. So far as you know, the letter book has not been removed from the office since this suit was begun?

531 A. I have not seen the letter book. I don't know anything about whether it was removed since, or before, or whether the executors took it when he died. I have no knowledge whatever of Thomas Nelson's private letter book, in relation to its removal.

Q. 254. When did you last see it, so far as you can remember?

A. I don't know; I haven't any idea.

Q. 255. I show you now a printed circular marked "Exhibit 6, Oct. 11, 1904," which is a paper put in evidence in connection with the deposition of Mr. Charles H. Altmiller, and ask you whether you recall that circular, or the circular of which that is a sample?

[Objected to as immaterial.]

A. I do not, Mr. Brandeis.

Q. 256. Do you see anything on that circular which is in your handwriting?

A. Why, yes.

Q. 257. What?

A. That writing and that writing, and that and that.

Q. 258. Will you read the words that are in your handwriting?

A. "Mr. Nelson said call this unsold."

Q. 259. That is written in red ink?

A. Written in red ink: "100," "82500," 'Are now ready."

Q. 260. What else?

A. "O. N. Pierce, Grinnell Mfg. Co., New Bedford, Mass."

Q. 261. That circular was made out by you originally—the blank was filled in by you, was it not?

A. Yes.

Q. 262. And subsequently the words, "Mr. Nelson said call this unsold," were written by you, and was recording the statement made by Mr. Nelson to you and the instructions which he gave you?

A. I presume so.

Q. 263. Do you know Mr. O. N. Pierce?

A. I do not.

Q. 264. Or his handwriting?

A. I do not.

Q. 265. Do you recall whether you filled out blanks in the other circulars which were sent out in that form to subscribers to stock in the Old Dominion Copper Mining & Smelting Company?

A. I do not remember.

Q. 266. Was that a part of your duty at that time?

A. I think it may have been.

Q. 267. You think it was, do you not?
A. I cannot say. In other words, I don't know whether I worked alone on those or not, Mr. Brandeis.
532 Q. 268. That is, either you alone, or you in connection with somebody else, sent out these notices?
A. Yes.
Q. 269. Of which that is a sample,—notices to subscribers, of which that is a sample?
A. Yes.
Q. 270. Who was the other person, or persons, who worked with you, if you didn't do it alone?
A. I think likely Mr. Bissell did.
Q. 271. I wish to ask you now as to whether or not you know of the deaths of certain persons who have appeared on this list as subscribers to the syndicate or to the stock. J. O. Weatherbee?
A. Dead.
Q. 272. Do you know about when he died?
A. I should say about two years ago.
Q. 273. W. W. Grout?
A. General Grout is dead; he died at least four years ago.
Q. 274. Horace Stevens?
A. Horace Stevens is dead. I should say he died two years ago.
Q. 275. R. C. Billings?
A. Robert C. Billings died three years ago.
Q. 276. R. M. Field?
A. Field died about four years ago, at least.
Q. 277. Isaac Fenno?
A. Isaac Fenno has been dead for five years, I should say.
Q. 278. Gordon Prince?
A. Gordon Prince has been dead four or five years.
Q. 279. Joseph Rechert?
A. Five or six years.
Q. 280. George H. Ball?
A. Less than two years.
Q. 281. H. C. Moses?
A. I don't know whether he is dead or not.
Q. 282. Moses T. Stevens?
A. I don't know whether he is dead or not.
Q. 283. Samuel S. Stevens?
A. I don't know whether he is dead or not.
Q. 284. W. A. Tower?
A. I don't know him.
Q. 285. Of Tower, Giddings, Col. W. A. Tower, Henry Woods?
A. He has been dead about three years, I should say.

[This deposition is kept open for cross-examination, or for any further examination by plaintiffs, if, after it is written out, plaintiffs wish to put additional questions.]

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

533 OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *October* 27, 1905.

Deposition of Henry Wood.

HENRY WOOD, being first duly sworn by Howland Twombly, Esq., is answer to interrogatories propounded by Louis D. Brandeis, counsel for the plaintiff, deposes and says,—

Q. 1. State your full name, residence, and occupation.

A. Henry Wood; Cambridge; literary work; I am an author.

Q. 2. What was your occupation in 1895?

A. The same.

Q. 3. I show you a paper marked "Exhibit 10, March 27, 1903," being a paper attached to the deposition of A. S. Bigelow in this cause, the paper itself being dated July 18, 1895, and purporting to be a subscription for the stock of the Old Dominion Mining & Smelting Company, and call your attention particularly to the name "Henry Wood one hundred shares (100)" on that paper, and ask you whether that is your signature?

A. Yes, sir.

Q. 4. Where did you write your name and the subscription?

[Objected to as immaterial.]

A. I think that was at Mr. Bigelow's office; that is my recollection.

Q. 5. In the Sears building?

A. Yes, sir.

Q. 6. Did you subsequently take the one hundred shares of the stock for which you subscribed?

[Objected to as incompetent, irrelevant, and immaterial.]

A. Yes, sir.

Q. 7. How was the payment for that stock made; whether by check or in cash?

[Objected to as incompetent, immaterial, and irrelevant.]

A. One check for five hundred and one for two thousand.

Q. 8. Are the two canceled checks now shown you the checks which you gave, to which you have just referred?

[Objected to as incompetent, immaterial, and irrelevant.]

A. These are the checks.

Mr. BRANDEIS: I now introduce in evidence these checks and read them into the record as follows:

534 [Objected to as incompetent, immaterial, and irrelevant.]

"$500. SEPTEMBER 17, 1895.

Boston Safe Deposit & Trust Co.

Pay to the order of Thomas Nelson, Treasurer, Five hundred dollars.
No. 807. HENRY WOOD."

It is endorsed: "For deposit only to account of Old Dominion Copper Mining & Smelting Co., P. K. Dumaresq, Assistant Treasurer." It is marked "Paid, Boston Safe Deposit & Trust Co."

"$2,000. SEPTEMBER 21, 1895.

Boston Safe Deposit & Trust Co.

Pay to order of Thomas Nelson, Treasurer, Two thousand dollars.
No. 809. HENRY WOOD."

This checks is endorsed: "For deposit only to account of Old Dominion Copper Mining & Trust Co., P. K. Dumaresq, Assistant Treasurer," and is marked "Paid," and canceled.

Q. 9. I show you now what purports to be a letter from you, dated September 17, 1895, addressed to Thomas Nelson, treasurer, and ask you whether that letter is in your handwriting?
A. It is; yes, sir.
Q. 10. The whole of it?
A. Yes, sir; written from Wentworth Hall, Jackson, N. H.
Q. 11. Will you read that letter in evidence?

[Objected to as immaterial, irrelevant, and incompetent.]

A. [Reading:]

"WENTWORTH HALL, JACKSON, N. H.,
September 17, 1895.

Thomas Nelson, Treasurer.

DEAR SIR: I enclose check for $500 towards the 100 shares of Old Dominion subscribed for by me. I expect to return to the city on Friday and will call on Saturday and pay the balance and get the certificates.

Yours truly,
HENRY WOOD,
Of The Warren, Roxbury."

535 I lived in Roxbury at that time; I moved to Cambridge five years ago.
Q. 12. You did subsequently secure the certificate?
A. Yes, sir.
Q. 13. I now hand you certificate No. A17 for 100 shares of Old Dominion Copper Mining & Smelting Company's stock, standing in the name of Henry Wood, the certificate being dated September 19, 1895, and ask you whether that is the certificate that you received?

[Objected to as incompetent, immaterial, and irrelevant.]

A. It is the original certificate.

Q. 14. And that is your endorsement on the certificate?

A. Yes, sir.

Q. 15. Did you, prior to subscribing for that stock, have any conversation with Mr. Bigelow or Mr. Lewisohn in relation to your subscription?

A. I don't think I ever met Mr. Lewisohn. I think I had a little conversation with Mr. Bigelow, naturally. As to the details of that conversation, I don't remember much.

Q. 16. Were you acquainted with Mr. Bigelow before you made that subscription?

A. Somewhat, yes, sir; I met him a few times.

Q. 17. Whether or not, before making the subscription, Mr. Bigelow stated to you anything as to his, or his and Mr. Lewisohn's, or his and his associates, purporting to take a block of this stock, 50,000 shares, or any number of shares of this stock, as compensation for their services or otherwise in getting up the company?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I don't think I inquired especially about the inside matters of the company. I bought the stock, thinking it was a good investment, on general principles, and I had had stock in Mr. Bigelow's companies before. If I did, I have no recollection of finding out the inside details or history of that stock; I have no recollection of it now.

Q. 18. Did you at any time hear that Mr. Bigelow and Mr. Lewisohn and his associates had taken a large block of this stock for themselves?

[Objected to as incompetent, immaterial, irrelevant, and leading.]

A. Do you mean previous to the subscription?

Q. 19. Yes, first, whether previous to the subscription?

A. No; I have no recollection of knowing about it previous to the subscription.

Q. 20. Did you at any time subsequent to the subscription hear anything to that effect?

[Objected to as incompetent, irrelevant, and immaterial.]

536 A. More recently from the papers and general notoriety; of course, I have heard of this difficulty, but not being interested in the company at present, I haven't looked into it at all, only in a very general way.

Q. 21. Then you first heard anything to that effect since you ceased to be interested in the company?

A. Yes, sir, so far as I remember.

Q. 22. When did you cease to be interested in the company?

A. In 1891 I sold the last share of stock I had.

[No cross-examination.]

[It is agreed that the original checks may be returned to Mr. Wood, and they are returned to him.]

Subscribed and sworn to before me this — day of November, 1905.

——— ———,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *October* 27, 1905.

Deposition of Stephen M. Crosby.

STEPHEN M. CROSBY, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by Louis D. Brandeis, counsel for the plaintiff, deposes and says,—

Q. 1. State your full name, residence, and occupation?

A. Stephen M. Crosby; 364 Marlborough street, Boston; no occupation.

Q. 2. What was your occupation in 1895?

A. I was president of the Massachusetts Loan & Trust Company.

Q. 3. And had been before that?

A. For several years; yes, sir.

Q. 4. When did you cease to be president of that company?

A. I am nominally still president, because the organization is kept alive, but I am not in any active management of matters.

537 Q. 5. I show you a paper marked "Exhibit 3, March 24, 1903," being an exhibit put in evidence in connection with the testimony of A. S. Bigelow in this cause, the paper being dated May 21, 1895, and call your attention to the words and figures on that paper, "Stephen M. Crosby $10,000:" is that in your handwriting?"

[Objected to as immaterial.]

A. It seems to have been originally different. That is my signature, but as to the amount against it, I don't know anything about that.

Q. 6. That is, you mean by that to say you don't know whether the figures, $10,000, are in your handwriting or not?

A. I think they are not. My signature and handwriting is $20,000.

Q. 7. I call your attention now to another paper, marked "Exhibit 5, March 24, 1903," being an exhibit put in evidence with the deposition of A. S. Bigelow in this cause, and which exhibit is dated June 14, 1895, and call your attention again to the name and words "Stephen M. Crosby, Ten thousand dollars," and ask you whether that is in your handwriting?

[Objected to as immaterial.]

A. It is.

Q. 8. All of it?

A. It is all of it in my handwriting, yes.

Q. 9. Did you subsequently make the payment in pursuance of that subscription?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I did.

Q. 10. Are you able to state what payments you made?

A. I haven't any list of them nor any checks.

Q. 11. Did you receive the certificate or certificates for stock in the company in pursuance to this subscription?

[Objected to as immaterial, incompetent, and irrelevant.]

A. I did; yes, sir.

Q. 12. I now show you certificate No. 213, for 1600 shares of stock in the name of Stephen M. Crosby, and ask you whether that is a certificate of stock received by you in pursuance of that subscription?

[Objected to as immaterial.]

A. It is.

538 Q. 13. And is the endorsement, "Stephen M. Crosby," in your handwriting?

A. It is.

Q. 14. And the date, September 30?

A. It is.

Q. 15. Referring now to the subscription paper bearing date May 21, 1895, the earlier of the two subscription papers, being Exhibit 3, are you able to state where you signed that paper?

[Objected to as immaterial.]

A. I have no distinct recollection where that was signed.

Q. 16. Do you remember whether or not, prior to signing that paper, you had any conversation with Mr. Bigelow or Mr. Lewisohn in relation to your subscription to the enterprise?

[Objected to as incompetent, irrelevant, and immaterial.]

A. No, I have no recollection.

Q. 17. Referring now to the other subscription paper, marked "Exhibit 5," which was referred to as being of date of June 14, 1895, I ask you whether you recall where, or under what circumstances, you signed that second subscription paper?

[Objected to as immaterial, incompetent, and irrelevant.]

A. No, none whatever.

Q. 18. Do you remember whether or not, prior to the signing of that second paper, you had any conversation with Mr. Bigelow or Mr. Lewisohn in relation to the enterprise?

[Objected to as incompetent, irrelevant, and immaterial.]

A. No, I have no distinct recollection at all.

Q. 19. Did Mr. Lewisohn or Mr. Bigelow, at any time prior to

the signing of either of those papers, say anything about their purposing to take 50,000 shares, or any number of shares, of the stock of this company as compensation for their services in promoting the syndicate or promoting the company, or anything to that effect?

[Objected to as incompetent, irrelevant, and immaterial.]

A. No; I have no recollection of any such statement.

Q. 20. Did any such information come to you from any source prior to your signing either of those subscription papers?

539 [Objected to as incompetent, immaterial, and irrelevant.]

A. No.

Q. 21. Did any such information come to you from Mr. Lewisohn or Mr. Bigelow, or any other source prior to your paying the money under these subscriptions?

[Objected to as incompetent and immaterial.]

A. No.

Q. 22. Did any such information come to you from Mr. Lewisohn or Mr. Bigelow, or any other source prior to your receiving the certificate for the stock in the company?

[Objected to as incompetent, irrelevant, and immaterial.]

A. No.

Q. 23. Has any such information come to you at any time since?

A. Yes.

Q. 4. When?

[Objected to as immaterial.]

A. I should think some two or three years ago. I think I heard it first from Mr. Smith, who had then become president of the Old Dominion Copper Mining & Smelting Company.

[The answer is objected to as being mere hearsay.]

Q. 25. You were personally acquainted with Mr. Bigelow?

A. Yes.

Q. 26. Met him from time to time?

A. Yes.

Q. 27. Both before and after the subscription and the payment of the money and the receipt of the certificate?

A. Yes.

[No cross-examination.]

Subscribed and sworn to before me this — day of November, 1905.

_____,

Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

540 OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *October* 27, 1905.

Deposition of Edwin M. Dodd.

EDWIN M. DODD, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by Louis D. Brandeis, counsel for the plaintiff, deposes and says:

Q. 1. State your full name, residence, and occupation.

A. Edwin M. Dodd; wool broker; present residence at Hotel Charlesgate; permanent residence, Providence.

Q. 2. What was your residence and occupation in 1895?

A. Residence at Providence, and occupation the same.

Q. 3. I hand you herewith a paper marked "Exhibit 10, March 27, 1903," being an exhibit put in evidence in connection with the testimony of A. S. Bigelow in this cause, being a subscription paper dated July 18, 1895, for stock of the Old Dominion Copper Mining & Smelting Company at $25 a share, and call your attention specifically to the name and words and figures, "Edw. M. Dodd, by Matthew Luce, fifty (50) shares," and ask you whether you are the Edwin M. Dodd referred to in that subscription?

A. I am, yes.

Q. 4. And did Mr. Luce make that subscription on your behalf with your authority?

[Objected to as immaterial.]

A. He made a subscription by my authority.

Q. 5. For 50 shares; and you subsequently took and paid for the shares?

A. I subsequently took and paid for some shares. My papers are all in Providence and I couldn't be certain whether the number was 50; it probably was. It was a comparatively small number of shares I took and paid for.

[Objected to as immaterial and incompetent.]

Q. 6. I show you now a certificate of stock in the Old Dominion Copper Mining & Smelting Company marked "B No. 2," in the name of Edwin M. Dodd, dated September 19, 1895, for 50 shares, which certificate is endorsed "Edwin M. Dodd, September 27, 1895," and ask you whether that is the certificate which you received?

[Objected to as immaterial.]

541 A. That is my signature on the back of it, so it must be.

Q. 7. Did you, prior to the time of making that subscription, hear from Mr. Bigelow or Mr. Lewisohn, or from any other source, that they, or any of them, or their associates, were purposing to take 50,000 shares, or any number of the shares, of the stock in the company, or had taken any such shares in the stock of the company, as compensation for their services in forming the company or otherwise?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I did not.

Q. 8. Did you hear from Mr. Bigelow or Mr. Lewisohn, or from any other source, any such information at any time prior to the paying of the money under that subscription?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I did not.

Q. 9. Or at any time prior to your getting the certificate?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I did not.

Q. 10. Have you ever heard from Mr. Bigelow or Mr. Lewisohn any information to that effect?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I never have.

Q. 11. Have you heard from any source, since obtaining the certificate, that Mr. Bigelow, Mr. Lewisohn, and their associates had taken 50,000 shares, or any large number, or any shares, as compensation for their services, or alleged compensation for their services, in forming the syndicate or company, or in that connection?

[Objected to as incompetent, irrelevant, and immaterial.]

A. Not until within a week or ten days, when I first heard of this suit.

[No cross-examination.]

——— ———.

Subscribed and sworn to before me this — day of November, 1905.

———, ———,
Notary Public.

542 *Stipulation.*

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET, BOSTON, *October* 27, 1905.

Deposition of William A. Rust.

WILLIAM A. RUST, being first duly sworn by Howard Twombly, Esq., in answer to interrogatories propounded by Louis D. Brandeis, counsel for the plaintiff, deposes and says:

Q. 1. Please state your name, residence, and occupation.

A. William A. Rust; residence, at the present time, East Bri
water; president Freemans National Bank.

Q. 2. Freemans National Bank of Boston?

A. Yes, sir, Freemans National Bank of Boston.

Q. 3. What was your occupation in 1895?

A. The same.

Q. 4. I call your attention to a paper marked "Exhibit 10, Ma
27, 1903," being a paper put in evidence as an exhibit in con
tion with the deposition of A. S. Bigelow in this cause, wh
paper itself is dated, Boston, July 18, 1895, and is an agreem
to subscribe for stock of the Old Dominion Copper Mining & Sm
ing Company at $25 a share; and I call your attention particula
to the words and figures, "Nancy E. Rust, per W. A. R., fo
shares (40)," and ask you whether that is in your handwriti

A. Yes, sir.

Q. 5. And the "W. A. R." indicates who?

A. Myself.

Q. 6. And Nancy E. Rust is Mrs. Rust, your wife?

A. It was; she is not living.

Q. 7. Are you able to state where that paper was signed by you?

[Objected to as immaterial.]

A. I don't know, sir, where.

Q. 8. Was the stock subscribed for by you in Mrs. Rust's na
taken and paid for?

[Objected to as immaterial.]

A. Yes, sir.

543 Q. 9. I show you now a certificate of the Old Domini
Copper Mining & Smelting Company, No. 247, for eigh
shares, in the name of Nancy E. Rust, being a certificate dat
September 27, 1895, and endorsed by Nancy E. Rust, witness, W.
Rust, and ask you whether that is a certificate which you receiv
in pursuance of that subscription?

A. I presume it must be; I don't know anything why it isn
I don't recollect whether I bought any other or not, but I presu
it is.

Q. 10. The endorsement is in Mrs. Rust's name?

A. Yes, sir.

Q. 11. And the witness is yours?

A. Yes, sir.

Q. 12. And that is your handwriting?

A. Yes, sir.

Q. 13. You were acquainted at the time of making that subscri
tion with Mr. A. S. Bigelow?

A. Yes, sir.

Q. 14. Did you know Mr. Lewisohn?

A. No, sir.

Q. 15. Did you hear from Mr. Bigelow at any time, or from M
Lewisohn, or from any one associated with them, anything to th
effect that Mr. Bigelow, Mr. Lewisohn, or they and their associate
or any of them, were purposing to take 50,000 shares, or any bloc

of this stock for their own services, or otherwise, in connection with the promotion of this enterprise?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I never did.

Q. 16. Did you have any such information from any source at any time prior to the paying in of the money?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I did not.

Q. 17. Or at any time prior to the receiving of the certificate?

[Objected to as incompetent and immaterial.]

A. No, sir.

Q. 18. Have you at any time since receiving the certificate had any information, or heard anything to that effect?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I have never known anything about it except what I have seen in the papers the last few days, and when your man came up to see me.

544 Q. 19. When did you first hear, so far as you know, anything to that effect?

[Objected to as immaterial.]

A. I saw in the paper that there was a suit commenced; that is the first I knew anything about it.

Q. 20. That was some two or three years ago?

A. Oh, no, sir. I didn't know it then; only lately.

Q. 21. Some months ago?

A. I should think it was a few weeks ago I saw it in the paper.

Q. 22. Do you refer to the report in the paper of the decision of our Supreme Court one day?

A. No; I don't know anything about any decision at all. I only saw by the paper something about a suit against Mr. Bigelow and Mr. Lewisohn; I don't know whether that has anything to do with this or not, but I supposed it was from what you said.

Q. 23. That was the first information you had from any source in regard to this matter?

A. Yes, sir; I didn't know anything about it at all.

[No cross-examination.]

——— ———.

Subscribed and sworn to before me this — day of November, 1905.

———, ———,

Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET, BOSTON, *October* 27, 1905.

Deposition of Edwin C. Swift.

EDWIN C. SWIFT, being first duly sworn by Howland Twombly Esq., in answer to interrogatories propounded by Louis D. Brandei counsel for the plaintiff, deposes and says:

Q. 1. State your full name, residence, and occupation.

A. Edwin C. Swift; my residence is Beverly, Mass.; I am in th beef business.

545 Q. 2. What was your occupation in 1895?

A. The same.

Q. 3. I call your attention to a paper marked "Exhibit 6, Marc 24, 1903," being a paper put in evidence in connection with th deposition of Mr. A. S. Bigelow in this cause, and particularly to th words and figures, "E. C. Swift 10,000," signed to that paper, an ask you whether that signature is your handwriting?

[Objected to as immaterial.]

A. Yes, sir.

Q. 4. I call your attention also to a paper marked "Exhibit 10 March 27, 1903," being a paper put in evidence in connection wit the deposition of A. S. Bigelow in this cause, which paper is date Boston, July 18, 1895, and purports to be a subscription to the stoc of the Old Dominion Copper Mining & Smelting Company at $25 share, and call your attention particularly to the words and figure signed to that paper, "E. C. Swift, 1000," and ask whether that is i your handwriting?

A. Yes, sir.

Q. 5. I now show you a certificate in the Old Dominion Copper Mining & Smelting Company, dated September 19, 1895, No. 119 for 1000 shares in the name of E. C. Swift, and purporting to b endorsed "E. C. Swift," and ask you whether the endorsement is i your handwriting?

A. Yes, sir.

Q. 6. I also show you a certificate in the Old Dominion Copper Mining & Smelting Company for 800 shares, No. 248, in the name of E. C. Swift, dated September 27, 1895, and endorsed in the name of E. C. Swift, and ask you whether that endorsement is in your handwriting?

A. Yes, sir.

Q. 7. Did you pay for and take the stock coming to you under the two subscriptions which have been called to your attention?

[Objected to as immaterial.]

A. So far as I know; yes, I suppose I did.

Q. 8. And those two certificates which I have just shown you are the certificates which were delivered to you in pursuance of those subscriptions?

A. It appears so.

Q. 9. Were you, prior to the taking of the first of those subscriptions, acquainted with Mr. A. S. Bigelow?

A. Yes, sir.

Q. 10. And Mr. Lewisohn?

A. Well, I don't think so; I never met Mr. Lewisohn but once, and that wasn't on business—just happened to meet him, and was introduced to him.

546 Q. 11. Do you recall under what circumstances you made the first of those subscriptions?

A. No, sir; I do not.

Q. 12. Or under what circumstances you made the second of the subscriptions?

A. No, sir.

Q. 13. Nor where the paper was signed?

A. No, sir.

Q. 14. Did Mr. Bigelow, prior to your making the first of those subscriptions, say anything to you about its being the intention of himself and Mr. Lewisohn to take 50,000 shares, or any number of shares, of stock of this company as compensation for his services, or otherwise than as a subscriber?

[Objected to as immaterial and irrelevant.]

A. I have no memory of any such thing.

Q. 15. Was any such information given to you by Mr. Bigelow, or any one else, prior to your making the second subscription?

[Objected to as incompetent, immaterial and irrelevant.]

A. I have no memory of any thing of the kind.

Q. 16. Or prior to your paying in the money under either of those subscriptions?

[Objected to as incompetent and irrelevant.]

A. I have no memory of anything of the kind.

Q. 17. Did you, at any time subsequent to the paying in of the money and to the receiving of the certificates, hear from Mr. Bigelow, or from any other source, that Messrs. Bigelow and Lewisohn had taken 50,000 shares, or any large number of shares, of the stock in the company as alleged compensation for their services, or otherwise than as subscribers?

[Objected to as incompetent, immaterial and irrelevant.]

A. I have no memory on the subject.

Q. 18. I asked you whether you at any time had heard this?

[Objected to as immaterial.]

A. If I ever did, I don't remember it.

Q. 19. Have you heard anything recently, I mean? You have heard it talked of recently, haven't you?

547 [Objected to as incompetent, immaterial, and irrelevant.]

A. I haven't heard anything more than has been in the papers.

Q. 20. And that which has been in the papers is what you have

seen within the last two or three years, since Mr. Bigelow went out of the management?

A. I should think it was very recent.

Q. 21. I show you what purports to be a letter signed by E. C. Swift, under date of September 24, 1895, and ask you whether that is your signature?

A. Yes, sir.

Q. 22. Will you read that letter?

[Letter objected to as incompetent, immaterial, and irrelevant.]

A. [Reading:]

"SEPTEMBER 24, 1895.

Thomas Nelson, Esq.

DEAR SIR: I am in receipt of your favor of the 23rd acknowledging the receipt of check for $25,000, and handing me certificate for 1000 shares of Old Dominion Copper Mining & Smelting Company stock.

Yours truly,

E. C. SWIFT."

Q. 23. Have you the letter to which that refers, the letter from Mr. Nelson?

A. I have made diligent search for it, but have not been able to find anything.

Q. 24. I call your attention now to a letter in the letter press copy book of the Old Dominion Copper Mining & Smelting Company, purporting to be dated September 23, 1895, which letter reads as follows:

[The admission of this letter is objected to because it is incompetent, irrelevant, and immaterial, and as being correspondence between others than the parties to this suit.]

"E. C. Swift, Esq., Ames Bldg., Boston, Mass.

DEAR SIR: Your late favor covering check for $25,000 to pay for 1000 shares of stock of Old Dominion Copper Mining & Smelting Company was duly received. We enclose you herewith certificate No. 119 in your name for one thousand (1000) shares of this Company's stock. Please acknowledge receipt.

Yours truly,

THOMAS NELSON, *Treasurer*,
By BISSELL."

548 —and ask you whether that is the letter which your letter of the 24th acknowledges the receipt of?

A. I presume it is.

Q. 25. And certificate No. 119 for 1000 shares, shown you a few moments ago, is the certificate referred to in that letter, and which you then acknowledged the receipt of?

A. I presume so.

[No cross-examination.]

Subscribed and sworn to before me this — day of November, 1905.

——— ———,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically: also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER.
161 DEVONSHIRE STREET.
BOSTON, *October* 27, 1905.

Deposition of David M. Anthony.

DAVID M. ANTHONY, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by Louis D. Brandeis, counsel for the plaintiff, deposes and says:

Q. 1. State your full name, residence, and occupation.
A. David M. Anthony; Fall River, Mass.; provision dealer.
Q. 2. What was your business in 1895?
A. Provision dealer.
Q. 3. I call your attention to a paper marked "Exhibit 6, March 24, 1903," being an exhibit put in evidence in connection with the deposition of A. S. Bigelow in this cause, the paper itself being dated 1895, purporting to be a subscription to a syndicate called "The Old Dominion Syndicate," and call your attention specifically to the words and figures, "D. M. Anthony, 5000," and ask you whether that is in your handwriting?
A. I should say it was.
Q. 4. And I will ask you in whose handwriting the name "Harold H. Anthony, 5000" is?
A. That is my son, and I should say that was my writing.
549 Q. 5. Do you recall under what circumstances and where your signature to that paper was given?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I could not bring it to mind at all.
Q. 6. Did you subsequently make payments and receive stock in pursuance of that subscription?

[Objected to as immaterial.]

A. I couldn't say from memory.
Q. 7. I show you now a certificate in the Old Dominion Copper Mining & Smelting Company, No. 86, for 200 shares, in the name of D. M. Anthony, the certificate being dated September 19, 1895, and purporting to be endorsed by D. M. Anthony, and ask you whether that is in your handwriting?
A. Yes, sir, I should say so.
Q. 8. And I also show you certificate No. 198, in the Old Dominion Copper Mining & Smelting Company, for 400 shares in the

name of D. M. Anthony, and purporting to be endorsed "D. M. Anthony," and ask you whether that is in your handwriting?

A. Yes, sir.

Q. 9. And were those certificates received by you in pursuance of your subscription to the syndicate or to the stock of that company?

A. Well, from the evidence here I should presume so; I couldn't say from memory. It has all passed from my memory.

Q. 10. I show you a letter dated October 2, 1895, purporting to come from the office of D. M. Anthony, wholesale provisions, 83 Davol street, Fall River, and ask you in whose handwriting that letter is?

A. That is my writing.

Q. 11. Will you read that letter, please?

[Objected to as incompetent, immaterial, and irrelevant.]

A. [Reading:]

"FALL RIVER, MASS., *October 2nd*, 1895.

Thomas Nelson, Esq., Treasurer.

DEAR SIR: Yours of October 1st containing check for $5000 to my order came to hand this a. m. Thanks for the same.

Very truly yours,

HAROLD H. ANTHONY."

550 Q. 12. I call your attention now to a letter under date of October 1, 1895, being a copy in the letter-press copy book of the Old Dominion Copper Mining & Smelting Company, and ask whether that is the letter to which the letter of October 2 refers?

[Objected to as incompetent, immaterial, and irrelevant, and as correspondence between parties other than parties to this suit.]

A. Yes.

Q. 13. Will you read that letter?

A. [Reading:]

"OCTOBER 1, 1895.

Harold H. Anthony, Esq., Box 13, Fall River, Mass.

DEAR SIR: Enclosed you should find check of the Old Dominion Copper Mining & Smelting Company to your order for $5,000. Please acknowledge receipt.

Yours truly,

THOMAS NELSON, *Treasurer*.
By BISSELL."

Q. 14. Were you, prior to the signing of that subscription paper, acquainted with Mr. A. S. Bigelow?

A. I don't think I was; I don't think I had ever met him at that time.

Q. 15. Did you, prior to signing that subscription paper, receive any information from him or Mr. Lewisohn, or from any other person that Messrs. Bigelow and Lewisohn and their associates, or

any of them, had taken, or purposed to take, 50,000 shares, or any number of shares, or any profits for promoting this Old Dominion Copper Mining & Smelting Company?

[Objected to as incompetent, immaterial, and irrelevant.]

A. No, sir; I have no recollection of it.

Q. 16. Did you get any such information from any source prior to the payment of the money under that subscription, or any of the money?

[Objected to as incompetent, immaterial, and irrelevant.]

A. No, sir.

Q. 17. Did you get any such information from any source prior to the receipt of the certificates of stock in the company?

551 [Objected to as immaterial, irrelevant, and incompetent.]

A. No, sir.

Q. 18. Have you, since the receipt of the certificates, received any information from any source that Messrs. Bigelow and Lewisohn and their associates had taken 50,000 shares, or a large block of the stock, on account of the promotion of the company, or otherwise, for their services?

[Objected to as incompetent and irrelevant.]

A. Nothing except what I have seen in the public prints recently, since this company came in possession.

Q. 19. You mean by that since the change of management from Mr. Bigelow?

A. Yes, sir.

Q. 20. And since Mr. Smith became president of the company?

A. Yes, sir. Perhaps I ought to say in this case of my son, that he was a minor at that time and I was his guardian, and this was really my transaction, although it was done in his name for certain purposes. That is merely an explanation.

[No cross-examination.]

——— ———.

Subscribed and sworn to before me this — day of November, 1905.

——— ———,

Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *October* 27, 1905.

Deposition of George Marshall Preston.

GEORGE MARSHALL PRESTON, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by Louis D. Brandeis, counsel for the plaintiff, deposes and says,—

Q. 1. State your full name, residence, and occupation.

A. George Marshall Preston; 91 Bedford street, Boston; dry-goods commission merchant.

552 Q. 2. You are of the firm of Faulkner, Page & Company?

A. Faulkner, Page & Company.

Q. 3. What was your occupation in 1895?

A. Just the same.

Q. 4. I show you a paper marked "Exhibit 4, March 24, 1903," being a paper introduced in evidence in connection with the deposition of Albert S. Bigelow in this cause, which paper itself is dated May 24, 1895, and is a subscription paper to the formation of the Old Dominion Syndicate, so called, and ask you whether you are the George M. Preston whose name is appended to that paper?

A. Well, all I can say is, I suppose so; I don't know of any other George M. Preston; but I don't know anything more than that. I don't know anything about it.

Q. 5. Will you look at certificate No. 242 in the Old Dominion Copper Mining & Smelting Company, for 400 shares in the name of George M. Preston, dated September 27, 1895, and, turning to the back of the certificate, purporting to be endorsed by George M. Preston?

A. That is my signature.

Q. 6. That is your signature?

A. Yes, sir, that is my handwriting in the date there. I filled that in. That is my handwriting, and that is my signature, but further than that I don't know anything about it.

Q. 7. The dating you refer to is the 21st of May?

A. Yes, I mean that date there, that is my handwriting, at the same time I signed that signature. That is all I can say.

Q. 8. You were acquainted with Matthew Luce?

A. Yes.

Q. 9. Did you, through Matthew Luce, subscribe for or take stock in the Old Dominion Copper Mining & Smelting Company?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I don't know.

Q. 10. Are you acquainted with Mr. Albert S. Bigelow?

A. Yes.

Q. 11. Were you prior to 1895?

A. Yes.

Q. 12. Were you well acquainted with Mr. Luce?

A. Oh, very.

Q. 13. Did Albert S. Bigelow, or Leonard Lewisohn, or any one else, so far as you can remember, inform you at any time prior to your endorsing that certificate No. 242, that Mr. Bigelow and Mr. Lewisohn, and their associates, had taken, or proposed to take, 50,000 shares, or any number of shares, of stock in this company as compensation, or on account of their having promoted it?

[Objected to as irrelevant, immaterial, and incompetent.]

553 A. No, sir.

Q. 14. Did you get any information prior to that time, in any way, to that effect, or any information relating to any profits which Messrs. Bigelow and Lewisohn, and their associates, purposed taking for themselves in this connection?

[Objected to as immaterial, incompetent, and irrelevant.]

A. Not that I remember. No, I will answer, no.

Q. 15. Did you, at any subsequent time, hear anything from Mr. Bigelow, or Mr. Lewisohn, or from any other source, as to their having taken 50,000 shares of stock, or any large number of shares or any special profits on account of their acting as promoters or otherwise in connection with this Old Dominion Copper Mining & Smelting Company?

[Objected to as immaterial and irrelevant and incompetent.]

A. No; I haven't heard anything.

Q. 16. Did you hear anything recently on the subject?

[Objected to as immaterial.]

A. Oh, yes, recently.

Q. 17. Then you meant you had not heard until recently?

A. No.

Q. 18. How far do you go back by the use of the word "recently"?

A. About the time that this matter came up; I don't know whether it was a year ago. It was since this matter was started, brought up, whatever it was.

Q. 19. That is, since this litigation was begun?

A. Yes, since this litigation was begun. I don't remember hearing anything before.

[No cross-examination.]

——— ———.

Subscribed and sworn to before me this — day of November, 1905.

——— ———,

Notary Public.

554 *Stipulation.*

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *October* 27, 1905.

Deposition of James F. Ormand.

JAMES F. ORMAND, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by Louis D. Brandeis, counsel for the plaintiff, deposes and says:—

Q. 1. State your full name, Mr. Ormand.
A. James F. Ormand.
Q. 2. Your residence?
A. 1087 Boylston street, now. I have been living in Brookline and have moved into town.
Q. 3. Your occupation?
A. Carriages and carriage man, corner Beacon street and Tremont and the Hotel Bellevue.
Q. 4. What was your occupation in 1895?
A. The same thing.
Q. 5. Did you, in 1895, and prior to that time, know Mr. A. S. Bigelow?
A. I have known him since he was a child.
Q. 6. Did you subscribe for certain stock of the Old Dominion Copper Mining & Smelting Company?
A. I don't remember; if I did it couldn't have been for a great deal.
Q. 7. Do you recall whether or not you subscribed for 50 shares of stock in that company, or any small amount of stock in that company?

[Objected to as immaterial]

A. I may, but I don't remember. I wouldn't be apt to remember.
Q. 8. Have you absolutely no recollection?
A. No, none whatever.
Q. 9. As to whether you subscribed for the stock?
A. I don't think so. I might have bought some for a flyer, or something of that sort, and sold it again, but I don't think I ever did. I may have, too, but I don't think so.

[The examination of the witness is suspended while search is made for his certificate.]

555 *Depositions of Witnesses taken at St. Johnsbury in the State of Vermont on the 14th Day of December, 1905, Before George C. Frye, Notary Public, and by Agreement of Counsel, for use in the Above-entitled Cases.*

Present:

Alfred Hemenway, Esq., of Boston, Attorney for Alfred S. Bigelow.

Eugene Treadwell, Attorney for Frederick Lewisohn, et als.

Edward F. McClennen, Attorney for Old Dominion Copper Mining & Smelting Company.

Deposition of Josiah Grout.

I, JOSIAH GROUT, being duly sworn, on oath depose and say, in answer to interrogatories propounded by Mr. McClennen, as follows:—

Q. 1. Mr. Grout, what is your full name?

A. Josiah Grout.

Q. 2. And you reside where?

A. Derby, Vt.

Q. 3. You are the brother of William W. Grout?

A. William W. Grout was my brother.

Q. 4. And he is now deceased?

A. Yes.

Q. 5. And when did he die?

A. He died October 7, 1902.

Q. 6. You were the executor of his estate?

A. I am the exectuor; I am the administrator, not executor—administrator.

Q. 7. I show you, Mr. Grout, a letter in the file of the complainant company, dated September 13, 1905——

A. [Interrupting:] 1895, you mean.

Q. 8. [Continuing:] 1895, purporting to be signed by William W. Grout; do you recognize that as being in the handwriting of your brother?

A. I should say that is his handwriting.

Mr. MCCLENNEN: That I will offer.

Mr. HEMENWAY: The defendants object to the admission of this letter on the ground that it is incompetent, immaterial, and irrelevant, being apparently correspondence with a third party not interested in the action.

Mr. MCCLENNEN: The letter reads as follows:—

"ST. JOHNSBURY EAST, *Sept. 13th*, 1895.

Thomas Nelson.

MY DEAR SIR: I have your call for money for Old Dominion stock on the 19th inst. I start for Chattanooga Park dedication in
556 the morning, but have arranged with Barton National Bank to send you check for $12,500.00 in payment of 500 shares

to be issued in my name and sent by mail to above Bank, Barton, Vt. The other 500 shares to be issued as follows:

100 shares to William H. Bissell
50 shares to A. H. McLeod.
50 shares to Stocker Brothers.
50 shares to F. T. Dwinell
200 shares to Josiah Grout and
50 shares to W. P. Smith.

I have arranged with these gentlemen to make payment directly to you. If I were to be at home would collect and send to you, but in my absence thought best to let them send direct to you. If they fail to make payment, on my return in about ten days will attend to it.

If you want the residence of these men it is as follows: W. H. Blaisdell, Jay, Vt., A. H. McLeod, St. Johnsburg, Vt., W. P. Smith, St. Johnsbury, Vt., Stocker Brothers, Danville, Vt., Josiah Grout, Derby, Vt., F. T. Dwinell, Boston, Mass., 50 State St.

Very truly yours,

WILLIAM W. GROUT."

Mr. McCLENNEN: I now offer the reply of the company's letter book.

Mr. HEMENWAY: Defendants object to reply as incompetent, immaterial, and irrelevant.

Mr. McCLENNEN: The reply from page 87 of the letter book reads:

"SEPT. 21, 1895.

Hon. Wm. W. Grout, St. Johnsbury East, Vt.

DEAR SIR: Your favor of Sept. 13th was duly received. We received checks from the different gentlemen as noted in your letter, with the exception of Mr. Dwinell who has called and made arrangemens to pay which are satisfactory.

Enclosed you should find certificate for 1000 shares stock of the Old Dominion Copper Mining and Smelting Company in your name. The subscription being in your name, it was necessary to issue the stock to you.

557 Please fill in the names you wish the stock transferred to and sign and return the certificate, and we will do the needful.

Yours very truly,

THOMAS NELSON, *Treas.*
By BISSELL."

Q. 9. Mr. Grout, I show you the canceled certificate of the complainant company, No. 103, dated September 19, 1895, for 10,000 shares——

DEPONENT [Interrupting:] 1000.

[Continuing:] 1000 shares in the name "W. W. Grout:" do you recognize the endorsement on that as being in the handwriting of your brother?

A. Yes, sir.

Mr. HEMENWAY: Object to that as immaterial, incompetent, irrelevant.

Mr. McCLENNEN: Certificate offered in evidence and marked "Complainant's Exhibit 1, of December 14, 1905."

Q. 10. Mr. Grout, I show you, from the company's file, a letter of September 25, 1895: do you recognize the signature to that as being in the handwriting of your brother?

A. Yes, sir, the whole letter is in his handwriting.

Mr. McCLENNEN: The letter I will offer——

Mr. HEMENWAY: Defendants object to the admission of said letter because it is incompetent, irrelevant, and immaterial.

Mr. McCLENNEN: And it reads as follows:

"SEPT. 25, 1895.

Thomas Nelson.

DEAR SIR: Enclosed find certificate for 1000 shares Old Dominion Copper Co., with 500 shares transferred to different parties whose addresses you have in my letter of a former date and probably from the parties themselves, to whom you had best send certificates directly.

The transaction will leave 500 shares still in my name, which will thank you to send to me at St. Johnsbury East, Vt.

Very truly yours,

WILLIAM W. GROUT."

Mr. McCLENNEN: From the company's letter-press copy book, page 100, I offer a letter of September 27, 1895, to Hon. William W. Grout.

Mr. HEMENWAY: Defendants object to the admission of said copy of said letter because it is incompetent, irrelevant, and immaterial.

Mr. McCLENNEN: Are you purposing to insist on the fact that it is a copy as an objection?

558 Mr. HEMENWAY: Insist on everything.

Mr. McCLENNEN: The letter reads as follows:

"SEPT. 27, 1895.

Hon. William W. Grout, St. Johnsbury East, Vt.

DEAR SIR: We enclose you herewith certificates of this company's stock in your name as follows, viz:

No. A 123 100 shares.
No. A 124 100 shares.
No. A 125 100 shares.
No. A 126 100 shares.
No. A 127 100 shares.

Please acknowledge receipt.

Yours truly,

THOMAS NELSON, *Treas.*
By BISSELL."

Q. 11. Mr. Grout, have you, since your appointment as administrator, taken possession of the papers left by your brother?

A. Yes, sir.

Q. 12. Have you found among them the originals of these two letters which I have just—copies of which I have just put in, from the company's letter book?

A. No, sir, I have not.

Q. 13. As far as you know are the originals now in existence?

A. I do not know that they are.

Q. 14. I show you a letter from the company's letter file, dated September 17, 1895: is this in your handwriting?

A. Yes, sir, it is.

Mr. McCLENNEN: This letter I offer.

Mr. HEMENWAY: Defendants object to admission of said letter because it is incompetent, irrelevant, and immaterial.

Mr. McCLENNEN: The letter reads as follows:

"DERBY, VT., *Sept.* 17, 1895.

MY DEAR SIR: Enclosed I hand you check for $2500.00 signed by Mary H. Bates, payable to me and duly endorsed to you. This to apply on 200 shares Old Dominion Copper stock which my brother, W. W. Grout, has written you about.

559 I expected the balance to cover this transaction would be in your hands before this but not hearing as I should if such were the case, I fear it is not. I expected the stock to be issued Oct. 1, so to meet Sept. 19th hurries matters some.

If it will answer, and I trust it will, I will see that the bal. reaches you in a few days, say by the middle of next week. If this will not answer, let me know and I will arrange accordingly.

When you issue the stock please put it in 50 share certificates, and put 100 shares in the name of Charles K. Bates and the other 100 shares in my name.

I am, truly,

JOSIAH GROUT.

Thomas Nelson, Sears Building, Boston, Mass."

Q. 15. Mr. Grout, I show you a copy, on page 102 of the company's letter-press copy book, dated September 27, 1895, and addressed to you: is the original of that now in your possession?

A. Well, I can't find it.

Q. 16. You can't find it?

A. No, I don't find any of the correspondence relating to that transaction, or to Old Dominion transactions, and other stock matters.

Q. 17. Does that answer refer to your brother's correspondence as well as your own?

A. Yes; I have looked the papers over; I do not think anything from my brother's ever came into my hands—these letters.

Mr. McCLENNEN: This copy I will offer.

Mr. HEMENWAY: Defedants object to the admission of letter-press copy of said letter as being immaterial, irrelevant, and incompetent.
Mr. McCLENNEN: The letter reads as follows:

"SEPT. 27, 1895.

Josiah Grout, Esq., Derby, Vt.

DEAR SIR: We enclose you herewith certificates of this company's stock in your name as follows, viz: No. A 121, 100 shares, No. A 122, 100 shares.

Please acknowledge receipt.

Yours truly,

THOMAS NELSON, *Treas.*
By BISSELL."

560 Q. 18. I show you, Mr. Grout, from the company's letter file, a letter of September 9, 1895: is that in your handwriting?

A. No, that is September 23.

Q. 19. September 23, I beg your pardon, 1895.

A. Yes, sir, that is my handwriting.

Mr. McCLENNEN: That I will offer.
Mr. HEMENWAY: Defendants object to the admission of this letter as incompetent, immaterial, and irrelevant.
Mr. McCLENNEN: The letter reads as follows:

"DERBY, VT., 9/23/95.

Thomas Nelson, Sears Building, Boston, Mass.

DEAR SIR: You by this time have the $5000.00 for 200 shares Old Dominion Copper stock which you were to issue subject to my order, as my brother, W. W. Grout, wrote you, or you should have.

If you have, please send the stock as I wrote you in my last. Check M. H. Bates $2500.00, check H. K. Dewey $2500.00, $5000.00.

Truly,

JOSIAH GROUT."

Q. 20. I now show you the company's canceled certificates of stock, one hundred each, Nos. A 121 and A 122, dated September 26, 1895, in the name of Josiah Grout, one endorsed to Payn, Webber & Company, and the other to Mrs. Mary H. Bates: are the signatures to those two endorsements yours?

A. I should say so, sir. You mean assignments there, do you?

Q. 21. The signatures to the assignments yours?

A. Yes.

Mr. HEMENWAY: The admission of said certificates now offered is objected to as immaterial, incompetent, irrelevant.
Mr. McCLENNEN: The certificates are offered in evidence, and marked respectively, "Complainant's Exhibits 2 and 3, of December 14, 1905."

Q. 22. In your letter of September 17, Mr. Grout, you refer to the enclosure of a check for $2500 of Mary H. Bates: was such a check sent?

A. Yes, sir.

Mr. HEMENWAY: Objected to as immaterial.

Q. 23. In your letter of September 23, you refer to a check of M. H. Bates, for $2500. I assume that is the same check.

A. I should say so; yes, sir.

Q. 24. You also refer in that letter to another check of $2500, of H. K. Dewey: who was H. K. Dewey?

A. Cashier of the Barton National Bank.

561 Q. 25. And prior to writing that letter had you arranged with him for the sending of such a check?

A. I had.

Mr. HEMENWAY: Objected to as immaterial.

Q. 26. I show you a letter of September 18, 1895, purporting to be signed by H. K. Dewey, cashier, and on the letter paper of the Barton National Bank; do you recognize that as being in Mr. Dewey's handwriting?

A. I do, sir.

Mr. MCCLENNEN: That letter I offer.

Mr. HEMENWAY: Objected to as incompetent, irrelevant, and immaterial.

Mr. MCCLENNEN: The letter reads as follows:—

"BARTON NATIONAL BANK, BARTON, VT., *Sept.* 18, 1895.

Thomas Nelson, Esq., Treas., 199 Washington St., Room 303, Boston, Mass.

DEAR SIR: At the request of Hon. William W. Grout I enclose my check for twelve thousand five hundred dollars ($12,500.00), for which please send me 500 shares of Old Dominion Copper Mining and Smelting Co., issued in name of William W. Grout, of Barton, Vermont;

Also my check for two thousand five hundred dollars ($2500.00), for which please send me 100 shares of Old Dominion Copper Mining and Smelting Company, issued in name of W. H. Blaisdell, of Jay, Vt.

Also my check for two thousand five hundred dollars ($2500.00) for credit on account of Major Josiah Grout, of Derby, Vt. He told me — had written you about it.

Please own receipt. If you do not, send stock by first mail.

Yours truly,

H. K. DEWEY, *Cashier.*"

Mr. MCCLENNEN: From the company's letter-press copy book, page 90, I offer letter of September 23, 1895, to H. K. Dewey.

Mr. HEMENWAY: Copy of letter is objected to as incompetent, immaterial, and irrelevant.

Mr. McCLENNEN: The letter as follows:—

562 "SEPT. 23, 1895.

H. K. Dewey, Esq., Barton National Bank, Barton, Vt.

DEAR SIR: Your favor of 18th inst. with checks as stated, was duly received. The subscription to the stock being in the name of Gen. Grout, it was necessary that the stock be first issued to him. This has been done, and the stock forwarded to him, with the request that he make an assignment to Mr. Blaisdell, and also an assignment to Josiah Grout. In due course certificates will be mailed to those gentlemen.

Yours truly,

THOMAS NELSON, *Treas.*,
By BISSELL.

Q. 27. Mr. Grout, what was the first that you had to do in any way with the stock of the complainant company?

Mr. HEMENWAY: Objected to as immaterial and irrelevant.

A. Why, the first I had to do was getting those shares, one hundred for myself and one hundred for the Bates—Charkes K. Bates or Mary H. Bates, whichever name it was put in; it wouldn't make any difference.

Q. 28. With whom did you have whatever negotiations resulted in your taking that stock?

Mr. HEMENWAY: Objected to as immaterial.

A. The negotiations for securing the stock was with my brother, William W. Grout. The details of paying were with the Barton Bank and the officers of the company in Boston.

Q. 292. Having regard to the date of your letter of September 17, 1895, can you inform me about when you had these negotiations with your brother?

Mr. HEMENWAY: Objected to as immaterial.

A. Well, before that time, I should say.

Q. 30. Are you able to state whether it was a considerable period or a short period?

A. No, not very long.

Q. 31. And was this negotiation with your brother in writing or by conversation?

Mr. HEMENWAY: Objected to as immaterial.

A. Well, some features of the negotiations were by conversation, and there might have been some correspondence. I am not sure about that.

563 Q. 32. So far as it was by correspondence, if at all, is that correspondence in existence?

A. No, not to my knowledge.

Q. 33. Will you state, as nearly as you can at this length of time, the language of the correspondence and the conversations?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I really have no recollection as to correspondence, and so cannot give any of it. The conversation was that it was——

Mr. HEMENWAY: The conversation is objected to as immaterial, incompetent, irrelevant.

A. (Continuing:) That it was a good thing it was on the ground floor, or near enough to the first floor to be interesting, and he assured me that he was going to take some of the stock, and thought I wouldn't lose anything if I did.

Q. 34. And you arranged to take two hundred shares; one hundred for yourself and one hundred for Bates?

A. Yes, sir.

Q. 35. Did your brother inform you as to his sources of information?

Mr. HEMENWAY: Objected to as incompetent, immaterial, irrelevant.

A. Yes, so far as I knew—or change that, strike that out, please. So far as——

Mr. HEMENWAY: One moment; you have answered the question.

Q. 36. What did he state to you as his sources of information?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. He stated that his information came from the Bigelow office in Boston.

Q. 37. Did he state with any more particularity as to person from whom he got his information?

A. Well, Mr. Bigelow.

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. (Continuing:) He is the oracle that he consulted, and in which he seemed to have a great deal of confidence,—or in whom.

Mr. HEMENWAY: Answer objected to as incompetent, irrelevant.

Q. 38. Can you, at this length of time, state with any more particularity what your brother informed you that Mr. Bigelow had stated to him?

Mr. HEMENWAY: Objected to as incompetent, irrelevant, and immaterial.

A. I think I have, in substance, covered pretty much the conversation that I had with him antedating the taking of the stock. Of course, there would be very much more to the talk by way of filling, but I have given what I should regard the upshot of the conversation.

Q. 39. Did you receive from your brother, from Mr. Bigelow, or

564 from any other source, prior to acquiring the stock, any information as to whether or not Mr. Bigelow, or any of the other promoters, had taken any profit in connection with the organization of the company, or intended to take any such profit?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. In answer to that I will say that I was given to understand in that conversation that I was invited into the charmed circle, and all of the perquisites, emoluments, etc., were merged in the intrinsic value of the stock; that nobody had any shearings from any source whatever in it.

Mr. HEMENWAY: Objected to as wholly incompetent.

A. [Continuing:] That is the way it came to me, sir; that is the way I understood it.

Q. 40. To be more specific, was your attention called by any one to the fact, or were you informed of the fact, that Mr. Bigelow and Mr. Lewisohn, or either of them, had taken, or purposed to take, 50,000 shares of the capital stock of the company, or any part thereof, by way of a profit, or by way of compensation for the services or labor connected with the organization or bringing out of the company?

Mr. HEMENWAY: Objected to as incompetent, immaterial, irrelevant, and leading.

A. I know nothing about Mr. Bigelow or his house receiving anything for promoting the Old Dominion project; never heard any intimation of the kind before—I will take that back, never heard any direct intimation.

Q. 41. Prior to taking your stock had you received any intimation of this kind indirectly?

Mr. HEMENWAY: Objected to as incompetent, immaterial, irrelevant.

A. No, no, not before taking the stock; I had no intimation of the kind whatever, of that character.

Q. 42. Did you have any information at any time prior to taking your stock as to whether or not the amount for which the company should be organized had or had not at any time been changed from the amount originally projected by the organizers or promoters?

Mr. HEMENWAY: Objected to as incompetent, immaterial, irrelevant, and leading.

A. I do not recall that I had any such information or intimation of any such.

Q. 43. Had you any information as to the manner in which, or the terms upon which, the properties had been obtained with which to capitalize the company?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

565 A. Well, I think that was all recited to me, as my brother always took pains to go into such details, but I shouldn't want to undertake to give any of it in a general way, it is so vague just at this moment in my mind, in my memory.

Q. 44. Well, so far as your recollection will permit, will you state anything that was said upon that subject?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Well, one thing I was told was that the property had been always a paying property and purchased by the Bigelow syndicate or Bigelow folks for, I should say, a million dollars. That may be a wrong statement of the amount, but I think that was—that is my recollection. I think that was the sum—and then it was to be organized and in its new form issue stock of which I was advised to take some, and that is about as particular as I would care to be now unless you are able to refresh my memory, for my memory sometimes does glow upon such subjects as the old embers are raked over. The fire is pretty much out as far as I know.

Mr. HEMENWAY: Answer objected to as incompetent.

Q. 45. Did you ever have any conversations directly with Mr. Bigelow or with Mr. Lewisohn relative to this matter?

A. Never saw either of the men.

Mr. MCCLENNEN: That is all, Mr. Hemenway.

Mr. HEMENWAY: No cross-examination.

JOSIAH GROUT.

STATE OF VERMONT,
Caledonia County, ss:

At St. Johnsbury this 11th day of December A. D. 1905 personally appeared the above-named Josiah Grout, and made oath to the truth of the foregoing statement by him subscribed before me.

GEORGE C. FRYE,
Notary Public.

Deposition of Frank D. Stocker.

I, FRANK D. STOCKER, being duly sworn, on oath depose and say, in answer to interrogatories propounded by Mr. McClennen, as follows:—

Q. 1. Your full name is?

A. Frank D.

Q. 2. And you reside where?

A. In Danville.

Q. 3. And you, in 1895, were one of the partners in Stocker Brothers?

566 A. Yes, sir.

Q. 4. In connection with the acquisition of stock by you in the Old Dominion Copper Mining & Smelting Company, do you,

recall whether you had any conversations with any one other than Mr. McLeod?

Mr. HEMENWAY: Objected to as immaterial.

A. No, I do not.

Q. 5. Will you state, as far as you can recall, what your conversations with Mr. McLeod were?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I never had much to say to him about it anyway, but I did talk it over and done the most of the talking with him.

Q. 6. Did you have any conversation with General Grout concerning the matter?

A. No, I don't know as I ever met him.

Q. 7. Or with Mr. Bigelow or Mr. Lewisohn?

A. No.

Q. 8. At the time the stock was acquired did you have any information concerning the organization of the company?

A. No, sir.

Q. 9. Did you know or receive any information relative to the taking of fifty thousand shares, or any other number of shares, of the capital stock of the company, or of the intention to take them, by Mr. Bigelow or Mr. Lewisohn, or any one else, by way of a promoters' profit or in return for services rendered?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. No.

Q. 10. When, if at all, did you ever receive any information on this subject?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I don't know as I ever knew anything about it.

Mr. MCCLENNEN: That is all.

Mr. HEMENWAY: No questions.

FRANK D. STOCKER.

STATE OF VERMONT,
Caledonia County, ss:

At St. Johnsbury this 14th day of December A. D. 1905 personally appeared the above-named Frank D. Stocker, and made oath to the truth of the foregoing statement by him subscribed before me.

GEORGE C. FRYE,
Notary Public.

567 *Deposition of Fred B. Stocker.*

I, FRED B. STOCKER, being duly sworn, on oath depose and say, in answer to interrogations propounded by Mr. McClennen, as follows:—

Q. 1. What is your full name?
A. Fred B. Stocker.
Q. 2. You reside where?
A. At Danville.
Q. 3. You are a member of the firm of Stocker Brothers?
A. I am.
Q. 4. And were in 1895?
A. Yes, sir.
Q. 5. And of whom did that firm then consist?
A. Of Fred B. Stocker and Frank D. Stocker.
Q. 6. I show you, from the company's letter file, a letter of September 18, 1895; in whose handwriting is that?
A. That is in mine.

Mr. MCCLENNEN: The letter I will offer.
Mr. HEMENWAY: Defendants objected to the admission of said letter because it is incompetent, irrelevant, and immaterial.
Mr. MCCLENNEN: The letter reads:

"DANVILLE, VT., *Sept.* 18, 1895.

Thomas Nelson, Treas.

DEAR SIR: Enclosed find check of $1250.00 for 50 shares Old Dominion as per instructions of W. W. Grout.

Yours &c.,

STOCKER BROTHERS."

Mr. MCCLENNEN: From the company's letter-press copy book, page 92, I offer a letter of September 23.
Mr. HEMENWAY: Defendants object to the admission of this letter-press copy of letter, because incompetent, irrelevant, and immaterial.
Mr. MCCLENNEN: The letter reads as follows:

"SEPT. 23, 1895.

Stocker Brothers, Danville, Vt.

GENTLEMEN: Your favor of 18th inst. covering check for $1250.00, to pay for fifty (50) shares of the Old Dominion Copper Mining and Smelting Company, was duly received. Certificate will be forwarded to you in a few days.

Yours very truly,

THOMAS NELSON, *Treas.*
By BISSELL."

568 Q. 7. Have you the original of the letter a copy of which I have just read?

A. I might be able to find it, but I hardly think so.

Q. 8. Is this the check referred to in the two letters just read?

A. It is.

Mr. HEMENWAY: Defendants object to the admissibility of said check, because incompetent, irrelevant, and immaterial.

Mr. MCCLENNEN: The check reads on the face as follows:—

"DANVILLE, VT., *Sept* 18, 1895.

No. — Caledonia National Bank.

Pay to the order of Thos Nelson, Treas. $1250. One thousand and two hundred fifty No /100 Dollars.

STOCKER BROTHERS."

Has stamped on its face: "Caledonia National Bank, paid Sept. 24, 1895, Danville, Vt."

Reads upon its reverse side: "For deposit only to account of Old Dominion Copper Mining and Smelting Co., Thomas Nelson, Treas. For collection for account of Atlas National Bank of Boston, Benj. P. Lane, Cashier."

All upon the back, except the words "Thomas Nelson," being in rubber-stamp print.

Check offered, and marked "Complainant's Exhibit 4, of December 14, 1905."

I now offer from the company's letter-press copy book, page 101, a letter of September 27, 1895.

Mr. HEMENWAY: Defendants object to said letter-press copy, because incompetent, irrelevant, and immaterial.

Mr. MCCLENNEN: The letter reads:

"SEPT. 27, 1895.

Stocker Brothers, Danville, Vt.

GENTLEMEN: We enclose you herewith certificate No. B68 in your name for fifty (50) shares of this company's stock.

Please acknowledge receipt.

Yours truly,

THOMAS NELSON, *Treas.*
By BISSELL."

Q. 9. I show you, from the company's letter file, a letter of September 26, 1895: is that in your handwriting?

A. It is.

569 Mr. HEMENWAY: Letter objected to as incompetent, immaterial, and irrelevant.

Mr. MCCLENNEN: The letter reads:

"DANVILLE, VT., *Sept.* 26, 1895.

Thomas Nelson, Treas.

DEAR SIR: Yours with certificate enclosed, for fifty shares Old Dominion Copper Mining stock, received.

Yours, &c., STOCKER BROTHERS."

Q. 10. I show you the canceled certificate B No. 68, for fifty shares of the capital stock of the Old Dominion Copper Mining & Smelting Company, in the name of Stocker Brothers; is the signature to the transfer on the back of this in your handwriting?

A. It is.

Mr. MCCLENNEN: The certificate is offered in evidence and marked "Complainant's Exhibit 5, of December 14, 1905."

Mr. HEMENWAY: Objected to as immaterial.

Q. 11. With whom, Mr. Stocker, did you have the negotiations which led to your procuring this stock?

A. I think it was through A. H. McLeod.

Q. 12. Of St. Johnsbury?

A. I think it was.

Q. 13. Having regard to the date of the first letter put in, of September 18, 1895, when, as nearly as you can state, did you have your negotiations?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I do not think I could tell anything only the records, from memory.

Q. 14. Was it a matter of days or weeks prior to that?

Mr. HEMENWAY: Objected to as immaterial.

A. I should say we was talking about it for some little time.

Q. 15. Were your negotiations wholly oral or were they to some extent by correspondence?

Mr. HEMENWAY: Objected to as immaterial.

A. I think it was oral.

Q. 16. As nearly as you can state at this length of time, what were the conversations which you had?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I think that Mr. McLeod told us that Mr. Grout had such a number of shares that he was going to have of the Old Dominion Copper Company, and that we could have some if we wished. I think that was about the conversation.

Q. 17. Did he tell you anything about the terms of issue, or the organization?

570 Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. The price was to be 25, which was par for the stock, and I

think he told us that it was a very rich mine; it would be a good stock to buy.

Mr. HEMENWAY: Answer objected to.

Q. 18. Did he give you any information, one way or the other, as to whether there were to be any promoters' profits or compensation for services in connection with the issue?

A. I don't think so.

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

Q. 19. Did he tell you anything relating in any manner to that subject?

Mr. HEMENWAY: Objected to as immaterial and incompetent.

A. I don't think he did.

Q. 20. Did you have any conversations, prior to acquiring your stock, with anyone beside Mr. McLeod?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I don't think I did.

Q. 21. Did you have any conversations with either Mr. Lewisohn or Mr. Bigelow prior to acquiring your stock?

A. Did not.

Q. 22. Did you know or have any information to the effect that Mr. Bigelow and Mr. Lewisohn, or any of them, or any one connected with them, either had taken or purposed to take fifty thousand shares, or any other number of shares, of the stock of the company as a promoters' profit, or in return for any services rendered?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I did not.

Q. 23. When, if at all, did anything of this nature ever come to your attention?

Mr. HEMENWAY: Objected to as incompetent, immaterial.

A. I think when we read it in the papers. It was discussed in the papers.

Q. 24. And as nearly as you can fix it, what was the date?

Mr. HEMENWAY: Objected to as immaterial.

A. I should say it was when the present president, Mr. Smith, isn't it, took hold of the company.

Q. 25. Do you remember whether or not, in connection with your acquisition of the stock, the term "ground floor" was used?

Mr. HEMENWAY: Objected to as immaterial, incompetent, and leading.

A. We supposed we was getting as low as any one, that was about all; the price as low as any one had the stock.

Mr. HEMENWAY: Objected to as incompetent.

571 Q. 26. Without stating any supposition of yours, can you state anything by way of conversation on that subject, if there was any conversation on that subject?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I couldn't remember the conversation we had now.

Q. 27. Prior to acquiring your stock, were you informed from any source as to whether there had at any time been any change in the amount for which the company was to be organized?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I don't quite understand that question.

Q. 28. At any time prior to acquiring your stock, were you informed as to whether there had been any change in the plan of organization with respect to the amount for which the company should be capitalized?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I had not.

Mr. MCCLENNEN: That is all.

Mr. HEMENWAY: No questions.

FRED B. STOCKER.

STATE OF VERMONT,
Caledonia County, ss:

At St. Johnsbury this 14th day of December, A. D. 1905 personally appeared the above-named Fred B. Stocker, and made oath to the truth of the foregoing statement by him subscribed.

Before me,

GEORGE C. FRYE,
Notary Public.

Deposition of Angus H. McLeod.

I, ANGUS H. MCLEOD, being duly sworn, on oath depose and say, in answer to interrogatories propounded by Mr. McClennen, as follows:

Q. 1. Your first name, Mr. McLeod, is?

A. Angus H.

Q. 2. You reside where?

A. St. Johnsbury.

Q. 3. And resided there in 1895?

A. Yes.

Q. 4. Your business was then what?

A. Milling business, grain and feed.

Q. 5. The business of Stocker Brothers at that time was what?
A. Well, they were farmers, and sold grain, feed, and so on, and they owned part of the stock in our mill at that time.

572 Q. 6. I show you a letter of September 18, 1895, from the company's letter file: is that written by you?
A. Yes, sir.

Mr. McCLENNEN: The letter I will offer.
Mr. HEMENWAY: Defendants object to the admissibility of the letter on the ground of its incompetency, immateriality, and irrelevancy.
Mr. McCLENNEN: The letter reads as follows:—

"ST. JOHNSBURY, VT., *Sept.* 18, 1895.

Thomas Nelson, Treas., Boston, Mass.

DEAR SIR: By instruction of W. W. Grout I enclose you my check No. 601 for $1250.00, to pay for 50 shares Old Dominion Copper stock.
Kindly make out two certificates of 25 shares each to Angus H. McLeod, St. Johnsbury, and send same by mail.
Yours truly,

A. H. McLEOD.

P. S.—What has struck Merced? Is it likely to go much lower?
A. H. McLEOD."

Mr. McCLENNEN: From the company's letter-press copy book, page 90, I offer letter of September 23, 1895.
Mr. HEMENWAY: Objected to as incompetent and immaterial.
Mr. McCLENNEN: The letter reads:

"SEP. 23, 1895.

A. H. McLeod, Esq., St. Johnsbury, Vt.

DEAR SIR: Your favor of September 18th, with check for $1250. to pay for 50 shares stock of the Old Dominion Copper Miniing and Smelting Company, was duly received.
The subscription to the stock being in the name of General Grout, it was necessary that the stock be first issued to him. This has been done and the stock forwarded to him with the request that he assign 50 shares in your favor. When this has been done, we will forward certificate in your name.
Only 60 shares of Merced sold at 32. It is held at 38 to 40 today.
Yours truly,

THOMAS NELSON, *Treas.*
By BISSELL."

573 Q. 7. Is this the check referred to in the two letters?
A. Yes.

Mr. HEMENWAY: Objected to as immaterial.
Mr. McCLENNEN: The check reads on its face,—

No. 601. "ST. JOHNSBURY, VT., *Sept.* 18, 1895.

The First National Bank.

Pay to the order of Thomas Nelson, Treas., $1250.00 Twelve hundred fifty and No/100 Dollars.

A. H. McLEOD."

It is stamped on the face: "First National Bank, Paid Sept. 24, 1895, St. Johnsbury, Vt." On the back appears this: "For deposit only to account of Old Dominion Copper Mining and Smelting Co., Thomas Nelson Treas. For collection for account of Atlas National Bank of Boston, Benj. P. Lane, Cashier. Endorsement guaranteed, Atlas National Bank," all of which is in rubber-stamp type, except the words written, "Thomas Nelson."

[The check is offered and marked "Complainant's Exhibit 8, of December 14, 1905."]

From the company's letter-press copy book, page 101, I offer a letter.

Mr. HEMENWAY: Objected to as incompetent, immaterial.

Mr. MCCLENNEN: It reads as follows:

"SEPT. 27, 1895.

Angus H. McLeod, Esq., St. Johnsbury, Vt.

DEAR SIR: We enclose you herewith certificate No. B 67 in your name, for fifty (50) shares of this company's stock.

Please acknowledge receipt.

Yours truly,

THOMAS NELSON, *Treas.*,
By BISSELL."

Q. 8. Have you, Mr. McLeod, the original letters, the two of which I have just read copies from the company's letter book?

A. I couldn't say whether I have got them or not; I haven't looked for them. If they were the milling company's letters—I ain't so particular of my own letter—I think I could find them.

Q. 9. I show you, from the company's letter file, the letter of September 28, 1895; is that written by you?

A. Yes.

574 Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

Mr. MCCLENNEN: The letter reads as follows:

"ST. JOHNSBURY, VT., *Sept.* 28, 1895.

Thomas Nelson, Treas., Boston, Mass.

DEAR SIR: Your favor of 27th at hand, with certificate No. B 67, for fifty (50) shares of the Old Dominion Copper Mining and Smelting Co. stock.

Yours truly,

ANGUS H. McLEOD."

Q. 10. I show you a canceled certificate, B No. 67, for fifty shares of the capital stock of the Old Dominion Copper Mining & Smelting Company, in the name of Angus H. McLeod, dated September 26, 1895: is the signature to the transfer on the back of this in your handwriting?

A. Yes.

Mr. McCLENNEN: The certificate I offer.

Mr. HEMENWAY: Objected to as immaterial.

Mr. McCLENNEN: It is marked, "Complainant's Exhibit 9, of December 14, 1905."

Q. 11. Mr. McLeod, having regard to the date of your letter of September 18, 1895, when did you have the negotiations which led to your acquiring this fifty shares of stock?

Mr. HEMENWAY: Objected to as immaterial.

A. Well, it was a very short time before; I couldn't say, it might have been a week or ten days, or two or three days.

Q. 12. With whom did you have them?

A. General Grout.

Mr. HEMENWAY: Objected to as incompetent and immaterial.

Q. 13. Did you have any conversations with any one beside General Grout on the subject of stock in this company?

Mr. HEMENWAY: Objected to as incompetent and immaterial, irrelevant.

A. I don't think it.

Q. 14. Did you have any correspondence on the subject other than the remittances to the company?

A. Not as I remember of, at all.

Q. 15. What, as nearly as you can recall it, were the conversations that you had with General Grout?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

575 A. Well, the general, about that time, had been very successful in his stock investments, and it was quite natural for the directors in the bank at our meetings to talk stocks to him a little, although we wasn't in the habit of buying any stock to speak of at all, and among other things, at the time, they were reorganizing the Old Dominion Company, and he said that he had a block of stock we could have, and, I don't know as I remember how he expressed it, but he made us understand that we were on the ground floor,—might not have said it in *that* words, but there was no profit to anybody, that we were getting in as cheap as anybody was. We had confidence in him, so we were getting in as cheap as he was anyway, and we had the impression that he had the inside, because he was a heavy buyer of stocks,—I know of the time when he had a million dollars' worth of stock, so we had a good deal of confidence in the general at that time.

Mr. HEMENWAY: Object to the answer as incompetent and immaterial.

Q. 16. Did he inform you anything as to the real source of his information?

Mr. HEMENWAY: Objected to as incompetent, immaterial, irrelevant.

A. His sources of information was from Mr. Bigelow, he said. He used Mr. Bigelow's name.

Q. 17. Now, recurring again to the conversation, and without going into the matters which aroused your confidence, will you state, as nearly as you can, what was said?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Well, I don't know as I can repeat just what was said exactly, as it was some time ago, but he had this block of stock, and he said any of us directors could have part of it. I told him I would take 50 shares and thought the Stocker Brothers would take 50 shares.

Q. 18. What did he tell you, if anything, that Mr. Bigelow had said to him?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Well, I don't think I can state anything that he said that Mr. Bigelow had said to him.

Q. 19. What, as nearly as you can state it, in substance, did he say as to the terms upon which you could come in?

Mr. HEMENWAY: Objected to as incompetent, immaterial, irrelevant.

A. We could come in on the same terms as he did.

Q. 20. And what did he say, if anything, as to the terms upon which he was coming in?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Well, that we was getting the stock as he was getting the stock; as cheap as anybody.

576 Q. 21. Did you know, or did General Grout or any one else inform you, that Mr. Bigelow or Mr. Lewisohn, or any one else, had taken, or intended to take, 50,000 shares, or any other number of shares of the capital stock of the company, either as a promoters' profit, or in return for services rendered, or otherwise?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. No, sir.

Q. 22. When, if at all, did you first receive any information upon that subject?

Mr. HEMENWAY: Objected to as immaterial.

A. I didn't get any information until we got it through the press; I think sometime about the time that they changed and Smith got to be president, along about that time somewhere. I can't tell when; it was through the Boston papers that it was first intimated to me.

Mr. McCLENNEN: That is all.

Mr. HEMENWAY: No questions.

ANGUS H. McLEOD.

STATE OF VERMONT,
Caledonia County, ss.

At St. Johnsbury this 14th day of December A. D. 1905 personally appeared the above-named Angus H. McLeod, and made oath to the truth of the foregoing statement, by him subscribed.

Before me,

GEORGE C. FRYE,
Notary Public.

Deposition of Walter P. Smith.

I, WALTER P. SMITH, being duly sworn, on oath depose and say in answer to interrogatories propounded by Mr. McClennen, as follows:

Q. 1. What is your full name, Judge?
A. Walter P. Smith.
Q. 2. You are the judge of probate?
A. I am.
Q. 3. And you held that office in 1895?
A. Yes, I did.
Q. 4. You reside at St. Johnsbury?
A. Yes.
Q. 5. I show you, from the company's letter file, letter of September 18, 1895: is that in your handwriting?
A. It is.

Mr. McCLENNEN: The letter I offer.

Mr. HEMENWAY: The defendant objects to the admissibility of this letter on the ground of its incompetency and irrelevancy.

Mr. McCLENNEN: It reads as follows:

577 "Office of Probate Court, District of Caledonia,
Walter P. Smith, Judge.

ST. JOHNSBURY, VT., *Sept. 18th,* 1895.

Thomas Nelson, Treas.

DEAR SIR: I herewith send you my check $1250.00, for 50 shares of Old Dominion Copper stock. This is by direction of Gen. W. W. Grout who informs me that you have been informed that a certificate of 50 shares is to be sent to me.

Yours truly,

WALTER P. SMITH."

Q. 6. Have you the check that was enclosed in that letter?
A. I have. [Check produced.]

Mr. McCLENNEN: This check upon its face——

Mr. HEMENWAY: The defendants object to the admissibility of the check on the ground of its incompetency and irrelevancy.

Mr. McCLENNEN [reading]:

No. 1162. "ST. JOHNSBURY, VT., *Sept.* 18, 1895.

The First National Bank pay to the order of Thomas Nelson Treas $1250.00, Twelve hundred and fifty Dollars.

WALTER P. SMITH."

It has stamped on the face: "First National Bank, Sept. 24, 1895, Paid, St. Johnsbury, Vt."

It has stamped upon the back: "For deposit only to the account of Old Dominion Copper Mining and Smelting Co., Thomas Nelson, Treas. For colection for account of Atlas National Bank of Boston, Benj. P. Lane, Cashier. Endorsement guaranteed by Atlas National Bank," all of which is in rubber-stamp type except the words, "Thomas Nelson," written.

The check is marked "Complainant's Exhibit 6, of December 14, 1905."

I offer, from the company's letter-press copy book, page 93, a letter of December 23, 1895.

Mr. HEMENWAY: Objected to as incompetent, irrelevant, and immaterial.

Mr. McCLENNEN: The letter reads:

578 "SEPT. 23, 1895.

Walter P. Smith, Esq., St. Johnsbury, Vt.

DEAR SIR: Your late favor covering check for $1250.00, to pay for fifty (50) shares stock of the Old Dominion Copper Mining and Smelting Company, was duly received. Certificate will be forwarded to you in a few days.

Yours truly,

THOMAS NELSON, *Treas.*,
By BISSELL."

Mr. McCLENNEN: From the company's letter-press copy book, page 100, I offer letter of September 27, 1895.

Mr. HEMENWAY: Objected to as incompetent and immaterial.

Mr. McCLENNEN: The letter reads:

"SEPTEMBER 27, 1895.

Walter P. Smith, Esq., St. Johnsbury, Vt.

DEAR SIR: We enclose you herewith certificate No. 866, in your name, for fifty (50) shares of this Company's stock.

Please acknowledge receipt.

Yours truly,

THOMAS NELSON, *Treas.*,
By BISSELL."

Q. 7. Have you in your possession, Judge Smith, the originals of the two letters, copies of which I have just read?

A. I am unable to say, I haven't been called upon to look for them; I am not able to say whether I can find them or not.

Q. 8. I show you canceled certificate of the complainant, B No. 66, for fifty shares of its capital stock, in the name of Walter P. Smith, dated September 26, 1895; is the signature to the transfer thereon in your handwriting?

A. It is.

Mr. McClennen: The certificate is offered in evidence.

Mr. Hemenway: Objected to as immaterial.

Mr. McClennen: And marked "Complainant's Exhibit 7, of December 14, 1905."

Q. 9. Having regard to the date of your letter of September 18, 1895, can you recall approximately the time of the negotiations which led to your acquiring this stock?

579 Mr. Hemenway: Objected to as immaterial.

A. Well, a few days before; I am unable to state the exact length of time.

Q. 10. And with whom did you have them?

Mr. Hemenway: Objected to as immaterial.

A. Gen. W. W. Grout.

Q. 11. Did you have—were they conducted by correspondence or conversation?

A. Conversation.

Q. 12. Did you have any conversations, as far as you recall, with any other persons relative to the matter?

Mr. Hemenway: Objected to as immaterial.

A. Relative to the negotiations?

Q. 13. Yes.

A. No.

Q. 14. What, as nearly as you can state, were the conversations?

Mr. Hemenway: Objected to as incompetent, immaterial, and irrelevant.

A. The conversation that I had with General Grout was upon the occasion of a meeting of the directors at the First National Bank. After the business of the meeting was ended, and as we were about going away, General Grout said something about the Old Dominion Company. Just how the conversation began I am unable to say. It may have been that something was said about stocks generally, and this matter came up. As I remember it now, he said that there had been, or was to be, a reorganization of the Old Dominion Company, and that he was going to take some stock himself, and that there was an opportunity for some of the rest of us to have some if we would like it.

Q. 15. Do you recall whether he gave you any further informa-

tion in that conversation, or in any other conversation, as to the organization of the company?

Mr. HEMENWAY: Objected to as incompetent, irrelevant, immaterial.

A. No, I think not. The conversation was brief, and he gave us to understand that it was a good opportunity to get in.

Mr. HEMENWAY: Answer objected to.

Q. 16. Did he state to you anything about the terms upon which you could come in?

Mr. HEMENWAY: Objected to as incompetent, immaterial, irrelevant, and leading.

A. Except that we could now get the stock at $25 a share.

Q. 17. Did he inform you anything with respect to the terms upon which others were to get the stock?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

580 A. Don't remember that he did.

Q. 18. Did you have any conversations about this matter with any one except General Grout?

Mr. HEMENWAY: Objected to as immaterial.

A. Do you mean as to the taking of stock in the company?

Q. 19. Yes, or as to anything connected with its organization?

Mr. HEMENWAY: Objected to as incompetent, immaterial.

A. Mr. McLeod, as I remember it, was present. I might have passed a few words with him in regard to taking some of the stock. I remember of telling General Grout at the time that I would take 50 shares.

Q. 20. Did you know, or were you informed, that Mr. Bigelow and Mr. Lewisohn, or either of them, or any one else, had taken, or purposed to take, 50,000 or any other number of the shares of the capital stock of the company, by way of promoters' profits, or in return for services rendered, or otherwise?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. No.

Q. 21. Was any information given to you in any way bearing upon that subject?

Mr. HEMENWAY: Objected to as immaterial.

A. Nothing whatever.

Q. 22. When, if at all, did you ever learn that anything of that character had occurred?

Mr. HEMENWAY: Objected to as incompetent and immaterial.

A. I don't think I ever heard anything about it until after President Smith came into office and this matter was agitated.

Mr. McCLENNEN: That is all.

Mr. HEMENWAY: No questions.

Mr. McCLENNEN: It is understood that the objections made by Mr. Hemenway are also made by Mr. Treadwell on behalf of Mr. Lewisohn.

WALTER P. SMITH.

STATE OF VERMONT,
Caledonia County, ss:

At St. Johnsbury this 14th day of December, A. D. 1905, personally appeared the above named Walter P. Smith, and made oath to the truth of the foregoing statement, by him subscribed.

Before me:

GEORGE C. FRYE.
Notary Public.

581 Taken Before Howland Twombly, Esq., Notary Public at 161 Devonshire Street, Boston, Mass., May 22, 1906.

Appearances:

Louis D. Brandeis, Esq., and E. F. McClennen, Esq., for the plaintiff.

Eugene Treadwell, Esq., and Alfred Hemenway, Esq., for the defendants.

George C. Burpee, stenographer.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

Deposition of Joseph S. Bigelow.

JOSEPH S. BIGELOW, being first duly sworn by Howland Twombly, Esq., a notary public, in answer to interrogatories propounded by L. D. Brandeis, Esq., counsel for the plaintiff, deposes and says:

Q. 1. Please state your name, residence, and occupation?

A. Joseph S. Bigelow; Cohasset; vice-president of the Webster & Atlas Bank.

Q. 2. What was your occupation in 1895?

A. I had none.

Q. 3. And subsequent to that time until 1902?

A. In 1897 I became president of the Atlas Bank.

Q. 4. And remained president of it until its consolidation recently with the Webster Bank?

A. Yes.

Q. 5. You were for several years a director in the Old Dominion Copper Mining & Smelting Company?

A. I was a director of it.

Q. 6. Do you remember when you became a director?

A. I cannot. I have no record of it.

Q. 7. Did you at any time while you were a director of that company know that the company had a cause of action against Mr. Albert S. Bigelow and Mr. Leonard Lewisohn?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I do not know that it was at the time I was a director. I knew there was a cause of action at some time; I do not know whether it was during that time or not.

582 Q. 8. What do you refer to by saying you knew there was a cause of action?

A. I saw in a paper I read there was something going on; what, I did not know, because I did not know anything about it.

Q. 9. That is, you refer to a suit that was commenced against Albert S. Bigelow?

A. A suit commenced against Mr. Lewisohn and Mr. Bigelow.

Q. 10. Was that suit that was commenced the first you ever knew or heard of any cause of action or any claim against them?

[Objected to as incompetent, irrelevant, and immaterial.]

A. The first I ever knew of it.

——— ———.

Subscribed and sworn to this — day of ———, 1906, before me.

——— ———,

Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

Deposition of Clarence H. Bissell.

CLARENCE H. BISSELL, being first duly sworn by Howland Twombly, Esq., a notary public, in answer to interrogatories propounded by L. D. Brandeis, Esq., counsel for the plaintiff, deposes and says:

Q. 1. Please state your full name, age, residence, and occupation?

A. Clarence H. Bissell; residence, Winthrop, Mass.

Q. 2. What is your occupation?

A. I am clerk in the office of various mining companies at 303 Sears Building.

Q. 3. Mining companies with which Mr. Albert S. Bigelow is connected?

A. Yes.

Q. 4. How long have you been in the employ of those companies, or of Mr. A. S. Bigelow?

A. Well, something over thirty years.

Q. 5. Have you been during all that time in practically the same capacity, as clerk?

A. Practically, yes.

Q. 6. You were for some time a director in the Old Dominion Copper Mining & Smelting Company, were you not?

A. I do not recollect as to that.

583 Q. 7. That is, you do not recall that you ever were a director in that company?

A. I could not swear that I was; no.

Q. 8. You were in some way connected with the Old Dominion Copper Mining & Smelting Company or acted in relation to the company as clerk, or otherwise, were you not?

[Objected to as incompetent, irrelevant, and immaterial.]

A. Yes.

Q. 9. When did you cease to act in whatever capacity you did act?

A. Well, I think at the time the company left our office.

Q. 10. You say at the time the company left your office?

A. I think the date was in 1902.

Q. 11. Did you at any time prior to that, or when the company left your office, as you express it, know of the company's having any cause of action against Albert S. Bigelow or Leonard Lewisohn, or the estate of Leonard Lewisohn?

[Objected to as incompetent, irrelevant, and immaterial, and also as leading.]

A. I saw something of it in the papers.

Q. 12. You mean that you refer to the suits that were commenced against Mr. A. S. Bigelow and the Leonard Lewisohn estate?

A. I do not know that they were commenced at that time.

Q. 13. Well, you refer to whatever was published in the paper after the change in management, when Mr. Charles S. Smith became the president of the company, do you?

A. That is my recollection.

Q. 14. Prior to what you saw in the papers that you have just testified about, did you have any knowledge of any cause of action against Mr. A. S. Bigelow, Mr. Leonard Lewisohn, or Mr. Leonard Lewisohn's estate?

[Objected to as incompetent, irrelevant, and immaterial.]

A. No.

[No cross-examination.]

——— ———.

Subscribed and sworn to this — day of ———, 1906, before me.

———,

Notary Public.

584 *Stipulation.*

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

Deposition of J. Morris Meredith.

J. MORRIS MEREDITH, being first duly sworn by Howland Twombly, Esq., a notary public, in answer to interrogatories propounded by E. F. McClennen, Esq., counsel for the plaintiff, deposes and says.—

Q. 1. Mr. Meredith, what is your full name?

A. James Morris Meredith.

Q. 2. And you reside where?

A. I am a resident of Boston; I am living in Topsfield.

Q. 3. And your business is what?

A. Real estate, trustee, agent, and broker.

Q. 4. You had something to do, did you not, with the original acquisition from the Simpson estate of the Old Dominion mine?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I sold the mine for Mr. Simpson.

Q. 5. Have you any correspondence relating to those transactions?

A. All I could find was some copies——

Mr. HEMENWAY: The question is, "Have you any?"

The WITNESS: I have some.

Q. 6. Will you refer to such as you have been able to find, and inform us of the earliest date that you find?

[Objected to as immaterial.]

A. April 29, 1905.

Q. 7. To whom and by whom was that letter written?

[Objected to as immaterial.]

A. By me to Mr. Leonard Lewisohn.

Q. 8. Mr. Meredith, you said April 29, 1905?

A. Yes.

Q. 9. Did you [in] fact mean that, or in 1895?

A. In 1895.

Q. 10. Will you read that letter?

[Objected to as incompetent, irrelevant, and immaterial; and I should like to see the letter.]

585 A. Well, before I show it to anybody, I should like to make a remark about it myself. It is marked "Private," and I really do not see why I should be compelled to bring in my private correspondence to you gentlemen. There is nothing I want to hide about it, and I presume there is nothing very material. It is a private communication from me to Mr. Lewisohn; it is marked "Private," and I brought it up here because I was summoned. I do not know that you have any right to this communication. There is nothing that will hurt one side or do the other side any good in it, so far as I can see. At the same time, it is rather extraordinary that I should be asked to produce it.

Q. 11. Well, Mr. Meredith, to relieve you of any feeling of embarrassment on that subject, I show you a letter of Mr. Lewisohn to you of April 29, 1895, which has already been inroduced in evidence in New York and is marked "Exhibit 162:" is the letter to which you have just referred in your answer the same letter?

[Objected to as immaterial.]

A. I do not know. [Inspecting letter.] Oh, that has nothing to do with this matter at all.

Mr. HEMENWAY: That letter was objected to in the testimony taken in New York.

The WITNESS: That refers——

Mr. HEMENWAY: No, no, there is no question.

Q. 12. You say that is not the same letter?

A. That letter applies to an entirely different subject, and has nothing to do with or to say about the Old Dominion, or anything in connection with it.

Mr. MCCLENNEN: That is Exhibit 162.

Q. 13. Now I show you a copy of a letter of yours of April 30, 1895, introduced in evidence and appearing on page 5 of the testimony of Mr. Hyams. That is a letter to Leonard Lewisohn, of April 30, 1895, from you.

A. You have probably got a copy.

[Letter shown to witness.]

Mr. HEMENWAY: The defendant objects to the admission of this letter, or any portion of its contents, it being correspondence between Mr. Meredith and Mr. Lewisohn, neither of whom are parties to this suit against Mr. Bigelow.

The WITNESS: That appears to be the one.

Q. 14. In this letter which you have now read, namely, that of April 30, 1895, you say, "Your favor of yesterday re-
586 ceived:" is the letter which you have spoken of as a confidential communication the letter therein referred to?

[Objected to as incompetent, irrelevant, and immaterial.]

A. No. When I said the letter was private, it was a letter from myself to Mr. Lewisohn, not one from him.

Q. 15. Have you the letter from Mr. Lewisohn referred to as of "yesterday," in this your letter of April 30, 1895?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I cannot find it. You see, this was private business of my own, and whilst I used the copy book of the firm to copy my letters, the letters I received got mixed up and they are where I cannot put my hand on them.

Q. 16. Does the letter which you have characterized as confidential, of April 29, 1895, relate to the matter of the Old Dominion mine?

[Objected to as incompetent, immaterial, and irrelevant.]

A. It does. As I said before, I can see no harm in showing it, but simply it was correspondence between him and myself; it is nothing that will do you any good or the other side any harm, that I can see.

Q. 17. So that you have no personal objection?

A. I have no personal objection, nor do I know that anybody else has any objection, to showing it, only I did not know that a broker was compelled to show his correspondence in these things; but I am not a lawyer and do not know anything about it.

Q. 18. If it be a fact that under the rules of law a broker is compelled to do it, you have no objection to doing it?

A. I have no objection.

Q. 19. Then I will ask you to produce the letter.

A. Well, on the theory that the law does compel me to?

Q. 20. Let me assure you that it is a fact that the law does compel you to produce it, provided it is relative to the inquiry.

A. All right. I will take your assurance.

Mr. McCLENNEN: This letter of April 29, 1895, we will offer in evidence, and it reads as follows——

Mr. HEMENWAY: The defendant objects to this letter from Mr. Meredith to Mr. Lewisohn as being incompetent, immaterial, and irrelevant, having no relation whatever to the issues in this case, and being correspondence between Lewisohn and Meredith,
587 parties other than parties to the suit. And, in order to save time, with Mr. Brandeis' permission, I would like to make the same objection to all the correspondence between Mr. Meredith and Mr. Lewisohn other than correspondence that is brought home to the attention of Mr. Bigelow, if there be any such.

Mr. BRANDEIS: We accept that general objection.

Mr. McCLENNEN: The letter reads as follows:—

"Private."

APRIL 29TH, —5.

Leonard Lewisohn, Esq., Fulton St. New York.

DEAR SIR: Concerning the property you want me to get hold of, the owner of five sevenths did not sell as I supposed. He is a valued client of mine and we manage some large real estate interests here for him. I have been with him for an hour today.

He cautioned me not to talk with the Bigelow crowd as he apparently has been imbued in Baltimore with the same absurd jealousy and fear.

Something is going on in the way of negotiations now and I have reason to believe Mr. Dodge is in it.

However to day everything is open and I could buy the property or at least five sevenths with an agreement on my part to take the remaining two sevenths if offered, provided no one suspected to whom it was going and Baltimore did not hear of it until accomplished. It is needless to caution you to keep from saying a word to anyone on this subject at present.

The owner expects to leave here in four days to go out there and

I ought to see him again before he goes and know exactly what to say to him.

The mine is shut down awaiting the completion of the S. P. railroad branch which is being built in to it.

If you are really in want of this property now is the time but let no one know it or hear you speak of it.

Wire me early tomorrow where to meet you on the arrival of tomorrow's three o'clock shore line train which gets in about nine and after an hour's talk with you I must return on the midnight train as I must be in Boston Wednesday.

Of course this is only in case you need me.

I ought to be instructed just what to say to him before he goes.

Yr's Very Truly,

J. M. MEREDITH."

588 Q. 21. Mr. Meredith, as far as you now recall, what, if anything, had occurred between you and Mr. Lewisohn prior to this letter relating in any way to the possible acquisition of the Old Dominion mine?

[Objected to as incompetent, irrelevant, and immaterial.]

A. He had asked me in New York whether I knew that Mr. Simpson had sold his interest in the Old Dominion. I told him that I did not think he had, because I thought Mr. Simpson would have told me if he had; I should have heard of it. And I gathered from him—I do not know whether he told me or I asked him—that it was a property that he would be interested in. And I came to Boston and saw Mr. Simpson, and then wrote Mr. Lewisohn about it. That is my recollection.

Q. 22. And this letter which has just been read was what you wrote?

A. Yes.

Q. 23. I show you Exhibit 1, March 24, 1903, of Mr. Bigelow's deposition, a paper dated April 30, 1895, and signed by Mr. Simpson: is that in your handwriting?

[Objected to as immaterial.]

A. Yes, sir, it is.

Q. 24. Do you recognize that paper as being the option or bond referred to in your letter of April 30, 1895, which you have just read, which appears on page 5 of Mr. Hyams' deposition, by a copy?

[Objected to as immaterial.]

A. Yes, to the best of my belief, it is.

Q. 25. In that same letter you speak of instructions of the morn- from Mr. Lewisohn by telephone: do you have any recollection of that telephone conversation which you had on the morning of April 30 before obtaining this option from Mr. Simpson?

[Objected to as immaterial.]

A. No, sir, I do not.

Q. 26. Have you any recollection, in view of the letters and the option, of the subject to which the conversation related?

[Objected to as incompetent, irrelevant, and immaterial.]

589 A. If there was such a conversation over the telephone it would have applied to that option, undoubtedly.

Q. 27. Just what the details were you have no recollection of?

A. No.

Q. 28. In the letter of April 30 you speak also of the conversation with Mr. Simpson which resulted in your obtaining this option; will you state the substance of that conversation with Mr. Simpson as far as you now recall it?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I cannot recall anything more than what is in that letter; and that I do not recall. I simply see that I have written it.

Q. 29. Are you prepared to say that is a correct recital of the conversation which occurred?

[Objected to as immaterial, incompetent, and as leading.]

A. — and impertinent, I should say. I have stated that. I am not in the habit of writing things that are not correct.

Q. 30. Do not understand my question as insinuating the contrary. In view of the rules of procedure, we have to get the facts down.

A. All right, sir.

Q. 31. Now I will put it in this form: Refreshing your recollection from the letter of April 30, will you state, as thereby refreshed, what the conversation was?

[Objected to as immaterial and irrelevant.]

A. I can simply state that I have no doubt that the conversation occurred as stated in this letter.

Mr. McCLENNEN: I will now offer the letter of Mr. Meredith to Mr. Lewisohn of April 30, 1895, which reads as follows:—

Mr. HEMENWAY: Objected to for the reasons heretofore stated.

Mr. McCLENNEN: [Reading:]

"APRIL 30TH, —5.

Leonard Lewisohn, Esq., Fulton St., New York.

DEAR SIR: Your favor of yesterday rec'd. In accordance with your instructions of this morning over the telephone I sent for Mr. Simpson who was out of town at his mill and he only arrived late this afternoon too late to consult you or anyone. I found it harder than I supposed to pin him down, he showed a strong desire before committing himself to consult with some one, due as he stated it that giving an option might ruin another negotiation under way.

590 My reply was that it appeared that he had got to ruin one or the other, that my instructions were to settle the matter for ever at my first interview and that I could not allow him even to use the Long Distance. If I left without a bond he could be sure he would never hear from my people again.

My acquaintance with him permitted me to be a little more severe than otherwise.

After two hours he has given me a bond copy of which I enclose.

We had to write it ourselves as neither of us wanted to leave the other for fear of the Long Distance.

If any of the details or the form are very objectionable wire me tomorrow, 'form of bond impossible' and send me by night's mail a form drafted by your lawyer and I will try and get him to change it. Mr. Simpson is a fair minded man and I believe he will be perfectly reasonable with me.

He goes west in two days leaving his power of attorney at his office.

He says that the Company has got on hand actual surplus of over $350,000 in copper cash and notes receivable which are really undeclared dividends and that he will not include this in the sale.

He has nothing else connected with this Company except an interest in a store which is a private enterprise.

The provisions for delay in transfer is because it might turn out that he would have to apply to the Probate Court but there is no one to consult but himself.

I think some of your warm friends on the street will be much troubled if this sale is completed.

You may send me your check for the two thousand dollars.

He expects an expert to be sent by me at once to the mine so as to report within the fourteen days, you will know if this is necessary.

He has no idea who my people are.

If I have done wrong in anything correct me. It was a difficult matter.

Yr's Very Truly,

J. M. MEREDITH."

Q. 2. What is the next, Mr. Meredith, that you now find in the order of date in the correspondence?

[Objected to as immaterial.]

A. To Mr. Lewisohn; May 16.

391 Q. 33. Let me call your attention to a letter introduced in the deposition of Mr. Hyams at page 7, and dated May 1, 1895, written from the Somerset Club, and see ——

A. This [referring to copy in hand of witness] is dated May 16, from the Somerset Club.

Q. 34. Do you recall the letter of May 1?

[Objected to as immaterial.]

A. I do not recall anything about it; although I have no doubt it is quite possible such a letter was written; I have no copy of it.

Q. 35. To do away with any uncertainty, I show you the original of this letter of May 1, 1895; do you recognize that as your handwriting?

A. Yes, I recognize my handwriting and my signature.

Mr. McCLENNEN: This letter of May 1, 1895, I will offer.

Mr. HEMENWAY: Objected to for the reasons heretofore stated.

Mr. McCLENNEN: It reads as follows:—

"SOMERSET CLUB, BOSTON, *May* 1, '5.

Leonard Lewisohn, Esq., Fulton St., New York.

DEAR SIR: Your favor over the telephone today was duly received. Mr. Simpson, not feeling very well, did not come to town today, so this afternoon I had to go out to his house at Saxonville to see him. My form of bond was of course unsatisfactory, but knowing him to be a thoroughly honorable man, and having asked him verbally about many of the points you suggest, I deemed it better to lock him in with an unsatisfactory bond, rather than to let him talk to Baltimore, and I still think I was right. He shows every willingness this afternoon to put the bond in any form that is absolutely fair. He agrees that of course the corporation of which you buy the shares owns all the mines, smelters, furnaces, buildings, mining tools and other appurtenances, also all the ores on dump or in process, copper bottoms, and so forth, and that all he wishes to reserve from the sale is any finished copper product, such as pig copper or ingot copper, cash or notes receivable which have been in the company's possession before this time, the total not to exceed in any case over $350,000, so-called company surplus. The clause about legal delivery of the stock from his father's estate was put in by prudence. Tomorrow I consult an attorney as to
592 whether it is not in his power to absolutely deliver it. I think it is. He agrees with me that this must be put in such shape that no outside influence can interfere; but, when it comes to terms, he not knowing, you understand, who my people are, refuses longer time, in doing away with satisfactory endorsements; as he expresses it, he either runs the mine or sells it; and $100,000 cash is nothing to him if he loses the control of the mine and then has to take it back. He remarks that if my people are as strong as I state them, the terms named are ample. He agrees to be in New York with me on Friday and sign any new bond from which day the fourteen days shall run, but insists that he must go West Friday night and that after that day he cannot change the terms of the bond. Therefore you must consult your attorney and have him ready on Friday to prepare a bond, and he and I can again see Mr. Simpson without his disclosing you in the matter at all.

Telephone me tomorrow if this is all right, and I will wire you about his father's will. I should not be surprised if he believes the purchasers to be Anaconda & Calumet & Hecla, who buy to whip Montana and Tamarack.

Yours very truly,

J. MORRIS MEREDITH."

Q. 36. I now show you Exhibit 2, March 24, 1903, of the deposition of Mr. Bigelow, an option between the Simpson estate and yourself of May 4, 1895: do you recall the fact of obtaining a second option?

[Objected to as immaterial.]

A. There was some paper which Mr. Beaman in New York prepared on the day Mr. Simpson was in New York, and it was

executed by Mr. Simpson at the Waldorf, I think, or one of the hotels, in the evening. Whether it was this option or not I do not know.

[Answer objected to as incompetent, irrelevant, and immaterial.]

Q. 37. Was the paper to which you refer, which was executed by Mr. Simpson at the Waldorf, some form of option upon the Old Dominion stock?

[Objected to as immaterial.]

A. It was some form to take the place of the one he had signed when I was here in Boston.

[Answer objected to as incompetent, irrelevant, and immaterial.]

593 Q. 38. That is the one of April 30?

A. Yes.

Q. 39. I show you a letter of May 6, 1895, appearing to be from you to Mr. Lewisohn: is that in your handwriting?

[Objected to as immaterial.]

A. Yes, that appears to be my signature and my handwriting.

Mr. McCLENNEN: This I will offer.

Mr. HEMENWAY: Objected to for the reasons heretofore stated as to the other correspondence.

Mr. McCLENNEN: It reads as follows:—

"Office of Meredith & Grew, 15 Congress St., Boston, Mass.

BOSTON, *May* 6, 1895.

Leonard Lewisohn, Esq., Fulton St., New York.

MY DEAR SIR: Mr. Butler did not find Mr. Keyser at Old Point Comfort and was to follow him to Baltimore hoping to return to Boston tomorrow morning. I have secured the third executor's signature to the option, and have written Mr. Beaman to that effect. Mr. Bigelow has agreed to let me have, or rather take and pay for a small share of his interest in this venture. I only mention this to show my desire to aid your side of the copper business. I think I can help you on the railroad situation with Mr. Huntington. His private secretary, Mr. Tweed, formerly a partner of Evarts, Southmayd & Choate, I have known for years, and our relations are always of the pleasantest. Mr. Johnson wires me that the senior of the banking house cannot be reached for a day or two more. I will consult with you on this on Wednesday when I shall be in New York. To-night Mr. Hyams is to coach me thoroughly on the railroad situation. My rough idea is to try and get a five years' contract before the option is closed. It will greatly strengthen the situation and enhance the value of the property. But we will talk this over when I meet you.

All comes to those who know how to work for it. Believe me,

Yours truly,

J. MORRIS MEREDITH."

594 Q. 40. In this letter, Mr. Meredith, you have referred to the fact that Mr. Bigelow has agreed to let you "have or rather take and pay for a small share of his interest in this venture;" have you any recollection of how long, prior to May 6, 1895, you had had any conference with Mr. Bigelow on this subject?

[Objected to as immaterial.]

A. My recollection is that after the option——

Mr. HEMENWAY: He simply asks for the time.

The WITNESS: I cannot give the time.

Q. 41. Can you give me the time by reference to any of the transactions?

[Objected to as immaterial.]

A. I think I can.

Q. 42. Well, will you do so?

A. When the option was in Mr. Lewisohn's hands that I had obtained from Mr. Simpson, the commission was stated in the option. Mr. Lewisohn thought he ought to have part of it. I demurred to that. When I came to Boston I told Mr. Bigelow of that. He said that he would give me an interest if I put the money into it, and that under those circumstances he did not believe Mr. Lewisohn would again make his request for part of that commission, which I agreed to.

[Answer objected to as irresponsive and irrelevant.]

Q. 43. From what source had you learned that Mr. Bigelow was interested in this plan?

[Objected to as immaterial.]

A. Oh, I had talked with Mr. Bigelow about it ever since Mr. Lewisohn first spoke to me about it.

Q. 44. Well, do you mean by that before the acquisition of the option?

A. I do not remember, but I think it extremely likely.

Q. 45. Did you learn from Mr. Bigelow what his interest was in the enterprise?

[Objected to as immaterial.]

A. I do not remember.

Q. 46. Do you remember whether he at the time told you what portion he was to have?

[Objected to as immaterial.]

595 A. I do not remember.

Q. 47. Referring back to your letter of April 29, in which you outlined the possibility of doing something with Mr. Simpson, do you recall whether or not at that writing you had talked with Mr. Bigelow at all about the matter?

[Objected to as leading.]

A. I do not recall any such talk.

Q. 48. Have you any means of fixing how many times you had conferred with Mr. Bigelow, prior to this letter of May 6, which has just been read, relating to the agreement to permit you to contribute to the enterprise?

[Objected to as immaterial and leading.]

A. My recollection is that I went into Mr. Bigelow's office every day after I got working on this, when I was in Boston.

Q. 49. Did you confer with him there on these occasions?

A. I suppose so.

Q. 50. Apart from the conferences at his office, do you remember whether you had any telephone communication from Lewisohn?

A. I cannot recall that—eleven years ago.

Q. 51. Do you remember whether or not—do you remember where you conducted your telephone communications with Mr. Lewisohn referred to in these letters we have just been reading?

[Objected to as immaterial.]

A. I do not.

Q. 52. Do you remember whether any of those were from Mr. Bigelow's office?

[Objected to as immaterial.]

A. Probably they were.

Q. 53. You refer in your letter of May 6, just read, to the fact of Mr. Butler's not finding Mr. Keyser: do you remember the arrangement which led to Mr. Butler's attempting to find Mr. Keyser?

[Objected to as immaterial and irrelevant.]

A. Mr. Butler went down to Baltimore for some purpose, undoubtedly to see Mr. Keyser: it would be a mere surmise for me to try to remember exactly why he went.

5961 Q. 54. Do you remember by whom it was arranged that he should go?

[Objected to as immaterial.]

A. No, I cannot say by whom: no, I could not say.

Q. 55. Do you remember when the possibility of acquiring Mr. Keyser's interest was first discussed by you, either with Mr. Lewisohn or Mr. Bigelow?

[Objected to as immaterial and as leading, and as assuming a fact not yet proven.]

A. I think it is mentioned in the original bond: I am not sure. You have got it, and I have not.

Q. 56. Let me call to your attention, Mr. Meredith, the fact that the original options of April 30 and May 4, while containing a provision that the purchasers must buy Keyser's share if he so elects, do not contain a provision compelling Keyser to dispose of his share.

A. No.

Q. 57. Having that in mind, will you state the first you recollect

with reference to any effort being made, if any there was, to get Mr. Keyser to sell?

[Objected to as immaterial.]

A. The only thing I remember is there came a time when Mr. Keyser said he would sell, provided he did not have to pay me my commission; and there was a trade made with me, so that I should not insist upon that commission. When that was, I do not know, whether one of these letters will state or not. On June 10 I wrote to Mr. Lewisohn, reciting what he was to give me on that account.

Q. 58. But you have no present recollection of the beginning of the negotiations which led to that?

A. No. May 25, I telegraphed, "Keyser does not care to consult other owners two sevenths until option is acted upon," so I suppose he had not expressed whether he would or would not take it by May 25.

Q. 59. Is this letter of May 7, appearing to be from you to Mr. Lewisohn, written by you?

[Objected to as immaterial.]

A. It is.

Mr. McCLENNEN: That letter I offer. It reads as follows:
Mr. HEMENWAY: That is objected to for the reasons before stated.
Mr. McCLENNEN [reading]:

597 "Office of Meredith & Grew, 15 Congress St.

BOSTON, *May* 7, 1895.

Leonard Lewisohn, Esq., P. O. 1247, New York.

DEAR SIR: Your favor of yesterday enclosing check to my order for the $2000 paid out by me under agreement of May 4, received with thanks. I shall hope to see you tomorrow, and will call at the office. My hotel will be the Waldorf.

Yours very truly,

J. MORRIS MEREDITH."

Q. 60. After this letter, Mr. Meredith, am I right that the next letter you find is May 16?

[Objected to as immaterial.]

A. To Mr. Lewisohn?
Q. 61. To Mr. Lewisohn.
A. Yes.
Q. 62. May I have that?
A. [Copy produced.]

Mr. McCLENNEN: This letter I will offer.
Mr. HEMENWAY: Objected to for the reasons heretofore stated as to the other correspondence.
Mr. McCLENNEN [reading]:

"Somerset Club, Boston.

MAY 16, '5.

DEAR SIR: Your kind favor of yesterday received and I have delayed answering until I came up town. At all times business suggested by you will receive my closest attention. I will be in New York next Tuesday and look into the matter of the Alabama coal company with pleasure.

Mr. Simpson goes west on Saturday and Mr. Butler wishes you could give the endorsements on the notes and guarantee before then so that he could pass on them before leaving. I should think you and Mr. A. S. Bigelow would be ample. I will see Mr. Bigelow in the morning and have him call you up.

Mr. Keiser telegraphed today for a ten days option Old Dominion to run from May 28th if you do not take it and it was given to him. I hope the report from Arizona will be favorable.

Hoping to see you on Tuesday, I remain very truly and with thanks.

J. M. MEREDITH.

L. Lewisohn Esq."

598 Q. 63. What is the next letter to Mr. Lewisohn?
A. May 17.

[Copy exhibited.]

Mr. MCCLENNEN: This letter I offer.

Mr. HEMENWAY: Objected to for the reasons heretofore stated.

Mr. MCCLENNEN [reading]:

"MAY 17, '5.

Leonard Lewisohn, Esq., Post Office box 1247, New York.

DEAR SIR: Mr. Simpson agrees that your notes endorsed by Lewisohn Bros. Co. and Albert S. Bigelow will be satisfactory to the Executors of his father's E-tate.

But as to the guarantee to take the minority he prefers Mr. Kaiser to pass on this and I have written under his direction to Mr. Kaiser for his approval. I have no doubt it will be all right. They want the papers to pass at the Old Colony Trust Company here in Boston.

Mr. Simpson desires me to assure you that the only reason for his consenting to give ten days option after the 28th was that Mr. Kaiser was under obligations to do so when asked and that Mr. Simpson under the circumstances could not refuse.

Y'rs Very Truly,

J. M. MEREDITH."

Q. 64. Up to this date, May 17, 1895, Mr. Meredith, had you had any correspondence with Mr. Keyser?

[Objected to as immaterial.]

A. Up to the 17th?
Q. 65. Up to the 17th.
A. I have no copy of any before the 17th.

Q. 66. What is the first correspondence that you had with Mr. Keyser?

[Objected to as immaterial.]

A. On the 17th [exhibiting a copy].

Mr. McCLENNEN: This letter I will offer.

Mr. HEMENWAY: The letter is objected to for the reasons before stated and for the reason that Mr. Keyser is in no way interested in any of these suits at present pending in regard to these matters.

599 Mr. McCLENNEN: The letter reads as follows:

"MAY 17TH, '5.

Wm. Kaiser, Esq., Kaiser Building, Baltimore, Md.

MY DEAR SIR: Under the option for the Old Dominion Copper Mining Co. given me by Mr. F. E. Simpson and assigned by me to Mr. Leonard Lewisohn, Mr. Simpson has agreed that Mr. Leonard Lewisohn's notes endorsed by Lewisohn Bros. Co. and Mr. Albert S. Bigelow will be satisfactory to the Executors of his father's Estate. But as to the guarantee to be given to take any part of the minority offered within sixty days he prefers to have you decide, as it is of more interest to you than to him.

Will you kindly wire me on receipt of this if the above three names will be satisfactory to you.

I think it possible that if you also notified me at once that the two sevenths be tendered I could get the parties to agree to take them at the same time, of course with the understanding that they should at once control the board of directors.

But this is only an idea of my own to make things as pleasant as possible for you.

I remain with respect.

Y'rs very truly,

J. MORRIS MEREDITH."

Q. 67. Have you any recollection, Mr. Meredith, whether you had seen Mr. Keyser in this matter prior to the writing of this letter on May 17, 1895?

[Objected to as immaterial.]

A. I have none, sir.

Q. 68. Up to this date had you any correspondence with Mr. Bigelow?

[Objected to as immaterial.]

A. May 16 is the first letter that I find a copy of to Mr. Bigelow.

Mr. McCLENNEN: That letter I offer.

[Objected to as immaterial.]

Mr. McCLENNEN: The letter reads as follows:

"MAY 16TH, 1895.

600

DEAR BIGELOW: Enclosed is seventy dollars being my share amounting to ($25,000) twenty five thousand dollars of the $2000 paid for option in the Old Dominion Copper Mining Company deal.

Y'rs very truly,

J. M. MEREDITH."

A. S. Bigelow, Esq.

Q. 69. Mr. Meredith, I show you Exhibit 20, May 5, 1903, accompanying Mr. Bigelow's deposition, a so-called underwriting agreement of May 25, 1895; is the signature thereto, "J. Morris Meredith, $25,000," yours?

[Objected to as immaterial.]

A. Yes, that is my signature.

Q. 70. Is the $25,000 interest therein mentioned the one to which you refer in your letter of May 16 to Mr. Bigelow?

[Objected to as immaterial.]

A. Yes, undoubtedly.

Q. 71. Now, in order to date, what is the next letter that you have, either to Mr. Lewisohn, to Mr. Bigelow, or to Mr. Keyser?

[Objected to as immaterial.]

A. What date are we at now?

Q. 72. The 17th of May. We have had the one of the 17th of May.

A. May 20, to Mr. Keyser [exhibiting copy].

Mr. MCCLENNEN: This letter I will offer.

Mr. HEMENWAY: Objected to as irrelevant, incompetent, and immaterial.

Mr. MCCLENNEN: The letter reads as follows:

"MAY 20TH, '5

Wm. Keyser, Esq., Keyser Build'g, Baltimore, Md.

DEAR SIR: Your favor of the 18th received. Altho' everybody supposed that you would desire to retire, I personally am reluctant to cause inconvenience to any gentlemen in a trade where I might be looked upon as an outsider.

I shall be in New York at the Holland House tomorrow and if you will kindly wire me there tomorrow where and when to meet you either in New York or Baltimore as early as possible I will

601 endeavor to keep the appointment. I think after a personal interview I can arrange things to please you all and I hope to be considered a well doer rather than a nuisance. I remain,

Y'rs very truly.

J. MORRIS MEREDITH."

Q. 73. What is the next letter in order of date to Mr. Lewisohn, to Mr. Bigelow, or to Mr. Keyser?

[Objected to as immaterial.]

A. I think there is one to each of them on the 25th, if I am not mistaken. I think you will find it there.

Mr. McCLENNEN: I offer a letter of Mr. Meredith to Mr. Bigelow of May 25, 1895.

Mr. HEMENWAY: Objected to for the reasons heretofore stated

Mr. McCLENNEN: It reads as follows:

"MAY 25, '5.

A. S. Bigelow, Esq.

DEAR SIR: Enclosed you have check for thirty five hundred dollars on a/c of my share in the Old Dominion Copper Mine Co. purchase.

Y'rs very truly,

J. MORRIS MEREDITH."

Mr. McCLENNEN: I offer a letter from Mr. Meredith to Lewisohn Brothers of May 25, 1895.

Mr. HEMENWAY: Objected to for the reasons heretofore stated.

Mr. McCLENNEN: It reads:

"MAY 25, '5.

Lewisohn Bros. Co., Fulton Street, New York:

Keyser does not care to consult other owners two seventhe until option is acted upon assures me if sale is made there will be no captious opposition nor any delay in transfer of property control to new owners. If you get telegram from Hyams tomorrow cannot you repeat to me Somerset Club Boston there is so little time show this to Beaman.

J. M. MEREDITH."

602 Q. 74. Was that a letter or a telegram, Mr. Meredith?
A. It looks like a telegram.

Mr. McCLENNEN: I will offer a letter from Mr. Meredith to Mr. Keyser dated May 25, 1895.

Mr. HEMENWAY: Objected to for the reasons heretofore stated.

Mr. McCLENNEN: The letter reads as follows?

"MAY 25, '5.

Wm. Keyser, Esq., Keyser Building, Baltimore, Md.

DEAR SIR: Your favors of May 23rd and 24th both received with my best thanks.

We have not yet received expert reports from the mine but shall no doubt by Monday.

I remain,

Y'rs very truly,

J. MORRIS MEREDITH."

Q. 75. In a letter to Mr. Keyser of May 20 you refer to your intention to be at the Holland House in New York on the following day, and in your telegram to Lewisohn Brothers you refer to Mr. Keyser's not desiring to consult the other owners until the option is

acted upon; do you recall what course you did in fact pursue so far as Mr. Keyser was concerned?

[Objected to as immaterial, incompetent, and irrelevant.]

A. I know that at some time I saw Mr. Keyser at the Holland House in New York; I cannot tell you whether on just that date or not.

Q. 75. Do you know whether it was at that conversation that you learned that he did not care to consult the other owners?

[Objected to as immaterial and leading.]

A. I cannot tell you.

Q. 77. It has appeared in the testimony of Mr. Bigelow, at page 173, that a letter was written by Lewisohn Brothers to Adolph Lewisohn, as follows:

603 "NEW YORK, *May 24th*, 1895.

Adolph Lewisohn, Esq., London.

DEAR SIR: Mr. Meredith got back from Baltimore yesterday and had a conference of a couple of hours' duration with Mr. Keyser, but is none the wiser as to whether this gentleman intends to let us have his two-sevenths of the Old Dominion or not. He intimates that if we make it a different company with a higher capitalization, he would probably not remain in; but he had not decided and is not compelled to decide for sixty days. Having three directors out of five, they control; and we would have to get one of those directors to our side—otherwise they would have the running of the company until next February when a meeting will be held and new directors appointed.

We will have to take our chances on this matter, and we hope he will act fairly.

Mr. Lieberman of Arizona is one of the directors, we understand, and Mr. Leonard Lewisohn believes we will be able to win him over, and Mr. Simpson also promised to help us in gaining our point there, and it is probable that this matter will right itself in course of time as it is not likely that Keyser will be very mean when there is not much for him to gain thereby.

Very truly yours,

LEWISOHN BROTHERS,
LEWISOHN,
General Manager."

Do you recall whether you had more than one meeting with Mr. Keyser?

Mr. HEMENWAY: The defendant objects to that part of this interrogatory which incorporates the so-called letter from "Lewisohn Brothers, Lewisohn, General Manager," to Adolph Lewisohn as being incompetent, immaterial, and irrelevant, the letter itself being objected to, and the next interrogatory having no relation to this letter, apparently, said letter having not yet been proven, and it

being between other parties than those to the suits to which Mr. Bigelow is a party; and the last part of the interrogatory is objected to as immaterial.

A. I remember of seeing him at the Holland House, New York, I remember of going to Baltimore and going to the Keyser building, to the office; whether I saw him there or whether I saw somebody else, I have no recollection to-day.

604 Q. 78. Do you remember which visit was first, to the Holland House or to the Keyser building?

[Objected to as immaterial.]

A. I do not.

Q. 79. Do you remember on one or the other of these occasions discussing with Mr. Keyser on the question of his disposition of his two sevenths?

[Objected to as leading and immaterial.]

A. I do not.

Q. 80. Will you relate, as far as you can, what was said between you and Mr. Keyser on those two occasions?

[Objected to as immaterial, irrelevant, and incompetent.]

A. If my recollection is right, at the interview at the Holland House Mr. Keyser said he would be down town in the course of the morning, and he would see Mr. Beaman. I think those two gentlemen had an interview, and that is all that I can remember about it.

Q. 81. Now as to the occurrence in Baltimore?

A. I do not recall what transpired there.

Q. 82. Recurring again to your telegram of May 25, wherein you say, "Keyser does not care to consult other owners' two sevenths until option is acted upon assures me if sale is made there will be no captious opposition," have you any means of fixing where you received that information?

A. I have not.

Q. 83. Do you recall whether or not you received it from Mr. Keyser?

[Objected to as immaterial.]

A. I do not recall anything about it.

Q. 84. Do you have means of stating from what place this telegram was sent?

[Objected to as immaterial.]

A. What date was that?

Q. 85. May 25.

A. Why, it was evidently copied in our office in Boston, so I suppose it was sent from there.

Q. 86. Do you mean, by your earlier answer as to the conversation at the Holland House, to say there was no conversation there

605 beyond the simple statement made?

A. Oh, I cannot say that. If I recall right, we sat down there and had a chat; what transpired, I cannot remember.

Q. 87. Let me call your attention to some particular things. Do you recall whether anything was said by Mr. Keyser in either of these places with reference to not desiring to disturb the other owners of the two sevenths interest until it was known whether the option was to be acted upon?

A. I have no recollection of it now.

Q. 88. Do you recall whether you had any conference with either Leonard Lewisohn or Jesse Lewisohn about conferring with Mr. Keyser?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I do not suppose at that time I was ever in New York without seeing Mr. Leonard Lewisohn if he was in New York. That is all I can tell you.

Q. 89. Do you recall whether or not you reported to Mr. Lewisohn on those occasions the substance of your conversations with Mr. Keyser?

[Objected to as immaterial.]

A. I do not recall doing so. No doubt I did.

Q. 90. Do you recall whether or not your conference, if any, in Baltimore had considerable duration, perhaps two hours?

[Objected to as immaterial.]

A. No, I cannot remember.

Q. 91. Do you recall whether or not, in any such conversation, you discussed with Mr. Keyser the possibilty of his taking stock if a different company with a higher capitalization was formed?

[Objected to as incompetent, irrelevant, immaterial, and leading.]

A. I cannot remember those talks—it was eleven years ago—except that I see something on paper that reminds me, my mind is a blank about it.

Q. 92. Well, does seeing on paper this statement that "Mr. Meredith got back from Baltimore yesterday and had a conference of a couple of hours' duration with Mr. Keyser, but is none the wiser as to whether this gentleman intends to let us have his two sevenths of the Old Dominion or not. He intimates that if we make it a different company with a higher capitalization, he would probably not remain in," assist your recollection as to anything?

606 Mr. HEMENWAY: I object to this method of attempting to assist the recollection of the witness, as such a thing would be impossible, it being from a typewritten letter between other parties.

A. I do not think it would be fair to say that reading that letter refreshes my memory of a fact. I have no doubt Mr. Lewisohn wrote what was true, but it does not refresh my memory to know that he did write it.

Q. 93. Well, seeing that Mr. Lewisohn did write Mr. Adolph Lewisohn, as he did, cannot you assist us a little as to what the transactions were? Of course you are better informed than we are.

Mr. HEMENWAY: Objected to as incompetent, irrelevant, and immaterial, the witness having already answered the question that his memory is in no wise refreshed, only stating that he thinks that what Mr. Lewisohn there wrote would be true. That does not enable him to swear to it as of his own memory.

A. All of my recollection about that whole matter with Mr. Keyser is this: that the impression I got was that Mr. Keyser was very indignant that this mine had been sold, that the five sevenths had been sold, and that he was very much disappointed, as he represented to me; that when he found he could not stop it, it became a serious question in his mind what to do with regard to the minority, and that it was some time before I knew what his final decision was going to be. Beyond that, I cannot undertake to say that I knew anything that passed in his mind or that was said to me in regard to the matter.

Q. 94. You recall the fact that, in the process of handling this matter, a new Old Dominion Copper Mining and Smelting Company was formed?

[Objected to as immaterial and incompetent.]

A. My recollection of all that is that Mr. Beaman, as I understood it, was in consultation with Mr. Bigelow as to what they were going to do; and, whilst it is possible that certain parts of those things were mentioned in my presence and told me, I did not pay much attention to what was being done. I felt that there was going to be a profit. My interest in it only came out of the commission I had made, and whatever those gentlemen felt was the right thing to do, that was all that I cared for.

Q. 95. In those early days you were in frequent consultation with them, were you not?

A. Oh, I think I was in the office nearly every day when they wanted me.

Q. 96. And as the various developments came, do you have any recollection of their causing any surprise to you?

[Objected to as immaterial, incompetent, and altogether irrelevant.]

607 A. No, I do not remember anything that surprised me at all. The only thing I can remember is that for quite a long time all the evidence that I had with regard to what was coming to me was a little penciled memorandum; I remember of wishing it was in writing, but did not care to ask for it.

Q. 97. Is that memorandum still in existence?

A. No.

Q. 98. That was destroyed, was it?

A. I suppose so. I suppose it was destroyed. I have not got it.

Q. 99. Do you remember whether it stated the number of shares that you were to have?

[Objected to as immaterial.]

A. As I remember, it was a little piece of paper that jotted down the number of shares for each purpose which were coming to me.

Q. 100. What were the different purposes stated?

Mr. HEMENWAY: That is objected to as immaterial. If there is any such paper in existence, he has not looked for it yet, and therefore he cannot state from memory.

A. As I remember it, there was the amount of shares coming to me for the $25,000 subscription; the amount of shares coming to me for Mr. Lewisohn's interest in compromising my commission on the minority, and the amount of shares coming to me from Mr. Bigelow on the same.

Q. 101. Do you remember at all when you learned of the fact that the company had organized,—the new company?

[Objected to as immaterial.]

A. I do not remember.

Q. 102. Do you remember whether you knew at the time of the fact of the organization when it occurred?

A. I suppose I should have, yes; I should think so.

Q. 103. As nearly as you can state, how long prior to that had you known of the project to organize a new company?

Mr. HEMENWAY: He has not testified yet that he knew of the project to organize a new company. For that reason I object to the assumption of that fact in the interrogatory; also because it is immaterial and irrelevant.

A. I cannot remember, honestly.

Q. 104. Do you remember now whether at any time you discussed with any one connected with the Old Dominion venture the possibility of a new corporation?

608 [Objected to as immaterial and misleading.]

A. I think they told me in the office always what they were doing when I went in there. I think undoubtedly, although I do not have any distinct recollection, that they were telling me that they were doing this; I have no doubt that I was told. I only mean by my previous remark to say I did not pay serious attention to it, as I should have under other circumstances; I felt that Mr. Beaman, Mr. Bigelow, and Mr. Lewisohn were fully capable of doing the right thing, and whatever they said was perfectly satisfactory to me.

Q. 105. In the course of their conversation with you do you recall whether or not either Mr. Lewisohn or Mr. Bigelow mentioned the fact of a new corporation to you?

A. I do not recall it, but I have no doubt it was told me.

Q. 106. Have you any recollection of what information you were supplied with, if any, to enable you to discuss the matter with Mr. Keyser when you saw him?

[Objected to as immaterial, and as assuming a discussion with Mr. Keyser which does not yet appear to have taken place.]

A. I recall no such discussion with Mr. Keyser in regard to any new company.

Q. 107. In view of your telegram of May 25, are you not able to state whether you had any discussion with Mr. Keyser that went into the detail of this Old Dominion venture?

[Objected to as incompetent, irrelevant, and immaterial.]

A. There is nothing in that telegram that leads me to suppose that there was any discussion about the future of the property sold.

Q. 108. Are you able to state any fact or occurrence which led you to report that Mr. Keyser did not care to consult the other owners of the two sevenths?

[Objected to as immaterial, incompetent, and irrelevant.]

A. I do not recall. It looks as if I had been instructed to find out whether he would not consult the owners, but I do not recall the matter.

Q. 109. Have you any recollection of any fact which led to your going to Baltimore to see Mr. Keyser?

[Objected to as immaterial.]

A. I have not.

609 Q. 110. At the time (namely, May 23, 1895), have you any recollection of any other person than Mr. Lewisohn or Mr. Bigelow with whom you were dealing as parties in interest in this matter?

[Objected to as incompetent, irrelevant, and immaterial.]

A. There was Mr. Nelson, Mr. Hyams, Mr. Butler, on Mr. Simpson's behalf; I think Mr. Simpson was away at that time, I am not quite sure.

Q. 111. Having in mind the people whom you have mentioned as parties in interest, if it shall appear to be the fact that you had conversation with Mr. Keyser in Baltimore on May 23, 1895, dealing with the subject of the possibility of creating a different company with a higher capitalization, are you able to state whether that proposal came from yourself or from some of those men with whom you were dealing?

[Objected to as incompetent, irrelevant, immaterial, and as purely a conjectural question.]

A. I could not answer that. I do not know of any such conversation; I do not recall any such conversation that occurred between myself and Mr. Keyser; if it did occur, I do not recall what it was, and I certainly, under those circumstances, cannot attempt to recall who told me to do it.

Q. 112. Are you prepared to say at the present time that the subject of the formation of a new corporation to acquire these properties had not been discussed between you and Mr. Bigelow, or Mr. Lewisohn, prior to May 23, 1895?

[Objected to as immaterial.]

A. I could not say it one way or the other.

Q. 113. Do you remember whether at the time you received the memorandum which you have described, in which your interest was set forth in terms of shares, you knew whether it related to the new corporation or the existing old corporation?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I must have known it related to the new company.

Q. 114. You knew, then, it related to the new company?

A. I must have.

Q. 115. Have you any means of stating from what source you got that information?

[Objected to as immaterial.]

610 A. Through Mr. Bigelow or Mr. Nelson or Mr. Hyams, or all three of them.

Q. 116. When you gave your underwriting of $25,000, about which you have testified, what, if any, information did you have relative to the way in which that money was to be used or in which it was proposed that it should be used?

[Objected to as incompetent and immaterial.]

A. I cannot recall at present; I cannot recall what information I had at the time.

Q. 117. Can you recall any information that you had at that time?

A. Only that that $25,000 went in on the same conditions that what Mr. Bigelow took, or what anybody else took, did, as far as the purchaser of the Old Dominion was concerned.

Q. 118. Had you any information as to the way in which the Old Dominion was to be acquired?

[Objected to as immaterial, irrelevant, and incompetent.]

A. I suppose I had, as I have stated before, but I have no recollection. I was perfectly satisfied that the detail as proposed by these gentlemen would be honest and satisfactory, and I have no doubt that they told me, but I cannot recall now what they said, or what they did not say, after eleven years.

Q. 119. Do you recall whether anything was ever said by them, or either of them, with reference to your acquiring stock in the Old Dominion Company?

[Objected to as immaterial, irrelevant, and incompetent.]

A. No, I cannot remember that.

Q. 120. Do you recall anything being said by any of them with reference to increasing the capital of the Old Dominion Company?

[Objected to as immaterial and incompetent.]

A. I know that there were many talks and many statements of what they proposed to do that were held in my presence, but I can no more remember the details than you can remember as to who was at your christening.

Q. 121. Well, without attempting to exhaust all the facts that may have been discussed, I ask you with reference to this one: do you recall any discussion with reference to increasing the capital of the Old Dominion Company?

[Objected to as incompetent and irrelevant.]

A. No, I do not.

611 Q. 122. You do not recall any?

A. No.

Q. 123. Do you remember any discussion at any time with Mr. Bigelow or Mr. Lewisohn with reference to shutting down the mine?

[Objected to as immaterial and irrelevant.]

A. Why, I think when I was in Globe, Ariz., there was some conversation about whether to wait for a new smelter or whether to go running the mine without.

(By Mr. HEMENWAY:)

Q. Was Mr. Bigelow or Mr. Lewisohn in Globe with you?

A. Yes, at some time Mr. Bigelow invited me to go out on a trip through the Northwest, and we went down to Globe afterwards; when it was I cannot tell you at this time.

Q. 124. Was it after the acquisition of the property?

A. I should say it was.

Q. 125. Do you recall whether you had any knowledge of an intention to shut down the mine between the time that the Simpson interest was acquired and the time when the Keyser interest was acquired?

[Objected to as incompetent and immaterial.]

A. I cannot remember.

Q. 126. Do you recall whether in any of your conversation with Mr. Keyser anything was said with respect to the terms upon which he might or might not remain interested in the Old Dominion?

[Objected to as incompetent and immaterial.]

A. Nothing only what these letters say or refer to; I remember nothing more.

Q. 127. At the time of the acquiring of these options were you aware of the method which had been pursued by Mr. Bigelow and Mr. Lewisohn in other similar enterprises?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I think not.

Q. 128. Had you known of the fact of their acquiring other mining properties before this?

[Objected to as immaterial and irrelevant.]

A. I knew they were very largely interested in mines; they must have acquired them.

612 Q. 129. Did you know anything about the method which had been pursued by them in increasing those enterprises?

[Objected to as immaterial and irrelevant.]

A. I think not.

Q. 130. Had you been engaged in any way in any of these other enterprises?

[Objected to as immaterial, irrelevant, and leading.]

A. I do not remember of any.

Q. 131. Did you have any knowledge at the time of the acquiring of these options as to the capital stock of the Old Dominion Company?

[Objected to as immaterial and irrelevant.]

A. I cannot recall whether I did or not.

Q. 132. Did you have anything to do with the Old Dominion Syndicate, so-called?

[Objected to as leading and immaterial.]

A. What do you call "the Old Dominion Syndicate"? I do not know exactly what you refer to.

Q. 133. Did you know of anything being formed at about the time of the acquiring of these options, or soon thereafter, called the Old Dominion Syndicate?

[Objected to.]

A. I notice in one of these letters where I send some money to the "Old Dominion Syndicate, P. O. Box 5104, Boston, A. S. Bigelow, Esq." That was the address where the letter went.

Q. 134. Have you any recollection of what the Old Dominion Syndicate was?

[Objected to as immaterial.]

A. No, I cannot follow those individual things.

Q. 135. Do you know whether you had anything to do with it yourself?

A. If the purchase of the Old Dominion mine has anything to do with it, if the $25,000 turned in in the way I turned it in has anything to do with it, if the receiving in lieu of my commisson on the minority *an* interest had anything to do with it, then I had; otherwise, it is entirely obscure to my mind.

613 Q. 136. Do you remember whether at the time those options were acquired, the Old Dominion mine was in question or not?

[Objected to as immaterial and irrelevant.]

A. No, I cannot remember.

Q. 137. You have no knowledge on that subject?

A. I undoubtedly knew whether it was or not at the time; I cannot recall now which way it was.

Q. 138. At the time you were making this comparatively large investment, did you have any knowledge whether you were investing in a mine that was to operate or in a mine that was to be idle?

[Objected to as immaterial, irrelevant, and incompetent.]

A. I knew I was investing in a thing that was to be managed by the Bigelow office, and managed with the ability they had always shown in all their other things; whether that meant it was to run immediately, or to shut up immediately, I did not know anything about.

Q. 139. Did you have any knowledge at this period of the way in which you might expect to obtain any profit out of this investment for yourself?

[Objected to as immaterial and incompetent.]

A. I had examples in the Boston & Montana, Tamarack, and several other companies which had been prosperous; I suppose this would be prosperous in the same way.

Q. 140. That is, in the same way as the Boston & Montana and Tamarack?

[Objected to as immaterial and incompetent.]

A. I knew they had been very profitable corporations, and I suppose this investment was to be one equally prosperous.

Q. 141. Had you been informed by either Mr. Lewisohn or Mr. Bigelow that it was proposed to deal with this in the way they had been dealt with?

[Objected to as incompetent, irrelevant, and immaterial, and as leading.]

A. I do not think they made any comparison with the others.

Q. 142. What information had you received from either
611 of them which enabled you to suppose that the enterprise was of any such character as Boston & Montana or Tamarack?

[Objected to as immaterial and incompetent.]

A. I heard it from Mr. Lewisohn and from Mr. Hyams both, that they considered there was great value in this mine.

Q. 143. At the time that you received the memorandum stating what you were to have as your share, do you know whether or not the present Old Dominion Copper Mining & Smelting Company had been organized?

[Objected to as immaterial.]

A. I cannot recall the dates now so as to tell you that.

Q. 144. Well, when you received that memorandum, do you recall whether there was already a new corporation in existence?

A. I could not tell you, honestly, whether this new corporation had been formed at that time or not. I remember the fact that I had for a long time in my pocket a little piece of paper that told me I was entitled to a certain number of shares, and I held that until I got my certificates, which came in afterwards.

Q. 145. Were the certificates which you received, as stated in the memorandum, as you recall?

[Objected to as immaterial.]

A. Undoubtedly.

Q. 146. Was that memorandum made at the time of your agreement with Mr. Bigelow, or subsequently?

[Objected to as immaterial.]

A. Oh, I think afterwards, some time afterwards.

Q. 147. Do you remember how long after?

A. I cannot.

Q. 148. And you cannot remember whether at the time it was made the corporation was already organized?

Mr. HEMENWAY: That question has already been asked and answered several times, and I think it is unfair to the witness to repeat it, and unfair in the time it takes to repeat it so often.

615 Q. 149. Mr. Meredith, what effort has been made to secure any letters that you have received from Mr. Lewisohn, Mr. Bigelow, or Mr. Keyser?

A. The copy letter books of these letters were easily found because they were in our safe, and they were numbered, and I have kept them there for convenience since. My recollection is that the letters that I received were not put with the Meredith & Grew letters; they were put with some papers of my own, and those papers,—I have moved three or four times since, and I do not know where to go to look for them, and I do not know how to find them; it might mean two or three weeks' hard work hunting into old papers, and then not finding them after all. If I knew where they were, I would just as soon refer to them.

Q. 150. Do you remember some time ago having a conversation with Mr. Brandeis about this matter?

[Objected to as immaterial.]

A. Yes, he came into my office about it.

Q. 151. Did the conversation relate to some of the same matters that I have referred to?

[Objected to as immaterial.]

A. Yes, he seemed to want to find out all he could, if I remember right. He was quite liberal in asking questions.

Q. 152. Do you remember whether in the course of that interview anything was said as to your recollection of the intention to form a new corporation?

[Objected to as immaterial.]

A. I cannot remember what I said at that meeting.

Q. 153. Do you remember whether that particular thing was discussed in any way?

A. I do not remember.

Q. 154. This interview with Mr. Brandeis was some years back, was it not?

A. Yes, I should think it was.

Q. 155. Somewhat nearer the events that we are inquiring about?

A. Why, it seems to me, I do not recall whether I had ever heard

that there was any such question before he came to me, and whether I had I cannot remember, but it was about the first time that I had heard that there was some trouble involved in this matter that Mr. Brandeis called; whether he told me of it first or whether I had known of it before he came, I do not know, but I think it was while it was just fresh to my mind.

616 Q. 156. Do you remember whether he asked you whether you had had a conversation with Mr. Keyser in which Mr. Keyser had said that if a different company was formed with a higher capitalization he would probably not remain in?

Mr. HEMENWAY: Objected to as incompetent, irrelevant, and as a conversation between Mr. Brandeis and the witness, having nothing to do with the issues in this case.

A. I do not remember.

Q. 157. Do you remember whether at that time you said, in substance, that this remark, namely, "that if we make it a different company with a higher capitalization, he [Keyser] would probably not remain in," was a remark which Keyser made to you at the time you were seeing him about getting the option?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I cannot remember anything in regard to my conversation with Mr. Brandeis, unless it is that he had some notes on a piece of paper and he began and asked me questions right along. I was perfectly willing to tell him anything that I knew, but what I told him and what I did not tell him I cannot remember and cannot say what it was. I did not keep notes of the conversation; he probably did.

Q. 158. Do you mean that your mind is a blank as to whether or not you told Mr. Brandeis this remark as to a new corporation with a larger capital was made in one interview or another?

A. It is. I cannot tell you at all.

Q. 159. Is it possible, then, that you may have stated that to Mr. Brandeis?

[Objected to as immaterial and incompetent.]

A. I suppose everything is possible in this world.

Q. 160. I mean possible in view of the facts and your knowledge of them.

[Objected to as incompetent, immaterial, and purely conjectural.]

A. I could not answer that question; I have got nothing to go by.

Q. 161. Well, let me call to your attention, Mr. Meredith, these facts; you would not have stated to Mr. Brandeis a thing which was not so?

[Objected to as incompetent, immaterial, and an improper way of trying to get in Mr. Brandeis' version of this transaction.]

A. I think I could assent to that last statement, that I should not have said anything that was not true.

617 Q. 162. Well, it is in the light of that that I am asking you in the form I do, whether it is possible that you stated to Mr.

Brandeis this remark of Mr. Keyser's, that he would not come in if they made it a different corporation with a larger capitalization?

[Objected to, the counsel's calling on him being of no consequence.]

A. I think that is referred to in these letters; I do not know what I told him, but I think there is a letter where I said that.

Q. 163. Now I am merely asking you, in the light of these things, if you will state what your recollection is on that subject?

A. My only recollection is that which I see and feel sure of; that is all that I can tell you. I think it was a letter to Mr. Lewisohn, was it not, where I say that? We have read it this morning, I am sure.

Mr. HEMENWAY: There is no such letter.

Q. 164. Have not you in mind the letter to Mr. Lewisohn?

Mr. HEMENWAY: That letter has not been put in evidence yet, and the only thing he has in mind is the frequent statement- of counsel in his examination.

Mr. MCCLENNEN: Just note an objection to Mr. Hemenway's characterization of the witness' reference.

Q. 165. Is not the letter which you have in mind the one which I have read, Mr. Meredith, in which occurred the statement, "Mr. Meredith got back from Baltimore yesterday, and had a conference of a couple of hours' duration with Mr. Keyser, but is none the wiser as to whether this gentleman intends to let us have his two sevenths of the Old Dominion or not. He intimates that if we make it a different company with a higher capitalization, he would probably not remain in"?

[Objected to as immaterial and incompetent.]

A. I suppose it was, but I cannot tell you whether it was or not. It shows the danger——

Mr. HEMENWAY: He has not completed his answer.

The WITNESS: It shows the danger of trying to surmise that you do remember. I should have sworn that there was a letter in these letters from me to Mr. Lewisohn, in which I stated that Mr. Keyser would not go in. Now that I come to look, there is not. So I am going to be a little cautious in what I swear to.

Q. 166. Am I right in gathering from that last answer that it was your recollection that you had written to Mr. Bigelow that?

A. No. No, I am not prepared to say that.

618 Q. 167. Do you remember whether you conferred with Jesse Lewisohn at any time with reference to this matter?

[Objected to as immaterial, incompetent, and irrelevant.]

A. I always saw Mr. Leonard Lewisohn if he was there. Whether or not I called at Fulton street some day when Mr. Leonard Lewisohn was not there, and saw either Mr. Jesse or Mr. Adolph Lewisohn, I cannot tell you; it would have been possible for me to have done that, but my regular person was Mr. Leonard Lewisohn.

Q. 168. And you have no recollection, then, of whether any of your interviews with Mr. Keyser were reported to Mr. Jesse Lewisohn?

A. I cannot recall.

Q. 169. What is the next letter that you have after May 25?

A. To anybody?

Q. 170. Yes; that is, to Mr. Lewisohn, Mr. Bigelow, or Mr. Keyser.

[Objected to as immaterial.]

A. June 10, to Mr. Leonard Lewisohn, there is something to Mr. Keyser, possibly, before that; June 10, to Mr. Lewisohn, I think that is the one, if I have not made a mistake.

Mr. McCLENNEN: The letter of June 10 I will offer.

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

Mr. McCLENNEN: It reads as follows:—

"JUNE 10, '5.

Leonard Lewisohn, Esq., of Lewisohn Bros. Co., Fulton St., New York.

DEAR SIR: According to our understanding by Telephone today, I am to have for surrendering all claim to commission on the two sevenths minority stock in the Old Dominion Copper Co. deal fourteen, four hundred & fifty third (14 453rd) parts of any profit coming to you or those under you taking the 453/1000 interest in the entire deal and I also get for the same reason a similar interest of fifteen thousand dollars in the Boston pool profits.

Kindly write me a line agreeing to this.

Yr's Very Truly,

J. MORRIS MEREDITH."

This is what Messrs. Bigelow and Nelson think is fair and it was suggested by them."

619 Q. 171. Do you know whether or not at that time the pencil memorandum that you have mentioned was or was not in existence?

A. I could not say; I could not say whether it was or not. I do not know when those certificates came out, when the certificates were really delivered.

Q. 172. Did the pencil memorandum precede or follow the coming out of the certificates?

[Objected to.]

A. Certainly it preceded it.

Q. 173. Do you know anything with respect to the method proposed for obtaining cash working capital for this enterprise?

[Objected to as incompetent, irrelevant, and immaterial.]

A. As I say, at the time there was undoubtedly lots of things told

me, but feeling that I was not the one to judge of them I accepted them as being all right, and I did not load my mind with that detail.

Q. 174. Do you remember whether or not you were aware that it was proposed to have a cash capital of $500,000?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I cannot state any figures at all.

Q. 175. Do you remember whether you were aware at the time that there was to be anything done about securing cash capital?

A. I cannot imagine a mine started without any cash capital.

Q. 176. But you think you have no recollection with respect to it?

A. I do not.

Mr. McClennen: I think that is all.

Mr. Hemenway: Doubtless there may be some questions that Mr. Lauterbach will want to ask him on cross-examination.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

620 *Deposition of William J. Ladd.*

William J. Ladd, being first duly sworn by E. F. McClennen, Esq., a notary public, in answer to interrogatories propounded by L. D. Brandeis, Esq., counsel for the plaintiff, deposes and says,—

Q. 1. Please state your name, residence, and occupation.

A. William J. Ladd; residence, Newton, Mass.; occupation, treasurer of several copper companies.

Q. 2. Are those copper companies in which Mr. Albert S. Bigelow is an officer or stockholder?

A. Yes.

Q. 3. What companies are they?

A. The Tamarack Mining Company, Osceola Consolidated Mining Company, Isle Royale Copper Company, and the Ahmeek Copper Company.

Q. 4. What was your occupation in 1895?

A. I was comptroller of the Chicago, Burlington & Quincy Railroad Company.

Q. 5. When did you first become connected with the Old Dominion Copper Mining & Smelting Company?

A. I think it was the latter part of November or the 1st of December in 1897.

Q. 6. What was your connection with that company at that time?

A. I was secretary and treasurer.

Q. 7. And a director?

A. Yes, and a director.

Q. 8. Had you been a stockholder of that corporation before that time?

A. No, sir.

Q. 9. How long did you continue to hold the office of secretar treasurer, and director?

A. Well, until the company was moved away from the office; should think it was—I do not remember just when it was—1902.

Q. 10. That is, at the time when Mr. Charles S. Smith becam president of the corporation?

A. Yes.

Q. 11. Did you at any time while you were a director of the Ol Dominion Copper Mining & Smelting Company know that the com pany had a cause of action against Albert S. Bigelow and Leonar Lewisohn?

Mr. HEMENWAY: Objected to as assuming a fact not proven an as being a leading question.

A. No, I do not remember anything of the kind.

Q. 12. What, if any knowledge, did you have in relation to any cause of action, if any there was, against Albert S. Bigelow and Leonard Lewisohn, or either of them, while you were a director o other officer of the Old Dominion Copper Mining & Smelting Com pany?

A. I do not remember of having any.

621 Q. 13. Did you at the time that you became treasurer and director of the Old Dominion Copper Mining & Smelting Company, connect yourself also with other companies in which Mr. Albert S. Bigelow was then largely interested?

Mr. HEMENWAY: Objected to as immaterial, incompetent, and irrelevant.

A. Yes.

Q. 14. With what other companies?

Mr. HEMENWAY: Objected to as immaterial.

A. Tamarack, Osceola, Boston & Montana, Butte & Boston—I think they were all in our office at that time—and Isle Royale.

[No cross-examination.]

——— ———.

Subscribed and sworn to this — day of ———, 1906. Before me.

——— ———.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

Deposition of Charles S. Smith.

CHARLES S. SMITH, being first duly sworn by E. F. McClennen, Esq., a notary public, in answer to interrogatories propounded by E. F. McClennen, Esq., counsel for the plaintiff, deposes and says,—

Q. 1. Your full name?

A. Charles S. Smith.

Q. 2. You reside where?

A. Lincoln, Mass.

Q. 3. You are president of the Old Dominion Copper Mining & Smelting Company?

A. I am.

Q. 4. And have been such since April, 1902?

A. Yes.

Q. 5. Before that time you had never held office in the company?

A. Never.

Q. 6. But had been a stockholder?

A. Yes.

Q. 7. I show you certificate A-21 for 100 shares of the stock of this company, dated September 19, 1895, issued in the name of F. and C. S. Smith, purporting to be endorsed in those names; is the endorsement in your handwriting?

A. It is.

Mr. MCCLENNEN: That certificate I will offer.

Mr. HEMENWAY: Objected to as immaterial.

[The certificate A21 is marked "Exhibit 1, G. C. B., July 24 1906."]

622 Q. 8. On Exhibit 10 of the deposition of Albert S. Bigelow in this case, among other subscribers, it has appeared that there is the name of F. and C. S. Smith for 100 shares: have you in the course of these hearings, seen that document?

A. I have.

Q. 9. And is that subscription in your handwriting?

A. It is.

Q. 10. It has appeared among the checks received by the Old Dominion Copper Mining & Smelting Company, in the list in evidence, that there was one for F. and C. S. Smith for $2500: was that yours?

A. It was in pay for my stock, but it was not my check.

Q. 11. It was not your check?

A. No.

Q. 12. Since this certificate of September 19, 1895, how continuously have you been a stockholder in the Old Dominion Copper Mining & Smelting Company?

A. I have been a stockholder continuously since.

Q. 13. Did you, at the time of signing the subscription or receiving or paying for the stock for which this certificate A21 was issued, have any knowledge as to the intention of Mr. Albert S. Bigelow or Mr. Leonard Lewisohn with reference to the taking of any

profits or compensation for services in connection with the organization of the company or otherwise?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I had no knowledge of the fact.

Q. 14. Had you any knowledge that they, or either of them, had taken any profit either in stock or otherwise, or any compensation for their services?

Mr. HEMENWAY: Objected to as incompetent, irrelevant, and immaterial.

A. Not until some years later.

Q. 15. Had you at that time any knowledge that Mr. Albert S. Bigelow and Mr. Leonard Lewisohn, or either of them, had taken, or intended to take, 50,000 shares of the capital stock of this company either by way of compensation for services, or as profits or otherwise?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant, because the question assumes a fact not proven, and is leading.

A. I had no knowledge.

Q. 16. In view of the objection which is made to the question just asked, I will put this question: Had you at any time in 1895 any knowledge that Mr. Albert S. Bigelow or Mr. Leonard Lewisohn, or either or both of them, had taken, or intended to take, 50,000 shares of the capital stock of this corporation, or any part thereof, either as compensation for services, or as profits or otherwise, if such be the fact?

Mr. HEMENWAY: Objected to as immaterial, incompetent, and irrelevant.

623 A. I had no knowledge.

Q. 17. What was the first time, if ever, at which you acquired any such knowledge?

Mr. HEMENWAY: Objected to as immaterial, incompetent, and irrelevant; also as leading and involving the assumption of a fact not proven.

A. Some time in 1901.

Q. 18. Can you fix with any certainty the time in 1901 when you first had any information on this subject?

Mr. HEMENWAY: Objected to for the same reasons that the last interrogatory was objected to.

A. My impression is it was in the latter part of 1901, on reading Walker's Copper Mines of the Southwest that I first learned of the distribution of the original stock, and I think that was published in the latter part of 1901, if I remember correctly.

Mr. HEMENWAY: The answer is objected to as incompetent.

Q. 19. When was the next stockholders' meeting after you got this information?

A. In April, 1902.

Q. 20. And that was the meeting at which you became a director and president of the company?

A. Yes.

Q. 21. On getting this information in the latter part of 1901, did you take any steps with relation to the company?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I did.

Q. 22. What did you do?

Mr. HEMENWAY: Objected to as incompetent.

A. I went to the property, the first thing, in Arizona; then I issued a circular to stockholders in connection with the company; went to New Jersey, and got a list of the stockholders; and cooperated with Towle & Fitzgerald, who were large stockholders, to get proxies to use at the annual meeting.

Mr. HEMENWAY: The answer is objected to as incompetent.

Q. 23. And the purpose for which those steps were taken, and those proxies were acquired, was what?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. To get control of the company.

[No cross-examination.]

Subscribed and sworn to this — day of ——, 1906, before me,

Notary Public.

624 *Stipulation.*

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

Deposition of Eugene V. R. Thayer.

EUGENE V. R. THAYER, being first duly sworn by Howland Twombly, Esq., a notary public, in answer to interrogatories propounded by Louis D. Brandeis, Esq., counsel for the plaintiff, deposes and says,—

Q. 1. Your full name?

A. Eugene Van Rensselaer Thayer.

Q. 2. Your residence and occupation?

A. Lancaster, in this state, Massachusetts. I am trustee of my father's estate.

Q. 3. Your office is in Boston?
A. At 50 State street.
Q. 4. What was your occupation in 1895, and from then on?
A. Well, I was trustee, in the same position——
Q. 5. —that you are now?
A. Yes.
Q. 6. You were from some time in 1895 to 1902 a director of the Old Dominion Copper Mining & Smelting Company, were you not?
A. Yes.
Q. 7. Do you recall how long you were a director of the company?
A. No, I cannot; I should say four or five years; but I would not swear to it without looking up.
Q. 8. Did you, at the time that you were a director of that company, know that the company had a claim or cause of action against Albert S. Bigelow and Leonard Lewisohn?
A. No, I did not.
Q. 9. When did you first hear anything to that effect?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I do not know; I saw it in the paper some long time after I was a director.
Q. 10. That is, after the management changed from Mr. Bigelow to Mr. Charles S. Smith?
A. Yes.
Q. 11. Your first knowledege in relation to the matter was what you learned from the public press after the suit was begun?
A. Yes.

[No cross-examination.]

——— ———.

Subscribed and sworn to this — day of ——, 1907, before me.

———,
Notary Public.

625 *Interrogatories Taken on Behalf of the Plaintiff and Answers by John Stanton.*

1. State your name, age, residence, and occupation, and how long you have been engaged in your present occupation. A. John Stanton; seventy-three; New York; I am engaged in copper mining; fifty years. I am at present the president of a number of copper-mining companies at Lake Superior and elsewhere,—namely, the Wolverine Copper Mining Company, the Mohawk Mining Company, the Baltic Mining Company, the Atlantic Mining Company, the Winona Copper Company, the Michigan Mining Company, etc.
2. State whether or not you were acquainted with the late Leonard Lewisohn and how long you had known him. A. I was. About ten years now.
3. State whether or not you recall the formation of the Old

Dominion Syndicate, so called; and if so, state what that syndicate was. A. I do. I was told by Mr. Leonard Lewisohn, in his office, that his firm had bought the Old Dominion mine, and asked what I thought of its value. He told me further that he had paid a million of dollars for it. I told him I thought it was a very good purchase. "Would you like to become interested in the purchase to a small extent?" "Oh," I said, "I do not mind chipping in say $5000,—who are with you?" "Well," he said, "our firm, Mr. Bigelow, and we have let in Mr. Beaman, our counsel, and possibly one or two others." I said, "I suppose this is with the understanding that I come in on the same basis that you do." "All right," he says, "exactly what we pay, you shall have your proportionate share," and "Shall I send you a check?" I said: "No, we will call on you as the payments are to be made," he said. When they did call I paid, on June 6, 1895, $700; on July 23, $1145.28; on August 1, $2892.55, making a total of $5037.83. As I remember it that amount was to cover interest. I know nothing more of the formation of any syndicate than just that conversation.

4. State whether or not you became a subscriber to the so-called Old Dominion Syndicate; and if so, at what time. A. I do not remember the date, but it was in 1895, shortly before I made my first payment, say the latter part of May or early part of June.— I have no way of fixing a date of that conversation, as I made no memorandum of it. Yes, verbally so.

5. If you state that you did become a subscriber to the Old Dominion Syndicate, so called, state whether or not your agreement to subscribe was oral or in writing. If in writing, please annex hereto the original writing or a copy thereof, if in your possession. If the agreement was oral, state with whom it was
626 made. If it was made with Leonard Lewisohn, state what the agreement was, and what was said at the time of making said agreement as to the purpose for which said syndicate was formed, and what its operations would be. A. Entirely oral. I never saw any writing in regard to the syndicate. Leonard Lewisohn. I do not know that any purpose was stated; of course, it was understood that it was to go into a corporation and be worked; but it was not so definitely stated,—simply that I had interest to that extent in the purchase whatever was done with it. All that was said was simply to join us in the purchase to the extent of that interest.

6. If you state that you became a subscriber to the Old Dominion Syndicate, state what the amount of your subscription was, and when payments were made by you under said subscription. A. I have already answered that question by my answer to the third interrogatory.

7. If you state that you became a subscriber to the Old Dominion syndicate, state whether, as a member of said syndicate, you afterwards received stock in the Old Dominion Copper Mining & Smelting Company; and if so, what amount of stock you received and when. A. I did receive stock in the Old Dominion Copper Mining & Smelting Company,—400 shares. I do not remember the exact

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date, but the approximate date must be some time in November, 1895.

8. State whether or not you had any conversation with Leonard Lewisohn concerning your subscription, the formation of said syndicate, and the distribution of stock in the Old Dominion Copper Mining & Smelting Company; and if so, state the date of such conversation, and what said conversation or the substance thereof was, as nearly as you can remember. A. I cannot remember that I had any conversation with Leonard Lewisohn about it, but I had with some member of the firm along in the summer of 1895,—I think it was Adolph Lewisohn,—I cannot fix the date,—in which he stated that it was the purpose of the syndicate to organize a company with a capital of $2,500,000, and to sell the mine to that company for $2,000,000, and the balance of the stock, or $500,000, to be paid into the treasury for working capital, and asking if that was satisfactory to me, to which I replied "Perfectly so." I had no*t* other conversation, to the best of my recollection, concerning my subscription, the formation of said syndicate, or the distribution of stock of the Old Dominion Copper Mining & Smelting Company, either with Leonard Lewisohn or with any other member of the firm of Lewisohn Brothers.

9. State whether or not you had any correspondence with Leonard Lewisohn or Lewisohn Brothers in relation to the Old Dominion Syndicate or its operations. If so, state the date of each such
627 letter and annex hereto the original letters, or, if and so far as said originals are not in your possession, or you are unwilling to annex the same, annex copies hereto. A. I had. On December 5, 1895, I wrote to Messrs. Lewisohn Brothers at 81 Fulton street, New York, and on December 5, 1895, I received their reply to that letter. I have with me, and produce, the press copy of my letter, being page No. 628 in such press letter copy book, under the date of December 5, 1895. I also have with me and produce the original letter from Lewisohn Brothers dated December 5, 1895, and signed "Lewisohn Brothers" in typewriting, and then Leonard Lewisohn's signature as general manager. This original letter was in reply to my letter to them. I do not care to annex the original press copy sheet to my deposition, nor the original reply received from Lewisohn Brothers, but I produce and annex to my deposition copies of said letters and mark them "Exhibits A and B," respectively.

My attention was called to the fact that my certificates were in a company with a capital of $3,750,000 instead of a capital of $2,500,000, as I had supposed, and my letter was written to Lewisohn Brothers in order to get an explanation of the increase of capital. I dropped the matter right there.

10. If, in answer to the preceding interrogatory, you have not already stated that you wrote Lewisohn Brothers a letter under date of December 5, 1895, state whether or not you wrote them a letter under that date; and if you have not already produced and annexed said letter, or a copy thereof, to your answer, please state whether or not the copy of letter under date of December 5, 1895,

annexed hereto marked 1 is not a copy of such letter. A. I have already stated that I did write them a letter under that date. I have already produced and annexed a copy of such letter, but I will say further that the letter annexed hereto marked 1 is a true copy of such letter.

11. If, in answer to interrogatory No. 9, you do not state that you received from Lewisohn Brothers a letter under date of December 5, 1895, please state whether it is not a fact that you did receive a letter from them under said date, and whether the letter so received was not signed by Leonard Lewisohn, and, if you have not already produced and annexed said letter, or a copy thereof, to your answer, please state whether the copy of letter hereunto annexed, marked 2, is not a copy of such letter. A. I have already stated that I did receive a letter from them under the date of December 5, 1895. I have already stated that the letter so received was signed by Leonard Lewisohn, general manager. I have already produced and annexed a true copy of such letter, and I will further state that the copy of the letter hereto annexed, marked 2, is a true copy of such letter.

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No. 1.

DECEMBER 5TH, 1895.

Messrs. Lewisohn Brothers, 81 Fulton St., New York.

DEAR SIRS: Referring to the interest of $5,000, that I took in the Syndicate for purchase of the "Old Dominion" mine, which interest was stipulated to be on exactly the same basis of cost and distribution of stock in the Company to be organized to take over the property to you and your associates, all to be on the same footing pro-rata.

I have now to say that I am informed that in addition to the allotment of stock on the basis of $2,500,000, capital in which you have handed me 200 shares, as well as the 200 shares for which I subscribed at $25. per share, there has been another allotment of 50,000 shares to the purchasing syndicate, making the entire capital of the Company $3,750,000.

I have not yet received my share of this allotment, which would be in the proportion that $5,000, bears to $1,000,000, or 250 shares.

This matter has, no doubt, been overlooked by you, and I now call your attention to it.

Very truly yours,

JOHN STANTON.

No. 2.

DEC. 5TH, 1895.

Mr. John Stanton, City.

DEAR SIR: In reply to your favor of the 5th instant, would say that you have received exactly the same amount of stock as any party who subscribed to the original syndicate. You can inquire in Boston—where the distribution was made—and you will find that this is a fact.

The balance of 50,000 shares has been devoted towards promoting and other expenses.

Very truly yours,

LEWISOHN BROTHERS.

L. L./F

Exhibit 228.

629 *Objections to Interrogatories for the Deposition of John Smith.*

The defendant objects to Ints. Nos. 3, 4, 5, 7, 8, 9, 10, and 11, for the reason that they are immaterial, irrelevant, and incompetent.

The defendant also objects to Int. No. 6 for the reason that it is immaterial, irrelevant, and incompetent, and because it calls for an oral statement of the contents of a written instrument, if it was in writing.

Cross-interrogatories:

The defendant, without waiving his objections to the direct interrogatories, propounds the following cross-interrogatories to said John Stanton:

Cross-int. 1. Did you receive any letter or letters from said Albert S. Bigelow? If so, please annex said letters or copies thereof to your answer to these interrogatories.

A. Never. I have none such.

Cross-int. 2. Did you not ask said Leonard Lewisohn to permit you to become a subscriber to the syndicate, if there was one to which you subscribed?

A. He offered it to me, as I have already stated in my answers to the direct interrogatories. I have not been a stockholder in the Old Dominion Copper Mining & Smelting Company since 1st May, 1896.

JOHN STANTON.

Before Willoughby L. Webb, Esq., Commissioner.

NEW YORK, *February* 4, 1903.

Pursuant to notice, parties met this day at the office of the commissioner, No. 63 Wall Street, New York city.

Appearances:

Messrs. Brandeis, Dunbar & Nutter (by Mr. Brandeis) for plaintiff.

Messrs. Long & Hemenway (by Mr. Hemenway) for defendant.

Edward Lauterback, Esq., for the defendant, and for Albert, Walter, and Frederick Lewisohn.

It is stipulated between the parties that Albert F. Dawson shall be employed as stenographer, and that he shall furnish three copies of the minutes, the expense thereof to be paid one half by each side, the successful party to tax the share paid by him as part of the costs.

630 WALTER LEWISOHN, sworn for plaintiff:

Direct examination by Mr. BRANDEIS:

Q. 1. State your full name, age, and occupation.

A. Walter Lewisohn; age, twenty-three; banker.

Q. 2. You are one of the executors of Leonard Lewisohn, are you not?

A. I am.

Q. 3. And you have been acting as such since April, 1902?

A. Yes, sir.

Q. 4. As executor of Leonard Lewisohn, you have in your possession, or under your control, have you not, the books and papers relating to the estate of Leonard Lewisohn?

A. Yes, sir.

Q. 5. And have also access to all the books and papers of the firm of Lewisohn Brothers?

A. Yes, sir.

Q. 6. That firm of Lewisohn Brothers consisted of whom at the time of the death of Leonard Lewisohn?

A. Of Mr. Leonard Lewisohn, Frederick Lewisohn, and myself.

Q. 7. And Frederick Lewisohn is your brother?

A. Yes, sir.

Q. 8. How old is he?

A. Twenty-one.

Q. 9. When was the firm consisting of your father and yourself and brother formed?

A. I don't know the exact date, but it was around January or February, 1902.

Q. 10. Who were the members of the firm doing business under the name of Lewisohn Brothers prior to January, 1902, when the new firm was formed?

Mr. LAUTERBACH: I might state here that just prior to that, a few months, I think, prior to the formation of the partnership to which this witness refers, the firm of Lewisohn Brothers consisted of Mr. Leonard Lewisohn only, and some three or four months before that had acquired the interest of Mr. Adolph Lewisohn in the firm Lewisohn Brothers, Adolph Lewisohn then retiring from the firm. Before that period, and for some years, the firm of Lewisohn Brothers consisted of Leonard and Adolph Lewisohn.

Mr. BRANDEIS: In 1895 Jesse had 5 per cent interest, hadn't he?

Mr. LAUTERBACH: He had some interest in the profits of the firm.

Mr. BRANDEIS: But was not a partner.

Mr. LAUTERBACH: I don't think he was a partner. Prior to 1895 Jesse had a 5 or 10 per cent interest, I think, in some of the transactions of Lewisohn Brothers, but we will get that correct for you subsequently. I don't know whether it was in all their business or just some of it; at any rate, he was not a partner.

631 Mr. BRANDEIS: But you can get the exact information, can you?

Mr. LAUTERBACH: Precisely. I will get that for you definitely and accurately.

Q. 11. Then you and your brother, either as executors or survivors of the firm of Lewisohn Brothers, are in possession of all the books and papers both of Leonard Lewisohn and of Lewisohn Brothers covering this period from 1895 and subsequent?

A. I don't know whether we are in possession of all of them.

[Examination of this witness is suspended for the present, and it is agreed that the hearing may be adjourned to Tuesday next, February 10, at 10 A. M., at which time counsel for defendant will produce the witnesses Frederick, Walter, Albert, and Adolph Lewisohn, and in the mean time further search will be made for additional letters, papers, etc.]

[After the adjournment, in pursuance of Mr. Lauterbach's request to specify books, papers, etc., the following letter was sent to Mr. Lauterbach by Mr. Brandeis:]

"63 WALL STREET,
NEW YORK, *February 4th*, 1903.

Edward Lauterbach, Esq., 22 William Street, New York City.

MY DEAR MR. LAUTERBACH: In pursuance of your suggestion, I call your attention to the following papers which do not appear to be among those which you handed me for inspection this morning, and which we should like to have produced by the executors and Mr. Adolph Lewisohn at the adjourned day, February 10th, at 10 A. M.

First. All of the letters relating to these matters received from A. S. Bigelow, Hyams, William Keyser, R. Brent Keyser and Mr. J. Morris Meredith, and from the various persons who were subscribers to the Old Dominion Syndicate and to the Company's issue of stock of the Old Dominion Company.

Second. Copies of all letters to those subscribers to the syndicate and to the Company's issue of stock and copies of additional letters which passed between Mr. Bigelow, Mr. Hyams, Mr. Meredith and the Keysers.

You will find upon looking over these, I think, that there are other letters of which copies are not found on the first search.

Third. If Leonard Lewisohn, or Lewisohn Brothers, kept copies of their letters, in any letter press copy books, I should like to have a careful examination made of both the firm's and private letter books covering the year 1895.

632 Fourth. The original papers bearing upon the transaction including the original option of the Simpson Estate to Meredith, dated, I think, April 30th, the contract of the Simpson Estate and Meredith dated May 4th, the contract with Keyser, the Syndicate agreement and any further agreement between Mr. Bigelow and the Lewisohns.

Fifth. All papers relating to the properties sent by Mr. Keyser to Mr. Lewisohn including lists of property of which copies were sent by Mr. Lewisohn to Mr. Bigelow or to Mr. Hyams.

Sixth. All statements of account rendered between the Lewisohns and Bigelow, also the account of Mr. Meredith, also the ledger account and all other entries in the books of the Lewisohns relating to payments and receipts on account of this property, and the operation of the Syndicate, the stock received by the Lewisohns and the disposition of the other stock, and of the Lewisohn's stock and proceeds thereof.

Seventh. All other papers bearing upon the matter which may be found.

Yours truly,

LOUIS D. BRANDEIS.

Kindly acknowledge receipt to Boston."

NEW YORK, *February* 10, 1903, 10 A. M.

[Met pursuant to adjournment.]

[Present: Same as before.]

Mr. BRANDEIS: Have you any definite information, Mr. Lauterbach, with regard to Lewisohn Brothers?

Mr. LAUTERBACH: I find that in 1895, when these transactions went on, the firm of Lewisohn Brothers did not exist: it was the corporation of Lewisohn Brothers. The firm was afterwards started, but at the time of the formation of the syndicate it was Lewisohn Brothers, a corporation. That is the only information I have.

WALTER LEWISOHN, resumed:

(By Mr. BRANDEIS.)

Q. 11. Who has charge of the papers belonging to the estate of Leonard Lewisohn, and of the old firm that did business under the name of Lewisohn Brothers, besides yourself?

A. My brother Frederick.

Q. 12. Any one else?

A. Well, you ask two questions there. The executors have charge of the matters pertaining to the estate of Leonard Lewisohn;
633 probably Frederick and myself are the only ones that have charge of the matters pertaining to Lewisohn Brothers.

Q. 13. What persons besides you two have charge of those papers?

A. Nobody has charge.

Q. 14. Who are the clerks in your employ who have custody, or have access especially, to those papers?

A. They have no access.

Q. 15. They are entirely in your custody?

A. We are the only ones who have access to them.

Q. 16. That is, the executors, and, so far as Lewisohn Brothers are concerned, yourself and your brother Frederick?

A. Yes.

Q. 17. My inquiries relate, so far as I refer to Lewisohn Brothers, to the papers of the firm, the concern doing business under the

name of Lewisohn Brothers during your father's lifetime, and not the present firm?

A. In some matters the other executors would also have charge of some of Lewisohn Brothers, in so much as they have to do with the estate of Leonard Lewisohn—in other words, it would be called Lewisohn Brothers in liquidation.

Q. 18. And indeed the other executors would have equal access with yourself and your brother Frederick?

A. Yes, sir.

Q. 19. As a matter of fact are all those old papers kept at your office, 11 Broadway?

A. We really haven't got many papers.

Q. 20. But so far as there have been,—for instance, those which have been produced by Mr. Lauterbach on February 4, and this morning: from what place are those papers taken?

A. Well, there is no one special place.

Q. 21. 11 Broadway, are they kept at your office there?

A. There are some papers there.

Q. 22. What other place are the papers kept; what other source were these papers which were produced taken from?

A. Well, wherever we had any idea they were.

Q. 23. Now will you just state how much you did yourself in searching for these papers which have been produced?

A. I went all through the offices, wherever in 11 Broadway we had any idea those papers existed.

Q. 24. What method of filing or preserving papers has been adopted, especially in your office, with reference to a particular subject like the Old Dominion Syndicate or the Old Dominion Company—in other words, are all papers relating to a general matter kept together or are they kept chronologically or alphabeti-
634 cally; what method is adopted or has been adopted?

A. So far as that is concerned, why, there are so many things, and as the estate has not been wound up, it is almost impossible to have everything systematized because the subjects are so numerous and as the firm of Lewisohn Brothers in liquidation has not been wound up,—all things are not all together, probably, just kept separately.

Q. 25. What was the method of filing away the papers which existed, which you found, when you began to investigate this matter?

A. I don't know of any special method.

Q. 26. Were all Old Dominion papers filed away together?

A. I don't know exactly.

Q. 27. Did you personally make a search, or did you have somebody else do it?

A. I personally made the search and I also had some of the other parties in our office search, and this [pointing to a party in the room] gentleman searched also.

Q. 28. Who is this gentleman you refer to?

A. Ferdinand Rahaeuser.

Q. 29. Whom else besides Mr. Rahaeuser did you have to assist you in making this search?

A. My brother, I think.

Q. 30. Which brother?

A. Fred.

Q. 31. Whom else?

A. I don't know who else, or, I think, Mr. Albert Lewisohn and Mr. P. S. Henry; they did as much as they could, and of course all the other men in our employ that were asked to help us did all they could.

Q. 32. Whom did you ask to help you of the men in your employ?

A. Ferdinand.

Q. 33. That is Mr. Rahaeuser?

A. Yes, he was about the only one besides ourselves that knows anything about it.

Q. 34. That had made a search?

A. Yes, sir.

Q. 35. When did you make the search?

A. Right along every day as much as we could.

Q. 36. Where did you search for these papers? I mean in what files, in what boxes.

A. Well, in different offices.

Q. 37. What offices are they to which you refer?

A. Our offices which are in 11 Broadway.

Q. 38. You mean the office of Lewisohn Brothers?

A. Yes, sir.

Q. 39. You searched there?

A. Yes.

Q. 40. Now in what manner are the old papers of Lewisohn Brothers, to which I assume you have just referred, filed away or packed away?

A. I don't know as there is any particular manner about it.

635 Q. 41. Are the papers relating to any one year filed together or packed away? As the letters,—for instance, the papers for the year 1895?

A. No, I don't think there are any, pretty nearly; I would not say exactly that way, but I guess pretty nearly they were in that way.

Q. 42. That is, filed away by the year?

A. Yes, sir.

Q. 43. Aside from filing away by the year, was there a filing away of the papers in relation to different matters in which Lewisohn Brothers were interested? There were a great many of these matters, were there not?

A. In relation to what? In relation to just one thing or the Old Dominion?

Q. 44. In relation to everything; there were a good many different matters in which Lewisohn Brothers were interested, were there not?

A. Yes, sir.

Q. 45. What method was taken of arranging and disposing of papers in these several matters?

A. I have forgotten exactly.

Q. 46. When did you begin to search for the letters that were called for by the subpœna here with reference to the Old Dominion—where did you go to search for them?

A. I went in a desk where they were kept and in different departments where we kept certain rooms we had for these matters.

Q. 47. Now in what rooms did you find the letters which have been produced by Mr. Lauterbach?

WITNESS: What was the number of the room, Mr. Rahaeuser?

Mr. RAHAEUSER: 320.

Q. 48. They were all in the same room, were they?

A. I forget whether they were all in the same room or not.

Mr. RAHAEUSER: Practically all; the majority of them were in room 320.

Mr. BRANDEIS: What other room were they in?

Mr. RAHAEUSER: 320, the room of Lewisohn Brothers, proper.

Mr. LAUTERBACH: You mean in the main room?

Mr. RAHAEUSER: Yes, sir.

Mr. BRANDEIS: Do you mean your main office?

Mr. RAHAEUSER: Yes, sir.

[The examination of this witness is suspended for the present and it is agreed that Mr. Ferdinand Rahaeuser may be examined under this commission with the same effect as if done under the order, such as has been issued to take the examination of other witnesses.]

636 FERDINAND L. RAHAEUSER, sworn.

Direct examination by Mr. BRANDEIS:

Q. 49. Give your full name, age, and residence.

A. Ferdinand L. Rahaeuser; age, twenty-five years; residence, New York.

Q. 50. How long have you been connected with the business of Lewisohn Brothers?

A. Since August, 1895.

Q. 51. What was your occupation from time to time in connection with this business?

A. Clerk.

Q. 52. In what department?

A. Telephone.

Q. 53. Telephone clerk?

A. Yes, sir.

Q. 54. Have you been continuously telephone clerk since that time?

A. Yes, sir.

Q. 55. What, if anything, have you had to do with the filing away of papers?

A. I have filed the letters away from December, 1895.

Q. 56. And in addition to the current filing of the letters have you had the disposition of the letters?

A. No, sir.

Q. 57. Who has disposed of them after they were filed away, after the letters were filed away?

A. I have filed them away for the last two years.

Q. 58. From the time when you began to file, which I understand was in December, 1895, until you ceased, who had charge of the final disposition of the letters that were filed?

A. We used to file them away and then transfer them into boxes and the boxes we would put in the vault.

Q. 59. When was this transfer made from the files to the boxes?

A. About the 1st of July and the 1st of January.

Q. 60. What, if anything, did you have to do with the transferring to the boxes of the letters or any other papers on the 1st of January, 1896?

A. I put them in the boxes and then put them in the vault.

Q. 61. Did you put these letters and papers all together in all the various matters of Lewisohn Brothers?

A. Yes, sir.

Q. 62. No matter what department of business it related to?

A. Certain portions I put away and the other portions were put away by Mr. Faint.

Q. 63. Is he still with Lewisohn Brothers?

A. No, sir.

Q. 64. Do you know his first name?

A. No, sir.

Q. 65. Do you know what his business is now?

A. He was a stenographer.

Q. 66. How long is it since he left Lewisohn Brothers?

A. About a year ago.

637 Q. 67. Have you seen him since that time?

A. Yes, sir.

Q. 68. Can you give us any information as to where he is, or what his address is?

A. I cannot.

Q. 69. You say that you had to do with putting away all the papers in that certain department; which papers did you have to do with putting away; the papers relating to the Old Dominion matters?

A. I don't know, only the incoming mail I filed.

Q. 70. That is all you filed?

A. Yes, the incoming mail.

Q. 71. Who filed away copies of the letters that were sent out?

A. Mr. Faint, I believe; I won't swear to that.

Q. 72. How were they filed away; all together?

A. Alphabetically.

Q. 73. I mean if there was a letter, for instance, from Mr. Bigelow and a letter to Mr. Bigelow, wouldn't they be filed together, a copy of the letter to Mr. Bigelow and the letter from Mr. Bigelow?

A. The letter from Mr. Bigelow is filed in one place, and the letter to Mr. Bigelow is filed in another.

Q. 74. And when they were put away in boxes, were they put away in the same, or different, boxes?

A. Different boxes.

Q. 75. Did you have to do with the putting away of the letters that came from Mr. Bigelow?

A. I put away those letters.

Q. 76. That is, you put those letters away regularly?

A. Filed them away as they came in the next morning.

Q. 77. That is, beginning with December you filed those letters as they came in?

A. Yes, sir.

Q. 78. Did you also pack up those letters as of the 1st of January or the 1st of July, and put them away in the boxes?

A. Yes, all of them.

Q. 79. You had nothing whatever to do with the copies of the letters which went out to Mr. Bigelow?

A. No, sir.

Q. 80. That was all done by Mr. Faint at that time?

A. Yes, sir; he filed them.

Q. 81. And put them in the boxes, too?

A. Yes, sir.

Q. 82. Were the boxes of the incoming letters put away in the same place as the boxes of the outgoing letters or copies of letters?

A. In the same room.

Q. 83. But in separate boxes?

A. Yes, sir.

Q. 84. And have been kept in separate boxes since?

A. Yes.

Q. 85. And in the same boxes in which they were originally?

A. Yes, sir.

Q. 86. So far as 1895 and 1896 letters are concerned?

A. Yes.

638 Q. 87. Who had charge of filing the letters and papers; who put them in the boxes before you took charge of them in December, 1895?

A. Arthur Mairs.

Q. 88. And is he now connected with Lewisohn Brothers?

A. No, sir.

Q. 89. How long was he connected with Lewisohn Brothers?

A. I could not tell you how long he was connected with them.

Q. 90. When was he last connected with them?

A. December, 1895.

Q. 91. And he left their employ at that time?

A. Yes, sir.

Q. 92. When you put away the letters in January, 1896, say, you put away the letters also which Mairs had been filing up to December?

A. Yes, sir.

Q. 93. From July to December?

A. Yes.

Q. 94. And when you made the search, as I understand, in room 320, Lewisohn Brothers' room, for the letters and papers relating to the Old Dominion matter, did you find those letters and papers to be separate and apart from other letters and papers in regard to other matters in which Lewisohn Brothers were interested during this period from July, 1895, to January, 1896?

A. What do you mean by "separate and apart"?

Q. 95. Were they all in one file, or were they in separate files?

A. That is not all together; all the papers were not together; there were different papers there of different sorts of businesses and transactions.

Q. 96. I mean this: Lewisohn Brothers were connected with a large number of different transactions, of which Old Dominion was one; is not that the fact?

A. Yes, sir.

Q. 97. Were the papers relating to Old Dominion matters mixed up with papers in the other matters?

A. Yes, sir.

Q. 98. All being in one daily file?

A. What do you mean by "one daily file"?

Q. 99. All the letters, say, of the 10th of December, you filed one after another, although they related to different matters?

A. No, sir; they were all arranged alphabetically.

Q. 100. Now in the alphabetical arrangement of these letters, would you have, say, the letters from persons beginning with the letter A covering the whole half year together?

A. Yes, sir.

Q. 101. When you finally filed them away?

A. Yes, sir.

Q. 102. Then, as of the first of January, you rearranged all the letters that had come in during the six months?

A. Only transferred them to a box.

Q. 103. But do you mean you had some different files of letters; first there were letters of the alphabet?

A. What do you mean?

639 Q. 104. I want to know how you went about it.

A. If a letter came in for A it was filed under A; if it was Ba it was filed under B, and if it was Ca it was filed under C.

Q. 105. Covering the whole period of six months?

A. Yes, sir.

Q. 106. So that you filed the letters away in the same file, although probably the letters related to entirely different matters, filing one after another, is that the way?

A. Yes, sir.

Q. 107. And is that the way it was always done?

A. Yes, sir.

Q. 108. And is that the way in which you found the file when you searched for it the other day to produce the papers here?

A. There were dozens of files gone through that day; it was not one file.

Q. 109. What do you mean by "dozens of files"?

A. We looked over all of 1895 files to see if there was anything relating to Old Dominion there.

Q. 110. Do you mean to say you looked at every letter?

A. Everything relating to Old Dominion.

Q. 111. How could you tell whether it related to Old Dominion until you had read the letter?

A. I didn't have to read the whole contents; the top would indicate whether it was Old Dominion or not.

Q. 112. Do you wish to be understood as testifying that you did look at every letter which was received by Lewisohn Brothers, or Leonard Lewisohn or Mr. Adolph Lewisohn during this year, 1895, that is in your possession?

A. That I read every one?

Q. 113. That you looked at every letter for the purpose of seeing whether or not it related to Old Dominion matters?

A. Yes, sir, all those that are in the separate room now.

Q. 114. Are there any letters that were received which have been taken out of that separate room?

A. I don't know anything about that.

Q. 115. Now it appears that from the letters which were produced by Mr. Lauterbach that there is not a single letter from Mr. Albert S. Bigelow. Do you wish to be understood as testifying that in those files there was not a single letter from Mr. Bigelow relating to Old Dominion matters?

A. I haven't seen any.

Q. 116. Did you find any letters from Albert S. Bigelow in those files?

A. Only those that are there.

Q. 117. But there is not a single one here from him?

A. Then there wasn't any there.

Q. 118. Where is the file of letters?

A. File of what letters?

640 Q. 119. From Albert S. Bigelow?

A. I don't know where that is.

Mr. LAUTERBACH: He didn't say there was any such file.

Q. 120. Have you any recollection that Albert S. Bigelow ever wrote a letter to Leonard Lewisohn or Lewisohn Brothers during the year 1895?

A. No, I can't recall back that far who signed the letters. I just took the signatures of the letters and filed them in the proper place, but whether it was Bigelow or any one else I don't know.

Q. 121. Do you now wish to be understood as testifying that in these files of letters which you examined you did not, according to the best of your recollection, see any letter from Albert S. Bigelow?

A. That is the files I examined in the last two or three weeks?

Q. 122. Yes.

A. No, there were no letters from A. S. Bigelow.

Q. 123. Now I want to ask you where the letters from A. S. Bigelow are kept?

A. I don't know where they are kept.

Q. 124. Do you know where they were kept formerly?

A. There have been three or four transfers made.

Q. 125. What transfers have been made?

A. I mean in regard to moving.

Q. 126. Tell me what transfers have been made.

A. The letters used to be kept down at the Produce Exchange building; then they were taken up to 81 Fulton street, on the second floor.

Q. 127. Was 81 Fulton street Lewisohn Brothers' office?

A. Yes, sir.

Q. 128. How long did they remain there?

A. I can't say exactly how long; then the letters were transferred to the third floor of No. 81 Fulton street, and then they were transferred down to No. 11 Broadway.

Q. 129. Where they now are?

A. Yes, sir.

Q. 130. In the course of those removals were all the various boxes in which the letters were kept moved each time, so far as you know?

A. No. The whole contents of the vault were removed; all the papers were removed, the boxes were not disturbed.

Q. 131. What kind of boxes are they in which these letters of 1895 were?

A. Small wooden boxes, or pasteboard boxes, 10x12, with a wooden back.

Q. 132. How many boxes did you examine containing letters for the year 1895?

A. I examined all the boxes.

Q. 133. How many, about, were there?

A. I can't tell you.

Q. 134. Approximately?

A. It would be hard for me to say. I would not say how many, for the simple reason that some of the boxes run from January 1 to the 7th, and then from the 7th to the 15th, and some from the 15th to the 28th, and some from the 28th of January to
641 about the 4th of February. I could not tell you how many boxes there were. If there was one box there must have been about seventy boxes, at least.

Q. 135. Take this box that runs from January 1 to 7th.

Mr. LAUTERBACH: He didn't say that they run exactly from January 1 to the 7th.

Mr. BRANDEIS: I am assuming the dates as an example of the letters that Lewisohn Brothers, or Leonard Lewisohn, received during that time went into that single file, and were arranged alphabetically in that particular box, were they?

A. Yes, sir.

Q. 136. Then the next file, if it was a single one, the next box was from the 7th to the 15th, that would run along just the same

way with the letters of the alphabet and all matters in that particular box?

A. Yes, sir.

Q. 137. Consequently, if Lewisohn Brothers, or Leonard Lewisohn, wanted to turn back to any particular matter of the correspondence they had no other way of doing it except to pull out each box from the beginning, and look through until he came across the particular letters that bore upon that matter?

A. That is the way I understood it.

Q. 138. That is the way you understand the filing was done?

A. Yes, that is the way it was in my time.

Q. 139. I am referring to this time from 1895 to 1896, with which you are familiar, I understand, to a certain extent?

A. Yes, sir.

Q. 140. Now, in these various movings of the papers which you refer to, do you recall any box of papers that were disposed of at any particular place?

A. What do you mean by "disposed of?"

Q. 141. Separated from the rest of the boxes.

A. Not that I know of. I didn't have charge of the moving.

Q. 142. Did you have charge of filing away all letters addressed to Mr. Leonard Lewisohn, personally, as distinguished from Lewisohn Brothers?

A. Some of them I filed away.

Q. 143. Did you file away those letters in the same place you did Lewisohn Brothers' letters, or did they go into separate files?

A. I think they were in the same files.

Q. 144. With the Lewisohn Brothers?

A. With the Lewisohn Brothers.

Q. 145. And were put away in the same boxes as part of the whole?

A. I believe so, yes.

642 Q. 146. Now in the examination which you made during the last two or three weeks in searching for letters, did you find any letters from Mr. G. M. Hyams?

A. Relating to what?

Q. 147. Any letters at all from G. M. Hyams?

A. I have seen some relating to routine business.

Q. 148. Did you see any letters of any kind relating to Old Dominion?

A. No, not as I know of. I didn't look at the signatures of the letters. All the letters that I looked at that related to Old Dominion I looked at the top; looked at the top to see how they were headed. I never looked at the signatures of the letters.

Q. 149. You mean of Mr. Hyams?

A. Mr. Hyams or any one else.

Q. 150. Do you mean to say you read each letter sufficiently to tell whether it related to the Old Dominion matter or not?

A. Yes, sir.

Q. 151. Were you familiar with Old Dominion matters so that you could determine whether it related to them or not?

A. You could tell when a letter started off about "Cathos," specifications of copper regarding shipments, or anything like that, that it did not relate to Old Dominion.

Q. 152. Who aided you in making this investigation?

A. I practically made it alone at room 320. I was the only one.

Q. 153. What search did you make in the general office?

A. I didn't make any search in the general office, only of those papers laying around there. A few boxes laying around loose.

Q. 154. What boxes were?

A. One or two boxes laying around there with old papers in.

Q. 155. What kind of old papers?

A. Relating to cotton and one or two other things.

Q. 156. You didn't look among the papers relating to cotton for the purpose of finding Old Dominion papers?

A. We looked through all the boxes.

Q. 157. Do you mean to testify you looked through every box of papers there is in Lewisohn Brothers for the purpose of seeing whether in that box there was anything that had to do with these transactions?

A. In room 320 yes, every box of 1895; that is, of incoming and outgoing letters.

Q. 158. You looked in the outgoing letters also, did you?

A. Yes, sir.

Q. 159. And looked through every outgoing letter?

A. Yes, sir.

Q. 160. And you had no assistance of any kind whatever?

A. No.

Q. 161. What part did Mr. Walter Lewisohn take in these investigations?

A. He came around the room and directed me to look through and went around the other side of the house in Lewisohn
643 Brothers' room and gave instructions there, in room 303, the general office.

Q. 162. Directing them and giving them instructions?

A. I don't know who he gave instructions to. He said he was going around the other side of the house.

Q. 163. He didn't make any examination of the matters, did he?

A. I don't know.

Q. 164. What did you do with the papers you called out?

A. Put them on Mr. Fred and Mr. Walter Lewisohn's desk.

Q. 165. You made no list of them?

A. No, sir, I did not.

Q. 166. Simply put them there?

A. Yes, sir.

Q. 167. On how many different dates did you make that search?

A. Practically every afternoon after 3 o'clock.

Q. 168. For how long a period of time?

A. I was looking all last week, and the week before that I was looking.

Q. 169. And do you mean at the end of the day you put the papers down on their desk?

A. After 3 o'clock, yes, sir.

Q. 170. How many did you find in all?

A. I never counted the letters.

Q. 171. About?

A. I won't give an idea of how many we found, because I didn't count them.

Q. 172. When did you find the last of them?

A. I think it was Saturday afternoon, if I am not mistaken.

Q. 173. Did Saturday afternoon complete your search?

A. Yes, sir.

Q. 174. What else did you find in this file of letters except letters themselves; anything?

A. What do you mean by "what else?"

Q. 175. Any other papers,—contracts or any papers other than letters?

A. I found contracts in the contract file.

Q. 176. What is the contract file that you are talking about?

A. Contracts on copper with different people; with regard to lead, tin, spelter—any contracts made in the New York Metal Exchange.

Q. 177. You searched through those files, did you?

A. Yes, sir, searched through the contract file and attorney file; Lewisohn Brothers' files.

Q. 178. Are these entirely separate files from the letter files you spoke of?

A. Yes, sir.

Q. 179. And one of them you call a contract file?

A. Yes, sir.

Q. 180. And is that a single file or is that a series of boxes such as you spoke of before?

A. Two boxes.

644 Q. 181. Covering the whole year 1895?

A. Yes sir.

Q. 182. Did you find anything in that file?

A. No, sir.

Q. 13. Did you find anything there?

A. No, sir.

Q. 184. You spoke of attorney's files; did you find anything there?

A. I think I did; one or two letters.

Q. 185. What was that attorney's file?

A. Letters from attorneys.

Q. 186. Letters from counsel?

A. Yes, sir.

Q. 187. They are kept separate from all other letters, are they?

A. Yes, sir.

Q. 188. What did you refer to as Lewisohn Brothers' file? Is that a separate file?

A. I meant Lewisohn Brothers' file; it was Lewisohn Brothers

then, and this was kept in the United Smelting Company's file, room 320.

Q. 189. Are these boxes you speak of Lewisohn Brothers' files?

A. Yes, sir, these small boxes.

Q. 190. Just like the other boxes?

A. Yes, sir.

Q. 191. What is the difference between Lewisohn Brothers' file of boxes and the boxes which you described before?

A. Which boxes?

Q. 193. You described at great length having looked into some boxes.

A. They were Lewisohn Brothers', but they belonged to the Smelting Company, as I understand.

Q. 193. Do you mean anything else now than that you looked in room 320 and that that room is a room of the office of the United Metal & Smelting Company?

A. That is it.

Q. 194. Those two boxes containing the contracts for the year 1895 in which you found nothing in room 320, were they?

A. All the boxes were in that room.

Q. 195. I thought you said that certain boxes were in Lewisohn Brothers' office?

A. Old cases that related to different things; not only 1895, but 1896, '97, and 98; sometimes the papers accumulate and the boys would not give them to you, but would throw them aside and they would lay there for some time and then they would be put in the boxes and reduced that way.

Q. 196. And those are the papers you say you looked at in the office, are they?

A. In the main office, yes.

Q. 197. How do you know that you looked at all the boxes relating to 1895?

A. All that was in room 320.

Q. 198. But there are in that room a large number of boxes besides the boxes of 1895, are they not?

A. Yes, sir.

645 Q. 199. What other boxes are there in there?

A. 1889, I suppose, and 1896—No, 1895, I believe, is the last; up to 1895 and before that.

Q. 200. How far do you think they go back?

A. 1866.

Q. 201. How do you know that you found all the boxes that related to 1895?

A. They were all together.

Q. 202. How do you know they were?

A. They were all together.

Q. 203. How do you know they were all together?

A. When I went in there I found them.

Q. 204. You formed certain ones, but how do you know you had all the letters for that year and all the boxes?

A. I didn't say I had all the letters for that year.

Q. 205. How do you know whether you have covered all the various boxes for the year 1895?

A. I covered all that were in that room.

Q. 206. These boxes covered definite periods, I understand?

A. From January 1 to December 31.

Q. 207. But each box covers the period of a certain number of days?

A. Yes, sir.

Q. 208. It is not a regular period, is it; there are not the same number of days covered in any one box?

A. No, sir.

Q. 209. It depends upon whether the box gets full or not?

A. Yes.

Q. 210. Now you have the box covering a period of days?

A. Yes.

Q. 211. Now have you checked up those boxes which you examined so that you have a list, or made a list, of the boxes covering the twelve months from January 1, 1895, to January 1, 1896?

A. I didn't check them up, but I took a box that run, for instance, from January 1 to 7, then the next box from January 7 to 13, and so on until the end of the year.

Q. 212. But you did not check them, so that you don't know whether you got all the boxes?

A. There wasn't any need of checking them, was there?

Q. 213. There was a need unless you followed them up?

A. That is what I did.

Q. 214. For each year?

A. Each day.

Q. 215. Then you are certain and can swear you examined every box covering each business day of that year?

A. Yes, incoming and outgoing letters.

Q. 216. Both?

A. Both.

Q. 217. Then you do know, do you, that you have covered boxes taking in that whole period?

A. Yes, sir.

Q. 218. What did you mean by saying you did not check
646 them up?

A. By checking them up I thought you meant taking a piece of paper and pencil and checking each one off. That is what I understand you meant by "checking."

Q. 219. How were the boxes arranged in that place?

A. A and Ba running from January to a certain date, and then took the next A and Ba to the end of the year and the same way with the outgoing letters.

Q. 220. There is not, among the letters which have been produced by Mr. Lauterbach, any letter from J. Morris Meredith. Do you recall whether you found in the files any letters from J. Morris Meredith?

A. I don't know whether I did or not. I can't recall finding any.

Q. 221. It appears by the letter from Mr. Charles C. Beaman to Leonard Lewisohn of May 9, 1895, which Mr. Lauterbach has produced, that letter was received from J. Morris Meredith on May 8, 1895, relating to Old Dominion matters. Will you now search and see whether you can find that letter?

A. Do you want me to make a search?

Q. 222. Yes.

A. I will do so.

Q. 223. It appears by the copy of a letter of Lewisohn Brothers to G. M. Hyams of May 14, 1895, that Lewisohn Brothers received a telegram from Mr. Hyams of that date. Will you search for that telegram?

A. I will.

Q. 224. It appears by the letter of Lewisohn Brothers to William Keyser dated May 13, and Lewisohn Brothers to G. M. Hyams dated May 15, that Lewisohn Brothers received a letter from William Keyser dated on or about May 12, in relation to the Old Dominion property, which letter is not among those produced by Mr. Lauterbach. Will you make search for that letter?

A. Yes, sir.

Q. 225. It appears by a letter, presumably of Mr. Jesse Lewisohn or Leonard Lewisohn, or Lewisohn Brothers, of May 17, 1895, that there was a letter of J. Morris Meredith of May 16, 1895, which has not been produced or is not among those produced by Mr. Lauterbach. Will you look for that letter?

A. Yes, sir.

Q. 226. It appears by the letter of Mr. Leonard Lewisohn to Mr. A. S. Bigelow, dated May 15, 1895, marked "Personal," that a statement was enclosed by Mr. Leonard Lewisohn to Mr. Bigelow relating to this matter. Will you look for the copy of that statement?

A. Yes, sir.

Q. 227. It appears, by a copy of the letter of Lewisohn Brothers to Aleck J. Meyer, dated May 29, 1895, that Lewisohn Brothers had communications with Mr. Meyer in regard to his share in the Old Dominion scheme. Will you search for letters from Mr. Meyer relating to the same subject?

A. Yes, sir.

Q. 228. It appears from a copy of the letter of Lewisohn
647 Brothers to William Keyser produced by Mr. Lauterbach, dated June 3, 1895, that there was a letter of Mr. Keyser to Mr. Meredith of May 24, 1895. Will you search for that letter?

A. I will.

Q. 229. It appears, by a copy of the letter of Leonard Lewisohn to William Keyser dated June 5, 1895, produced by Mr. Lauterbach, that there was a letter to Mr. Leonard Lewisohn of June 4, 1895, which has not been produced. Will you search for that letter?

A. I will.

Q. 230. It appears by the letter of Leonard Lewisohn to J. W. Belches of Boston, dated June 5, 1895, of which a copy has been produced by Mr. Lauterbach, that there was correspondence with Mr. Belches in regard to his share in the syndicate but there are no

letters from him among the papers produced by Mr. Lauterbach. Will you look for letters at that time, and subsequently, of Mr. Belches?

A. I will.

Q. 231. It appears, by the letter of Lewisohn Brothers to Mr. Bigelow, of June 6, 1895, that a letter was received on or about that date from Mr. James Calhoun, in relation to the Old Dominion. Will you search for that letter and other letters from Mr. Calhoun relating to this letter, as none have been produced?

A. I will.

Q. 232. It appears from the copy of a letter of Leonard Lewisohn dated June 6, 1895, to Thomas Nelson, that there was correspondence relating to this matter with Mr. Nelson. No letter from Mr. Nelson of that date, or any other date, has been produced. Will you search for letters from Mr. Nelson?

A. I will.

Q. 233. It appears from a letter of June 4, 1895, that Lewisohn Brothers received on that date, from Mr. A. S. Bigelow, the blanks relating to the Old Dominion Syndicate. Will you search for the letter of Mr. Bigelow accompanying those blanks?

A. Yes, sir.

Q. 234. And for any of the blanks therein referred to?

A. Yes, sir.

Q. 235. It appears by the letter of Mr. C. C. Beaman of June 7, 1895, that Lewisohn Brothers wrote Mr. Beaman about the date of June 5 in regard to his share in the Old Dominion Syndicate. Will you search for a copy of that letter?

A. I will.

Q. 236. It appears by the letter of Leonard Lewisohn to Mr. Brent Keyser, of June 7, 1895, that there was a letter of Mr. Keyser, of June 6, which has not been produced. Will you look for that letter?

A. Yes, sir.

Q. 237. It appears by a letter of Mr. Leonard Lewisohn, of June 10, 1895, to William Keyser, which has been produced that there was a letter from Mr. William Keyser, dated June 7, to Mr. Leonard Lewisohn, which has not been produced. Will you search for that letter?

A. Yes, sir.

Q. 238. It appears by the letter of Lewisohn Brothers to
648 Mr. A. S. Bigelow, of June 11, 1895, a telegram was received from Mr. William Keyser to Leonard Lewisohn, on that date. That telegram has not been produced. Will you search for that?

A. Yes, sir.

Q. 239. It appears by the letter of Lewisohn Brothers to A. S. Bigelow, of June 12, 1895, that there was a letter of Mr. Bigelow's dated June 11, which has not been produced. Will you search for that?

A. I will.

Q. 240. By the letter of Lewisohn Brothers to A. S. Bigelow, ap-

parently signed by Mr. Jesse Lewisohn, dated June 17, 1895, it appears that there were two letters from Mr. A. S. Bigelow, both dated June 15, which have not been produced. Will you search for those letters?

A. I will.

Q. 241. It appears by the letter of Leonard Lewisohn to A. S. Bigelow, of June 17, 1895, of which a copy has been produced by Mr. Lauterbach, that there must have been a letter from Mr. Bigelow to Mr. Lewisohn, of that date, which has not been produced. Will you look for that letter from Mr. Bigelow?

A. Yes, sir.

Q. 242. It appears from the letter of June 18, 1895, of Lewisohn Brothers to A. S. Bigelow, apparently signed by Mr. Jesse Lewisohn, of which a copy has been produced by Mr. Lauterbach, that a telegram was received from Mr. Hyams on that date, which telegram has not been produced. Will you search for that telegram?

A. Yes, sir.

Q. 243. It appears by the letter of June 21, 1895, of Lewisohn Brothers to A. S. Bigelow of which a copy has been produced by Mr. Lauterbach, that a letter was received from Mr. Bigelow dated June 19 which has not been produced. Will you search for that letter?

A. I will.

Q. 243½. It appears by the letter of June 21 of Lewisohn Brothers, or Leonard Lewisohn, to A. S. Bigelow, of which a copy has been produced, that there was a letter of June 20 from Mr. Bigelow which has not been produced. Will you search for that letter?

A. Yes, sir.

Q. 244. It appears by the letter of Lewisohn Brothers to William Keyser, dated June 25, 1895, of which a copy has been produced that there was a letter of June 24 from Mr. Keyser which has not been produced. Will you search for that?

A. I will.

Q. 245. It appears by the letter of June 27 of Leonard Lewisohn to William Keyser, of which a copy has been produced by Mr. Lauterbach, that there was a letter of Mr. Keyser of June 26 which has not been produced. Will you search for that?

A. Yes, sir.

Q. 246. It appears by the letter of July 1, 1895, from Leonard Lewisohn to R. Brent Keyser, of which a copy has been pro-
649 duced, that there was a letter of Mr. Keyser to Leonard Lewisohn received at that time, which letter has not been produced. Will you search for that?

A. Yes, sir.

Q. 247. It appears by the letter of Leonard Lewisohn of July 1, 1895, to Mr. A. W. Spencer, that a letter was received from Mr. Spencer to which the letter of July 1 is a reply. That letter from Mr. Spencer has not been produced. Will you search for that.

A. Yes, sir.

Q. 248. By the copy of the letter of July 5, 1895, from Lewisohn Brothers, or Mr. Leonard Lewisohn to A. W. Spencer it appears

that a letter of Mr. Spencer of July 3, 1895, has not been produc
Will you search for that?

A. Yes, sir.

Q. 249. By the letter of Leonard Lewisohn to A. W. Spencer
July 11, 1895, it appears that there was a letter of July 10 of
Spencer to Mr. Lewisohn which has not been produced. Will y
search for that?

A. Yes, sir.

Q. 250. It appears by a letter of Leonard Lewisohn, or Lewiso
Brothers, to the Old Colony Trust Company of July 3, 1895, t
there was a letter received from them under date of July 2, whi
has not been produced. Will you search for that letter?

A. Yes, sir.

Q. 251. It appears by the letter of Lewisohn Brothers to G.
Hyams of July 3, 1895, that on that date there was received
Lewisohn Brothers or Leonard Lewisohn, a letter from R. Bre
Keyser, dated July 2, and also a letter from Mr. William Keys
dated July 2 which have not been produced. Will you search f
those letters?

A. Yes, sir.

Q. 252. It appears by the letter of Leonard Lewisohn or Willia
Keyser, dated July 5, that Leonard Lewisohn received a letter fro
William Keyser, dated July 3 which has not been produced. Wi
you look for that?

A. Yes, sir.

Q. 253. It appears by a letter of July 5, 1895, of Leonard Lew
sohn to Allan W. Evarts, that there was a communication receive
from Mr. A. S. Bigelow on that date. Will you search for an
letters or telegrams from Mr. Bigelow?

A. Yes, sir.

Q. 254. It appears by a letter of July 8, 1895, from Leonar
Lewisohn, or Lewisohn Brothers, to Albert S. Bigelow, of which
copy has been produced, that there was a letter received from M
Allan W. Evarts on or about that date, which has not been pro
duced. Will you search for that?

A. Yes, sir.

Q. 255. It appears by a letter of July 9, 1895, from Leonar
Lewisohn to William Keyser that there was a letter of July 8 t
William Keyser which has not been produced. Will you searc
for that?

A. Yes, sir.

Q. 256. It appears by the letter of July 12, 1895, of Lewisohn
Brothers to the Old Colony Trust Company that there was a
650 letter from the Old Colony Trust Company dated July 11,
which has not been produced. Will you search for that?

A. Yes, sir.

Q. 257. It appears by the letter of Leonard Lewisohn, or Lewi-
sohn Brothers, of July 15, 1895, that there was a letter of Mr. Bige-
low's of July 12 which has not been produced. Will you search for
that?

A. Yes, sir.

Q. 258. It appears by the letter of Lewisohn Brothers of July 15 to J. W. Belches that there was a telegram from Mr. Belches which has not been produced. Will you search for that?

A. Yes, sir.

Q. 259. It appears from the letter of Lewisohn Brothers to the Old Colony Trust Company of July 15 that there was a letter of the Old Colony Trust Company of July 12 which has not been produced. Will you search for that?

A. Yes, sir.

Q. 260. It appears by the letter of July 16 of Lewisohn Brothers to A. S. Bigelow that there was a letter from Mr. Bigelow of July 15 which has not been produced. Will you search for that?

A. Yes.

Q. 261. It appears by the letter of Leonard Lewisohn to A. S. Bigelow of July 17 that there was a letter from him of the 16th which has not been produced. Will you search for that?

A. Yes, sir.

Q. 262. It also appears by the letter of Leonard Lewisohn, or Lewisohn Brothers, to William Keyser, which has been produced, dated July 17, 1895, that there was a letter of July 16 that has not been produced, from Mr. Keyser. Will you search for that?

A. Yes.

Q. 263. It appears by the letter of Lewisohn Brothers of July 18 to Mr. Bigelow that there was one of July 17 from Mr. Bigelow which has not been produced. Will you search for that?

A. Yes.

Q. 264. It appears by Lewisohn Brothers' letter of July 19 to A. S. Bigelow, which has not been produced, that there was a letter the preceding day from Mr. Bigelow which has not been produced. Will you search for that?

A. Yes, sir.

Q. 265. It appears by the leter of July 19, 1895, entitled "Old Dominion Syndicate," that a copy of a notice was sent by Lewisohn Brothers, or Leonard Lewisohn, to fifteen different subscribers of the Old Dominion Syndicate. Will you search for the letters to those fifteen different subscribers?

A. Yes, sir.

Q. 266. It appears by the letter of July 22 from Lewisohn Brothers to A. S. Bigelow, of which a copy has been produced, that there was a letter of Mr. Bigelow of the preceding day which has not been produced. Will you search for that?

A. Yes, sir.

Q. 267. It appears by the letter of Lewisohn Brothers of
651 July 22 to Mr. Bigelow that there was a letter from Mr. Bigelow to Lewisohn Brothers of the preceding day, or a day prior to that, which has not been produced. Will you search for that?

A. Yes, sir.

Q. 268. It appears by the letter of July 23, 1895, of Lewisohn Brothers to A. S. Bigelow that there presumably must have been

a letter dated immediately after that from Mr. Bigelow which ha not been produced. Will you search for that?

A. Yes, sir.

Q. 269. And also by a letter from Lewisohn Brothers to A. S Bigelow, of which a copy has been produced, dated July 23, 189 it appears that there was a letter from Mr. Bigelow to Lewisoh Brothers of the preceding day which has not been produced. Wil you search for that?

A. Yes, sir.

Q. 270. It appears also from a letter of Lewisohn Brothers to A S. Bigelow, dated July 25, 1895, that there was a letter from Mr Bigelow of the preceding day which has not been produced. Wil you search for that?

A. Yes, sir.

Q. 271. It appears by the letter of Lewisohn Brothers to Mr Bigelow of July 26 that there was a letter from Mr. Bigelow of July 25 which has not been produced. Will you search for that?

A. Yes, sir.

Q. 272. It appears by a letter of Lewisohn Brothers to Mr. Bigelow of July 30, of which a copy has been produced, that there was a letter of Mr. Bigelow of July 29 which has not been produced. Will you search for that?

A. Yes, sir.

Q. 273. It appears by a letter of July 30 of Lewisohn Brothers, or Leonard Lewisohn, to William Keyser that there was a letter from Mr. Keyser of the 24th which has not been produced. Will you search for that?

A. Yes, sir.

Q. 274. It appears by the letter of Lewisohn Brothers to William Keyser of July 30 that there was a letter from Mr. Bigelow to Leonard Lewisohn, presumably of July 29, which has not been produced. Will you search for that?

A. Yes, sir.

Q. 275. It appears by the letter of August 5, 1895, of Lewisohn Brothers to A. S. Bigelow, that there was a letter of August 3 from Mr. Bigelow which has not been produced. Will you search for that?

A. Yes, sir.

Q. 276. It appears by the letter of Lewisohn Brothers to R. Brent Keyser of August 12, 1895, that there was a letter from Mr. Keyser of August 10 which has not been produced. Will you search for that?

A. Yes, sir.

Q. 277. It appears by the letter of Lewisohn Brothers to Mr. Bigelow of August 22, 1895, that there was a letter of Mr. Bigelow's of the 21st which has not been produced. Will you search for that?

A. Yes, sir.

Q. 278. It appears by Lewisohn Brothers' letter to A. S.
652 Bigelow of August 20, 1895, that there was a letter from Mr. Bigelow of August 19 which has not been produced. Will you search for that?

A. Yes, sir.

Q. 279. It appears by the letter of Lewisohn Brothers to Mr. Bigelow of August 23, that there was a letter of August 22 of Mr. Bigelow's which has not been produced. Will you search for that?

A. Yes, sir.

Q. 280. It appears by the letter of Lewisohn Brothers to Mr. Bigelow of August 24, that there was a letter of August 23 from Mr. Bigelow which has not been produced. Will you search for that?

A. Yes, sir.

Q. 281. It appears by the letter of Lewisohn Brothers of August 27 to Mr. Bigelow that there was a letter from Mr. Bigelow to Lewisohn Brothers of August 26 which has not been produced. Will you search for that?

A. Yes, sir.

Q. 282. It appears by the letter of Lewisohn Brothers to Mr. Bigelow of August 30 that there was a letter from Mr. Bigelow to Lewisohn Brothers of August 29 which has not been produced. Will you search for that?

A. Yes, sir.

Q. 283. It appears by the letter of Lewisohn Brothers to Mr. Bigelow of August 31 that there was a letter from Mr. Bigelow of August 30 which has not been produced. Will you search for that?

A. Yes, sir.

Q. 284. It appears by the letter of the executors of A. W. Spencer to Leonard Lewisohn, dated October 5, 1895, that there was presumably a letter of Lewisohn Brothers to the executors, or to William A. Gaston, their attorney, dated August 6, or one of the few days following, of which no copy has been produced. Will you search for that letter?

A. Yes, sir.

Q. 285. It appears by the letter of William Keyser to Leonard Lewisohn, dated November 13, 1895, which has been produced, that there was a letter of Leonard Lewisohn to William Keyser of November 11 which has not been produced. Will you search for that?

A. Yes, sir.

Q. 286. It also appears that from that same letter of November 13 that there was a letter of William Keyser to Leonard Lewisohn, dated June 25, 1895, which has not been produced. Will you search for that?

A. Yes, sir.

Q. 287. It appears by the letter of Simon H. Stern to Lewisohn Brothers, dated September 20, 1895, that there was a letter from Lewisohn Brothers to Simon H. Stern of June 3 of which no copy has been produced. Will you search for that copy?

A. Yes, sir.

Q. 288. It appears by the letter of Simon H. Stern to Lewisohn Brothers, of October 4, 1895, that there were two letters of
653 Lewisohn Brothers to Mr. Stern of that date, only one of which has been produced. Will you search for the other?

A. Yes, sir.

Q. 289. It appears by the letter of Mr. Gaston to Adolph Lewisohn, dated October 8, 1895, that there was a letter from Adolph Lewisohn to Mr. Gaston of October 7, 1895, of which a copy has not been produced. Will you search for that?

A. Yes, sir.

Q. 290. It appears by the letter of November 6, 1895, from Leonard Lewisohn, or Lewisohn Brothers, to A. S. Bigelow that there was a letter from Mr. Bigelow to Leonard Lewisohn or Lewisohn Brothers of November 5 which has not been produced. Will you search for that?

A. Yes, sir.

Q. 291. It appears by the letter of Lewisohn Brothers to John Stanton, dated October 4, 1895, that there was some correspondence between John Stanton and Leonard Lewisohn, or Lewisohn Brothers, or Adolph Lewisohn, in relation to this matter. There is no letter from Mr. Stanton here and no other letter from Leonard Lewisohn or Lewisohn Brothers. Will you search for the letters from Mr. Stanton, and copies of other letters to Mr. Stanton, both before and after that date?

A. Yes, sir.

Q. 292. Were the letters of Mr. Jesse Lewisohn and Mr. Adolph Lewisohn in relation to those matters filed together with Lewisohn Brothers' and Leonard Lewisohn's letters?

A. All Lewisohn Brothers' were filed together.

Q. 293. No matter by whom they were written?

A. No, unless they kept a separate file for themselves, which I don't know anything about.

Q. 294. Do you know of any of their private files?

A. No, sir.

Q. 295. Or any private files of anybody else?

A. I have all of Lewisohn Brothers' files.

Q. 296. Do you know of anybody's private files?

A. Not of 1895.

Q. 297. Nor the early private files of 1896?

A. No, sir.

Q. 298. When was that begun?

A. I don't know. I know there were private files there, but what the date is I don't know.

Q. 299. I wish you would look that up.

A. I will.

Q. 300. It appears by the letter of Leonard Lewisohn to Simon H. Stern of December 23, 1895, that Leonard Lewisohn wrote Mr. Stern under date of the 19th of December, which letter has not been produced. Will you search for that letter?

A. Yes, sir.

Q. 301. Is there any explanation other than the lack of thoroughness in your search, which you can suggest explaining why
654 these letters to which I have referred in my questions and asked you to make search for, were not found in the search which you made?

Mr. HEMENWAY: Objected to as immaterial at present.

WITNESS: Shall I answer that question?

Mr. LAUTERBACH: Yes, go on.

WITNESS: I can't give you any explanation for it.

Q. 302. Has anybody made any examination of these files for the year 1895, recently, to your knowledge, before you began, and during the time in which you made that examination?

A. I don't know that anybody has made any examination of them. I could not say that because they are in different parts of the house altogether.

Q. 303. I ask you whether, so far as you know, anybody has?

A. No one has been through those files, so far as I know, outside of myself.

Q. 304. Do you know whether or not Mr. Hyams has made any examination of these files within the last few months?

A. No, sir.

Q. 305. You have seen Mr. Hyams and know him, don't you?

A. Yes.

Q. 306. He has been at the office, I presume?

A. Yes, sir.

Q. 307. And you don't know whether or not he has made any examination?

A. No, sir, I do not.

Q. 308. Were you not given directions by Mr. Walter Lewisohn or either of the other executors, or Mr. Lauterbach, or any one, as to how you should proceed to make your examination?

A. I was told to find all papers pertaining to the Old Dominion matters.

Q. 309. And what did you look for?

A. Well, Old Dominion.

Q. 310. Has it been part of your duty to make search for papers from time to time, or is this the first instance?

A. The first instance of anything like this where I have been called to search for papers.

Q. 311. Whose duty is it in that office; who generally makes the search through the old files for anything that happens to come up?

A. I don't know.

Q. 312. That is not one of the things you have done in that office?

A. I have looked for other papers in the past, but not at present.

Q. 313. To what extent have you been occupied in searching for papers?

A. When old letters were called for we would be requested to go and find them.

Q. 314. Have you done that often?

A. Not very often.

Q. 315. Anybody else there who does it in the office?

A. Not that I know of.

Q. 316. Who else is there in that office now besides you, except the heads of the office?

A. Who do you mean?

655 Q. 317. In the way of clerks.

A. Several clerks; Mr. Westervelt and Mr. Van Zandt.

Q. 318. What clerks are there now who were there when you commenced to work there in July, 1895?
A. In Lewisohn Brothers'?
Q. 319. Yes.
A. None.
Q. 320. That is, you are the sole survivor of those at that time?
A. Since 1895, yes.
Q. 321. Are you the only person there now who was there January 1, 1896?
A. With Lewisohn Brothers at the present time?
Q. 322. Yes.
A. I cannot answer that question exactly; there may be one or two.
Q. 323. Who are the ones?
A. Mr. Gibson of the coffee department, I think.
Q. 324. Who else?
A. I think that is the only one.
Q. 325. Is there anybody now living who was there July 1, 1895, with Lewisohn Brothers, so far you know?
A. Yes.
Q. 326. Who?
A. Quite a few of them.
Q. 327. Who are they?
A. Mr. W. Welch.
Q. 328. Where is he now?
A. At 11 Broadway.
Q. 329. He is not with Lewisohn Brothers now?
A. No, sir.
Q. 330. What is his business now?
A. With the United Metal Selling Company, I believe.
Q. 331. Who else?
A. Mr. Wilson.
Q. 332. What is his first name?
A. I think Mr. T. Wilson.
Q. 333. Where is he now?
A. 11 Broadway.
Q. 334. With the Metal Selling Company?
A. Yes, sir.
Q. 335. Who else?
A. Mr. Kane.
Q. 336. What is his first name?
A. T. J., I believe.
Q. 337. Who is he with?
A. The United Metal Selling Company.
Q. 338. Who else?
A. T. Gaden.
Q. 339. Who is he with?
A. The United Metal Selling Company.
Q. 340. Who else?
A. W. A. Weaver.
Q. 341. Who is he with?

A. The United Metal Selling Company.

Q. 342. Who else?

A. Mr. E. Laverty, and he is connected with the Metal Selling Company.

Q. 343. Go on.

A. Max Rosenthal.

Q. 344. Who is he with?

A. The United Metal Selling Company. Those are the only people I know of that are living that were employed with Lewisohn Brothers.

656 Q. 345. Go ahead and finish the list.

A. I think E. Mosehauer; that is all I can think of at the moment. A. There are some additional ones, but I can't think of them all.

Q. 346. Is there anybody who was with Lewisohn Brothers in 1895, whom you can think of, and who is living, and who is not with the United Metal Selling Company now?

A. With Lewisohn Brothers in 1895, that is living, and not with the United Metal Selling Company.

Q. 347. Yes.

A. No, I don't know of anybody that was with us then that is living now.

Q. 348. Is there anybody who is dead that you remember?

A. No, I have not heard of any deaths.

Q. 349. Then, to your recollection, everybody who was with Lewisohn Brothers in the office in 1895, except yourself, is now with the United Metal Selling Company?

A. No: there have been some people discharged or left of their own accord.

Q. 350. Who are they?

A. Mr. A. L. Casey, I think, was one, and Mr. William Faint—they had about forty or fifty clerks, but I don't remember them all.

Q. 351. You don't remember any of them?

A. No, at the moment, no, sir. There was Arthur Morris there before me. I was in the telephone booth at the time, and have always been since. Mr. Rechert was there. He was the cashier, but he is dead. And Mr. P. W. Landsburg.

Q. 352. Is he dead?

A. No, he is with Landsburg Brothers.

Q. 353. Mr. Faint was the stenographer to whom you referred?

A. Yes, sir.

Q. 354. Was he the only stenographer?

A. No, there was a Mr. Fox, I believe; where he disappeared to, or went, I don't know.

Q. 355. Mr. Faint was the one that had to do with the filing away of these papers?

A. I believe so, yes.

Q. 356. I wish you would, in addition to the matters specifically called to your attention, make a full search for all papers of any kind relating to the Old Dominion matters.

A. I will.

Q. 357. Or of all letters of any kind relating to Old Dominion matters to or from Albert S. Bigelow.

A. Yes, sir.

Q. 358. Or to or from G. M. Hyams.

A. Yes, sir.

Q. 359. Or to or from William Keyser.

A. Yes, sir.

Q. 360. Or to or from J. Morris Meredith.

A. Yes, sir.

Q. 361. Or to or from R. Brent Keyser.

A. Yes, sir.

Q. 362. Or to or from each one of those fifteen subscribers.

A. Yes, sir.

657 Q. 363. And when you are making that search check up so as to see that you have the full number of fifteen.

A. I will, but I don't know what their names are.

Q. 364. I haven't the full list. It appears by this list that among the subscribers are included John Stanton, Simon H. Stern, A. W. Spencer, J. W. Belches, and Alexander J. Meyer.

Q. 365. Were letter-press copy books kept by Lewisohn Brothers?

A. Of the copper business, do you mean?

Q. 366. I mean were the letters that were sent out kept in copying books?

A. I believe those that were written were.

Q. 367. What do you mean by that?

A. Plain writing.

Q. 368. You mean those that were in manuscript?

A. Yes.

Q. 369. And those that were not in manuscript,—those which were in typewriting,—were those kept in letter-press copy books?

A. I can't answer that. I paid no attention to that part.

Q. 370. I am referring to 1895 and 1896.

A. Yes, I don't know anything about that, then.

Mr. LAUTERBACH: There were copper copying books, were there not, indicating the purchase and sales of copper?

WITNESS: Yes.

Q. 371. What do you know, if anything, about where the books of account of 1895 or 1896 are kept—of Lewisohn Brothers or Leonard Lewisohn?

A. Where are they now?

Q. 372. Yes.

A. I don't know.

Q. 373. You had nothing to do with them at that time?

A. No.

Q. 374. And not since?

A. No, sir.

Q. 375. None of them are in this room 320?

A. Not that I have seen. I think that is the number of the room. I am pretty sure it is.

[Examination of this witness suspended for the present and recess is taken until 3 p. m.]

ADOLPH LEWISOHN, sworn.

Direct examination by Mr. BRANDEIS:

Q. 376. Give your full name.
A. Adolph Lewisohn.
Q. 377. During what period were you a member of the firm of Lewisohn Brothers?
A. It was no firm of Lewisohn Brothers. From about
658 1890 or 1891. I don't know when there was a corporation formed—from between 1891 to about 1901—and then there was the corporation of Lewisohn Brothers.
Q. 378. Prior to 1890 it was a firm?
A. Yes, sir.
Q. 379. And you and Mr. Leonard Lewisohn were members of that firm?
A. Yes.
Q. 380. Were you the sole members?
A. For many years.
Q. 381. For many years prior to 1890?
A. Away back to about 1885 Leonard Lewisohn and myself were the sole partners. I don't know the exact date.
Q. 382. And under what law was the corporation, Lewisohn Brothers, to which you referred, organized?
A. This state.
Q. 383. Who were the officers of that corporation?
A. Leonard Lewisohn, myself, Jesse Lewisohn. I don't think of any others. I think that was about all.
Q. 384. What were the interests of the several members in the corporation?
A. Leonard Lewisohn and myself had the larger share of it.
Q. 385. And Jesse a small interest?
A. Yes.
Q. 386. You and Leonard Lewisohn were equally interested, or which was the largest?
A. I think equally.
Q. 387. How long did you continue to own your share in the corporation of Lewisohn Brothers?
A. Until about a year and a half ago.
Q. 388. And then sold out to Leonard?
A. Yes.
Q. 389. And was Jesse a part owner up to the time you sold out?
A. Yes.
Q. 390. How were the offices distributed in the company; you three were directors?
A. Yes, sir.
Q. 391. Leonard, president?
A. I think Leonard was president, and I was treasurer.
Q. 392. There appear to be letters signed by you as general manager.
A. In order to make business easy there were two general managers; if one of us was away the other acted in that capacity.

Q. 393. That is, each of you had the power to act as general manager?

A. Yes, sir.

Q. 394. Now what was the business of the corporation?

A. Dealing in metal.

Q. 395. And was that the sole business of the corporation?

A. Yes, practically. I think they had other rights but practically that was the business.

Q. 396. It appears that under the name of Lewisohn Brothers a large number of transactions relating to the Old Dominion were carried on; that was not dealing in metal was it?

A. It was really for account of Leonard Lewisohn, and Lewisohn Brothers took charge of the matter for him.

659 Q. 397. That is, Lewisohn Brothers were practically the agents of Leonard Lewisohn in carrying on the firm's transactions?

A. Well, attended to it, practically, sometimes by Leonard Lewisohn and sometimes Lewisohn Brothers.

Q. 398. Was this transaction which was undertaken by Leonard Lewisohn in connection with A. S. Bigelow a transaction of Leonard Lewisohn individually?

Mr. HEMENWAY: Objected to as assuming that there were transactions which had taken place which does not appear in the evidence as yet.

Mr. BRANDEIS: I will say transactions in connection with the purchase of the Old Dominion Copper Mining Company property, and other mining claims, a transaction by Leonard Lewisohn individually, or by the corporation.

Mr. HEMENWAY: Objected to as leading, and also as indefinite, inasmuch as the transaction is not described, and as yet there is no evidence of any transaction.

A. It was for Leonard Lewisohn.

Q. 399. Was it a transaction in which you had any interest?

A. Leonard Lewisohn gave me a share in the profits.

Q. 400. What was that share?

Mr. HEMENWAY: Objected to as immaterial and incompetent.

A. I don't remember the exact share.

Q. 401. State as fully as you can what you recall in regard to the matter.

[Same objection.]

A. I think about a quarter or a third. I don't know exactly.

Q. 402. Of his interest?

A. Of his interest.

Q. 403. Did Jesse Lewisohn also have an interest?

A. I think he did.

Q. 404. Do you know what that interest was?

A. No, I don't remember.

Q. 405. When did you acquire that interest?

A. I was in Europe, as far as I remember at the time——

Mr. HEMENWAY (Interrupting): The question is, when did you acquire it?

A. I don't know any more the time.

Q. 406. You spoke of being in Europe. Do you refer to the period of 1895?

A. Yes.

Q. 407. Do you recall during what months you were in Europe?

A. I don't know what time I came back. I think I went in the spring.

Q. 408. You went in the spring, did you?

A. I think so. I think I came back in the summer. I don't know exactly.

660 Q. 409. Do you know whether or not this property had been purchased during your absence in Europe?

A. I remember it had.

Q. It had been?

A. Yes, sir.

Q. 411. Do you remember whether or not you heard of the purchase after you returned from Europe or while you were in Europe?

A. I don't remember that any more.

Q. 412. Do you remember whether or not the interest which you acquired in this syndicate was acquired by you after you returned to America?

Mr. HEMENWAY: Objected to, as it does not appear that he acquired any interest in the syndicate, and also as immaterial.

A. As far as I remember after my return,—well, Leonard Lewisohn gave me that share in the profits.

Q. 413. Was that evidenced by any writing?

A. No; I don't think so.

Q. 414. Was your interest that you speak of evidenced by any shares of stock, or by money, or both?

A. As I said before, a share in the profits, whatever that is.

Q. 415. Did you receive, as the result of that share, stock or certificates of stock in the Old Dominion Company, or money, or both?

A. I received, no doubt, shares and money.

Q. 416. Both?

A. I believe so. Paid for it, you see,—that means a share in the profits. I would have to pay and receive the money.

Q. 417. You say you received a share in the profits. Do you mean by that, you made a payment towards the amount as well as receiving something from it?

A. No doubt has been charged that payment,—charged that payment in order to get the balance of profits.

Q. 418. That is, you were charged with a certain amount as your contribution to the fund required to purchase?

A. Yes.

Q. 419. Do you recall what your proportion was?

A. No, I do not know.

Q. 420. Do you recall what proportion you had, or the total in-

terest which Leonard Lewisohn had, or that Leonard Lewisohn and Bigelow had together?

A. No; whatever interest or profits there was, was in the share of Leonard Lewisohn's profits.

Q. 421. Do you recall what fraction or proportion of Leonard Lewisohn's part you acquired?

A. As I said before, between either one quarter or one third.

Q. 422. Now were there any books kept by Leonard Lewisohn, or by you, or by Lewisohn Brothers, from which you could refresh your recollection as to the fact in this respect?

A. I have no books.

661 Q. 423. In what books were the facts relating to this transaction which you have just testified to recorded?

A. I don't know.

Q. 424. What other persons, if any, besides yourself, contributed to this fund which was required to make the purchase?

A. I don't remember that.

Q. 425. Don't you recall that other persons were spoken of as the syndicate subscribers coming in to contribute a share in the result in some form?

A. It is a good many years ago, and I don't remember any more details except what I have told here to-day.

Q. 426. It appears that there was a certain amount of correspondence conducted apparently in your name, by you as manager, relating to the matter; does not that refresh your recollection that there were other persons who did contribute?

A. I heard it testified to-day, as I say.

Q. 427. You refer by that to the examination of Mr. Rahaeuser, which you listened to, do you?

A. Yes, sir.

Q. 428. It appears from that deposition that there were other persons who contributed money, and who received certain proceeds of the syndicate transactions. I ask you in what books those transactions were recorded?

A. I don't know.

Q. 429. What did you have to do with the books of Lewisohn Brothers; anything?

A. I didn't tend to the books; they had a business manager, Mr. Rechert.

Q. 430. He was the bookkeeper, was he not?

A. Yes, sir.

Q. 431. I am not asking you as to the contents of the books, but I am asking what books there were, to your knowledge?

A. I don't know.

Q. 432. There being these books in which Lewisohn Brothers acted for some person or persons in connection with the receipt of money, and the disbursement of certificates—distribution of certificates of stock in this matter; are you not able to state whether or not these matters were recorded in Lewisohn Brothers' books?

A. I could not say.

Q. 433. Did you keep a private set of books for your own transactions?

A. I did not.

Q. 434. I don't mean whether you personally wrote in the books, but whether there was kept a private set of books for your individual transactions?

A. I think there were some books kept by me.

Q. 435. What has become of those books?

A. I don't think there were any kept for myself separately.

Q. 436. Do you mean by that that the transactions relating to yourself individually were kept in Lewisohn Brothers Books?'

662 A. There was no doubt a record kept; I don't know whether it was in the books of Lewisohn Brothers or separate.

Q. 437. Do you mean by that to say that you don't know whether you had any individual books of Adolph Lewisohn during this period?

A. I don't remember that.

Q. 438. What is your best recollection?

A. I don't know whether it was kept separate or not.

Q. 439. You don't know whether it was kept separate?

A. No.

Q. 440. I ask you for your best recollection in regard to it. Have you any recollection?

A. I don't recollect.

Q. 441. Have you made search yourself for any of the papers or books relating in any way to this Old Dominion matter?

A. No.

Q. 442. Why not?

A. I was not asked to; I was away.

Q. 443. Where are the books and papers of Leonard Lewisohn, or of your own, or of the Lewisohn Brothers' corporation, each and all of them that had anything to do with the transaction in relation to the Old Dominion?

A. I don't know.

Q. 444. When you sold out your interest in the Lewisohn Brothers' corporation, was that a complete severance of your relations with the business?

A. It was.

Q. 445. And all business connection with Leonard Lewisohn?

A. Yes.

Q. 446. What was done with the books and papers covering the previous transactions of yourself in connection with your brother Leonard?

A. I didn't keep any books of any kind from that time on. That is the only record I have.

Q. 447. And you have had a separate place of business, have you?

A. Since that time I have a separate office.

Q. 448. And you have had nothing whatever to do with the books or papers of the previous period?

A. Nothing whatever.

Q. 449. Did Edgar Buffum have any connection with Lewisohn Brothers or Leonard Lewisohn in 1895?

A. He was a clerk or bookkeeper.

Q. 450. Of Lewisohn Brothers?

A. Of Lewisohn Brothers, yes.

Q. 451. How long did he continue in that capacity?

A. He was there until a few years ago. He is now with the United Metal Selling Company.

Q. 452. Did the corporation of Lewisohn Brothers continue until the United Metal Selling Company was organized?

A. The corporation continued; they only sold the metal business to the metal company.

Q. 453. And did the corporation continue business until the time of Mr. Leonard Lewisohn's death?

A. Yes, but did not operate.

Q. 454. Who are the officers of it now?

A. I don't know, but simply the Lewisohn Brothers, as a
663 firm, owns all the shares in the Lewisohn Brothers' corporation, but it is simply inoperative.

Q. 455. And Walter and Frederick are the only partners?

A. I believe so.

Q. 456. Was Charles W. Welch connected with the firm of Lewisohn Brothers?

A. Yes.

Q. 457. In what capacity?

A. Some kind of a bookkeeper.

Q. 458. In 1895?

A. Yes.

Q. 459. How long did he continue with the firm?

A. The same way. He is now with the Metal Selling Company.

Q. 460. Was Sidney Riddlesdorffer connected with the firm of Lewisohn Brothers?

A. I think he was at that time.

Q. 461. In what capacity?

A. Bookkeeper, I think.

Q. 462. And he was with Lewisohn Brothers until the Metal Selling Company was organized?

A. No, he went over to the factory in Perth Amboy.

Q. 463. Lewisohn Brothers' factory?

A. It now belongs to the Metal Selling Company.

Q. 464. Then controlled by Lewisohn Brothers?

A. Yes.

Q. 465. And he is over there yet?

A. Yes, he is over there yet.

Q. 466. Do you know William V. Rowe?

A. I don't know him. I don't know his last name; probably one of the employees, I suppose; one of the younger boys.

Q. 467. Do you know William R. Montgomery?

A. I don't know the names; no doubt they are some of the clerks that have been there, the same as I would not have known we had this Mr. Rahaeuser.

Mr. LAUTERBACH: I think it right to say that there was in existence, coincident with Lewisohn Brothers' corporation, a Lewisohn Brothers' firm, although when he started his connection with Leonard Lewisohn, he started it with the firm of Leonard Lewisohn, then existing as well as the corporation, although it don't appear, and this present Leonard Lewisohn then became the sole partner of Lewisohn Brothers about a year and a half ago. Then he took into his firm Fred and Walter before his death, so that upon his death they became the surviving partners of what was really a continuing firm of Lewisohn Brothers, of which at one time he was a member.

WITNESS: When the Metal Selling Company was formed,— as I said before, the metal business that was the principal part of the business was sold to the Metal Company,—Leonard and I formed the partnership of Lewisohn Brothers, which partnership only existed then since 1900.

Q. 468. Mr. Lauterbach also spoke of there having been
664 a firm of Lewisohn Brothers previously, during the 90's?

A. I said before, formerly it was a corporation, away back to 1867 there was a firm, Lewisohn Brothers, and it was only a corporation was formed in 1891, I believe.

Q. 469. When the corporation was formed in 1891 did you cease to be in that firm of Lewisohn Brothers?

A. I didn't cease to be in the firm. We only made a new firm in about 1900. Leonard and myself were in the firm, and they took in the two boys after we went out.

Q. 470. Are you able to recall whether or not there was any one connected with Lewisohn Brothers by the name of E. Hawley, in 1895?

A. I don't think he was connected with it.

Q. 471. Do you remember any person by the name of E. Hawley?

A. Yes.

Q. 472. What, if anything, did he have to do with the Old Dominion matters?

A. I don't know as he had any.

Q. 473. Was he not a subscriber to the syndicate?

A. I suppose so. I don't remember.

Q. 474. Do you remember any gentleman in connection with it in 1895 by the name of H. Vollestein?

A. I know a gentleman by that name.

Q. 475. Who was he?

A. He was a merchant in the city.

Q. 476. Do you remember whether or not he had any relation with the subscribers to the Old Dominion Syndicate?

A. I don't remember.

Q. 477. Do you remember any person by the name of Theodore Gaden, Jr.?

A. He was a clerk.

Q. 478. In Lewisohn Brothers' employ?

A. Yes, sir.

Q. 479. How long did he remain in their employ?

A. He has gone with the Metal Selling Company.
Q. 480. Jacob Kohn: do you remember any such person?
A. I remember him.
Q. 481. What was he, a clerk?
A. No, a brother-in-law of mine.
Q. 482. Was he connected with Lewisohn Brothers?
A. No.
Q. 483. Do you remember whether he had any interest in the Old Dominion Syndicate?
A. I don't remember now, but maybe he was.
Q. 484. Do you remember G. A. Bicknell?
A. Yes, I know who he is.
Q. 485. Did he have any connection with Lewisohn Brothers?
A. No.
Q. 486. What was he?
A. He was a wool broker. I knew him very well.
Q. 487. Did he have any interest in the Old Dominion Syndicate?
A. I don't recollect it.
665 Q. 488. Charles F. Brooker?
A. No connection with Lewisohn Brothers; it is all the same.
Q. 489. What was Charles F. Brooker?
A. Manufacturer of brass. He was then with the Coe Brass Manufacturing Company. He was a merchant of some kind.
Q. 490. Did he have an interest in the Old Dominion Syndicate?
A. I don't know, but I suppose so.
Q. 491. Do you remember a man by the name of Louis G. Schiffer?
A. Yes.
Q. 492. He wasn't connected with Lewisohn Brothers, was he?
A. No.
Q. 493. What was he?
A. He is a cotton broker.
Q. 494. Was he interested in the Old Dominion Syndicate?
A. I don't remember that he was.
Q. 495. Do you know the concern of J. W. Belches & Company, referred to in the correspondence?
A. He was a stockbroker, I think.
Q. 496. Do you remember anything with regard to his interest in the Old Dominion?
A. No, I don't remember the interest.
Q. 497. Do you know what books there are, or papers there are, or where any can be found, in which you can refresh your recollection as to the relations of any of these persons with the Old Dominion?
A. I have no books or records of any kind.
Q. 498. Do you know where any are or are kept?
A. I do not.
Q. 499. Do you know in what manner the papers in Lewisohn Brothers were filed away and kept?
A. I do not.

Q. 500. Have you ever yourself seen the papers when they were filed away?

A. No.

Q. 501. Did you ever have occasion to refer to any papers which had been filed away?

A. Mr. Rahaeuser, as I said before, had charge of the business, and if I wanted any I would refer to him. I didn't know how they were filed in any way.

Q. 502. You heard the testimony that was given this morning by Mr. Rahaeuser in regard to the way in which the papers were filed away. Is there anything in that testimony which is contrary to your recollection?

A. No, I have no recollection about it.

Q. 503. No recollection whatever?

A. No.

Q. 504. Do you know whether or not Lewisohn Brothers had letter-press copy books in which their letters were copied?

A. I don't know.

Q. 505. Have you any recollection whether the letters which you wrote were ever copied in the letter-press copy books?

A. I don't know whether they were or not. I don't know whether they only filed them or copied them.

666 Q. 506. Do you remember whether or not at the time you returned from Europe, a corporation known as the Old Dominion Copper Mining & Smelting Company had been formed?

A. I don't remember that any more.

Q. 507. Have you no recollection as to the length of your stay abroad?

A. I generally stayed three to four months, about.

Q. 508. Have you any way of fixing the time when you went abroad?

A. I could not tell; I don't know that year. I often used to go in March and come back in June or July, but I could not place the time I went at that time.

Q. 509. Is there any way in which you can fix that date from papers which you can refer to?

A. Probably; I can't find out now.

Q. 510. What do you mean by "now"?

A. It is so many years ago I don't know.

Q. 511. Do you suppose by looking at the books of entry of Lewisohn Brothers, and papers, you could not easily enough determine and tell me when you ceased to sign letters and when you began again; couldn't you do that?

A. I don't know of any papers.

Q. 512. Do you mean to say that if you found it important to find out what date it was when you left and the date when you came back from Europe, you could not do it approximately?

A. Perhaps I could.

Q. 513. How would you go about it to do it?

A. I don't know at present how to do it.

Q. 514. Could you not do it by looking at the papers of Lewisohn

Brothers, and the business which you were carrying on, and find out when you ceased to take part in that business and when you began again?

A. I don't know anything about any books, and I don't know where they are, and I could not say.

Q. 515. Where were they when you last knew about them?

A. As I said before, since I was out I haven't any of those papers.

Q. 516. I ask you where they were when you last knew about them?

A. I suppose they were at Lewisohn Brothers.

Q. 517. Do you mean to say you have any doubt that, by looking at the papers of Lewisohn Brothers, you could state approximately when you went to Europe and when you came back?

A. I suppose I could find out.

Q. 518. Will you?

A. All right, I will try. I can't say what I have not got. No doubt I can; they might not let me in. I don't know. I am not connected with them.

Q. 519. If you will try, that is all we can ask of you.

A. I think I can find out some way or other.

667 Q. 520. Have you any doubt now that you could find out; also as to who the syndicate subscribers were with whom you communicated as manager of Lewisohn & Company in relation to the Old Dominion matters?

Mr. HEMENWAY: Objected to, as assuming that he did communicate, and that is not yet proven.

A. I don't know whether I could, but I presume I could.

Q. 521. Will you try?

A. All right; I want to do what I ought to do.

Q. 522. Will you also try and get such information as will enable you to determine exactly what your share was in this syndicate and what you paid for your share in that syndicate and what you got in the way of stock or moneys as the result of your interest in that syndicate?

A. I will.

Q. 523. How soon can you enter upon the making of those efforts?

A. I suppose in a few days.

Mr. BRANDEIS: If you could do it to-day or between to-day and sometime to-morrow I would like to suspend your examination until you could make an effort to get back. We will suspend your examination then for the present temporarily and go on with Mr. Walter Lewisohn.

WALTER LEWISOHN.

Q. 524. Is it a fact that you did not have anything to do with relation of any matters in connection with the Old Dominion syndicate?

A. Unless it was anything that I carried out for Mr. Leonard Lewisohn.

Q. 525. Do you mean merely the formal correspondence?

A. Yes, sir; that is all the business that I had to attend to.

Q. 526. Do you mean to be understood as testifying that you had no knowledge as to what the relations were between, say, Leonard Lewisohn and Albert S. Bigelow in connection with the purchase of this property?

A. I don't want to go as far as that; I might have been informed at the time, but I was not the direct—it was all for account of Leonard Lewisohn, and except, as I said before, I would carry out Mr. Leonard Lewisohn's business, but I don't want to say that I at that time didn't know about it.

Q. 527. Do you wish to be understood as testifying that you did not know anything about it?

A. I have already answered I don't know any of the details of these things.

Q. 528. Do you want us to understand that you have now no recollection of the circumstances attending the purchase of this Old Dominion property by Leonard Lewisohn and Mr. Bigelow?

A. Yes.

668 Q. 529. You don't know anything about it at present?

A. No.

Q. 530. Then you may have known at one time, but you don't know anything about it now: is that it?

A. That is it.

Q. 531. And you don't know anything now about the relations of any persons as members of the syndicate: is that so?

A. That is it.

Q. 532. And you don't know anything in regard to the plan to form a corporation?

A. I don't remember those details now.

Q. 533. Is there any way that you know of by which you can refresh your recollection on any of these matters I have asked you about?

A. No, I have no record in my hands.

Q. 534. No letters you received from Leonard Lewisohn?

A. I have nothing at all.

Q. 535. While you were abroad you certainly—I don't say certainly, but you probably received letters from Leonard Lewisohn?

A. If there were any I haven't got them now any more. It is years ago.

Q. 536. Do you mean you destroyed them?

A. I haven't got any of the old papers.

Q. 537. It was customary for your brother to correspond with you when you were abroad, was it not?

A. I got some letters, yes.

Q. 538. And to report to you the business that was going on?

A. Sometimes he would and sometimes not. This was not of this order, this kind of business. He went right along by himself with that kind of business, and what I would know about it would be the small business which would go to the London office.

Q. 539. Do you mean to say that in all transactions such as this

was, the purchase of practically the whole interest in a mining property in which an obligation of Lewisohn Brothers was given, amounting to nearly $1,000,000, that your brother would not report this matter to you?

A. He would act in just this way.

Q. 540. And it is your recollection, is it, that he did not report anything about that?

A. I don't say that. I don't recollect that he did.

Q. 541. At all events, if he did the letters in which he reported to you are not in existence?

A. No, sir. I am pretty sure.

Q. 542. Do you mean by that that it is not your custom to preserve letters?

A. Not any letters that I would receive from my brother. I mean regular business-house copy letters, but if I would get letters seven or eight years ago it is not likely I would have them now.

Q. 543. Do you mean it was your practice to destroy those letters?

A. Yes, sir.

Q. 544. While abroad were you on business or traveling for pleasure?

A. Business combined with pleasure; something to do there.

669 Q. 545. You had no office there?

A. I did not, no.

Q. 546. I mean no regular place of business.

A. The house had a London office.

Q. 547. Lewisohn Brothers?

A. Yes, sir.

Q. 548. Were you in London during this period?

A. I was traveling mostly on the Continent.

Q. 549. Then you feel certain that any letters which were received by you from your brother during that period in 1895 when you were abroad are not in existence?

A. If there were any, no, I am sure.

Q. 550. And you therefore say there is nothing whatever that would in any way refresh your recollection as to what he may have told you or may have written you in relation to the Old Dominion Syndicate and the formation of the corporation?

A. Yes, that is it.

Mr. BRANDEIS: If you could as soon as convenient ascertain this fact or the dates of your trip, or anything that would aid you to testify further than this, we will take you up again. What will be most convenient for you when we can continue?

Mr. LAUTERBACH: I will produce Mr. Lewisohn for further examination at any future time you may want him.

Q. 551. I show you a paper; is that Mr. Leonard Lewisohn's signature to the paper which I show you, being one of the papers produced by Mr. Lauterbach in response to our request?

A. Apparently it is.

Q. 552. Do you mean the signature is Mr. Leonard Lewisohn's handwriting?

A. Yes, sir.

Q. 553. In whose handwriting is the black writing?

A. I don't know.

Q. 554. I hand you another paper, being one of the papers produced by Mr. Lauterbach, in response to our request endorsed "Dated July 11th, 1895. Leonard Lewisohn to Old Dominion Copper Mining and Smelting Company. Offer to convey Mines, etc. Submitted to meeting of Directors of Old Dominion Copper M. & S. Co. held July 11, 1895, and accepted," entitled "To the Old Dominion Copper Mining & Smelting Company," and ask you whether or not the signature purporting to be that of Leonard Lewisohn, signed at the foot of that offer, is the handwriting of your brother Leonard?

A. It seems to be, I am pretty positive.

Q. 555. I ask you whether the signature purporting to be that of Leonard Lewisohn, which follows the words after the offer, "Please issue said 30,000 shares of stock to Mr. A. S. Bigelow and myself," is the handwriting of your brother?

A. That certainly appears to be Leonard Lewisohn's signature.

670 Q. 556. Are you able to state whose handwriting the words "Please issue said 30,000 shares of stock to Mr. A. S. Bigelow and myself" is?

A. I am not.

Q. 557. Are you able to state in whose handwriting the words "thirty thousand" which are inserted in black ink in the offer are?

A. No, I am not.

[The paper shown witness is here marked for identification "Plaintiff's Exhibit No. 1, February 10, 1903."]

Q. 558. I hand you herewith a paper endorsed "Old Dominion Copper Company of Baltimore City to Old Dominion Copper Mining and Smelting Company. Offer to sell property. Submitted to meeting of Board of Directors of Old Dominion Copper M. & S. Company held July 11, 1895, and accepted," being one of the papers produced by Mr. Lauterbach in response to our call for papers, and I ask you whether or not this paper purporting to be signed by "A. S. Bigelow, President," if that is the signature of A. S. Bigelow?

A. I think it is.

Q. 559. I call your attention to the words in the twenty-first line: "one thousand," before the word "shares," and ask you if you are able to state in whose handwriting those words are?

A. No.

Q. 560. I call your attention also to the word "first," in the last line on page 1, and ask you whether you are able to state in whose handwriting that is?

A. No.

[The paper shown witness is here marked for identification "Plaintiff's Exhibit 2, February 10, 1903."]

Q. 561. I call your attention to the letter dated Boston, May 28, 1895, Leonard Lewisohn to A. S. Bigelow, being one of the papers produced by Mr. Lauterbach in response to our call, and ask you whether or not the signature of Leonard Lewisohn, at the foot of that letter, is in your brother's handwriting?

A. That appears to be all right; yes, that seems to be his signature.

[The paper shown witness is here marked "Plaintiff's Exhibit 3," for identification of this date, and the rest of the papers produced by Mr. Lauterbach in response to the plaintiff's call, are here marked for identification, "Plaintiff's Exhibits 4 to 161, both inclusive, February 10, 1903."]

[Adjourned to to-morrow at 10.30 a. m.]

671

NEW YORK, *February* 11, 1903.

[Met pursuant to adjournment.]
[Present: Same as before.]

WALTER LEWISOHN, recalled.

By Mr. BRANDEIS:

Q. 562. Will you state whether you personally made any search whatever for all the papers referred to in the subpœna.

A. I personally searched a little bit, but not very much, such as going through the closets in those rooms; they are like closets where these papers were separated in this room 320. There was quite a little dirt around there, and I had my man Ferdinand Rahaeuser to go through.

Q. 563. The Ferdinand Rahaeuser who testified here yesterday?

A. Yes, sir.

Q. 564. Did you personally look through any files of papers?

A. I looked at the files, but not very carefully.

Q. 565. You mean you looked at the outside of the boxes?

A. Yes, but I was too busy to attend to looking through the files. He attended to that, for I had not done very much about files and don't know anything about them. I merely saw they were attended to properly.

Q. 566. Did you personally look at the contents of any files of papers?

A. Yes, I did.

Q. 567. What file of papers did you personally look through?

A. I don't remember.

Q. 568. What did the file look like that you looked through: was there more than one that you looked at personally?

A. Probably two or three I looked at.

Q. 569. What was the general appearance of those two or three boxes or files which you looked at?

A. Oh, a sort of oblong pasteboard box, I think, with wood at the bottom.

Q. 570. How large were those boxes?

A. About one foot long and 10 x 12 inches square, like that.

Q. 571. Were those boxes marked on the outside?

A. I forget exactly; I don't know; I think they were, but I don't remember.

Q. 572. Were those two or three boxes you looked at in the general room 320 which Ferdinand Rahaeuser has testified to?

A. Yes.

Q. 573. At the time you looked at them?

A. Yes, sir.

Q. 574. How much of an examination did you make of those two or three boxes?

A. I merely glanced through them to get a general idea of the files, that is all.

672 Q. 575. You did not, then, read the letters in them with a view of determining whether or not any of them were Old Dominion letters or related to the Old Dominion transaction?

A. I would look through to see if I saw Old Dominion letters, but I did not stand there very long to attend to it. I just wanted to see the search started, that is all, and to see that it was properly done.

Q. 576. Did you yourself take any of these letters from the files?

A. Yes, I just took them out and scrutinized quickly, just glanced through a few of those files, and then I told him to look and be sure he got all the Old Dominion papers, and then I had to run around the office, and he made the search and even came down at night.

Q. 577. I want you to describe a little more fully what you did when you looked through these two or three files that you refer to.

A. I just picked up the papers and quickly glanced through.

Q. 578. What do you mean by picking them up; did you take them out of the file?

A. Yes, sir.

Q. 579. How are they filed; are they affixed to anything, or simply lying there?

A. I didn't notice the details of it; I could not say; I just went in and picked the papers out of the files; didn't notice particularly how they were.

Q. 580. Did you go through any one of those files sufficiently careful to pick from any one of them the letters which related to Old Dominion matters, or did you merely glance at the files and see what they looked like?

A. I glanced at the files, and the papers in the files, but I just wanted to see just to get an idea of the files, just that the papers were all right there. I didn't make a regular search, as I said before, as there wouldn't have been any use, as I say I only saw two or three. There was no particular need to look at all the papers in those two or three unless I did them all.

Q. 581. What I want to know is whether, as matter of fact, you did go through any one of these files with sufficient care to know whether there were Old Dominion papers in it or not?

A. Yes, I saw there were Old Dominion papers there, but I didn't read them all over.

Q. 582. Was there anything in those files besides those Old Dominion papers?

A. That I don't remember, exactly. I think there were a few other papers.

Q. 583. That is, according to your recollection, most of the papers in those two or three files you looked at related to Old Dominion matters?

A. Yes.

Q. 584. Do you remember specifically any other matter that any of them related to?

A. No, I don't remember.

Q. 585. Are you certain there were no letters in there that
673 related to any other matter?

A. No, I don't know exactly; as I said, I only went through quickly, just looked at them.

Q. 586. Were those boxes and files, the two or three that you have referred to as having looked at, files of letters which were received or were they files of letters which had been sent?

A. I don't remember.

Q. 587. Do you remember whether or not the boxes or files you looked at contained original letters which had been received?

A. I don't know that either.

Q. 588. Do you remember whether or not the two files which you looked at had in them signed letters?

A. Yes, I think some of them were signed. I saw some signatures.

Q. 589. As matter of fact, the copies of letters which you have produced through Mr. Lauterbach are all unsigned, are they not?

A. I don't remember.

Q. 590. What do you know about the papers which Frederick Rahaeuser selected out of those boxes, as to whether or not we have those papers here?

A. I don't quite understand.

Q. 591. I want to know what you know about the result of his search?

A. Those that he went through he said he took out all the papers he could get of the Old Dominion.

Q. 592. Was that statement made by him to you?

A. Yes, sir.

Q. 593. What do you know about it besides the statement? Have you ever had those papers in your possession,—the papers that have been produced here by Mr. Lauterbach?

A. Yes, I had some of them; one day there were two, three, and four on my desk, and I was handed by my brother at another time some more.

Q. 594. What brother?

A. Fred, and that is all, and then I just had them put together and gave them back to him. I just looked at them hastily. I didn't look at them long enough to remember anything in particular about them. I didn't take any notice; probably just for about a minute, just glanced at them.

Q. 595. What is the total number of letters and papers which you received as having been found by Ferdinand Rahaeuser?

A. I don't know.

Q. 596. Are they more than five?

A. The papers that have been found?

Q. 597. Or letters.

A. All together?

Q. 598. Yes.

A. I think there were; I don't remember, exactly.

Q. 599. Where did you get them from; you got certain ones from Rahaeuser?

A. They were placed on my desk; that was all he went through at night and I noticed on my brother's and my own desk—we have a desk together there; of course there are other desks around the office at that place there, and I handed them to my brother and I
674 think he gave them in to one of the clerks or something to be taken care of, and they probably were afterwards handed to Mr. Lauterbach.

Q. 600. Were those letters placed on your desk at one time or at several times?

A. I don't know how many letters there were; there may have been only two at one time and a few at another time; that was all I remember. One day, I think, they just found one extra letter and I think it was handed to Mr. Lauterbach; I don't know.

Q. 601. So far as you know, then, all the letters which you know about as having seen were just these two or three or five or six letters; that small number, was it?

A. Yes, that is all I recollect.

Q. 602. That is all you saw?

A. I may have seen more; there may have been a dozen there, so far as I know, but I didn't look through all of them.

Q. 603. What was done with those that you did see, whether there were two or a dozen?

A. In what way?

Q. 604. What was done with them after you saw them?

A. I handed them over to one of the clerks to be given to my brother, so that they would be sent over to Mr. Lauterbach.

Q. 605. Which of the clerks did you hand them to?

A. I don't remember now exactly which one it was.

Q. 606. Who are the clerks—what are the names of the clerks to whom you delivered those letters?

A. Frederick Rahaeuser, I think, and another man by the name of Herman something—I don't know his last name—and E. C. Westervelt. I don't know whether he was given any of them, but he was a clerk in the office.

Q. 607. Then you handed them to one of those three, did you?

A. To either one of those three or, as I stated before, to my brother Fred.

Q. 608. You did not yourself send any of those letters to Mr. Lauterbach?

A. I looked at those letters, and transmitted them to Mr. Lauterbach.

Q. 609. I mean, you did not personally send them, accompanied by a letter. Did you write any letter to Mr. Lauterbach accompanying those?

A. I did not personally write a letter. I gave word to have those letters sent over to Mr. Lauterbach.

Q. 610. Were they accompanied by a letter?

A. That I don't know.

Q. 611. Those that we received yesterday—they were accompanied by a letter, were they not?

A. I could not tell you.

Q. 612. You did not sign the letter, if there was a letter written?

A. No, I did not.

Q. 613. And, so far as you know, who has had access, since
675 the time of your father's death, to the files of letters, and other papers, covering the year 1895?

A. I think all the executors have had access.

Q. 614. Who else besides the executors?

A. I don't believe anybody else, except like one of our clerks who would have access; there is nobody who has the right without our permission.

Q. 615. Who actually had permission to examine the letter files?

A. Ferdinand Rahaeuser.

Q. 616. Whom else?

A. Or any other clerks. I don't know that anybody, unless my brother may have given permission. I don't know. He could arbitrarily give permission, if he wanted to, or any of the executors could.

Q. 617. Whom else besides your clerks, if anybody, has had access to those papers?

A. I don't know who else.

Q. 618. Have any of the papers relating to the year 1895 been removed from the files, so far as you know, other than those which were brought out and collected by Ferdinand Rahaeuser, and delivered to you, or your brother, as you testified to?

A. I don't know anything about that.

Q. 619. I ask you whether, to your knowledge, any papers have been taken from those files except those taken by Ferdinand Rahaeuser, and delivered to Mr. Lauterbach?

A. Not that I know of. I don't know of anybody else taking any.

Q. 620. Hasn't Mr. G. M. Hyams of Boston—you know him, don't you?

A. Yes, sir.

Q. 621. He has been here at your office a number of times, has he not, within the last few months?

A. Yes, sir.

Q. 622. Since this litigation began?

A. Yes, sir.

Q. 623. Has he not had access to the files of papers for the year 1895?

A. I don't know whether he has had access to the files. He may have been given permission to go through the files; I don't know.

Mr. HEMENWAY: You are testifying against yourself. Testify to your own knowledge, what he has done so far as you know.

WITNESS: So far as I know, I don't know anything about his going through the files. What I do know is that the letters were brought into our office, some of them, when Mr. Hyams was there, it may have been, but I don't know whether any were given to Mr. Hyams. I know he has been in our office, but I don't know whether he has had access to the files or not.

Q. 624. He has been to your office during the time the search has been made?

676 A. It may have accidentally happened he was there during that time because he is in our office a good deal of the time.

Q. 625. He is here a large part of the time in your office, is he not?

A. Yes, sir, he is in our office whenever he is in New York and down at business. He stops in at our office.

Q. 626. Has Mr. Bigelow been in your office since this litigation began?

A. No, not that I know of.

Q. 627. Do you know whether or not these various boxes or files of letters which are described as being in room 320 have ever been removed from that room, in whole or in part, since you were appointed executors?

A. I don't know anything about that.

Q. 628. So far as you know they never have been removed, in whole or in part, is that true?

A. Well, of course the papers that were taken out of the files here lately must have been removed; those that you have here now.

Q. 629. But other than those particular papers which were taken from the files by Ferdinand Rahaeuser under your direction, have any papers been taken, even temporarily, from these files in that room?

A. I don't know; I could not tell you.

Q. 630. So far as you know, none have; is that the fact?

A. I don't know anything about it.

Q. 631. You don't know of any having been taken; is that what you wish to say?

A. Other than those that were brought here, I don't know anything about whether he had removed any papers. I don't imagine he did, but I don't know anything about it.

Q. 632. Whom do you mean by "he"?

A. You said Ferdinand Rahaeuser.

Q. 633. I say other than those papers which Ferdinand Rahaeuser gave to you, or laid on your desk, have any papers, or boxes or files containing papers, been removed from that room, temporarily or permanently, so far as you know?

A. No others, so far as I know.

Q. 634. Where are the books kept of Leonard Lewisohn and of Lewisohn Brothers, the books for the years 1895 and subsequently?

A. I don't know that.

Q. 635. Do you mean that you don't know where the books are relating to this period of 1895 to the time of your father's death?

A. No; I personally don't know where they are.

Q. 636. Are there any books?

A. I don't know whether there are or not.

Q. 637. Have you made any search for them?

A. I personally have not; no.

Q. 638. Did you request anybody to make any search for them?

A. No.

677 Q. 639. You were requested by the subpœna to do so?

A. My brother may have. I was not personally.

Q. 640. The same request was made to each executor.

A. Well, we will then obey it. If I had not been there at the time, he would have attended to it.

Q. 641. As a matter of fact, you have not made any search whatever to ascertain whether there are any books of account of Leonard Lewisohn or of Lewisohn Brothers in existence relating to the time prior to the death of your father?

A. I personally did not have anything to do with the search for any of these books.

Q. 642. And you mean by that that you did not direct any search to be made?

A. No; I did not because I didn't know I had anything to do with it.

Q. 643. You did not know that you were required to do it?

A. No, I don't think I ever read anything in the subpœna; whatever was to have been done may have been stated in the office to my brother, or he may have read it; and he would have attended to it in my absence, because if my duty called me out and he happened to be in he would attend to it, and when he is out I attend to the business when I am in the office.

Q. 644. As matter of fact, at the present moment you are unable to give us any information whatever with regard to the books of Leonard Lewisohn, or of the corporation or firm of Lewisohn Brothers, prior to the death of your father?

A. I am unable.

Q. 645. You mean by that you have never, since you were appointed executor, have had occasion to refer to a single entry in any books of account kept either by your father or for your father, or the firm or corporation prior to your appointment?

A. Relating to what matters?

Q. 646. Relating to any matters.

A. I have looked in some books.

Q. 647. What do you mean by that?

A. Of the firm of Lewisohn Brothers.

Q. 648. How far back?

A. 1901, I guess it was, or 1902.

Q. 649. That is, nothing earlier than that time?

A. No.

Q. 649½. So that you don't know now whether any such books exist or where they are?

A. No.

[The examination of this witness is further suspended for the present.]

678 FREDERICK LEWISOHN, sworn for plaintiff.

Direct examination by Mr. BRANDEIS:

Q. 650. State your name, age, and occupation.

A. Frederick Lewisohn; age, twenty-one; banker and mining business.

Q. 651. You are a member of the firm of Lewisohn Brothers, are you not?

A. Yes.

Q. 652. And the only other member of the firm is your brother Walter?

A. Yes, sir.

Q. 653. You and your brother were copartners with your father under the firm name of Lewisohn Brothers, at the time of his death?

A. Yes, sir.

Q. 654. And had been for how long before that?

A. I believe just a few months. He died on March 5, and our agreement dates back to January; that would be three months.

Q. 655. What connection, if any, has Albert Lewisohn, your co-executor, with the firm of Lewisohn Brothers?

A. He has no connection whatsoever.

Q. 656. Are you engaged in business in any way with him except as executor of your father's estate?

A. No.

Q. 657. What is Albert Lewisohn's business?

A. He is an importer and dealer in feathers, bristles, etc., I believe.

Q. 658. Is P. S. Henry, the other executor, connected with Lewisohn Brothers?

A. I believe he has an interest in our coffee department. He is not a partner; that is separate.

Q. 659. What is his business?

A. His business is to look after the coffee department.

Q. 660. Was he connected with your father's business before his death?

A. No, he was in no way connected; he was formerly employed by the United Metal Selling Company through C. S. Henry & Company of London, who were the foreign agents.

Q. 661. And was Albert Lewisohn connected with your father's business in any way?

A. In no way, I believe.

Q. 662. How long were you connected in any way in business with your father prior to the formation of this firm of Lewisohn Brothers in January, 1902?

A. I think I started with him the last week in December, 1897.

We started from January, 1898, which was my first start; that was in Fulton street.

Q. 663. And you have been continuously connected with the business, I believe?

A. In certain branches.

679 Q. 664. What branches?

A. I was in the metal department for quite a while, copper department, and then I was superintendent of the refining works in 1899. I think that was at Ansonia, Conn. Then I came back and went with the United Metal Selling Company, for a while, and then my father took me in his firm.

Q. 665. The United Metal Selling Company was a concern in which your father was largely interested?

A. He was president of the company.

Q. 666. What search, if any, have you made for papers relating to the transactions which your father had in connection with the Old Dominion Company or syndicate?

A. I directed one of our clerks, whom I believe you had over here, to go through all the files we had in our office and pick out from them everything relating to the Old Dominion matter, get a list of all letters of which we had copies, all the letters we had, and hand them over to me.

Q. 667. The clerk you refer to is Ferdinand Rahaeuser?

A. Yes, sir. He was about the only one I could think of who has been with us quite a while and had that sort of work to handle. He was used to it.

Q. 668. Aside from the directions which you gave him what, if anything, did you do in regard to finding the papers asked for?

A. I didn't do anything else, because I didn't know how to get at anything no more than what we had in the office. I directed him to get out all he could and that is all we could do. We found all that was there; that is all we could find.

Q. 669. Have you yourself ever examined any of the files of letters and other papers for the year 1895?

A. No.

Q. 670. Have you ever even looked at the exterior of the boxes in which those files are contained?

A. No, because these boxes and papers were all put in a special room away from our office.

Q. 671. What room is that?

A. A stationery room we have. We never have any reason to enter there so that there was nothing done until I received word to look there, and we sent the clerk who was best suited for that purpose to look for the papers.

Q. 672. You have not seen a single box or single file of these papers since you were requested to make the investigation? I mean you have never gone so far as to go to the room in which these papers were stored, to look at the boxes or files in which these papers were stored?

A. No, I did not go into the room.

Q. 673. Have you ever had occasion to examine the files of papers

relating to any of the matters in which your father or Lewisohn Brothers were interested prior to 1900?

A. No.

Q. 674. You know what the practice was in regard to the filing of papers?

680 A. No, I do not, only what I heard lately. They only had these carbon copies of letters that were sent out at that time.

Q. 675. That is, there were no letter-press copy books kept in the office business or his personal affairs?

A. I don't believe in 1895 there were.

Q. 676. Was there at any time?

A. Later on there may have been.

Q. 677. Is there any now?

A. Do you mean in our office?

Q. 678. Yes.

A. Yes, I believe there is.

Q. 679. Was there in the office of which you were a partner from January 1, 1902?

A. Yes, I believe there were letter-press copy books.

Q. 680. Was there, in the business with which you were connected from January, 1898, down to 1902?

A. I don't really know. I had nothing to do with that portion. I was only in the different accounting departments, just as a clerk.

Q. 681. Was it in pursuance of any suggestion which you made that the practice of taking letter-press copy books was continued in this firm?

A. I believe they had them when I came in. I say, when I entered the firm with my father they had already had them; that was only a year or so ago; what they did before that I don't know, because I had nothing to do with that portion of the business.

Q. 682. Do you know whether or not any books of account were kept by your father in regard to his business prior to his death, covering the year 1895 and subsequently?

A. No, I do not.

Q. 683. Do you know whether any books of account were kept at all?

A. I don't think he kept any personal books so far as we could find out. We looked for other matters and I believe most of it was done with his corporation business.

Q. 684. That is, the accounts were kept on the books of Lewisohn Brothers?

A. I believe that is the way they were kept. I don't know.

Q. 685. Now are those books of Lewisohn Brothers in your possession?

A. No, we have nothing to do with the Lewisohn Brothers corporation.

Q. 686. Who has to do with the corporation?

A. I believe that was sold out to the United Metal Selling Company; some arrangement was made, I believe, that Lewisohn Brothers corporation was sold out to the United Metal Selling Company, so that they do practically the same thing.

Q. 687. Do you wish to be understood as testifying that all the books relating to all the business that was done by Lewisohn Brothers was sold out to the United Metal Selling Company?

A. No, I am not in a position to know just how that was arranged. I had nothing to do with it.

Q. 688. Do you mean to say that the corporation of Lewi-
681 sohn Brothers delivered its books, and turned over its books of account in which the private accounts of your father were kept, to the United Metal Selling Company?

A. I really could not say. I don't know. I had nothing to do with that company.

Q. 689. Then you do not wish to be understood as testifying that that was the fact?

A. No. Of my own knowledge and belief the amount of his private—we can't find that any private books of his were kept: all the records we have are here, these copies of certain letters and different things.

Q. 690. Then you did direct the search to be made for private books of account containing his transactions, did you?

A. I told this clerk to look for books and papers in regard to the Old Dominion or any books that might by any chance have any statements in them regarding the Old Dominion transactions, and I gave him the dates and full particulars, and showed him what we were asked to produce, and he made this search, and whatever he got out was turned over to Mr. Lauterbach.

Q. 691. When you turned them over to Mr. Lauterbach did you accompany the papers which you sent him by a letter?

A. Yes, we told him we enclosed the letters that we found in the Old Dominion matters.

Q. 692. And in the letter you recited the letters which you enclosed, did you not?

A. I believe my brother signed the letter that was sent to Mr. Lauterbach.

Mr. LAUTERBACH: I never got such a letter. With the second batch I did get such a letter, but I don't recall whether he sent me a letter with the first batch or not.

Q. 693. Do you wish to be understood as testifying that the books of the corporation of Lewisohn Brothers are not in the possession of yourselves as executors of the firm of Lewisohn Brothers?

A. Yes, we have nothing whatsoever to do with those books.

Q. 694. How do you know you haven't those books in your possession?

A. We know what books we have got in our office.

Q. 695. How do you know that these books are not among the books in your office?

A. Because we have not been able to find them.

Q. 696. Have you made any search whatever for the books of the corporation of Lewisohn Brothers?

A. Yes, we have made a search.

Q. 697. I am asking you whether you did, not what "we" did?

A. Our firm did.

Q. 698. Have you made personally any search whatsoever for any of the books of account?

A. No, I have not made any search for any books of account.

Q. 699. Why not?

A. Because I was not in a position to find them. I had one of my clerks try to find them who knew how to do it. I would not really know where to look to find them.

682 Q. 700. What clerk did you request to look for them?

A. I requested our clerk Ferdinand Rahaeuser to get all the letters and papers under the direction of our cashier, Mr. E. C. Westervelt. I told him the whole situation of affairs, and asked him to look into it himself, and see if he could not ferret out these books.

Q. 701. Whom did you tell that to?

A. I told that to these two clerks.

Q. 702. That is, you told that both to Rahaeuser and Mr. Westervelt?

A. Yes, sir.

Q. 703. Were they together when you told them that, or were they separate or apart?

A. I don't remember. I may have spoken to them singly.

Q. 704. Which one of these did you request to make the search for the books, or did you request both of them to make search for the books?

A. I believe I told Westervelt about the books, and I am pretty sure I also told Ferdinand to get the books as well as the papers. I know I told him about the letters and all that, and I am pretty sure I also told him to get out the books.

Q. 705. You mean Ferdinand?

A. Yes, sir.

Q. 706. Are you certain you requested Mr. Westervelt to search for the books which contained the transactions?

A. I told him to send as many people as were needed to go through the room and get all the papers, and that he should stay down there of an evening, and superintend the matter.

Q. 707. I am not referring now to the papers. I am talking about books of account in which the transactions of your father relating to Old Dominion matters were kept; whether they were personal books or Lewisohn Brothers' books, firm or corporation. Now did you request Ferdinand Rahaeuser to search for those books?

A. I believe I did.

Q. 708. What do you mean by "I believe"; that it is your recollection?

A. That is my recollection.

Q. 709. When, according to your recollection, did you make any such request of him?

A. It was a few days after the subpœna that we started to look.

Q. 710. What report, according to your recollection, did Ferdinand Rahaeuser make to you with regard to the books of account?

A. He said they brought the papers out and he could not find

anything else at that time, but he was going to keep on looking; that was the first thing; he looked quite a while and then said he could not find any books. You see you can't find books that are not in our office.

Q. 711. I am asking you now just what Ferdinand Rahaeuser reported to you. Have you stated fully what he reported to you after the first day?

A. He reported to me after the first day he had gotten
683 this batch of letters out and that there was no more there, but he would keep on continuing his search, and that, as far as any books were concerned, he could not find any that had any bearing on that matter.

Q. 712. You are sure he made that report to you, are you?

A. I could not swear whether he or Westervelt told me that,—but one or the other.

Q. 713. What did you do with these letters that he delivered to you on the first day?

A. I think I sent them over on the following day to Mr. Lauterbach.

Q. 714. When next did Ferdinand make any report to you as to the result of his search?

A. A couple of days later he went through the files again and brought out some more papers and said he would still continue and he kept that up for a few days and then we finally sent them over, and you finally asked us to look up some more papers and he got out as many as he could.

Q. 715. On how many different days, according to the best of your recollection, did Rahaeuser deliver any papers to you?

A. Well, I remember about,—I think, four different times he gave me papers.

Q. 716. And what, on each of these occasions, did you do with the letters?

A. Why, I would let them accumulate until he had gotten a lot and put them on my desk and then I turned them over to Mr. Lauterbach—sent them over.

Q. 717. What else did you do?

A. I didn't do anything else.

Q. 718. You have stated two occasions when you sent letters to Mr. Lauterbach. Are those the only occasions?

A. I don't recollect how many times we sent over these letters; that is a small matter.

Mr. LAUTERBACH: I got two batches.

Q. 719. Did you examine the letters which were handed you, and papers, by Ferdinand Rahaeuser?

A. No, I didn't make any examination. I looked through one or two. I didn't know anything about the matters. I had not been in the office in 1895 and I didn't think it would do any good for me to look at them, and I thought I had better send them to Mr. Lauterbach.

Q. 720. Did you ever have any conversation with Ferdinand Ra-

haeuser about the books other than after the first day when he reported to you?

A. Yes, sir, I told him to continue his search.

Q. 721. For books?

A. For books.

Q. 722. When did you tell him to continue his search for books?

A. After he had obtained this first batch of letters, I believe.

Q. 723. And did he ever after that report to you the result of his search for books?

A. Yes, he reported.

Q. 724. When?

A. A few days later.

684 Q. 725. What report did he make?

A. He reported that the papers he handed me were all he was able to find; that there were no books.

Q. 726. That there were no books of account?

A. No books of account.

Q. 727. Did you ever have any other conversation with him in regard to the search for books in which these transactions were contained?

A. No.

Q. 728. You stated you asked your cashier or bookkeeper, E. C. Westervelt, to make a search for books, either of Leonard Lewisohn, or Lewisohn Brothers, and of the firm of Lewisohn Brothers, that would contain transactions of your father relating to the Old Dominion Syndicate. Now can you tell us whether or not Mr. Westervelt made any search so far as you know?

A. He made a search.

Q. 729. When?

A. At that time when we got out these letters, he made a search for the books and reported there was nothing to be found.

Q. 730. Was that report made before or after Rahaeuser made a report that there were no books?

A. I guess it was some time before. I think I told him about it the same day. Whether I told them together or not I don't know.

Q 731. Did you have any subsequent conversation with him in regard to the books?

A. No.

Q. 732. You stated a while ago that they could not find any books because there were not any books containing the entries relating to Old Dominion matters in your possession. Do I understand, also, that you mean under your control?

A. I mean in my possession.

Q. 733. Either in your possession or under your control?

A. Yes, of Lewisohn Brothers.

Q. 734. Or individually?

A. Or individually.

Q. 735. Or as an executor of your father's estate?

A. Yes, sir.

Q. 736. Or in any other capacity?

A. Have no control over any of those books.

Q. 737. Do you mean also to say that you have no knowledge where any such books are?

A. I have no knowledge.

Q. 738. Haven't you heard where any such books are?

A. Never heard where any such books are.

Q. 739. Haven't you heard what has become of the books of Lewisohn Brothers for the period prior to your partnership of 1902?

A. No.

Q. 740. Do you wish to be understood as testifying you have no knowledge as to where any of those books are?

A. Yes.

Q. 741. And by "knowledge" you mean any information of any kind relating to it?

A. Yes, sir.

685 Q. 742. You have heard nothing whatever as to where any of those books are?

A. I have heard nothing.

Q. 743. From any person?

A. From any person.

Q. 744. In what books were transactions of your father for the time immediately preceding his death recorded?

A. I don't know.

Q. 745. Have you had no occasion whatever to inquire, in your capacity as executor, in regard to any transactions in which your father was interested?

A. No.

Q. 746. Your father was engaged in very extensive business transactions at the time of his death, was he not?

A. Well, I don't know that there was anything very extensive,—one or two little things.

Q. 747. Is it not a fact that your father was interested in very large business transactions?

A. Yes; he had been.

Q. 748. For some time prior to his death?

A. He had been some time before,—a good while, but not right before. There wasn't anything very large except his coffee business.

Q. 749. What do you mean by "very large"?

A. I mean that he had to do himself. He had large interests, like holding various stocks of corporations that were being run. He was president of the United Metal Selling Company; that was practically his business; that was practically taking over his old business of Lewisohn Brothers, selling copper on commission and handling the products of these different companies.

Q. 750. He was interested in other transactions also, was he not?

A. In various corporations he had large interests.

Q. 751. What corporations?

A. I don't know what this has to do with it.

Q. 752. What corporations was he interested in?

A. Different corporations.

Q. 753. Go ahead; answer what they were.

A. United Metal Selling Company and a lot of small corporations.

Q. 754. Give us the names of them.

A. I will give you a few. He was interested in these different mining companies: do you want to know them?

Q. 755. Yes.

A. Tamarack, Osceola, Feather River Exploration Company, Raritan Traction Company, Middlesex Real Estate Company, Tennessee Copper Company, Utah Consolidated Gold & Copper Mining Company. The coffee business was about the only business that he really had to attend to himself at the time of his death. The other things were corporations he was heavily interested in.

Q. 756. His interests in all these corporations amounted to many millions of dollars, did they not?

A. I believe they did.

686 Q. 757. Do you wish to be understood as testifying there were no books in which his interests in these various concerns were recorded?

A. No, I believe he had some books that he put these things in; we had nothing to do with them, my brother or myself.

Q. 758. I asked you whether there were not books in which the interests of your father, the individual interests of your father, were recorded, and I understood you to testify there were no such books?

A. There were such books at the time—I mean there were no such books, to my knowledge, previous to the time I went in the firm.

Q. 759. Were there any such books at that time?

A. There were books where he kept an account of what stocks he held, of course.

Q. 760. Those books were not confined to what stocks he held, were they? They were confined principally to all his individual interests?

A. They were confined to the different corporations, so far as I can remember, and what his holdings were in each of them.

Q. 761. Where were those books?

A. Those books were turned over to the executors of the estate,—to my brother and myself.

Q. 762. And they are now in the possession of the executors?

A. They are in our possession still; they are in liquidation, but most of these books have been turned over.

Q. 763. Have you ever examined those books?

A. I have been over them, yes.

Q. 764. You have seen those books?

A. Yes, sir.

Q. 765. How many of them are there?

A. There is one book, I believe, a stock book.

Q. 766. A single book, is it?

A. A stock book,—his whole set of books; he certainly had a set of books when I was there, stock book and ledger.

Q. 767. Is that all?

A. Probably a cash book and journal, that is all; four books, they had from the time we went in.

Mr. HEMENWAY: Are these books of the firm of Lewisohn Brothers; they are books of the firm of Lewisohn Brothers of which your father was a partner, and you and your brother members of the firm?

WITNESS: Yes.

Q. 768. Do you mean to say the only books that came into your possession are the books of Lewisohn Brothers?

A. Yes, only the books of Lewisohn Brothers.

Q. 769. And that all these entries you are now referring
687 to are entries in the books of the partnership which began when you became a member on January 1, 1902?

A. I don't know; they may have been started before; whether when we just began or not I don't know. My brother attended to the books.

Q. 770. These books which you are testifying about are in your possession?

A. Yes, sir.

Q. 771. What is the earliest date that appears in those books?

A. 1901, I believe.

Q. 772. When did you last examine those books?

A. I have not made any examination.

Q. 773. Will you examine that set of books to which you now refer and prepare yourself to testify as to what the date is, and whether or not in those books there are any entries relating to the Old Dominion Syndicate; and will you also, when you examine those books, see whether the ledger, journal, and cash book appear to be entirely a new set of books, or whether they refer, either by transfers or balances, or by the numbers, to a series of which there were books preceding them?

A. I will.

Q. 774. These books you have referred to as to which you have now testified, you have referred to frequently, I suppose, in your capacity as executor, haven't you?

A. No, I have not.

Q. 775. What do you mean by "frequently"; what number of times?

A. I have turned them over; we have had the accountants to make out the accounts.

Q. 776. Who are the accountants who have made out the accounts in connection with these books?

A. We have several accountants working in the office; they do work in our different companies like the United Metal Selling Company; they have a regular audit department, and in our coffee department we use Deloitte, Dever & Griffith; but for small matters we use one of the auditors of the United Metal Company.

Q. 777. Who is the expert accountant you use on your books?

A. On all our books we usually use Deloitte, Dever & Griffith, a firm of chartered accountants.

Q. 778. I am asking you now who this particular bookkeeper of

the United Metal Selling Company was who has acted as bookkeeper for you in connection with the estate?

A. In connection with the estate I believe we had Arthur Stoneham; he was formerly connected with the firm of Deloitte, Dever & Griffith; he is our accountant for the estate.

Q. 779. According to the best of your knowledge, has any inspection been made by any one in regard to entries in any books of any business with which your father was connected concerning
688 his transactions in connection with the Old Dominion Company, Old Dominion Syndicate, and the acquisition of this property in connection with Mr. Bigelow?

A. Yes, what I said before. I told Mr. Westervelt to see what he could find in that direction.

Q. 780. You asked Mr. Westervelt to look for books according to your testimony?

A. Yes, and I told him at the time to look in the books and see if there was any account regarding the Old Dominion. We asked him to look separately for Old Dominion books because I didn't believe there were any; I thought they were in the ledger that was used at that time, and we could not find any 1895 or 1896 ledger, for I am pretty sure my father did not keep any separate books on those things; no particular books on those different companies; he put it all in the different companies, and if it is to be found, it is to be found in the old ledger; I don't know in whose hands it is now; but whether we can find these different accounts with this syndicate and this corporation I don't know.

Q. 781. What did Mr. Westervelt report to you in regard to the books containing those entries?

A. He reported he could not find any.

Q. 782. How long has Mr. Westervelt been in your employ?

A. He has been in my employ since last May; since our new firm started.

Q. 783. Was he previously to last May connected in any way in business with Lewisohn Brothers or your father?

A. Yes, I believe he was with my father before that for I don't know just how long; I could not say; three or four years probably. I know he was up at Fulton street when I was there, and that is about three, four, or five years ago.

Q. 784. And in what capacity was he employed by your father?

A. At that time, I believe, he was just stock clerk.

Q. 785. And what subsequently?

A. Subsequently, he was made a sort of manager of the office, to look after the clerks and books and cashier.

Q. 786. And continued in that capacity?

A. Still in that capacity.

Q. 787. Who else, so far as you know, has access to papers or books in your possession as executors, or individually, or members of the firm of Lewisohn Brothers during the last year?

A. No one would have access except the executors of the firm of Lewisohn Brothers, my brother and myself.

Q. 788. Do you mean that nobody has had physically any oppor-

tunity of seeing any of these papers or books, or that nobody had any right?

A. Nobody had any right. They may have broken in; I don't know.

Q. 789. Without breaking in; I suppose, then, there is no opportunity of getting in without breaking in?

A. I don't believe so; I believe the door is locked.

689 Q. 790. What was done with the keys?

A. I believe this is the stationery room; the keys are in charge of Ferdinand, I guess; I mean either one of the boys have the keys.

Q. 791. So far as you know, has anybody made an examination of the files, and books and papers, during the last year other than the examination made by Ferdinand Rahaeuser, under your directions within the last few weeks?

A. No, I believe there has been nobody in that room except Ferdinand, and I don't know how many boys they used for the purpose, but I told them to take as many as they wanted. Previous to that I don't believe we had to send anybody in there.

Q. 792. Do you know whether anybody aided Rahaeuser in his search?

A. I don't know.

Q. 793. Do you know whether or not Mr. G. M. Hyams of Boston has been here during the period of the search?

A. I believe I have seen him around at different times. He is usually in New York, and when he comes to New York, he usually comes in our office; he is here once in two weeks or so.

Q. 794. Is that all?

A. I don't know. We have a direct business with him. I only see him up on the same floor. I see him flitting in and out of the office once in a while, and he stops to see us for a few minutes, but that is all.

Q. 795. Has he, so far as you know, seen any of the letters or papers which related to the Old Dominion matters?

A. I don't know as he has seen any of the papers, that is, that came out of our office; I don't see how he could very well see them.

Q. 796. Is it your best recollection that he has not seen any of these papers?

A. So far as I know, I don't think anybody has except Westervelt, Ferdinand, or the boys they employed in getting them out.

Q. 797. Is it your best recollection that Mr. Hyams has not seen any of the papers or books, or made any investigation or search for any of the papers or books relating to the Old Dominion transactions?

A. He has done nothing in our office regarding the papers.

Q. 798. So far as you know?

A. So far as I know.

Q. 799. And you have had no consultation with him in any way regarding the matter?

A. Nothing of Old Dominion. I have talked to him a few minutes about a suit which had been started here.

Q. 800. Aside from that reference to the suit, you have had no talk with him whatsoever on this matter?

A. No, none whatever.

Q. 801. You are absolutely certain of that, are you?

A. I am certain I have had nothing to say to him regarding anything about the suit.

690 Q. 802. Or he to you?

A. He didn't say anything to me.

Q. 803. And he has not made any search for papers or examined any papers?

A. Not in my office he has not.

Q. 804. I mean the office of Lewisohn Brothers.

A. That is what I mean; that is the same thing as my office.

Q. 805. It appears from the examination of the papers which have been produced by you through Mr. Lauterbach, you and your co-executor through Mr. Lauterbach, that there are not among the papers which he has produced here on February 4, or February 10, a single letter from Albert S. Bigelow, or from J. Morris Meredith, or from G. M. Hyams. Are you able to give any explanation for the failure to produce any letters from any of those parties?

A. I don't know of any reason why.

Q. 806. It also appears from examination of such letters that were produced that there were received, apparently by your father or Leonard Lewisohn, a large number of letters relating to those matters which have not been produced. Are you able to give any explanation for the failure to produce the other letters which appear to have been received, as being referred to in the correspondence which has been produced?

A. No.

[Further examination of this witness suspended for the present.]

ALBERT LEWISOHN, sworn for plaintiffs.

Direct examination by Mr. BRANDEIS:

Q. 807. Give your full name, age, and occupation.

A. My name is Albert Lewisohn; age, thirty-seven; occupation, merchant.

Q. 808. You are one of the executors of Leonard Lewisohn?

A. Yes, sir.

Q. 809. Have you, as executor of Leonard Lewisohn, or otherwise, made any search for any of the papers and books called for in the subpœna which was served upon you?

A. Not I personally; I don't attend to that part.

Q. 810. What did you do, if anything, in reference to having a search made?

A. Mr. Fred Lewisohn attended to that. We left that part of Lewisohn Brothers' business to him. I attend myself to the coffee business; each one of us cannot attend to all details.

Q. 811. What, if anything, do you know in regard to the

691 books and papers of Leonard Lewisohn's estate?

A. I don't know anything much about the details. We

have our expert, who attends to that part, together with Mr. Frederick Lewisohn.

Q. 812. Who is the auditor or expert?

A. Mr. Stoneham, from the Metal Selling Company.

Q. 813. Have you yourself any knowledge whatever in regard to any papers or books belonging to the estate?

A. I have none whatsoever.

Q. 814. Have you been consulted in any way in regard to any one having access to the books or papers?

A. I have not.

Q. 815. Do you know Mr. G. M. Hyams of Boston?

A. Yes, sir.

Q. 816. Has he been here within the last three or four weeks?

A. I believe so. I have not seen him; but I am, as I say, in an entirely different part of the world; I am in the coffee business.

Q. 817. Has there been submitted to you any papers as being the result of a search for books or papers relating to the Old Dominion matter?

A. No; I have not seen any papers.

Q. 818. Has any information been given to you with regard to any papers referred to in this subpœna which was served upon you?

A. No.

Q. 819. Has any information been given to you, by any one, in regard to them?

A. No.

Q. 820. Has Mr. Frederick Lewisohn or Walter Lewisohn reported to you with regard to the search which you were requested to make in this subpœna?

A. No; those are detail matters which I could not take up. We could not take up every detail in the estate matters.

Q. 821. As a matter of fact, you have heard nothing whatsoever from any one in regard to this matter of the books and papers that are called for in the subpœna?

A. I knew a search was made.

Q. 822. Who told you it was made?

A. I heard that from Mr. Fred Lewisohn.

Q. 823. When did you hear that?

A. A few days, or a week, ago.

Q. 824. Is that all you have heard with regard to it?

A. Nothing else.

Q. 825. What he told you?

A. Yes.

Q. 826. And he told you on that single occasion, did he?

A. I think so. I don't remember. I didn't pay any attention.

Q. 827. What did he tell you?

A. Only that you wanted papers, and they had to get some papers, and he would try to get all the papers they could.

Q. 828. That is all the information you have obtained?

A. Yes.

692 Q. 829. And you have made no effort on your own behalf to get any?

A. No; I have not been able to. I have not had the time to attend to any of those matters.

Q. 830. Do you know how the accounts—in what manner, or in what books, the accounts of Leonard Lewisohn, relating to transactions which he had during his lifetime, were kept?

A. I have no idea.

Q. 831. Have you, as executor, had occasion to refer to any books whatsoever relating to Leonard Lewisohn's transactions?

A. No, I have not. The experts and Lewisohn Brothers have attended to that part.

Q. 832. Have you never, in connection with this large estate and the very extensive interest of Leonard Lewisohn, had occasion to have any matters looked up in the books relating to his past transactions?

A. These are not matters for us at all.

Q. 833. What do you refer to?

A. I mean these details. We don't attend to those. As executor, I looked after the estate—after the main interests—to see that everything is in good order; and for that reason we took the expert in there. The business I am attending to is the coffee business, which takes a very large part of my time, as it is a very large business.

Q. 834. I ask you whether, as matter of fact, you have had occasion, as executors, to have any matters relating to Leonard Lewisohn's individual estate looked up? I mean those matters in which he was personally interested?

A. I don't look them up.

Q. 835. Did you have them looked up?

A. Not I personally.

Q. 836. You have had nothing looked up?

A. No; that is not in my line.

Q. 837. In whose line is it?

A. That was Lewisohn Brothers and Fred and the expert.

Q. 838. Frederick and the expert are the ones, are they?

A. Yes, the main ones.

Q. 839. Who else?

A. Nobody else.

Q. 840. You said the main ones?

A. I can't tell whether they had anybody else; they are the ones who have attended to it.

Q. 841. In the distribution of labor between the executors relative to Leonard Lewisohn's estate, who is it that has had the charge of matters relating to his personal investments and stocks in various companies?

A. I just mentioned the names, Mr. Fred Lewisohn and Mr. Stoneman.

Q. 842. In that distribution among the several executors of Leonard Lewisohn, which one, if any, has had charge of matters relating to the litigation brought against them concerning Leonard Lewisohn's connection with the Old Dominion syndicate?

A. Fred Lewisohn has taken charge of that.

693 Q. 843. Have you had anything whatever to do with the matter?

A. Nothing, except I am subpœnaed here.

Q. 844. You have also been sued as one of the executors?
A. Yes, sir.
Q. 845. Do you mean to say that in the conferences with counsel you have taken no part?
A. I have taken no part in this, because I don't know anything about these matters. I don't know anything about mining and would not know if I heard all about it.
Q. 846. In the litigation of a claim which has been brought against the estate, involving a million or two of dollars or more, do you mean to state that you have not discussed the matter at all?
A. No.
Q. 847. You have left that to one of the other executors?
A. Yes, sir.
Q. 848. And you have made no search of any kind, or been consulted with regard to the matter in any way?
A. No.
Q. 849. And you have not been consulted in any way?
A. No, sir; I could not be, because I would not know anything about it. I cannot be consulted for I don't know anything about these mining matters, and I have not had anything to do with any mining matters, and I would not know what was going on at all, so I don't think I could be of any good.
Q. 850. You might not know of transactions in the past, but you would know of things with regard to the present?
A. I do know.
Q. 851. It is things with regard to the present about which I am asking you, such as the request which is contained in the subpœna which was served upon you, to produce here certain books and papers relating to Old Dominion matters.
A. I am satisfied that search was attended to.
Q. 852. But you have not given any direction with regard to attending to it?
A. Each one cannot give directions; besides I have not got time for it; if one party attends to it, that is sufficient.

Mr. BRANDEIS: I will suspend the examination of this witness for the present.

(By Mr. LAUTERBACH:)

Q. 853. When the subpœna was served on you you spoke to Mr. Fred Lewisohn about it, did you not?
A. Yes, sir.
Q. 854. And he agreed to do what he could to comply with the subpœna?
A. Yes.
Q. 855. And you rely on that?
A. Yes, sir.

(By Mr. BRANDEIS:)

Q. 856. You mean you have relied upon it?
A. Yes.

[Adjourned to February 24, at 10 A. M.]
[Next Plaintiff's Exhibit for Identification, 162.]

694 NEW YORK, *February* 24, 1903—10 a. m.

[Parties met pursuant to adjournment.]

Present: Mr. Webb, Mr. Brandeis, Mr. Hemenway, and Mr. Lauterbach.

[Mr. Lauterbach produced another batch of letters, etc., which are marked for identification 162 to 230, both inclusive.]

FERDINAND RAHAEUSER, recalled:

(By Mr. BRANDEIS:)

Q. 857. In addition to the letters, copies of letters, and papers produced at the sessions of February 4 and February 10, of which a list is to be annexed to your deposition and marked A, you have now produced, through Mr. Lauterbach, certain letters and documents, and copies of letters, of which a list is to be annexed to your deposition marked B. I ask you whether these letters, telegrams, and copies of letters enumerated in the list marked B, and now shown you, were found by you upon the search made since the adjournment of your examination on February 10?

Mr. HEMENWAY: So far as letters have been produced for the inspection of counsel, I do not understand that a single one of those letters has been offered in evidence, therefore I do not see the propriety of adding a list of letters at the present time. Whenever these letters shall be offered in evidence, I, as counsel for Mr. Bigelow, shall be entitled to examine them, and if I have any objection to their admission, to have that objection noted. At the present time, those letters have not been submitted to my examination.

Mr. BRANDEIS: They have been produced by your associate.

Mr. HEMENWAY: They have been produced by Mr. Lauterbach as counsel for the witnesses who have been requested to find and furnish certain papers; they have not been produced to be put in evidence as yet, and are subject to all legal objections.

Mr. BRANDEIS: I now offer you all these papers for your inspection. Do you wish me to suspend while you are examining them? I supposed you had looked them over or I would have handed them to you as I went along.

Mr. HEMENWAY: If you are going to ask him about them, of course.

Mr. BRANDEIS: I am merely going to ask him with regard to the search.

Mr. HEMENWAY: All right, then, go ahead.

Q. 858. Will you state fully what way you proceeded and to what extent you made a search for additional papers in pursuance
695 of the request made before the last adjournment?

A. I looked for the letters you requested me to look for, any other papers relating to Old Dominion; looked through the files for them.

Q. 859. When did you begin that search?

A. Oh, a day or two afterwards.

Q. 860. And on how many different days did you continue that search?

A. Practically every day except Sundays.

Q. 861. From the time you commenced until when?

A. Until last night.

Q. 862. And how much time did you spend each day in making that search?

A. I can't exactly answer that question, what time. I did it with my other work up to 5.30.

Q. 863. And how much time after 5.30?

A. At 5.30 we closed shop. I went home.

Q. 864. How much time did you spend each day on this search, approximately?

A. That I can't answer, for I didn't take notice of the time.

Q. 865. How much time did you spend yesterday in making this search?

A. From quarter after one until practically 4.30.

Q. 866. Did you spend as much or more than that on the other days?

A. I could not very well; yesterday was a holiday, and I devoted my time to it, other days I did other work.

Q. 867. Now on the other days did you spend as much as an hour a day?

A. Yes.

Q. 868. Did you spend as much as two hours a day?

A. Might some days, other days maybe not.

Q. 869. In the time which you did spend in making that search, how did you proceed; did you take up each single box of these seventy-odd boxes, if there were as many as that, as you have described before?

A. Each box, yes, sir.

Q. 870. And how many of the whole lot of boxes did you examine in this time?

A. Examined all of them.

Q. 871. How many of them did you examine yesterday?

A. Examined the telegram file yesterday.

Q. 872. Is there a separate file kept of telegrams?

A. Yes.

Q. 873. How many different boxes of telegrams?

A. Four.

Q. 874. And do all these telegrams relate to Old Dominion?

A. In the boxes?

Q. 875. Yes.

A. No, sir, all business.

Q. 876. Did these four boxes of telegrams comprise all the telegrams received during the year 1895?

A. Yes, sir.

696 Q. 877. You examined the full file for that year?

A. What do you mean by "examined the full file"?

Q. 878. The telegrams.

A. For telegrams from Hyams, Keyser, and all these different people you requested me to look for.

Q. 879. What other papers did you look for?

A. No other ones.

Q. 880. You did not?

A. No.

Q. 881. I mean give me a list of those you did look for.

A. Keyser, Stern, Hyams, Calhoun, Bigelow, and all those others I was told to look for.

Q. 882. Give me a list of them.

A. Just repeat the list.

Q. 883. No, I won't.

A. For instance, Bigelow, Calhoun, Hyams, Keyser, Meredith Spencer, Stern, Simpson, Gaston. I think that is about all.

Q. 884. What search did you make on Saturday, the 21st?

A. Incoming letters.

Q. 885. How many files of letters did you examine at that time?

A. I didn't take a record of them Saturday.

Q. 886. Don't you remember how many?

A. No, I do not.

Q. 887. Were all the incoming letters that you examined at all examined on Saturday, the 21st?

A. No, sir.

Q. 888. On what days other than February 21 did you examine files of incoming letters since you recommenced your search, after February 10?

A. Saturday, I believe, was the first day. I started in at that time.

Q. 889. Saturday, the 21st?

A. Yes, sir.

Q. 890. How many boxes of incoming letter files did you examine on Saturday, the 21st?

A. I can't answer that question.

Q. 891. Approximately, how many?

A. I haven't any idea.

Q. 892. What time did you leave the office on Saturday, the 21st?

A. About 7.15.

Q. 893. When did you begin your search on Saturday, the 21st?

A. That I can't exactly answer; it must have been about twenty minutes after one when I got in the office on Saturday. I think it was about that time.

Q. 894. You got there?

A. Yes; went out again, came back, and then we started to search for the letters; what time it was I don't know.

Q. 895. That is, you started to search after you came back to the office?

A. Soon after I came back.

Q. 896. You said you came to the office about twenty minutes past one and then went out. Did you make any search between the time you came there and the time you went out?

A. No, sir.

697 Q. 897. When did you go out, approximately?

A. That I can't say.

Q. 898. As nearly as you can remember.

A. I didn't take notice of the time.

Q. 899. Was it an hour or two hours after you got to the office?

A. That I could not say.

Q. 900. What did you do between the time you got there, twenty minutes past one, and the time you went out?

A. Talked.

Q. 901. Haven't you any idea whether it was half an hour or an hour or two hours before you went out?

A. No, I have not.

Q. 902. How do you account for your extraordinary lapse of memory from the 21st to the 24th?

A. What do you mean by "extraordinary lapse of memory"?

Q. 903. If you can't remember from Saturday, the 21st, until Tuesday, the 24th, whether or not you were in the office, between your coming and going out, half an hour or an hour or two hours, I should call that an extraordinary lapse of memory, wouldn't you?

A. I don't know; there were some of the boys there, and I didn't take notice of the time.

Q. 904. You have no recollection whatsoever as to the time that you spent in discussion with them?

A. No, I have not.

Q. 905. How long did you stay out?

A. I can't say.

Q. 906. Was that half an hour or an hour or two hours; which?

A. I don't know how long I stayed out.

Q. 907. Have you no recollection whatsoever in regard to it?

A. No, sir, we were talking.

Q. 908. When you went out were you talking?

A. Yes, sir.

Q. 909. Where did you go when you went out?

A. I must not answer that question, must I?

Q. 910. Did you go to do something when you went out, to perform some duty?

A. I don't know whether you would call it duty or not.

Q. 911. How long were you gone; haven't you any idea as to how long you were gone?

A. No, sir.

Q. 912. No idea as to when you came back?

A. I don't know exactly what time I came back.

Q. 913. I haven't asked you exactly; have you any idea as to when you came back?

A. Oh, maybe about half past three or quarter to four; that is as near as I can get at it. I won't say that positively.

Q. 914. After you came back did you immediately begin to make your search?

A. Yes, sir.

698 Q. 915. And did you continue without interruption from that time until you left?

A. There might have been one or two minutes' interruption, but it wasn't much; the office force had all gone home then.

Q. 916. Did anybody aid you in the search?

A. No, sir.

Q. 917. You were there absolutely alone, were you?

A. Yes.

Q. 918. According to this testimony you are now giving, you searched on Saturday about three hours. Why didn't you mention that before when I asked you how much time you had searched on any day?

A. I didn't take note of the time. I did it every time I had an opportunity. Saturday is a sort of holiday with us.

[No Q. 919.]

Q. 920. When you searched Saturday during this time, about how many boxes of incoming letters did you look through?

A. That is a hard thing to say. I never kept record of how many boxes I looked through.

Q. 921. What period of time did you cover in the search which you made?

A. What period of time?

Q. 922. Yes.

A. Incoming boxes they run, you may say, from January to June, and July to January, alphabetically arranged, like A to Bl; they cover a period, that is, of the letters coming in, from A to Bl; any of those names would be filed in that file, and they would usually cover one year, A to Bl, and Bo to By; that is the way the files run alphabetically, letters coming in like Blackford or some other name like that, would be under Bl. If it was before June it would be put in that file; and if it was after, it would be put in the other file. Then there might be A to Bl; there might be six or eight files of those, according to what letters came in, and then we would have Bo to By.

Q. 923. Do you wish to be understood as testifying that there was a single file covering A to Bl letters received between January 1 and July 1, 1895?

A. No; I say the boxes came in that way. If there is an amount of letters that require more than one month's file, we transfer them for one month; but for a general period, they are not filed more than, say, twice a year, I believe.

Q. 924. What do you mean by being "filed twice a year;" you say you examined a box of incoming letters, that these letters were arranged alphabetically A to Bl: is that correct?

A. Yes, sir.

Q. 925. Now are these letters arranged also chronologically according to date?

A. No, not in the files; I can't say that.

Q. 926. In any one file of letters covering what dates do
699 letters A to Bl appear; from what date to what date do you keep in a single box letters A to Bl?

A. May or June.

Q. 927. From what date to what date?

A. From January 1 to May or June.
Q. 928. In one box?
A. Yes, sir.
Q. 929. A to Bl?
A. Yes.
Q. 930. And Bl to Bo also in one box from January to June?
A. Not Bl, Bo to By, I think they run.
Q. 931. One box from January to June?
A. I think so.
Q. 932. When is the next box?
A. Take June on.
Q. 933. Until December 31?
A. Might be until December 31.
Q. 934. You are sure of this statement you are making now, are you, that outgoing letters A to Bl, or Bo to By, cover a definite period of four or five months, do they, at least?
A. Sometimes only a month and sometimes two months; sometimes six months and other times four months.
Q. 935. Take A to Bl; that covers a period of four or five months?
A. I think so, yes.
Q. 936. How large a part of the alphabet did you cover in your search on Saturday, the 21st?
A. I haven't any idea of that.
Q. 937. Did you search through all of the boxes for all of the letters of the alphabet?
A. Those letters I was requested to search for, Old Dominion letters.
Q. 938. I assume you have searched for Old Dominion letters, but I ask you whether, in that search which you made for Old Dominion letters, you have covered all the letters of the alphabet?
A. I searched for the letters I was requested to search for, incoming letters from any of those people, as I said before, Stern and those people.
Q. 939. Bigelow?
A. Yes, Bigelow and Hyams.
Q. 940. And Meredith?
A. If there was any incoming letter that related to any party I would look for that also.
Q. 941. Did you cover in your search all of the boxes relating to these letters received for the whole year 1895?
A. Yes, sir.
Q. 942. Are you not able to state approximately how many boxes you examined?
A. No, I could not give account of that. I have no idea about that.
Q. 943. What did you do in your search on Friday, the 20th?
A. Outgoing letters.
Q. 944. Was that the first day on which you examined the outgoing letters,—by which I assume you mean the copies of letters?
A. No, that was not the first day I looked for them.

700 Q. 945. What did you do on Friday, the 20th?

A. I think I was finishing up the outgoing letters.

Q. 946. When you say "finishing up the outgoing letters," what did you look for?

A. The letters relating to Old Dominion that I could find: the names I was requested to look for.

Q. 947. Did you examine every file?

A. Yes, sir.

Q. 948. Now were those letters filed in the same way as the incoming letters?

A. What do you mean by "the same way;" alphabetically arranged?

Q. 949. Yes, alphabetically and chronologically.

A. Yes, sir.

Q. 950. In precisely the same method?

A. Yes—no, pardon me, those outgoing letters were filed A to Z, and they cover a period of maybe a week or two weeks, say from January 1 to January 10, January 11, the 14th or 15th, and so on.

Q. 951. That is, they are filed differently from the incoming letters, are they?

A. Yes, sir.

Q. 952. Then you examined every single file, did you, of the outgoing letters?

A. Every file of outgoing letters.

Q. 953. Covering the year 1895?

A. Yes, sir.

Q. 954. What part of that year did you examine on Friday, the 20th?

A. I don't know. I think I went through them all to a certain extent. I haven't any idea I examined any special one, so far as I can remember.

Q. 955. Do you mean to say that on Friday, the 20th, you looked into every one of the boxes of each one of these files covering perhaps a week?

A. I think I did, yes, sir.

Q. 956. Why did you?

A. To see if I left any in there or made a mistake—missed a box or two.

Q. 957. That is, you think you looked into every box containing every file of outgoing letters for the year 1895, do you mean, you did on Friday the 20th?

A. Yes, I think I did.

Q. 958. Do you mean to say that that was the only search you made?

A. On Friday, the 20th?

Q. 959. Yes.

A. No, sir.

Q. 960. What was it you did on Friday, the 20th; you certainly did not read all the outgoing letters on Friday, the 20th?

A. No, looked to see if there were any letters in there.

Q. 961. When you looked to see them you had to read them, didn't you?

A. Some of them.

701 Q. 962. Had you read any of them before?

A. I don't think I had. I started to read them, and if they related to Old Dominion or Stern or any of those people, took it out and laid it aside.

Q. 963. And you did that on Friday, the 20th?

A. No, I only reviewed to see if I left any in there.

Q. 964. How much time did you spend in that review on Friday, the 20th?

A. I can't say. I think I started in after lunch.

Q. 965. Was that a day when you spent as much as an hour on it?

A. I could not tell you. Friday is a pretty busy day running at the telephones and looking through the letters every time I had an opportunity.

Q. 966. What did you do on Thursday, the 19th, so far as searching for letters went?

A. The same thing.

Q. 967. You did not review it on Thursday, the 19th?

A. No, I looked through the files.

Q. 968. Through what?

A. Files.

Q. 969. What files?

A. Those I opened; it depended upon how far I was.

Q. 970. Did you proceed chronologically in making the search?

A. No, I can't say I did at the start-off.

Q. 971. How did you proceed?

A. All the files I had them carted or carried over to my room.

Q. 972. What room is that?

A. Telephone room, and put them down, and I would take them up every time I had occasion.

Q. 973. How do you know you examined them all?

A. I knew on Friday, the 20th.

Q. 974. How?

A. I had them alphabetically arranged from January 1 to the end of the year, one after another.

Q. 975. Sure?

A. Sure.

Q. 976. What did you do with the letters and copies of letters which you took out of these files?

A. Put them on the side and then put them on Mr. Lewisohn's desk.

Q. 977. Which Mr. Lewisohn?

A. Mr. Fred Lewisohn.

Q. 978. On what day did you put them there?

A. Friday I put some there. I think I put them there as I found them; then after a while I would go and get the letters and put them on my desk.

Q. 978½. Get them from where?

A. Mr. Lewisohn's desk.

Q. 979. That is, you put them first on his desk?

A. After I found them, laid them aside and then put them on his desk.

702 Q. 980. Do you mean to testify that on each day you put them on Frederick Lewisohn's desk?

A. Not exactly each day.

Q. 981. What did you do on the days which you did not; what did you do with the letters you got out of the files?

A. Put them in my desk.

Q. 982. In your own desk?

A. Yes, sir.

Q. 983. Was there any on which you did not get some letters?

A. I can't recall that.

Q. 984. Do you recall any day on which you did not get some letters?

A. I can't say yes or no to that very well.

Q. 985. You certainly can say whether you recall any day on which you did not find some one or more letters?

A. No, I can't say that I can to that extent say yes or no. We had a very active market down below and that kept me busy, and I was thinking of that also.

Q. 986. Did you keep any list of the letters which you found?

A. No, I did not.

Q. 987. Did you keep any account of the letters you found or delivered to Mr. Lewisohn?

A. No, sir.

Q. 988. Were the letters you laid on his desk fastened together in any way, or were they left loose?

A. No, they were not fastened.

Q. 989. Were they enclosed in an envelope, or left open?

A. Just laid flat on his desk.

Q. 990. Was that the last you ever saw of them after they were laid on his desk?

A. No, sir.

Q. 991. What else did you see of them?

A. I had them put together to send over to Mr. Lauterbach.

Q. 992. How many different batches of those letters did you send to Mr. Lauterbach?

A. One.

Q. 993. When was that?

A. Friday.

Q. 994. The 20th?

A. Yes, sir.

Q. 995. What was done with the letters you found on the 21st?

A. I have them here.

Q. 996. Did you produce them here this morning?

A. Yes, I brought them over this morning.

Q. 997. What had been done with those letters from the time you found them on the 21st until you brought them here?

A. In my desk.

Q. 998. Had Frederick Lewisohn seen those letters?

A. I put them on his desk this morning, when he requested me to take them over here.

703 Q. 999. In a copy of the letter of Lewisohn Brothers to Alex. J. Mayer, dated May 29, 1895, which is among the papers which have been shown you, and which were produced by Mr. Lauterbach this morning, there appears a memorandum in pencil, "We wrote to this effect but Faint has an exact copy in his private file under 'Old Dominion:'" was that memorandum on that copy letter when you found it?

A. Yes, that is Faint's writing. I will testify to that.

Q. 1000. It is Faint's writing?

A. Yes, sir.

Q. 1001. Now when did you find that copy of the letter?

A. That letter?

Q. 1002. Yes.

A. Yes, Friday or Saturday.

Q. 1003. Do you mean Friday, the 20th, or Saturday, the 21st?

A. Yes.

Q. 1004. Which, according to your best recollection, was it: Friday or Saturday?

A. Friday.

Q. 1005. What time on Friday?

A. I have no idea what time.

Q. 1006. Was it in the forenoon or afternoon?

A. Afternoon.

Q. 1007. When you took those letters to Mr. Lauterbach, what time was it?

A. When we sent them over to Mr. Lauterbach?

Q. 1008. Yes.

A. Maybe half past four or quarter to five.

Q. 1009. Did you deliver them to him in person?

A. No, sir, I did not.

Q. 1010. When you said you got them together to send to Mr. Lauterbach, do you mean you wrote him a letter enclosing them?

A. No, I just directed the boy to take the letters over to Mr. Lauterbach.

Q. 1011. Did you put them in an envelope?

A. No, I didn't put them in an envelope.

Q. 1012. Did anybody?

A. Eddy Middy might have, I don't know whether it was he or one of the other boys.

Q. 1013. And that copy of letter of May 29, containing the memorandum in Faint's handwriting, was among those that you sent to Mr. Lauterbach on the afternoon of Friday, the 20th, was it?

A. Yes, sir.

Q. 1014. Why didn't you send it to him then?

A. I don't know why.

Q. 1015. Didn't you say you sent to him on Friday all the letters and documents which you had found?

A. I believe I did.

Q. 1016. Why didn't you send this?

A. Why didn't I send that?

Q. 1017. Yes.

A. I don't know exactly why I didn't.

Q. 1018. There must have been some reason, must there not?

A. One of the reasons was Old Dominion wasn't on it; that is all.

Q. 1019. The fact that there was no Old Dominion on it
704 was a reason for sending it to him, not for withholding it?

A. I don't know where that file is; it is a lot of dirty work and tedious work.

Q. 1020. The fact that this was dirty work or tedious work, do you consider that a reason why you should not have sent to Mr. Lauterbach this letter of May 29, 1895, which you found on Friday afternoon?

Mr. HEMENWAY: He said he found it Friday or Saturday, and he thought Friday.

A. I may have wanted to show the letter to Mr. Lewisohn.

Q. 1022. Did you want to show the letter to Mr. Lewisohn?

A. Yes, I did.

Q. 1023. Why didn't you answer that before?

A. I don't know why I didn't answer it before.

Q. 1024. Which Mr. Lewisohn?

A. Mr. Fred Lewisohn.

Q. 1025. Do you realize that you are testifying here under oath?

A. Yes, sir.

Q. 1026. Now why didn't you state before the reason for your not sending this letter of May 29 to Mr. Lauterbach?

A. Repeat that question, will you?

Q. 1027. Question repeated.

A. I don't know why.

Q. 1028. Wasn't it because you wished to withhold that answer?

A. Withhold which answer?

Q. 1029. That you held it back in order to show it to Frederick Lewisohn.

A. Well, yes, I wanted to show it to him.

Q. 1030. Why didn't you answer that before when you were asked for the reason?

A. I can't answer that question very well.

Q. 1031. Do you understand that you were sworn to tell the truth, the whole truth, and nothing but the truth?

A. Yes.

Q. 1032. And do you realize also that if you fail in your oath it is perjury?

A. Yes, sir.

Q. 1033. Now I ask you again whether you can give any reason why, when I asked you the cause of your withholding this letter from Mr. Lauterbach, you said you did not know why, when you have since testified the reason why?

A. I can't answer that very well.

Q. 1034. What did Mr. Fred Lewisohn say when you handed him that letter of May 29?

A. I don't know as he passed any comments on it one way or the other.

Q. 1035. When did you see that next after the time you handed it to Mr. Frederick Lewisohn?

A. Maybe a minute or two.

[No Q. 1036.]

Q. 1037. When did you hand it to Mr. Frederick Lewisohn?

A. In the afternoon, before he was leaving.

705 Q. 1038. About 5 o'clock?

A. I don't know exactly what time he left.

Q. 1039. Did he give you any direction on leaving?

A. Direction with regard to what?

Q. 1040. Of any kind?

A. No, sir.

Q. 1041. When did you see Frederick Lewisohn next? After you handed him the letter of May 29, when did you next see him?

A. This morning, I believe.

Q. 1042. What time?

A. When he came in the office.

Q. 1043. Now what did you do with reference to searching for papers between the time when you handed that letter to Frederick Lewisohn and to-day when you came to this room to testify?

A. Didn't I tell you I looked for the files also, the incoming mail?

Q. 1044. Is that all you did?

A. Telegrams.

Q. 1045. Does that describe fully all that you did, or is there anything else that you did that you have not testified to?

A. No, not in regard to the search for the papers. I have testified all I know with regard to the search for the papers.

Q. 1046. Then you now testify that between Friday afternoon, the 20th, when you handed this letter of May 29, 1895, to Fred Lewisohn, and this morning, when you came here to testify, you have done nothing with reference to searching for any papers except what you have testified in answer to your previous questions this morning?

A. Yes, sir.

Q. 1047. Is that true?

A. I can't seem to catch that.

Q. 1048. What is that you can't seem to catch?

A. I believe I told you that I looked through all the papers I was requested to look for.

Q. 1049. Now the papers you have testified you had looked for, that you had searched for on Saturday; you said you searched for the incoming letters?

A. Yes, sir.

Q. 1050. And that was the only day when you looked for the incoming letters?

A. No, I don't think so. I believe I looked Sunday also.

Q. 1051. Sunday, the 22d?

A. Yes, sir.

Q. 1052. How much time did you spend Sunday, the 22d?

A. I don't know exactly the time I spent on Sunday, the 22d.

Q. 1053. Are you sure you were at the office on Sunday, the 22d?

A. Yes, sir.

Q. 1054. Didn't you state earlier in this testimony that you searched every day except Sunday?

A. No, I don't believe I did.

Q. 1055. Now I call your attention to Int. 850, "And on how many different days did you continue that search," and your
706 answer thereto, "Practically every day except Sundays," and ask you whether it is the fact that you did make a search on Sunday, the 22d?

A. Yes, sir.

Q. 1056. Now tell us what you did on Sunday, the 22d.

A. I think I finished up incoming letters.

Q. 1057. When were you at the office on Sunday, the 22d?

A. I think from about a quarter after one to 4.30.

Q. 1059. Did you do anything else besides finishing the incoming letters?

A. No, I don't think I did.

Q. 1060. Did you begin on the telegrams?

A. No, sir.

Q. 1061. What part of the incoming letters did you examine on Sunday, the 22d?

A. The part that I hadn't looked through before.

Q. 1062. What part was that?

A. That was the latter part of the year, the late numbers; or, at least, the alphabetical numbers. I don't know whether it was the S's or O's or what.

Q. 1063. You are sure you spent about three hours there Sunday afternoon?

A. Yes, sir.

Q. 1064. Looking through the incoming letters and nothing else?

A. I may have spent a minute or two with some of the boys.

Q. 1065. Who were there Sunday afternoon?

A. The cashier of the coffee department.

Q. 1066. What is his name?

A. Mr. Gibson, and I think Mr. Vilaret.

Q. 1067. Who is he?

A. Mr. Gibson's assistant.

Q. 1068. Did they aid you in the search?

A. No, sir.

Q. 1069. Have you now stated all that you did in the way of searching from the time you handed that letter to Mr. Fred Lewisohn on May 29 up to the time you came here to testify to-day?

A. Yes.

Q. 1070. Then you have never made any search particularly for this private file of Old Dominion papers referred to in that memorandum in Mr. Faint's handwriting on the letter of May 29?

A. I never knew where Mr. Faint kept his private files.

Q. 1071. Did you understand the question? I ask you whether you have made any specifiy search for that file?

A. No, I can't say that I did.

Q. 1072. You did not know that any such file existed until you found that memorandum on that letter, did you?

A. No, sir, I did not.

Q. 1073. What other letter did you hold back from Mr. Lauterbach, or other paper, on Friday, the 20th?

A. I don't know as there was any held back.

Q. 1074. Are you sure you sent him every letter that you
707 had found and copy of letter and paper, with the exception of this letter of May 29, 1895?

A. Yes, up to that time.

Q. 1075. Now what letters or papers that you found after Friday, after that talk with Mr. Lewisohn on Friday, the 20th, have you held back?

A. None.

Mr. BRANDEIS: It appears clearly from this witness' testimony that he has made no search for the private Old Dominion file.

[Mr. Lauterbach then instructs the witness to make further search for the private file referred to by Mr. Faint.]

Mr. BRANDEIS: I request the witness, in making this search, to make a memorandum of the exact time that he begins and the days and hours in which he is occupied in making the search for the file referred to; also to make a memorandum of each box or file of papers which he handles or examines in connection with making that search.

WITNESS: What do you mean by that? Make a record of each box I handle? You understand that I take a box in my hand the same as I take up anything else; you don't want me to make a record of that, do you?

Mr. BRANDEIS: Yes, every box you handle or examine in connection with making this search.

WITNESS: And do you want me to tell you what is in the box?

Mr. BRANDEIS: I want you to make a memorandum of it so that you can testify fully.

Mr. LAUTERBACH: And I also request you at the same time to bring any other papers which you may find relating to Old Dominion matters and covered by the previous request to search for papers already made.

[The witness, in the course of this investigation, is requested to examine all the files of letters and papers in the room referred to in this deposition as room 320, but which he now says is room 321, and also the other files of papers in the general office which the witness has referred to, and any other files of papers which may come to the witness' knowledge in connection with Lewisohn Brothers' business and the Leonard Lewisohn estate.]

WITNESS: What do you mean by "examine"?

Mr. BRANDEIS: Look through them and see whether they have

been examined and searched through heretofore by you, and
708 whether they contain the private files referred to as being Mr. Faint's private Old Dominion files, and whether they contain any other papers relating to these Old Dominion matters.

Mr. LAUTERBACH: Mr. Brandeis means to re-examine the whole thing in order to be absolutely sure you have gone over everything.

Mr. BRANDEIS: And make a memorandum of the search he has made and the time consumed in the search; and he is instructed to take any one to assist him; and if he takes any one with him we want the same record kept by that other person that he keeps.

[The examination of this witness is then suspended for the present, and it is consented that the deposition of Edward C. Westervelt may be taken with the same force and effect as if his name was mentioned in the order for examination herein.]

EDWARD C. WESTERVELT, sworn for plaintiff.

Direct examination by Mr. BRANDEIS:

Q. 1076. What is your occupation?

A. Clerk with Lewisohn Brothers.

Q. 1077. How long have you been connected with Lewisohn Brothers?

A. About four years.

Q. 1078. Were you connected with the corporation of Lewisohn Brothers?

A. No, only the firm.

Q. 1079. What was your occupation before you became connected with Lewisohn Brothers?

A. Clerk in Wall street with Walter C. Stokes & Company.

Q. 1080. How long had you been engaged in that business?

A. Do you mean the Wall-street business? Ten or twelve years.

Q. 1081. Are you a bookkeeper?

A. I am not.

Q. 1082. What is the nature of your duties as clerk?

A. Stock clerk. I am now cashier with Lewisohn Brothers, but I went there as stock clerk for Mr. Leonard Lewisohn. I merely ran the stock ledger.

Q. 1083. In the various corporations he was in?

A. No, memorandum of stocks bought and sold; New York stocks, sundry stocks.

Q. 1084. Sundry stocks bought and sold by him?

A. That was all, stock ledger; took charge of the securities, to see that they came in proper and see that they went to the vault.

Q. 1085. That is, the investments of one kind and another of Lewisohn Brothers that they made in stocks of different companies buying and selling?

A. Yes.

709 Q. 1086. Mr. Lauterbach has produced to-day what purport to be transcripts of accounts entitled "Old Dominion Syndicate," "Old Dominion Syndicate Subscription No. 2," and

"Old Dominion New Stock Subscription New A/c," containing in all seven double pages which have been marked 231, 232, and 233. Are these transcripts in your handwriting?

A. No; they are our bookkeeper's handwriting, Mr. C. Ebner. I don't know whether it is Charles or not.

Q. 1087. From what book or books are these a transcript?

A. Lewisohn Brothers' ledger.

Q. 1088. The corporation?

A. The old firm.

Q. 1089. The old corporation?

A. The old corporation.

Q. 1090. How is the ledger numbered?

A. I could not tell you that. I believe in years, it must have been the '95 and '96 ledger, 1895 ledger.

Q. 1091. And have they a separate ledger for each year?

A. That I could not tell you. I know nothing at all about their books.

Q. 1092. What investigation have you made in regard to this matter that enables you to testify at all?

A. None at all.

Q. 1093. I mean why you were singled out to testify in connection with these transcripts?

A. Of course you have had everybody in the office practically working on this matter, and of course I knew it was going on, and as I have been cashier since the first of the year, I naturally cleared out everything and started all around—I went over the old books in the office, and cleared out a lot of old matter to make myself perfectly familiar with everything, so that in case anything should turn up I would know everything about the place, and I found this ledger and I immediately took it in—I believe Mr. Lauterbach was there at the time, and I asked him if that had anything to do with that account, and he said yes, that he wanted this account, so I run through the ledger to see what was there, and told the bookkeeper to take everything out; and that is everything.

Q. 1094. And is that a transcript of these accounts which you found in the ledger?

A. Yes, of the ledger, and that is practically all I know about it.

Q. 1095. Are these the only accounts in that ledger?

A. The only accounts of the Old Dominion; that is all you want, isn't it, bearing upon the Old Dominion matters?

Q. 1096. Can you furnish me definitely a description of the ledger; I mean whether it was numbered or lettered, and the pages on which these accounts appear?

A. I could not do that without looking at the ledger.

Q. 1097. And that ledger you can get, can you not, and give it to us later?

A. Oh, yes.

710 Q. 1098. On my examination of the papers submitted as transcripts of the ledger, I find no reference in the transcripts to pages of any journal or cash book, or any other book from which these ledger entries are taken.

A. "To Cash," that is cash book.

Q. 1099. But I understand, according to the habits of bookkeepers——

A. [Interrupting.] I am not a bookkeeper.

Q. 1100. I understand, according to the habit of bookkeepers, it is customary to have some reference to another book, be it a day book, or cash book, or sales book, or stock book, whatever it may be, from which the items are entered in the ledger, and I call your attention to the absence of any such reference here, and ask you whether, in view of that fact, you are able to say these are exact transcripts of the ledger?

A. Well, not being a bookkeeper, I didn't do it. Of course, I gave it in charge of our head bookkeeper, and he has taken it off from the ledger, I suppose, I know where he states "To Cash," that of course that is the cash book.

Q. 1001. But you have no reference to any page as against that?

A. When you take off a transcript of an account you never do it.

Q. 1102. And you haven't done it in this instance?

A. No; and I never saw anybody who did it. Of course, it can be done.

Mr. BRANDEIS: I should like to have that done.

Mr. LAUTERBACH: If the ledger contains any such column, which, I suppose, it does, I will furnish it.

Q. 1103. Did you also find any other books relating to this period, 1895, besides the ledger?

A. I did not.

Q. 1104. What other books were there at the place where you found this ledger?

A. No others. I have explained the place where I found the book; found it in the stock.

Q. 1105. Was there nothing else in that stock?

A. Nothing at all.

Q. 1106. And you have never seen anywhere the other books making up the set of which that ledger is one?

A. I have not.

Q. 1107. How far back have you found the regular set of books in the place?

A. Our books go back to January 1, 1900.

Q. 1108. No books prior to that date there except this ledger?

A. None that I know of of any kind.

Q. 1109. Are there any private books of Mr. Leonard Lewisohn prior to January?

A. Not in our office.

Q. 1110. Or anywhere, so far as you know?

A. No, of course I could not tell.

711 Q. 1111. So far as you know you can't tell?

A. No, there are none.

Q. 1112. And you are certain there are none in the office under your personal charge?

A. I am very much so. Not in my office.

Q. 1113. What do you mean by "your office"?
A. Lewisohn Brothers' office, the general office.
Q. 1114. Have you made any search in any storeroom?
A. I have not.
Q. 1115. And you don't know where the old books are stored?
A. I do not.
Q. 1116. And haven't heard anything in regard to it?
A. Nothing except the controversy here among yourselves.
Q. 1117. I mean as to where they are stored.
A. No.

Mr. BRANDEIS: Can't this witness take back these papers, and have them completed?

Mr. LAUTERBACH: You mean the folios, etc., put in?

Mr. BRANDEIS: Yes.

WITNESS: When I spoke to the bookkeeper I didn't specify that, but I thought he would do it.

Mr. BRANDEIS: I wish you would, at the same time, also give us a description of the ledger on the back; state what it is,—for instance, No. 3, or whatever is on the back of it.

Mr. LAUTERBACH: It is 1895, I am sure.

Mr. BRANDEIS: And I wish in the mean time you would see if you can find any other book.

WITNESS: I never bother very much about them, and I can't tell.

Mr. LAUTERBACH: And also see if you can find any ledger, day book, cash book, or any other book to which these entries refer.

JESSE LEWISOHN, sworn for plaintiff.

Direct examination by Mr. BRANDEIS:

Q. 1118. State your full name, age, and present occupation.
A. Jesse Lewisohn; age, thirty-one; manager of the United Metal Selling Company.
Q. 1119. What was your occupation in 1895?
A. I was employed by Lewisohn Brothers.
Q. 1120. Was that a partnership or corporation?
A. In 1895? I really don't remember—it was a partnership, and was transferred to a corporation, now the date I don't re-
712 member, as I had been employed by the Lewisohn Brothers partnership before, and continued right through.
Q. 1121. And you continued to be employed by Lewisohn Brothers, first as a firm and then as a corporation, until the United Metal Selling Company was organized?
A. Yes.
Q. 1122. And you became manager of the United Metal Selling Company?
A. Sometime after, yes.
Q. 1123. The United Metal Selling Company took over the business of selling copper which Lewisohn Brothers were engaged in?
A. That is correct.
Q. 1124. And the concern was then, and subsequently, largely owned by the members of the Lewisohn family?

A. That is right.

Q. 1125. What was your interest in the firm or corporation of Lewisohn Brothers in 1895 at the time when the Old Dominion——

A. [Interrupting.] I had a percentage, my interest was on a percentage basis.

Q. 1126. Did you have an interest in the profits?

A. In the profits.

Q. 1127. And in the company, you had an interest in the stock?

A. Yes.

Q. 1128. What office did you hold in the corporation?

A. No particular office.

Q. 1129. You were one of the directors, I presume?

A. Yes, I was.

Q. 1130. And you were one of those who signed as general manager?

A. Yes, sir, assistant general manager.

Q. 1131. Your father, Leonard, and Adolph, signed as general manager, both of them?

A. Yes, sir.

Q. 1132. When the Old Dominion matter was taken up for the purchase of the Simpson interest, the Old Dominion Copper Company of Baltimore City, you acquired an interest in that purchase, did you not?

A. Yes, the interest that Lewisohn Brothers took.

Q. 1133. What was your first connection with that purchase; the first thing that you had to do with it?

A. I don't remember.

Q. 1134. Did you have any part in any negotiation for the purchase?

A. No.

Q. 1135. I call your attention to a telegram appearing among those produced by Mr. Lauterbach of May 3, 1895, from G. M. Hyams to Lewisohn Brothers, reading as follows: "Had not you or Josse better meet me at station on arrival so that I may know what to say to Meredith. Train will probably arrive an hour or two late." I ask you whether that telegram in any way refreshes your recollection as to any interview you had with Mr. Hyams in regard to the purchase?

Mr. HEMENWAY: Defendant objects to the putting on record of a telegram which is alleged to be described in the interrogatory, such telegram not being admissible in evidence and not yet having been offered in evidence, it being between parties other than the parties in this suit.

713

A. It does not.

Q. 1136. State what the first thing is that you do recall, if anything, in regard to interest acquired by Lewisohn Brothers, or Leonard Lewisohn, or yourself, in the Old Dominion Copper Company of Baltimore City, or the Old Dominion Mine, as it is sometimes called.

Mr. HEMENWAY: The defendant objects to the interrogatory, as it inquires for irrelevant and incompetent matter.

A. That would virtually necessitate the story of what is formed in my opinion.

Q. 1137. Question repeated.

A. I remember the purchasing of the Simpson-estate interest.

Q. 1138. Now state what you recall in regard to that purchase.

A. I remember that the syndicate acquired a five sevenths interest in the Old Dominion Company of Maryland, for an amount which I don't remember now.

Q. 1139. Will you state fully all that you recall in regard to the acquisition of that interest, and the formation of the syndicate by which you say that it was acquired?

Mr. HEMENWAY: These are facts that are called for.

A. My recollection is that Mr. Lewisohn and Mr. A. S. Bigelow bought this interest.

Q. 1140. Question repeated.

A. I don't recollect how the syndicate was formed other than it would be by a conversation.

Q. 1141. Well, tell us all that you remember for the formation of the syndicate, be it by conversation or otherwise; I am endeavoring to get your full recollection.

Mr. HEMENWAY: The defendant objects to any conversation at which Mr. Bigelow was not present.

A. Mr. Beaman, of the firm of Evarts, Choate & Beaman, was the attorney for our interest, Lewisohn Brothers, in this acquisition.

Q. 1142. Question repeated.

A. I then remember that the balance of the company was bought from the Keysers of Baltimore and that a new company was formed under the laws of New Jersey, wherein I was the treasurer and was subsequently deposed in favor of Mr. Nelson, to whom I turned over the books—whatever books and moneys that I had.

714 Q. 1143. You stated a few moments ago that all you remember in regard to the formation of the syndicate was by a conversation: what conversation do you refer to?

A. I refer to the possibility of the conversation being held over the 'phone as we had the use of a 'phone continually with the Boston office at that time, and unless it is on record in the letters that you have it might have taken place over the 'phone.

Q. 1144. You refer now to a conversation between Lewisohn Brothers and Mr. Albert S. Bigelow?

A. Yes.

Q. 1145. Is there any conversation which you had with Albert S. Bigelow on this subject?

A. None.

Q. 1146. Is there any conversation which your father had with Albert S. Bigelow in your presence?

A. None.

Q. 1147. Is there any conversation which your father had with any one in your presence in relation to this syndicate?

A. None that I can remember.

Q. 1148. Do you recall that you were ever present when your father had any conversation with Albert S. Bigelow in relation to this syndicate?

A. I cannot recall.

Q. 1150. Or in relation to the purchase of the property?

A. I do not remember.

Q. 1151. I call your attention to a copy of a letter of Lewisohn Brothers to Mr. James Calhoun of May 14, 1895, being one of the papers produced by Mr. Lauterbach, and particularly to the initials in the left-hand corner of that copy, "J. L." above the word "Enclo," and ask you whether such letters indicate that it is a letter dictated by you?

A. Either dictated by me or for me to sign.

Q. 1152. I call your attention to the following copies of letters produced by Mr. Lauterbach and bearing the initials "J. L." in the left-hand corner, as inquired about in the previous interrogatory, namely: Letter of May 6, 1895, No. 5; May 14, 1895, No. 164; May 14, 1895, No. 11; May 15, 1895, No. 13; May 15, 1895, No. 166; May 17, 1895, No. 16; May 29, 1895, No. 17; May 29, 1895, No. 167; June 14, 1895, No. 41; June 15, 1895, No. 44; June 17, 1895, No. 45; June 18, 1895, No. 52; June 18, 1895, No. 54; June 18, 1895, No. 58; June 18, 1895, No. 59; July 10, 1895, No. 91; November 26, 1895, No. 226; December 9, 1895, No. 229, and request you, after reading the same, to state whether or not these, or any of these letters, refresh your recollection in any respect as to the facts relating to the purchase of the interest in the Old Dominion Company or mine, or the formation of the syndicate in connection with the purchase, or of your own relations thereto.

A. [After examining the letters.] They refresh my memory.

Q. 1153. Now will you state, after so refreshing your recol-
715 lection, more fully what the facts were in relation to the purchase of the mine and the formation of the syndicate?

Mr. HEMENWAY: The defendant objects to this testimony as being incompetent and irrelevant at the present stage of the testimony.

A. As I remember the matter, my father, Mr. Leonard Lewisohn, desired to buy or get a controlling interest in the Old Dominion, and arranged with Mr. Meredith to get an option from the Simpson estate, who owned five sevenths. This was accomplished, and Mr. Calhoun and Mr. Hyams were sent to examine the properties, as the option was only for a short period. After they had started to make their examination Mr. Leonard Lewisohn took the matter up with Mr. Bigelow, and they agreed to take the option jointly in case the report was satisfactory.

Mr. HEMENWAY: The defendant objects to this statement of the agreement: if the agreement was in writing—it must be produced, if it was in writing. Defendant desires the witness to state whether or not it was in writing.

Q. 1154. You can state whether it was in writing, if you know.

A. I don't know whether it was in writing: this is my recollection

now after reading the different papers that you called my attention to.

Mr. HEMENWAY: Is this your recollection of an agreement between your father and Mr. Bigelow, or is it a recollection of something in reference to the transaction?

WITNESS: Only in reference to the transaction.

Mr. HEMENWAY: The defendant objects to the statement of the witness except as to matters which took place between Mr. Leonard Lewisohn and Mr. Bigelow in his presence.

Q. 1155. You may go on.

A. During the examination it was deemed advisable to endeavor to obtain the Keyser interest, and that was acquired.

Mr. HEMENWAY: Did you take part in these negotiations?

WITNESS: I was in the office continually, but I don't remember just whether I was absolutely active in the direct negotiation.

Q. 1156. Or whether it was done in your presence?

A. I don't know whether it was done in my presence; that is my recollection of the business.

Mr. HEMENWAY: It is your own memory that is being asked for in this case, and not any inference.

Q. 1157. Your recollection; and I ask also for a recollection of everything that was said to you by your father, or by Mr. Bigelow, or said in your presence; it does not mean necessarily said to you.

A. Well, I could not make any declaration as to any particular inference that I drew from anything directly said to me.

716 Q. 1158. I am asking you, not merely what was said to you, but for anything that happened, to your knowledge, or anything that you heard.

Mr. HEMENWAY: He is asking for your memory of what took place in 1895; not your inference now of what might have taken place, but your memory of what actually took place, if you have any.

A. Then there was a new company formed, which acquired the property from Leonard Lewisohn.

Q. 1159. What, if anything, do you recall, after refreshing your recollection, as to the organization of the syndicate who joined with your father and Mr. Bigelow to purchase the property?

A. There was no such syndicate ever formed.

Q. 1160. What was the syndicate to which you referred?

A. The syndicate to which I referred in answer to a previous interrogatory?

Q. 1161. Yes.

A. It was the syndicate of Leonard Lewisohn and A. S. Bigelow solely.

Q. 1162. Is it not a fact that a number of other persons joined with them in the purchase, or in contributing money with which the property was paid for?

A. No.

Q. 1163. What is your best recollection in that connection?

A. That Leonard Lewisohn and A. S. Bigelow paid jointly for the property.

Q. 1164. Do you mean by that to say that the money—that no part of the money which was used in paying for that property was contributed by any other person?

A. I believe no one else.

Q. 1165. I call your attention to the names of the following persons, and ask you whether that does not refresh your recollection as to others contributing to the purchase: John Stanton, J. D. Probst & Company, Charles F. Brooker, Joseph Cahn, Theodore Gaden, D. Wallerstein, E. Hawley, E. L. Bingham & Company, G. A. Bickner, W. A. Ammermann?

A. They did not contribute to the purchase of the shares from the Simpson estate and the Keyser shares.

Q. 1166. Do you mean, by your answer to the last interrogatory, to testify that all the purchase money was paid by your father and Mr. Bigelow in cash before these persons made any payment, or acquired any interest in the syndicate, so called, or in the Old Dominion Company?

A. I mean that they either paid for it or gave notes before the money was paid by the parties mentioned from your list.

Q. 1167. Before any money was paid by any of those parties?

A. I cannot say "any money," but my recollection serves me that either cash or notes had been given for the full payment of the purchase of the stock before any money was paid by any subsequent sale of new shares of stock.

Q. 1168. Will you make more clear what you mean by
717 your answer to the last question? What do you mean by "any subsequent sale of new shares of stock"?

A. That Leonard Lewisohn and A. S. Bigelow bought the Old Dominion shares from Simpson and Keyser, and that thereafter there was a sale of these shares to the syndicate, who invited participation; and the money—well, I think that answers your question.

Q. 1169. You mean that Leonard Lewisohn and Albert S. Bigelow paid for the property before anybody else was permitted to take any interest in the property?

A. That they either paid the money or gave notes, which, I understood, was the equivalent.

Q. 1170. For both the Simpson and the Keyser interests?

A. That is my recollection.

[Adjourned to February 25, 1903, at 10 a. m.]

[Next Exhibit for Identification, 234.]

NEW YORK, *February* 25, 1903.

[Met pursuant to adjournment.]
[Present: Same as before.]

JESSE LEWISOHN, resumed.

By Mr. BRANDEIS:

Q. 1171. At the adjournment of the session yesterday you were stating in what respect a perusal of the letters and papers submitted to you refreshed your recollection. We will go on from that. Now will you proceed and state anything further in respect to which your memory is refreshed by the perusal of those letters?

A. I can't think of anything else.

[Mr. Lauterbach here returns the transcripts of the accounts heretofore marked for identification 231, 232, and 233, with the statement that the references to cash books and journals, and the page numbers, as appeared by the witness' testimony, have now been supplied.]

Mr. BRANDEIS: I offer those transcript in evidence as part of Mr. Westervelt's testimony.

Mr. HEMENWAY: The defendant objects to the introduction of the transcripts on the ground that they are irrelevant, incompetent, and immaterial; that they are matters taking place between other parties than the parties to the suit, and that the subject matter
718 thereof is not strictly within the purview of books of account as admitted in action at law or in equity.

Q. 1172. I hand you transcripts from the ledger of Lewisohn Brothers entitled "Old Dominion Copper Company Syndicate," being Exhibit No. 231, "Old Dominion Syndicate, Sub. No. 2," and "Old Dominion New Stock Subscription A C," these being papers marked Nos. 231, 232, and 233, introduced as a part of the deposition of E. C. Westervelt in this case, and ask you to examine the same, and state whether such examination enables you to refresh, in any respect, your recollection in regard to the purchase of the interest in the Old Dominion Company and property and of the formation of the syndicate?

A. [After examination:] I see nothing in these documents to refresh my memory as to the syndicates.

Q. 1173. Does it refresh your memory any further in regard to the circumstances attending the purchase of the interests in the property?

A. It does not.

Q. 1174. Does it refresh your recollection in any respect as to any interviews that you had with Mr. Bigelow?

A. No, sir.

Q. 1175. Or Mr. Hyams, as representing Mr. Bigelow?

A. It does not.

Q. 1176. Or with Mr. Meredith?

A. It does not.

Q. 1177. Or with Mr. Keyser?

A. It does not.

Q. 1178. Or with your father, or anything said by any of these persons in your presence?

A. I can't recall anything.

Q. 1179. Is your memory refreshed in any respect beyond what you have fully testified in respect to any such interviews or any matters by the letters which you read yesterday or otherwise, or have you now stated fully all that you remember in regard to the acquisition of the property, or relations to the syndicate or organization of the syndicate?

A. I remember nothing further than what I have already stated.

Mr. Brandeis: I should like to suspend this examination until you have completed your search, and then go on with Mr. Lewisohn, as I suppose when we adjourn that search will be made so full that we will have everything completed and will have everything before us.

Mr. Lauterbach: I have given instructions to have a thorough search made, and I think under those instructions it must be very thorough.

[Adjourned until Tuesday, March 3, at 10 a. m., with the understanding that if Mr. Hemenway is engaged, the adjournment is until the following day, March 4, at 10 a. m.]

[Next Exhibit for Identification, 234.]

719 New York, *March* 3, 1903.

[At the request of Mr. Lauterbach and Mr. Hemenway, adjourned to March 5, at 10 a. m.]

New York, *March* 5, 10 a. m.

[Met pursuant to adjournment.]

[Present: Mr. Webb, Mr. Brandeis, Mr. Lauterbach, and Mr. Hemenway.]

Edward C. Westervelt, recalled.

By Mr. Brandeis:

Q. 1180. Referring to the request made by counsel for plaintiff of Mr. Lauterbach, under date of February 27, 1903, namely, "You will recall that the total amount of Old Dominion stock delivered to Mr. Leonard Lewisohn or his order was 58,840 shares, that is 36,190 shares out of the 80,000 shares and 22,650 shares out of the 50,000 shares. The transcripts of the account which you submitted from Lewisohn Brothers' ledger which went in as exhibits Nos. 231, 232, and 233 do not show what the disposition was of this stock; that is, they do not show how much of this stock was delivered to Mr. Leonard Lewisohn's associates in the syndicates, how much was retained by him, and what disposition he made of the stock; that is, to the extent his estate still holds the stock or even when he sold it and

the proceeds of such sale." Will you have the kindness to have ready at our next meeting transcripts of such of the accounts as will show these facts? I understand this request was transmitted to you as the person in charge of Lewisohn Brothers' books most competent to make the search and present the testimony. Will you state whether or not you have complied with that request?

A. I have endeavored to comply with it.

Q. 1181. And what has been the result of those endeavors?

A. I could not do it.

Q. 1182. What accounts have you found in Lewisohn Brothers' books containing the entries relating to the transactions inquired about in that request?

A. Stock book C, folios 59, 85, 86, 87, 88, 125, and 126, covering the period from September 24, 1895, to March 11, 1897 as of which date the account is transferred to stock book D folio 20. That contains all the entries which I have found bearing upon that matter.

Mr. HEMENWAY: On examination of these pages referred to in the answer of the witness the defendant objects to any admission of them for any purpose of the contents of these pages, either the original or a transcript, for the reason that they are apparently the entries of transactions not ordinarily or properly the subject of
720 book accounts, and it does not appear by whom said entries were authorized or that said entries in any way ever came to the attention of the defendant in this action, the whole matter being transactions between other parties with whom the plaintiff has no interest or connection.

Q. 1183. Where was this stock book C of Lewisohn Brothers found by you?

A. It was not found by me.

Q. 1184. When did it first come into your possession or subject to your inspection?

A. The 3d of March.

Q. 1185. By whom was the book submitted to you?

A. An office boy.

Q. 1186. Give his name.

A. Edward Middy.

Q. 1187. At Lewisohn Brothers?

A. Yes, sir.

Q. 1188. Had you ever seen this book before?

A. No.

Q. 1189. Do you mean you had not even seen the exterior of the book?

A. How could I answer a question like that?

Mr. HEMENWAY: Answer it of your own knowledge.

A. Not to my own knowledge.

Q. 1190. That is you have never seen this book before March 3?

A. Not to my knowledge.

Q. 1911. And do you know where this book was kept prior to March 3?

A. In the storeroom.

Q. 1192. Which storeroom?

A. Lewisohn Brothers' storeroom.

Q. 1193. No. 321?

A. The number of the room I don't know.

Q. 1194. Was it kept where the other old books of Lewisohn Brothers are kept?

A. No.

Q. 1195. Where were the other old books of Lewisohn Brothers kept?

A. That I could not tell you.

Q. 1196. Then you don't know that they are not kept at the same place this book was kept?

A. May I speak to Mr. Lauterbach?

Mr. LAUTERBACH: No. State all that you know about the books and about any book.

A. All the old books in this storeroom are the stock ledgers; just the stock ledgers.

Q. 1197. What stock ledgers are in that storeroom; covering what period?

A. A, B, C, D, and so on.

Q. 1198. What is the stock book now in use; what number or letter?

A. H.

Q. 1199. Then all the stock books except H, the one in current use, are in the storeroom?

A. Or they ought to be.

721 Q. 1200. You have seen the whole of the books after C yourself, haven't you, in the course of this search?

A. From D on.

Q. 1201. D, E, F, and G you have seen?

A. Yes, sir.

Q. 1202. And they are in the storeroom?

A. Yes, sir.

Q. 1203. In whose handwriting are the entries in this book?

A. I don't know.

Q. 1204. Is it the handwriting of any person who is now in the employ of Lewisohn Brothers?

A. No.

Q. 1205. Or who has been in the employ while you were there?

A. No.

Q. 1206. Why do you say that you are unable, from this book, to determine what disposition was made of the stock received by Lewisohn Brothers?

A. I went over it to prove it and I could not prove it; that was all.

Q. 1207. Doesn't this book give all the data necessary to determine?

A. Not being a clerk at that time I know nothing at all about the matter.

Q. 1208. That is, all the knowledge you have is the knowledge which the book itself affords?

A. Contains.

Q. 1209. And the only data which you could arrive at from that book are those which any accountant that took the entries in the book and put them together could arrive at: is that what you mean to say?

A. That is what I mean.

Q. 1210. And have you made a similar examination of books D, E, F, and G?

A. I have not.

Q. 1211. Have you examined any one of those with reference to the entries of Old Dominion?

A. I have not.

Q. 1212. Have you examined stock book B?

A. No.

Q. 1213. Did you request the office boy or any one to bring you the stock book B?

A. The way I put my request was to ask them for the stock book for the period of 1895.

Q. 1214. This stock book C begins September 24, 1895?

A. Yes.

Q. 1215. So that you don't know, of your own knowledge, at all events, whether there is any entry in stock book B relating to Old Dominion or not?

A. I do not.

[The witness, upon request, produces stock book B.]

Q. 1216. You have now before you stock book B. Will you state whether or not there is in stock book B any entries relating to transactions in stock of the Old Dominion Company or Old Dominion Copper Mining & Smelting Company?

A. Nothing to my knowledge.

Q. 1217. You have also produced now, upon request, stock
722 book D. Will you state whether or not there are any entries in that book relating to the transactions of Lewisohn Brothers in the Old Dominion Copper Mining & Smelting Company stock: if so, on what pages?

Mr. Hemenway: The defendant objects to any reference to the entries in stock book D for the same reasons expressed in regard to the admission of stock book C.

A. There are: folios 20, 21, 22, 23, 24, 25, 26, 27 (marked void), 28, and 29.

Q. 1218. At folio 29 the account appears to be transferred to stock book E, folio 20, does it not?

A. Yes.

Q. 1219. Please give the first and last dates of the entries in this account in stock ledger D which you have mentioned.

A. The first entry is under date of March 11, 1897, and the last entry is June 30, 1898.

Q. 1220. Are you able to state in whose handwriting this account, or any portion of it, is in this stock ledger D?

A. A part of it is in mine, part of it is in the handwriting of Theodore F. Van Ness, and the balance I don't know whose writing it is.

Q. 1221. What is the first entry in your own handwriting?

A. The entry of June 30, on folio 29.

Q. 1222. The first two entries on that date are in your handwriting?

A. Yes, sir.

Q. 1223. During what period is the handwriting of Theodore F. Van Ness?

A. All of the entries commencing with November 18, 1897, on folio 24, up to my entries on June 30, I believe, are in the handwriting of Mr. Van Ness. The entries on folios 20 and 24 prior to November 17, 1897, appear to be in the same handwriting as the entries in stock book C, and I don't know who made them, with the exception of the entries from October 18 to October 20, 1897, which appear to be in a different handwriting.

Q. 1224. Is Theodore F. Van Ness still in the employ of Lewisohn Brothers?

A. He is not.

Q. 1225. Is he living, so far as you know?

A. So far as I know he is.

Q. 1226. Where is he?

A. That I could not tell you.

Q. 1227. When did you last see him or hear of him?

A. I saw him about six months ago on Broadway.

Q. 1228. You don't know his present address or occupation?

A. No.

[Recess.]

WITNESS: I told you this morning that the last stock book in use was H. It is not. I have not got any number on it at all. The last one was G.

Q. 1229. The one in use now being not numbered?

A. Not numbered.

723 Q. 1230. You have produced now, in pursuance of request, stock book E of Lewisohn Brothers containing the account of transactions in Old Dominion Copper Mining & Smelting Company stock, from folios 20 and 21, covering a period, the first entry appearing being October 1, 1895, and the last entry April 25, 1899. Please state in whose handwriting those entries are.

Mr. HEMENWAY: The defendant objects to any examination or to the admission of any account in stock book E, the same being immaterial, irrelevant, and incompetent, and for the reasons already stated in reference to the other stock books.

A. Mine.

Q. 1231. I will ask you whether at any time in this account covered on folio 20 in the stock ledger E, the account appears to be balanced; and if so, at what date?

A. It is not directly balanced, but under date of November 9, 1898, all stock that Lewisohn Brothers previously held had been disposed of according to the books.

Q. 1232. Will you prepare, or allow the commissioner or stenog-

rapher to prepare, and annex to your deposition a transcript of the entries in stock ledgers C, D, and E, up to and including the date of November 9, 1898?

A. We will make it ourselves.

Q. 1233. And hand it to the commissioner?

A. Yes.

Mr. LAUTERBACH: Have you any objection to its being continued down to and including all the entries in stock ledger E, to show the whole transactions?

Mr. BRANDEIS: Not at all.

Q. 1234. Have you looked at the ledger from which the accounts produced here at the last hearing, marked, I think, 231, 232, and 233, were taken, to ascertain how the book is described?

A. I have looked at it in a general way.

Q. 1235. Can you tell what it is called and how it is numbered?

A. 1895 ledger, I believe.

Q. 1236. Of Lewisohn Brothers?

A. Lewisohn Brothers.

Mr. LAUTERBACH: Is that the corporation or the firm?

WITNESS: That is the corporation.

Q. 1237. Have you made any search for any other books than those which have been produced here, and of which a transcript was produced at the last hearing?

A. I have not.

Q. 1238. Have you aided any one in making a search for any letters or papers in relation to the Old Dominion matters?

A. I have not.

Q. 1239. And you have no knowledge of what search was made?

A. Except that a search was being made.

[The examination of this witness is suspended for the present.]

724 FERDINAND RAHAEUSER, recalled.

[Mr. Lauterbach produces another batch of papers, telegrams, etc.]

By Mr. BRANDEIS:

Q. 1240. You have produced here a memorandum of seven pages. Does that memorandum embody a correct statement of the days and hours during which you made search for the papers which you were requested at our last hearing and also a correct description of the various files of papers which you examined?

A. Yes, sir.

[The memorandum produced by the witness is here marked "Plaintiff's Exhibit C."]

Q. 1241. Did you complete the examination of all files available?

A. To 1895, yes, sir.

Q. 1242. And where did you make a search for those files?

A. In room 321.

Q. 1243. And also the general office?

A. We had all the files from 1895 sent down to the general office, as we had better light to work under there.

Q. 1244. And does the search which you made include all files for 1895 anywhere in the office?

A. Yes, sir.

Q. 1245. And you have produced here letters and copies of letters as appears by the list marked D which you presented at the hearing this morning? Are these all the letters and copies of letters and papers relating to Old Dominion matters that you found in connection with your search?

A. Yes, sir.

Q. 1246. In what files did you find these letters and copies of letters and papers; that is, were they all found in one file or separate files?

A. In separate files.

Q. 1247. I call your attention to the fact that there is not, among all of the papers which you now present, a single letter from or to Albert S. Bigelow or from or to J. Morris Meredith or from or to G. M. Hyams. Were there no letters from or to either Mr. Bigelow or Mr. Meredith or Mr. Hyams in the files which you examined?

A. Nothing relating to Old Dominion.

Q. 1248. Was there anything in those files relating to any other subject from or to Mr. Bigelow, Mr. Hyams, or Mr. Meredith?

A. From Mr. Hyams and Mr. Bigelow I believe there was.

Q. 1249. But not from Mr. Meredith?

A. Not that I know of.

Q. 1250. Now you were requested to make a search for the private file of Old Dominion papers referred to in the memorandum you stated was in William Faint's handwriting and which was
725 made on the copy of the letter of May 29, Exhibit 167. Have you made such search?

A. I had John Stocket, the colored man, bring around all the files of 1895; they are in one place; they are all kept together, 1895 files; and I went around myself afterwards to see they were all taken out and there was no private file of Old Dominion there.

Q. 1251. Then the only search that you made is that which you have described, namely, examining the files which John Stocket brought you?

A. And went around to see myself.

Q. 1252. You afterwards went into the room from which you are informed these files were taken; is that the fact?

A. Yes and saw there was no 1895 file left there.

Q. 1253. Do you mean to say you made an examination to see if there was no 1895 files there?

A. Yes, sir.

Q. 1254. Now what was there in that room 321 when you made that examination, and what was there there when the 1895 file left there?

A. I think there were files there away back for fifteen or twenty years; I believe, up to 1895.

Q. 1255. And were there any there for 1895?

A. No, sir.

Q. 1256. That is the last year of anything in that room?

A. Yes, sir.

Q. 1257. Did you take a memorandum of all files which you examined which you looked at the outside of?

A. In that room?

Q. 1258. Yes.

A. No, sir.

Q. 1259. You were requested to do that, were you not?

A. Only those that I handled; that is what I understood.

Q. 1260. You were requested to make an examination of all files which you examined, with a view to being able to testify what you had looked over, in order to testify as to the extent of your search for that private Old Dominion file; isn't that what you were requested to do?

A. I understood I was to look for the Old Dominion file and all files of 1895 in relation to Old Dominion. Now if I looked over one file in that room there I could easily say there were five or six hundred files in the room, dating back from 1863 up.

Q. 1261. Did you look at each one of those five or six hundred files, or how many there were in there?

A. No, sir, I did not.

Q. 1262. I don't mean whether you examined the contents of each one of these, but whether you looked at each file?

A. I looked at the outside of the files.

Q. 1263. How careful an examination did you make of the outside of those files?

A. Glanced over to see whether there were 1895 Old Dominion files among them.

Q. 1264. The precise thing I desired you to do was to take
726 a note of each file that you examined in order to ascertain whether you could find that Old Dominion file, and I submit you have not done it.

Mr. HEMENWAY: And I submit he has. What he says, as I understand his answer, is that in this room there were files from 1866 up, and that there were from five to six hundred of them; that the files of 1895 he examined carefully and went through them, and then examined the others sufficiently to see that there were no 1895 files in them other than those he examined.

Mr. LAUTERBACH: And no Old Dominion files.

Mr. HEMENWAY: That is what you say, isn't it?

WITNESS: Yes.

Q. 1265. I ask you whether you made so careful an examination of every file that there is or was in room 321 that you can, on your oath, state as a fact that there is no file there relating to Old Dominion matters?

A. Yes, sir.

Q. 1266. You do state that as a fact?

A. There is no file there relating to Old Dominion.

Q. 1267. And do you also state as a fact, upon your oath, that

there is and was no file there covering the year 1895, which you have not carefully examined, and from which you have not taken every letter or other paper relating to Old Dominion that was in there?

A. Every file of 1895 was examined in the way you have described.

Q. 1268. Did you find, in the course of your examination, anything to indicate in any way where that private Old Dominion file is?

A. No, I did not.

Q. 1269. Did you, in the course of that examination, find anything which would indicate to you where any letters or copies of letters to or from Albert S. Bigelow, G. M. Hyams, or J. Morris Meredith are?

A. No, sir.

Q. 1270. Where any of them could be found?

A. No, sir. In examining the papers for Old Dominion, you understand that when I came to a file where there was a lot of Old Dominion in it I took it out and pushed it aside without reading the letters through and through.

Q. 1271. Now have you produced here every single letter and paper relating to Old Dominion which you found?

A. Yes, sir.

Q. 1272. What happened to these letters and papers between the time that you took them out of the files and the time you produced them here to-day?

A. In my desk.

Q. 1273. Under your personal custody?

A. In my desk, yes, sir.

Q. 1274. Were they continuously in your custody?

A. Yes, sir.

Q. 1275. Nobody else saw them?

A. No, sir, except the stenographer this morning.

727 Q. 1276. Which stenographer?

A. Our stenographer—no, he didn't see them this morning; he saw them yesterday.

Q. 1277. In what connection did your stenographer see them yesterday?

A. Taking a memorandum of the letters, just who they were sent to and who they were from.

Q. 1278. Making a list?

A. Yes, sir.

Q. 1279. Of all the dates?

A. Yes, sir, all the letters and dates.

Q. 1280. Who is that stenographer?

A. Mr. Willicomb.

Q. 1281. How long were those letters in Mr. Willicomb's possession?

A. Long enough for him to finish making a memorandum of the letters.

Q. 1282. I mean, how many hours?

A. They were not in his hands any time.

Q. 1283. Some hours?

A. I don't think so. I didn't pay any attention to the time he had them.

Q. 1284. Was your desk locked while these papers were there?

A. Every night.

Q. 1285. And open during the day?

A. Open during the day.

Q. 1286. Anybody else besides the stenographer have occasion to go to your desk?

A. Nobody has occasion to go to my desk. In fact, no one is allowed in the room.

Q. 1287. That is, nobody is supposed to be in the room; you haven't a room absolutely alone, have you?

A. I have.

Q. 1288. How do you account for the fact that you have now produced this large number of letters and papers relating to Old Dominion, and that you failed to produce them heretofore when you had been requested to make a search and produce the letters relating to this subject?

A. The only way I can answer that is, as I said before, that I worked under insufficient light. I worked around that room under candle light at first. Now I sent them around to my room and made a more thorough search of them. I may have skipped a couple of them that came from a place.

Q. 1289. You spoke about skipping a couple. Now I find four or five times as many papers than you produced as the result of the other two searches?

A. I was requested before as to Stern and Meredith, and the other subscribers of Old Dominion or any one I could find. I think that accounts for it.

Q. 1290. Is that the only explanation you can give?

A. That is the only one I can give.

Q. 1291. Are you certain you now have made the most thorough search for these letters?

A. Yes, sir; I have had some help during that work.

Q. 1292. Who helped you?

A. Mr. Henry Asendorf, and John Stocket, I believe his name is.

Mr. LAUTERBACH: That is the negro?

728 The WITNESS: Yes, sir.

Q. 1293. Any other assistant?

A. No; they were the only ones.

Q. 1294. Did you have the assistance of Mr. John Stocket and Mr. Asendorf continuously?

A. No; Mr. Asendorf for one night, I believe, and Mr. Stocket worked on them one or two nights and during the daytime.

Q. 1295. Alone or in connection with you?

A. In the daytime worked alone and in the night time we both worked at different desks.

Q. 1296. Then in the daytime, when he worked, some of these papers were found, and some when you worked; isn't that the fact?

A. Yes, sir.

Q. 1297. And you have no knowledge yourself as to whether Mr. Stocket has handed you all the papers which he found or not?

A. I certainly have; he kept them in his desk until this morning, when I asked him for them and put them with my other letters and brought them over.

Q. 1298. You have no knowledge except that you made a request of him and he handed you the letters to-day?

A. That is all.

Q. 1229. And is the same true with regard to Mr. Asendorf's examination?

A. Yes, sir; in fact, Mr. Asendorf didn't hand me any letters.

Q. 1300. What did Mr. Asendorf do in the way of assisting you?

A. Looked through the files.

Q. 1301. When he found letters what happened?

A. I don't know as he found any letters.

Q. 1302. Then there was part of these files which you have never examined yourself?

A. Yes, sir.

Q. 1303. What part have you not examined personally?

A. The list is there. I don't know exactly what they are.

Q. 1304. You mean by reference to the list marked C?

A. Yes.

Q. 1305. Can you by reference to that list marked C state what you have not examined personally?

A. Those appearing on the list under Mr. Stocket which he examined and Mr. Asendorf examined. Those I have not examined personally.

Mr. LAUTERBACH: All the rest you have?

WITNESS: Yes, sir. I was mistaken in saying that Mr. Asendorf handed me nothing. He did hand me some cables.

[It is agreed that Mr. Stocket and Mr. Asendorf shall be examined next, and the hearing for the taking of the testimony of the witnesses is adjourned until some day mutually agreed upon by counsel.]

[Next Exhibit for Identification, 495.]

729 HENRY A. ROOT, sworn for plaintiff.

Direct examination by Mr. McCLENNEN:

Q. 1306. What is your residence?

A. Butte, Mont.

Q. 1307. Were you interested in some way in the original organization of the Old Dominion Copper Mining & Smelting Company?

[Objected to as leading.]

A. I was interested financially in that enterprise.

Q. 1308. What was the first thing that called your attention to the matter of the Old Dominion Copper Mining & Smelting Company?

A. My best recollection is a conversation I had with Mr. Hyams in Boston.

Q. 1309. With Mr. G. M. Hyams?

A. Yes, the gentleman sitting here.

Q. 1310. Can you fix the date of that conversation?

A. I can only fix it by reference to some papers I have looked at in Mr. Stern's office.

Q. 1311. To what papers do you refer?

A. I have seen an agreement there which was made by Mr. Stern with Mr. Lewisohn.

Q. 1312. And by reference to that paper what was the time you fixed as the date of the conversation with Mr. Hyams?

A. I should say it was a short time, whether a few days or a week or two I could not say, before the end of May, 1895.

Q. 1313. Where did the conversation occur?

A. In Mr. Bigelow's office in Boston.

Q. 1314. Will you relate the conversation, as nearly as you can?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I had been interested, as Mr. Hyams knew, or rather, to put it in more legal shape, Mr. Hyams and I had been talking over a little experience I had with the Merced mine, and fortunately I had made a little money, and I told Mr. Hyams that I would like to know if there was anything going on where there would be an opportunity to make some money, and he said he would be very much pleased to let me know any time that there was something doing, and he told me at that time that Mr. Bigelow and Mr. Lewisohn were going to bring out a new company, the Old Dominion, and that he would let me know when there would be some underwriting if I wanted him to so as to give me a chance to get some of the underwriting. That is all there was to it.

Q. 1315. That is the whole conversation?

A. That is all I recollect about it. That was impressed
730 on my mind because I thought it was very friendly on the part of Mr. Hyams.

Mr. HEMENWAY: I object to the latter part of the answer as not responsive to the question.

Q. 1316. You think that entirely exhausts your present recollection of the conversation, do you?

A. I think it does, yes.

Q. 1317. Let me call your attention to some specific things. Was anything said in that conversation with reference to under the laws of what state the new company was to be organized?

[Objected to as incompetent.]

A. Nothing.

Q. 1318. Was anything said in the conversation as to the amount of capital which the new company was to have?

[Objected to as incompetent.]

A. Not a word.

Q. 1319. Did you have any subsequent conversation with Mr. Hyams in relation to your going into the enterprise?

[Objected to as immaterial.]

A. None that I recall.

Q. 1320. What next did you do with reference to the matter?

[Objected to as immaterial and incompetent.]

A. I called to see Mr. Stern.

Q. 1321. And I assume you had some conversation with Mr. Stern?

[Objected to as immaterial and incompetent.]

A. I did have.

Q. 1321½. That is, Mr. Simon H. Stern?

[Objected to as immaterial and incompetent.]

A. Yes, sir.

Q. 1322. Of Stern & Rushmore of New York city?

A. Yes, sir.

731 Q. 1323. After this conversation with Mr. Stern what next did you do?

[Objected to as incompetent, immaterial, and irrelevant.]

A. The next thing that occurred, so far as I was concerned,—perhaps there may have been more than one conversation with Mr. Stern,—but the next step of any importance that I can think of was meeting Mr. Jesse Lewisohn.

Q. 1324. And where did you meet Mr. Jesse Lewisohn?

A. At the Lawyers' Club.

Q. 1325. In New York?

A. In New York.

Q. 1326. Who were present at that interview?

A. Mr. Stern, Mr. Lewisohn, and myself.

Q. 1327. Will you relate, as nearly as you can, the conversation at that interview?

[Objected to as incompetent, immaterial, and irrelevant.]

A. Mr. Stern talked with Mr. Lewisohn about going into the Old Dominion speculation. Mr. Lewisohn told him that if he would deliver over to him, Lewisohn, some of the underwriting which Mr. Stern had in the Merced Gold Mining Company, Mr. Lewisohn, or the Lewisohns, would give Mr. Stern a chance to go into the Old Dominion enterprise.

Q. 1328. Was there any more to that conversation?

[Objected to as immaterial and incompetent.]

A. Oh, it was a conversation that lasted probably an hour—a great deal more. Mr. Lewisohn, it is my best recollection, offered, or told Mr. Stern, that if he would turn over to the Lewisohns 600 shares of the underwriting in Merced they would let Mr. Stern into 5 per cent of their investment in Old Dominion. I say 600 shares

without being absolutely positive about it, but just an impression I have that there were 600 shares spoken of, but my further best recollection would be that Mr. Stern told them that was too much, didn't want to give them so much as that, and finally they agreed between themselves that he was to turn over to Lewisohns 300 shares of the Merced underwriting, and Lewisohns were to allow Stern to have 5 per cent of the investment which Lewisohn Brothers were putting into the Old Dominion. I may, of course, be mistaken as to this conversation. I could not be mistaken as to the 5 per cent, because I was equally interested with Mr. Stern in that myself, and
732 the amount was stated as to what we would have to put in; that is, what the 5 per cent was to be.

[The defendant objects to the answer as not responsive.]

Q. 1329. Do you recall anything further now of that conversation?

A. Nothing further except as to the amount that we were to put in; what the 5 per cent was to be.

Q. 1330. What was the date of that conversation?

A. I don't know. I only know it was before the agreement was made. It may have been two or three days, and might have been a week or two; I don't know.

Q. 1331. And the agreement was actually made on what date?

[Objected to as incompetent and immaterial.]

A. On the last day of May.

Q. 1332. In view of the objection just made, I will ask you again, what was the date of the signing of the paper which you have characterized as an agreement?

[Objected to as immaterial and incompetent.]

A. The paper is dated the 31st day of May. I don't know whether it was signed that day.

Q. 1333. And the year?

A. 1895.

Mr. Heminway: I object to this evidence of the contents of a paper not produced nor its absence accounted for.

Q. 1334. Having regard to such papers as you have investigated lately, will you state the extreme dates within which that conversation occurred with Jesse Lewisohn?

[Objected to as immaterial.]

A. I would say it was in the month of May, 1895.

Q. 1335. Have you stated all that you now recall of that conversation?

A. Unless you should call my attention to something that would refresh my memory, I have.

Q. 1336. Was any reference made in that conversation to the fact that you had previously talked with Mr. Hyams as to the bringing out of this new corporation?

[Objected to as incompetent, immaterial, and irrelevant.]

733 A. I don't recollect any.

Q. 1337. Was there anything said in the conversation relative to the subject matter of your 5 per cent interest; what you were to have a 5 per cent interest for?

[Objected to as incompetent and immaterial.]

A. Yes, sir.

Q. 1338. What?

[Objected to as before.]

A. In the Old Dominion Mining Company.

Q. 1339. Was anything said in the conversation indicating whether your interest was to be an interest in an old or a new corporation?

[Objected to as incompetent, immaterial, and irrelevant.]

A. It was to be in some stock that was to be issued.

Q. 1340. And stock of what?

[Objected to as incompetent and immaterial.]

A. Old Dominion Mining Company, or the Old Dominion, that is all. I don't think there was anything said about Mining Company—Old Dominion.

Q. 1341. Were you informed in that conversation as to the price which was to be paid, or had been paid for the Old Dominion mine or mines?

[Objected to as incompetent, irrelevant, and immaterial, and leading.]

A. We were informed that the Lewisohns were to put into it $300,000. That was to be their share of the contribution to the enterprise.

Q. 1342. Were you informed as to the total amount that was to be devoted to acquiring the properties?

[Objected to as before.]

A. As to that I could not be absolutely positive; but it is my best impression, and I would be nearly positive, that Mr. Lewisohn said they were to pay $300,000 for a further interest in the property that was being purchased—that their investment was to the extent of one half; that is my impression, which is rather a positive impression, but I could not testify to it with absolute certainty.

734 Q. 1343. Were you informed where the properties were situated?

[Objected to as immaterial.]

A. I don't think I was then, but I knew where they were. I think I got that information from Mr. Hyams, or learned it somewhere.

Q. 1344. Was anything said in that interview as to the laws of the state that the company was to be organized under?

[Objected to as incompetent and immaterial.]

A. There was not.

Q. 1345. Was anything said in that conversation as to whether the property had or had not already been acquired?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I could not say.

Q. 1346. Was anything said in that interview as to the amount of capital for which it was proposed to organize?

[Objected to as incompetent and immaterial, and having already been asked, and irrelevant.]

A. I don't think there was.

Q. 1347. Did you personally have any talk with Leonard Lewisohn relative to the matter?

A. I don't think I did.

Q. 1348. Do you know what amount of money was in fact contributed by yourself and Mr. Stern?

[Objected to as immaterial.]

A. Yes, sir.

Q. 1349. What was the amount?

[Objected to as immaterial.]

A. $15,000.

Q. 1350. Did you receive some stock in the Old Dominion Copper Mining & Smelting Company?

[Objected to as immaterial.]

735 A. Yes, sir.

Q. 1351. What amount of stock did you receive? I mean by that, you and Mr. Stern.

[Objected to as immaterial.]

A. I believe we received 1800 shares.

Q. 1352. I call your attention to a letter of December 4, 1895, from Simon H. Stern to Jesse Lewisohn, and marked for identification, "Exhibit 152."

Mr. HEMENWAY: The defendant objects to the introduction of said letter, or its examination by the witness.

Mr. MCCLENNEN: Do you recall having the conversation therein referred to?

[Objected to as incompetent and leading.]

WITNESS: I have a faint recollection of the subject, which is brought to me now by this letter, or this copy of a letter.

Q. 1353. Do you remember where that conversation took place?

[Objected to as incompetent and irrelevant.]

A. Yes, at his office.

Q. 1354. Whose office?

A. Mr. Stern's office; because we always talked business there. I

will say that, because we always talked business there, and nowhere else, that I remember.

[Answer objected to as irresponsive.]

Q. 1355. Do you remember any one else being present?

A. I presume there was no one. I don't remember any one being there.

Q. 1356. Who were the participants in that conversation?

A. Mr. Stern and myself.

Q. 1357. Did you, before that time, have any conversation with Jesse Lewisohn?

[Objected to as incompetent and immaterial.]

A. I don't think I did.

Cross-examined by Mr. HEMENWAY:

X 1358. With whom have you talked about the substance of your direct examination?

A. I talked with Mr. Stern about it yesterday and with Mr. McClennen this morning.

736 X 1359. These matters having occurred more than ten years ago your memory is somewhat hazy about it, is it not?

A. I can't say that it is hazy except that it is refreshed by papers I have examined.

X 1360. Otherwise you would have no particular memory about it, would you?

A. Oh, yes, I would. I made some money out of it and I never forget anything I make money out of.

Mr. MCCLENNEN: The latter part of the answer is objected to as not responsive.

Mr. MCCLENNEN. From the papers marked for identification Exhibits 1 to 494 of the depositions taken in New York on February 4, 10, 11, and 24, and March 5, 1903, the complainant offers in evidence, subject to the right of the defendant to object to any of them on the ground of immateriality, the following:

Exhibit 18, letter of June 3, 1895, Lewisohn Brothers to William Keyser, as follows:—

"JUNE 3RD, 1895.

William Keyser, Esq., President Old Dominion Copper Co., Baltimore, Md.

DEAR SIR: The Expert has returned from the Old Dominion Copper Company and—as you were doubtless advised by Mr. Butler—the first payment was duly made and good and sufficient Notes given for the balance.

The new owner would be obliged to you if, under the circumstances, you would send directions to the mine to stop all work of every kind, except pumping and such other work as is necessary for the protection of the property.

Very truly yours,

LEWISOHN BROTHERS,
General Manager."

Exhibit 20, letter of June 4, 1895, Lewisohn Brothers to A. S. Bigelow, as follows:—

"JUNE 4TH, 1895.

A. S. Bigelow, Esq., Boston, Mass.

DEAR SIR: We to-day received the Old Dominion Syndicate blanks for which we are obliged.

Kindly send us bill and we will remit.

Very truly yours,

LEWISOHN BROTHERS,
General Manager.

J. R."

737 Exhibit 36, letter of June 13, 1895, Leonard Lewisohn to William Keyser, as follows:—

"JUNE 13TH, 1895.

Mr. Wm. Keyser, care Balto. Smelting & Rolling Co., Baltimore, Md.

DEAR SIR: Mr. Brent Keyser no doubt has told you that I have offered you through him an interest of up to $25,000 in the Old Dominion enterprise with us on the same terms exactly as I myself come in. I should like to know from you, either tomorrow (Friday) or on Saturday at the latest, whether you are going to avail yourself of this or not. I thought you might wish to be a little interested and I should be only too glad to have you with us somewhat in the matter.

Yours very truly,

LEONARD LEWISOHN.

L. L."

Exhibit 38, letter of June 13, 1895, William Keyser to Leonard Lewisohn, as follows:—

"William Keyser, President.
Joseph Glendenn, Secretary.
R. Brent Keyser, Treasurer.
A. L. Walker, Consulting Engineer.

The Old Dominion Copper Company of Baltimore City.

Office: Keyser Building, German and Calvert Streets, Baltimore.

JUNE 13TH, 1895.

Mr. Leonard Lewisohn, New York City.

DEAR SIR: In accordance with a telephone message from Mr. Beaman I enclose herewith, duly signed, two papers drawn yesterday the first being a plan of procedure for Thursday June 20th, 1895, and the second covering the details of the sale of the two-sevenths of the stock of this company. In the latter paper I have added to the third clause from the last the words 'as of May 28, 1895' and have erased entirely the clause next to the last. Trusting you will find them in order, I remain

Yours truly,

WILLIAM KEYSER,
B."

738 Exhibit 39, letter of June 13, 1895, Leonard Lewisohn to A. S. Bigelow, as follows:—

NEW YORK, *June 13th*, 1895.

A. S. Bigelow, Esq., Boston, Mass.

DEAR SIR: After a long telephonic communication between Messrs. Beaman, Keyser and myself this afternoon, we have arranged as per enclosed copy of agreement, which Mr. Keyser has signed in Baltimore to-day and is sending me, and which I have signed at Mr. Beaman's office and am sending him.

Besides, please find enclosed plan of procedure for Meeting of the Directors of the Old Dominion Copper Company next Thursday, June 20th, when transfer is to be made.

Mr. Allen W. Evarts and I will be in Baltimore on that day, and I should be very pleased if you could make arrangements to be there also.

Very truly yours,

LEONARD LEWISOHN,
Per JESSE LEWISOHN.

Enclo."

Exhibit 43, form of agreement to form the Old Dominion Syndicate, dated June 15, 1895, as follows:—

"We the undersigned propose to form a Syndicate to be called the 'Old Dominion Syndicate.'

And we hereby agree to pay to A. S. Bigelow the sums set against our respective names.

Subscriptions to this Syndicate shall be payable as follows:

May 27, 1895 Fourteen per cent. (14%).

July 26, 1895 Twenty-eight and two-thirds per cent ($28\frac{2}{3}$%) and interest at five per cent from date of first payment.

August 25, 1895 Twenty-eight and two-thirds per cent ($28\frac{2}{3}$%) and interest at five per cent from date of first payment.

September 26, 1895 Twenty-eight and two-thirds per cent ($28\frac{2}{3}$%) and interest at five per cent from date of first payment.

It is expressly agreed and understood that each subscriber hereto acts for himself alone and that the relation of partners shall not exist or be deemed to exist between the subscribers hereto by virtue hereof.

The conditions, covenants and agreements herein contained
739 shall be binding on the substitutes, successors, heirs, representatives and assigns of the respective subscribers hereto.

In Witness Whereof, we have hereunto set our hands and opposite thereto the amounts of our subscriptions respectively, this fifteenth day of June, A. D. One thousand eight hundred and ninety-five."

[No signatures.]

Exhibit 45, letter of June 17, 1895, Lewisohn Brothers to A. S. Bigelow, as follows:—

"JUNE 17TH, 1895.

A. S. Bigelow, Esq., Boston, Mass.

DEAR SIR: In answer to your second letter of June 15th; we wish to say that we have had a conversation over the telephone this morning with Mr. Keyser regarding the way in which payments are to be made; and Mr. Keyser understands fully, and wishes us to make the payment in Boston—so that all the payments will be made in Boston at the office of the Old Colony Trust Company.

We also hear from Mr. Keyser that Mr. Bigelow has arranged with the Old Colony Trust Company that the money will be paid on Thursday. Mr. Abbott has written to this effect to Mr. Keyser.

Mr. Keyser is writing a letter to Mr. Abbott to-day telling him on payment of this money, to hold the shares to the order of Mr. Lewisohn—although we understand that the shares will have to be retained by the Old Colony Trust Company until the last note is paid.

Mr. Keyser is sending copies of the letters he is writing, of which we will send you copies.

In regard to the 25 shares of stock which Mr. Keyser is holding over; he is doing this as each Director needs 5 shares to qualify, and he thought it best to have these on hand in case they are needed at the Meeting, so that the Directors are qualified. Mr. Beaman also says this is necessary. We saw Mr. Beaman this afternoon and this gentleman says he believes that as regards the three Directors who, they promise, will resign; this will go quite in order; but he says he understood Mr. Bigelow had some relative or friend residing in Maryland who could be a Director—that if Mr. Bigelow desired this and that gentleman could be present, he could act as a Director.

740 If there is anything further you wish us to do, please let us know over the telephone and we will be glad to attend to it.

Very truly yours,

LEWISOHN BROTHERS,
General Manager.

J. L."

Exhibit 67, letter of June 28, 1895, Leonard Lewisohn to C. C. Beaman, as follows:—

"JUNE 28TH, 1895.

Mr. C. C. Beaman, Messrs. Evarts, Choate & Beaman, 52 Wall Street, New York City.

DEAR SIR: We merely desire to confirm our message to your clerk on the telephone this afternoon—that Mr. Leonard Lewisohn would like to hear from you at your convenience whether you consider it would be best to re-organize the Old Dominion Copper Company under the laws of Arizona, or whether it would be more advantageous to do so under the laws of some other State.

Very truly yours,

LEWISOHN BROTHERS,
General Manager.

W. F."

Exhibit 81, letter of Leonard Lewisohn to Allan W. Evarts, July 5, 1895, as follows:—

"JULY 5, 1895.

Allan W. Evarts, Esq., New York City.

DEAR SIR: Since this morning I have communicated with Mr. A. S. Bigelow, who desires me to have for the first year the following seven directors of the Old Dominion Copper Mining & Smelting Co. nominated, namely: Mr. A. S. Bigelow, Mr. Thomas Nelson, Mr. Leonard Lewisohn, Mr. Edgar Suffum, Mr. Moses P. Stephens, Mr. Joseph G. Ray, Mr. J. A. Coram.

Yours very truly, LEONARD LEWISOHN.

L. L."

Exhibit 134, letter of September 20, 1895, Simon H. Stern to Lewisohn Brothers, as follows:—

741 "Stern & Rushmore, Attorneys & Counsellors,
40 Wall Street, New York.

Simon H. Stern.
Charles E. Rushmore.

SEPTEMBER, 20TH, 1895.

DEAR SIR: Referring to your favor of the 3rd of June last I beg to enclose herewith my check for $8600 to cover third and fourth payments for my interests in the Old Dominion Syndicate as they then existed. Kindly acknowledge receipt of same. If you consider any adjustment of interest necessary please let your bookkeeper make a calculation and send it to me, but inasmuch as I anticipated some of the payments it seemed to me it could not make much difference one way or the other. Please also send me such certificates of stock as I am entitled to.

Yours truly, SIMON H. STERN.

Messrs. Lewisohn Brothers, City."

Exhibit 135, letter of Simon H. Stern to Lewisohn Brothers, dated October 4, 1895, as follows:—

"DEAR SIRS: I beg to acknowledge your two favors of even date and certificate No. 349 for 1200 shares of Old Dominion Copper Mining & Smelting Company stock. I propose now only to acknowledge receipt of the same and to return to you as requested the receipts Nos. 1A, 17A, 80A and 84A, but will write you further in relation to this matter in a day or two.

Yours truly, SIMON H. STERN.

Messrs. Lewisohn Brothers, City."

Exhibit 136, letter dated October 4, 1895, Lewisohn Brothers to John Stanton, as follows:—

"OCT. 4TH, 1895.

John Stanton, Esq., City.

DEAR SIR: Enclosed we hand you Certificate N. 361 for 400 shares capital stock of Old Dominion Copper Mining & Smelting
742 Company, against your subscription to the Syndicate of $5,000—in exchange for which please hand bearer the official receipts which you now hold.

Very truly yours,

LEWISOHN BROTHERS,
General Manager.

Rid/F."

Exhibit 137, letter dated October 4, 1895, Lewisohn Brothers to Simon H. Stern, as follows:—

"OCT. 4TH, 1895.

Mr. Simon H. Stern, 40 Wall Street, New York City.

DEAR SIR: Herewith we beg to hand you Certificate No. 349 for 1200 shares Old Dominion Copper Mining & Smelting Company's capital stock, against your subscription of $15,000 to the Syndicate. Please hand bearer receipts Nos. 1A, 17A, 80A and 84A in exchange for above and oblige.

Very truly yours,

LEWISOHN BROTHERS,
General Manager.

Rid/F.

P. S.—Since writing the previous letter annexed hereto, the 1200 shares have come in, and we are sending them to you herewith as above mentioned."

Exhibit 138, letter of October 5, 1895, Executors of the Will of A. W. Spencer, by William A. Gaston, Attorney, to Lewisohn Brothers, as follows:—

"Gaston & Snow, Attorneys & Counsellors-at-Law,
8 Congress Street, Room 4.

BOSTON, *October* 5, 1895.

Messrs. Lewisohn Brothers, Mr. Adolph Lewisohn, Manager, 81-83 Fulton Street, New York.

DEAR SIRS: The executors of the Will of Mr. Spencer have this day received your letter of October 4th, 1895, and have received Certificate No. 368 for 800 shares of the capital stock of the
743 Old Dominion Copper Mining & Smelting Company. We understood we were to receive from you on account of Mr. Spencer's subscription to the Old Dominion Syndicate more than the 800 shares which we have just now received. In your note you mention the terms of subscription. We have not seen the terms of subscription and would be very much obliged to you if you will kindly send us a copy of the same. Mr. A. S. Bigelow is at present

out of the city and when he returns we have no doubt he will be able to explain our position to us and give us accurate information as to what amount of shares the estate of Mr. Spencer is entitled to.

Deferring therefore to see Mr. Thomas Nelson and to deliver to him the stock in accordance with your request, we remain

Very truly yours,

EXECUTORS OF THE WILL OF
A. W. SPENCER,
By WILLIAM A. GASTON, *Attorney.*"

Exhibit 152, letter of December 4, 1895, Simon H. Stern to Jesse Lewisohn, as follows:

"DECEMBER 4TH, 1895.

DEAR JESSE: Mr. Root and I had a serious talk to-day in relation to your suggestion made last evening that we accept 600 shares of the Old Dominion Mining Company's stock, and call the matter ended.

While we do not agree with some of your views, nevertheless, we are deeply impressed with what you said concerning your father's wishes in the matter, and there is just this about it; that inasmuch as your father does wish that we should take the 600 shares and consider the thing closed, we will accept it so far as the shares are concerned. There is this one thing, however, which you must do, because it is perfectly right and proper to do, and because I know very well that your father does not wish to get from us anything which we are entitled to have. We paid you $15,000, that being five per cent of the amount which it was then thought L. Bros. would invest. It turns out now, after the matter is all over, that all you did invest was $285,000. Therefore, instead of paying you $15,000 for a five per cent interest, all that we should have paid you was $14,250, and of course it is clear that we are entitled in addition to the 600 shares, to receive a check from you for $750. Kindly send me the 600 shares and the check for $750 to-morrow, during the morning if possible, because Root is going away to-morrow night, and I want to fix up some things with him.

Yours truly,

SIMON H. STERN.

Jesse Lewisohn, Esq., City."

744 Exhibit 162 letter of April 29, 1895, from Leonard Lewisohn to J. Morris Meredith, as follows:

"APRIL 29, 1895.

Mr. J. Morris Meredith, care Messrs. Meredith & Grew, 15 Congress St., Boston, Mass.

DEAR SIR: Your favor of the 27th instant at hand.

I am very glad that you have given me the particulars. I will state how the matter occurred with Mr. Stanton. He called at my office here on last Thursday, and in conversation with him I might have answered some of his questions too frankly, as Mr. Stanton

always acts so very nicely; but I shall take your advice and be more guarded in future. Hoping to hear from you soon again, I remain,

Yours very truly, LEONARD LEWISOHN.

P. S.—I am trying to get the copper market up to ten cents, and after that hope to get it even higher.

L. L."

Exhibit 174, letter of June 21, 1895, Leonard Lewisohn to A. W. Spencer, as follows:

"JUNE 21, 1895.

Mr. A. W. Spencer, 53 State Street, Boston, Mass.

DEAR SIR: First and second payments on the $10,000 subscription to Old Dominion Syndicate will amount to the following:

14% on $10,000	$1,400 00
28⅝% on $10,000	2,866 67
Interest from May 28 to June 22, 25 days at 5%	14 81
Total	$4,281 48

Yours truly, LEONARD LEWISOHN.

Per —— ——."

Per —— ——."

Exhibit 187, letter of July 24, 1895, to Simon H. Stern, as follows:

745 "Mr. Simon H. Stern, City.

DEAR SIR: A number of the largest subscribers to the Old Dominion Syndicate have requested that they be allowed to take shares in the new Company at their par value of $25. per share, instead of having the amount of their subscription returned to them from the proceeds of sale of stock in the new Company as proposed.

As a subscriber to the Syndicate you are hereby informed that it has been decided to grant this request; and, the amount of your subscription being $15,000, you can, if you like, have six hundred shares of stock in the new Company (instead of the return of your $15,000.)—in addition to which a further six hundred shares in the new Company (equalling the amount of your subscription at $25 a share) will be allotted to you.

If you wish to avail yourself of the option of taking the six hundred shares first mentioned instead of receiving back the $15,000 which you subscribed to the Syndicate, you must notify me in writing on or before Saturday next the 27th instant, after which date this option will positively expire.

Very truly yours,

—— ——."

Exhibit 231, being three double pages Ledger No. 476 and 304, entitled "Old Dominion Copper Company Syndicate," marked "Exhibit 231, May 12, 1906."

Exhibit 232, two double pages, respectively Ledger 536 and Ledger 420, entitled "Old Dominion New Subscription Account," marked "Exhibit 233, May 12, 1906."

Exhibit 233, two double pages, respectively Ledger 479 and Ledger 484, entitled "Old Dominion Syndicate Sub-No. 2," marked "Exhibit 233, May 12, 1906."

Exhibit 258, letter of June 25, 1895, Lewisohn Brothers to Charles F. Brooker, as follows:

"JUNE 25TH, 1895.

Mr. Charles F. Brooker, c/o Coe Brass Manufacturing Company, Torrington, Ct.

DEAR SIR: The first and second payments on your Five thousand dollars subscription to the Old Dominion Syndicate are now due, as follows:

14% of $5,000	$700 00
28⅔% of $5,000	1,453 33
Interest from May 28th to June 26th—29 days at 5% p. a.	
Total amount of first and second payments	$2,141 92

746 The third payment of 28⅔rds per cent will be due August 25th; and the fourth and last payment of 28⅔rds per cent will be due September 24th, with interest at the rate of 5% per annum from May 28th.

Very truly yours, LEWISOHN BROTHERS.
General Manager.

J. R."

Exhibit 267, letter July 12, 1895, Jacob H. Schiff to Leonard Lewisohn, as follows:

"Kuhn, Loeb & Co.
27 & 29 Pine Street.

NEW YORK, *July 12th*, 1895.

DEAR MR. LEWISOHN: If Mr. Beaman has informed you that the Northern Pacific Underwriting Syndicate is now being formed, he certainly knows more about it than I do. The fact is that so far the proposed combination between the Northern Pacific and Great Northern is very far from having become perfected. I am not aware that we shall have anything to do with the formation of the Syndicate when it is to be formed; in fact, I have not even yet asked for an interest for ourselves, since I am convinced there is no such thing as a Syndicate as yet, nor will be for some time.

I thank you very much for your offer of a participation in the Syndicate which purchases the Old Dominion Copper Mining Shares, but as I have as yet too much money locked up in outside things, I prefer not to avail of your kind offer.

Thanking you, I am,

Yours very truly, JACOB H. SCHIFF.

Leonard Lewisohn, Esq., 81 Fulton St., City."

Exhibit 273, letter of July 24, 1895, to Charles J. Brooker, as follows:

JULY 24th, 1895.

Charles J. Brooker, Esq., Torrington, Ct.

DEAR SIR: A number of the largest subscribers to the Old Dominion Syndicate have requested that they be allowed to take
747 shares in the new Company at their par value of $25 per share, instead of having the amount of their subscription returned to them from the proceeds of sale of stock in the new Company, as proposed.

As a subscriber to the Syndicate you are hereby informed that it has been decided to grant this request; and, the amount of your subscription being $5,000., you can, if you like, have two hundred shares of stock in the new Company (instead of the return of your $5,000.)—in addition to which a further two hundred shares in the new Company (equalling the amount of your subscription at $25. a share) will be allotted to you.

If you wish to avail yourself of the option of taking the two hundred shares first mentioned, instead of receiving back the $5,000, which you subscribed to the Syndicate, you must notify me in writing on or before Saturday next the 27th instant, after which date this option will positively expire.

Very truly yours, ——— ———."

Exhibit 276, letter of July 25, 1895, to E. Hawley, as follows:—

"JULY 25, 1895.

Mr. E. Hawley,

DEAR SIR: A number of the largest subscribers to the Old Dominion Syndicate having requested that they be allowed to take shares in the new Company at their par value of $25 per share, instead of having the amount of their subscription returned to them from the proceeds of sale of stock in the New Company as proposed, as a subscriber to the Syndicate you are hereby informed that it has been decided to grant this request; and the amount of your subscription being $10,000, you can, if you like, have four hundred shares of stock in the new Company (instead of the return of your $10,000)—in addition to which a further four hundred shares in the new Company (equalling the amount of your subscription at $25 a share) will be allotted to you.

If you wish to avail yourself of the option of taking the four hundred shares first mentioned instead of receiving back the $10,000 which you subscribed to the Syndicate, you must notify me in writing on or before Saturday next the 27th instant, after which date this option will positively expire.

Very truly yours, ——— ———."

748 Exhibit 288, letter of August 6, 1895, Lewisohn Brothers to L. Behrens & Sons, as follows:—

"Per St. Louis

Aug. 6, 1895.

Messrs. L. Behrens & Sohne, Hamburg.

Dear Sirs: No doubt you know that copper has advanced considerably lately, and the prospects are rather for a still higher than a lower market. This condition of things has made some of the copper mining enterprises particularly prosperous, and we thought it no harm to direct your attention to the Old Dominion Copper Mining & Smelting Co., which has lately been organized, although the mine had been successfully worked since a number of years; but the Company is now in particularly good condition, owing to large developments which have recently been made and the better transportation facilities, thus enabling the Company to produce their copper lower than ever before and in much larger quantities. The prospect for regular and good-sized dividends is very promising, and some of the leading houses in Europe, like Messrs. N. M. Rothschilds & Sons of London, have lately taken some interest in this Company and bought some of its shares. The shares are quoted, at present, at 83¼, and are likely to be considerably higher soon. If you should wish to interest yourself in this Company and buy some of its shares, please cable us, and we may be able to offer you some of the shares; or, if you prefer, of course you could inquire or buy through other sources. They are dealt in principally in Boston, like the shares of most other copper mining companies. The shares of the Boston & Montana Co., in which we are largely interested, have advanced from $16, 2 years ago, and from $25, about a year ago, to about $100, per share now. We are the agents for the sale of the products of these various companies, as you probably know.

T. H."

Yours very truly,

LEWISOHN BROTHERS,
General Manager.

A. L."

Exhibit 296, letter of August 20, 1895, Lewisohn Brothers to C. S. Henry & Company, as follows:—

749 "August 20, 1895.

Messrs. C. S. Henry & Co., London.

Gentlemen: Enclosed we send you sale note for the 200 shares of Old Dominion Copper Mining & Smelting Co., stock sold to Messrs. Lazarus Sons at $29. Please hand it to them if you agree with same.

Very truly yours,

LEWISOHN BROTHERS,
General Manager."

Exhibit 305, letter of August 26, 1895, Lewisohn Brothers, to C. S. Henry & Company, as follows:—

"Per Havel.

AUG. 26, 1895.

Messrs. C. S. Henry & Co., London.

DEAR SIRS: In conformity with our reading of your cable gram received to-day, we have booked Mr. G. A. Jamieson for 500 shares of stock of Old Dominion Copper Mining & Smelting Co., at $30., less 5%. Please advise us if this is correct, and oblige,

Yours very truly,

LEWISOHN BROTHERS,
General Manager.

T. H."

Exhibit 315, letter of September 12, 1895, Lewisohn Brothers, to Sally Mainz, as follows:—

S. S. Lucania."

"SEP. 12TH, 1895.

Mr. Sally Mainz, Hamburg, Germany.

DEAR SIR: We beg to confirm sale to you, by our Mr. Leonard Lewisohn of two hundred (200) shares of stock of the Old Dominion Copper Mining & Smelting Company, at twenty-nine dollars ($29) a share, as per statement herewith.

Very truly yours,

LEWISOHN BROTHERS,
General Manager.

Enclo.

Rid-F."

750 Exhibit 335, letter October 1, 1895, Lewisohn Brothers to Waldemar Caspary, as follows:—

OCT. 1, 1895.

Mr. Waldemar Caspary, 502 Broadway, City.

DEAR SIR: We beg to acknowledge receipt of your check for $31,000. for the purchase of 1,000 shares of stock of Old Dominion Copper Mining & Smelting Co., which we have credited to your account.

Yours very truly,

LEWISOHN BROTHERS,
General Manager.

H. E."

Exhibit 363, letter October 10, 1895, Lewisohn Brothers to A. Iselin & Company, as follows:—

"OCTOBER 10TH, 1895.

Messrs. A. Iselin & Co., 36 Wall Street, City.

GENTLEMEN: We herewith hand you Certificate No. 385 for 500 shares Old Dominion Copper Mining & Smelting Co. capital stock for account of Banque International, Paris, against payment of

$13,500. The certificate is in the name of G. A. Brocknell, whose endorsement we guarantee.

Very truly yours,

LEWISOHN BROTHERS."

CHARLES F. BROOKER, sworn for complainant.

Direct examination by Mr. MCCLENNEN:

Q. 1361. You reside where?

A. Ansonia, Conn.

Q. 1362. I show you certificate No. 369, for 200 shares of the Old Dominion Copper Mining & Smelting Company in the name of Charles F. Brooker, dated October 3, 1895: is the signature to the endorsement on the back in your handwriting?

A. That is my handwriting.

[Offered in evidence and marked "Complainant's Exhibit 495, May 12, 1906."]

751 Q. 1363. What was the first of the negotiations which led to your acquiring this stock?

A. I could not tell you distinctly from memory what the first was.

Q. 1364. What is the first you now recall?

A. If you will let me tell the story in my own way I think I can give you the whole thing. This is eleven years ago, and I have no books or papers connected with the matter, and it is simply a matter of recollection, and if you will allow me to tell the matter as I remember it I will be glad to go on.

Q. 1365. I wish you would.

[Objected to as incompetent, immaterial, and irrelevant.]

A. Some time in 1895, I should say it was in the spring, Mr. Leonard Lewisohn or Mr. Adolph Lewisohn, I can't say which, one or the other, and perhaps both, suggested to me taking an interest in what they called Old Dominion matters, and I agreed to take a $5000 interest in the matter, or the syndicate, or whatever it was they called it. I don't remember; but I agreed to take a $5000 interest, which I did, and the understanding in the matter was that the property had cost $1,000,000, and they proposed to capitalize the company at $2,500,000, and the money we put into it was to be paid back and we were to have an equal amount of stock. That was done. I paid my money, whether I did it all at once or in instalments I don't remember, and have no account of it, but I paid the money and got it back; afterwards I got a certificate for 200 shares of stock, and when I got the certificate I noticed that the company was capitalized for $3,750,000, which I noticed to be different, and I made some inquiry about it and was informed by whomever the powers in authority were that they had concluded to make it $3,750,000 instead of $2,500,000. I accepted it without demur on the ground that I was asked to go into the company and the money I made was because I was asked, and I saw no reason

for me to make any row about it; therefore I accepted it. That is all I know about it. Afterwards I sold my stock at whatever the price was; if I remember right, something like $18 or $20 a share, and got out of it. That is the history of my connection with it, and really all I know about it.

[Defendant objects to the answer as incompetent, immaterial, and irrelevant.]

Q. 1366. Do you remember, after discovering that the corporation was capitalized at $3,750,000 instead of $2,500,000, having a conversation with Leonard Lewisohn?

[Objected to as incompetent and immaterial.]

752 A. I don't remember any particular distinct conversation with Leonard Lewisohn about it or Adolph. I might have asked them what the capitalization was and why it was different from what it started originally. I presume I did, and they told me for some reason or other they made it $3,750,000 instead of $2,500,000. I asked Mr. Bigelow at one time the same question, and he told me that there were expenses connected with the thing which they had not thought of in the first place, and they had concluded to make it $3,750,000, and they did.

[Answer objected to as incompetent, immaterial, and irrelevant.]

Q. 1367. Did they say what had been or was to be done with the 50,000 shares?

[Objected to as incompetent, immaterial, and irrelevant.]

A. My recollection about that is more or less indistinct, but I should say that Mr. Bigelow said to me that that was divided up between him and Leonard Lewisohn. I should say that was the statement in connection with it.

Q. 1368. Do you remember whether or not you asked Adolph Lewisohn and he referred you to Leonard?

[Objected to as leading, incompetent, and immaterial.]

A. I could not say whether I asked Adolph first or Leonard first.

Q. 1369. Do you remember whether Leonard referred you to Mr. Bigelow?

A. I don't think he ever did. I don't remember that he ever did.

Q. 1370. Do you remember any conversation on this subject with Albert S. Bigelow, in which he said something to the effect that it was none of his damned business?

[Objected to as incompetent, immaterial, and leading.]

A. No, I remember this conversation with Albert Bigelow in connection with the matter.

Q. 1371. What is that?

[Objected to as immaterial, incompetent, and irrelevant.]

A. It may be what you have in mind, and what you have in mind you have gathered from what I told Mr. Smith one day in a conver-

sation at that gentleman's office, and which I had no reason to suppose he would repeat, but he evidently has. I told Mr. Bigelow,
753 when asking him a question—and I remember it because Mr. Smith said that I said it to him—I asked Bigelow and he said if that question had been asked him by some people sitting in that chair he would say it was none of their damned business, but that with me it would be different; and that is probably what you have in your mind and what Mr. Smith possibly brought to you about a confidential conversation which he failed to observe.

[Answer objected to as incompetent and not responsive, and motion to strike out latter part of same.]

Q. 1372. Have you any way of fixing how long it was, before you put in your first money, you had had your conversation with Mr. Lewisohn relating to this subject of capitalization?

A. I have no way of fixing that at all. I have no record of it. This is eleven years ago, and the papers I had at that time have been destroyed.

Q. 1373. I show you a letter of Lewisohn Brothers to you of June 25, 1895, Exhibit 258, and ask you if that would assist you in stating anything about the date of the conversation?

A. No, only it gives me the date on which this letter is written.

Q. 1374. Would it enable you to state whether or not your conversation was before or after that letter? I mean the conversation in which the amount of capital was stated.

A. No, it would not assist me at all.

Q. 1375. Were you given any information as to the laws of the state that this $2,500,000 corporation was to be organized under?

[Objected to as incompetent, immaterial, and irrelevant.]

A. Nothing more than I have given.

Q. 1376. In view of the objection which Mr. Hemenway has interposed to your answer, I will ask you to state now the conversation which you had with Mr. Bigelow, without reference to what you have said about it to any one else?

A. My recollection of the conversation is, as I said before, that while in Mr. Bigelow's office I made some inquiry as to the amount of its capitalization, and I should say he said to me that "some people sitting where you do I would tell them it was none of their damned business, but that it was different with you," and the capitalization was made $3,750,000, because they found that there were expenses and so on which they did not count on in the beginning, and it was finally made $3,750,000, instead of $2,500,000.

Q. 1377. And in that conversation did he say what was done with the additional 50,000 shares?

A. He said, if I remember correctly, that it was divided between himself and Leonard Lewisohn.

754 NEW YORK, *May* 23, 1906.

[Hearing resumed this day.]

[Present: The Commissioner and Messrs. McClennen, Hemenway, and Lauterbach.]

SIMON H. STERN, sworn for complainant.

Direct examination by Mr. MCCLENNEN:

Q. 1378. Will you kindly state your full name?

A. Simon H. Stern.

Q. 1379. And you reside where?

A. In the city of New York.

Q. 1380. You are a practising attorney in the city of New York?

A. Yes; I am a member of the firm of Stern & Rushmore.

Q. 1381. Do you recall the bringing out of the Old Dominion in 1895?

A. Yes, sir.

Q. 1382. What was it that first came to your attention in connection therewith?

[Objected to by Mr. Hemenway and Mr. Lauterbach as incompetent, irrelevant, and immaterial.]

A. I first heard of it in a conversation with Mr. Leonard Lewisohn.

Q. 1383. What was that conversation?

[Same objection, and also the special objection that Mr. Lewisohn is dead.]

A. Mr. Leonard Lewisohn asked me to deliver him a certain number of shares of the stock of the Merced Mining Company in consideration of transferring to me an interest to the extent of 5 per cent which the firm of Lewisohn Brothers were to have in a syndicate which it was about acquiring of the entire property of the Old Dominion Company, I think, of Arizona.

Q. 1384. Do you recall whether there was any one else who took part in that conversation, or was present at it?

A. No one was.

Q. 1385. Can you fix the date of that conversation approximately?

A. Possibly by reference to some of my papers [referring to papers]: in April or May of 1895.

Q. 1386. Did Mr. Lewisohn say anything to you with reference to the way in which it was proposed to handle this property?

[Same objection.]

A. He did.

755 Mr. LAUTERBACH: And I would like it understood that I object to any conversation with Mr. Lewisohn on the ground that he is dead.

Q. 1387. What did he say?

A. He said that he and Bigelow of Boston had acquired large

interests in the Old Dominion Mining Company and that they were negotiating for the balance of the interest, the Keyser interest, as I recollect it, of Baltimore, and he thought I would be benefited very much indeed by getting an interest in his interest in the enterprise. He may have said "proposition" and not "enterprise."

Q. 1388. Was the arrangement between you and him in writing?

A. Not the arrangement I made with him. We did not go into details. He told me his son Jesse would see me on the subject, he being extremely busy at the time, and it was a hasty talk.

Q. 1389. And all that you have said was done in one conversation, was it?

A. All in one conversation.

Q. 1390. Do you recall anything more of what was said in the conversation?

[Objected to as incompetent, immaterial, and irrelevant.]

A. Yes, he started out by saying that I ought to let his firm have a certain number of shares of the Merced Mining Company stock at the exact cost of it to me on the ground that before I had purchased it I had asked him for advice, as to whether or not it would be a good thing for me to purchase. I told him that was a most absurd proposition, inasmuch as when I went to him for advice he said he could not advise me, but that if I would turn over my whole subscription for the Merced stock he would take it off my hands. He said, "Of course, I am in a different situation than you are. I go into these things and I win or lose. I lose on one thing and gain on another and it is my business, but you are a lawyer, and this is not your line of business and you may consider that it is unwise to take any chances, therefore I can't give you any advice"—oh, that was in the first interview. I did have two interviews with him. He telephoned me one day and wanted me to give up, I think, 600 shares of Merced mining stock on the ground that he had advised me, and in the second interview I have related what took place.

Q. 1391. Do you think of anything further that occurred?

A. That is all that ever occurred that I can recollect at the moment with Leonard Lewisohn, because he said he would send his son Jesse to me and he would arrange the business with me.

756 Q. 1392. Did Leonard Lewisohn say anything in either of those interviews as to how it was proposed to work out the profit, if any?

[Objected to as incompetent, immaterial, and irrelevant.]

A. He said that when they acquired the Keyser interest they were going to form a new company and give it a very successful management.

Q. 1393. Did he inform you what amount of capital the company was proposed?

A. He did not.

Q. 1394. Did you subsequently have a conversation with Jesse Lewisohn?

A. I did.

Q. 1395. Where did that occur?

[Same objection.]

A. I had several conversations with Jesse Lewisohn. I think the first was at the Lawyers' Club where Mr. Root, he, and I took luncheon together.

Q. 1396. What, as far as you recall, was said in that interview?

[Objected to as incompetent, immaterial, and irrelevant.]

A. He started out by telling me that I had not pleased his father. That he was afraid that his father felt aggrieved at my refusal to give him my shares of Merced Mining Company stock at cost to me of the same, saying, that his father was an extremely important man and had many opportunities to favor his friends and that I should have done precisely what the old gentleman had asked me to do without any discussion or argument. I told him that his father, whom he alluded to usually as the "old gentleman" had asked me to do an absurd thing: that there was not the slightest merit in the suggestion that I make him a handsome present of money; that he came very near discouraging me from going into the thing at all by the manner he had treated the subject when I first spoke to him, and I asked him to drop the subject, because it annoyed me. He then began to dicker with me about getting some of my shares of Merced at cost for a 5 per cent interest in the Old Dominion Mining Company scheme with which his firm was connected with Mr. Bigelow. We finally agreed on a lesser number than he had asked for and the document, the original of which I have present, was signed by his firm, and is dated New York, May 31, 1895.

757 Q. 1397. Do you remember whether or not it was signed on that day?

A. That I do not. My best recollection is it was taken away by Jesse Lewisohn and then returned to me by mail; but that I don't really recollect. It may have been returned by messenger boy. I know I got it back.

Q. 1398. Do you know within how near a time to that date it was?

A. I don't remember the date, but I do remember that it was a very short time indeed when I received the document back after I handed it to Jesse Lewisohn.

Q. 1399. May I see the document?

A. You may [producing same].

Mr. McClennen: I offer the document referred to by the witness in evidence as an exhibit.

Mr. Hemenway: I object to the admission of this paper on the ground that so far as Mr. Bigelow is concerned and so far as the issues in this action are concerned, it is incompetent, immaterial, and irrelevant.

The paper is marked "Exhibit 496," and is as follows:

"NEW YORK, *May* 31, 1895.

For and in consideration of the sum of One Dollar and of other good and valuable considerations we have agreed and do hereby agree with Simon H. Stern that he shall be entitled to an interest equal to five per cent of such interest as we have at present or shall acquire hereafter in the enterprise known at present as The Old Dominion Mining Company of Arizona. Our present investment therein partially paid for and to be paid for hereafter amounts to about $300,000.

LEWISOHN BROTHERS."

Q. 1400. What is the next thing that occurred so far as you now recall after the making of this agreement?

[Objected to as incompetent, immaterial, and irrelevant.]

A. The next thing that happened was the receipt by me of a letter from Messrs. Lewisohn Brothers and signed by Adolph Lewisohn and Jesse Lewisohn of date June 3, 1895.

[Letter offered in evidence.]

[Objected to on the same grounds.]

The letter is marked "Exhibit 197" and is as follows:

758 "Lewisohn Brothers, 81-83 Fulton Street, New York.

Cable Address: Lohengrin.

P. O. Box 1247.

NEW YORK, *June* 3, 1895.

Mr. Simon H. Stern, 40 Wall Street, New York.

DEAR SIR: In answer to your favor of the first instant we would inform you that the first payment on account of the $15,000 interest you have in the Old Dominion Syndicate was due on the 28th ultimo amounting to $2,100. This first payment is for 14% of the $15,000. The second payment is for 28⅝% due July 26th or $4,300; therefore the total amount of the first and second payment is $6,400, for which you may send us your check, and the amount of the third and fourth payments you can send on your return from Europe.

Very truly yours,

LEWISOHN BROTHERS,
A. LEWISOHN, *General Manager*.
JESSE LEWISOHN.

Third payment 28⅝% and 5% interest is due August 25, 1895. Fourth payment 28⅝% and 5% interest is due September 24, 1895."

The entire letter is typewritten except the words "A. Lewisohn" and "Jesse Lewisohn," and it is written on the printed letterhead of Lewisohn Brothers.

Q. 1401. Have you with you any copy of the letter of June 1 to which this appears to be a reply?

A. I have not a copy of that letter with me, but I can produce it, I have no doubt.

Q. 1402. Have you any recollection of how long a time elapsed between the time of your conference with Leonard Lewisohn and the time of your coming to an actual agreement on paper, as appears by this exhibit of May 31, 1895?

A. It was a short time. The Lewisohns were very eager to get my Merced stock, and, as I recollect it, it was appreciating in the market.

[The letter is objected to as improper and not responsive.]

759 Q. 1403. By "a short time" do you mean a matter of days or weeks?

A. Oh, a few days.

Q. 1404. Now going on. After the letter of June 3, what is the next you had to do with the matter?

[Objected to as immaterial, irrelevant, and incompetent.]

Q. 1404½. The next was the receipt of a letter, addressed to me at my office dated July 24, 1895 [producing same].

[Offered in evidence. Same objection.]

Letter marked "Exhibit 498," and is as follows, being written on the printed letterhead of Lewisohn Brothers:—

"81—83 Fulton Street,

Cable Address: Lohengrin, P. O. Box 1247, New York.

JULY 24TH, 1895.

Mr. Simon H. Stern, City.

DEAR SIR: A number of the largest subscribers to the Old Dominion Syndicate have requested that they be allowed to take shares in the new Company at their par value of $25 per share, instead of having the amount of their subscription returned to them from the proceeds of sale of stock in the new Company as proposed.

As a subscriber to the Syndicate you are hereby informed that it has been decided to grant this request; and, the amount of your subscription being $15,000., you can, if you like, have six hundred shares of stock in the new Company (instead of the return of your $15,000)—in addition to which a further six hundred shares in the new Company (equalling the amount of your subscription at $25. a share) will be allotted to you.

If you wish to avail yourself of the option of taking the six hundred shares first mentioned instead of receiving back the $15,000. which you subscribed to the Syndicate, you must notify me in writing on or before Saturday next the 27th instant, after which date this option will positively expire.

Very truly yours,

LEONARD LEWISOHN,
ADOLPH LEWISOHN, *Mng.*"

760 WITNESS: When this letter came to my office I was in Europe.

Q. 1405. What is the next?

[Objected to as incompetent, immaterial, and irrelevant.]

A. The next thing was the receipt at my office, either by me personally or by my representative, I can't now recall whether I had returned from Europe at that time or not, of a letter dated September 20, 1895 [producing same].

[Offered in evidence. Same objection.]

Letter marked "Exhibit 499," and is as follows, same printed letterhead, and dated:—

SEPTEMBER 20TH, 1895.

Mr. Simon H. Stern, 40 Wall Street, City.

DEAR SIR: Enclosed we hand you official receipts Nos. 80 and 81 covering third and fourth payments against your subscription of $15,000 to the Old Dominion Syndicate. The amount of interest due from May 28th to date at 5% per annum is One hundred and twenty-four Dolalrs and eighty-two cents ($124.82) which please remit at your convenience and it will close your subscription.

Very truly yours,

LEWISOHN BROTHERS.

J. L. A. LEWISOHN, *General Manager.*

N. B.—On reference to your letter of June 3rd you will note interest therein charged on first and second payments and above interest only applies to third and fourth payments aggregating $8,600."

[All typewritten except the words, "A. Lewisohn" and "J. L.," which are in handwriting.]

Q. 1406. Have you the answer to the letter of July 24, Exhibit 498?

A. Yes, sir [producing same].

[Letter offered in evidence. Same objection.]

Marked "Exhibit 500," and is as follows:—

"DEAR SIR: Your letter of the 24th inst. to Simon H. Stern, Esq. relative to the matter of the Old Dominion Syndicate
761 and the allotment of shares in the new company has been received. I have Mr. Stern's instructions to notify you, and I hereby do so, that he desires that his subscription should remain and that he should receive the stock to which he will be entitled as per your favor referred to and pursuant to the agreement heretofore made between Lewisohn Brothers and himself relative to the Old Dominion enterprise, it being understood that the acceptance

of the option contained in your letter of the 24th is to be of course without prejudice to the original agreement with Mr. Stern referred to. Very truly yours,

CHARLES E. RUSHMORE.
For Simon H. Stern.

Leonard Lewisohn, Esq.,
Adolph Lewisohn, Esq., New York City."

Q. 1407. Who is Mr. Rushmore?

A. He was my partner, and attorney, in fact.

Q. 1408. Now after the letter of September 20, Exhibit 499, what was the next thing that occurred?

[Same objection.]

A. A letter of October 4, 1895 [producing same].

[Offered in evidence. Same objection.]

Marked "Exhibit 501," being on the same printed letterhead, and is as follows:—

"OCT. 4TH, 1895.

Mr. Simon H. Stern, 40 Wall Street, New York City.

DEAR SIR: Herewith we beg to hand you Certificate No. 349 for 1200 shares Old Dominion Copper Mining & Smelting Company's capital stock, against your subscription of $15,000, to the Syndicate.

Please hand bearer receipts Nos. 1A, 17A, 80A and 84A in exchange for above and oblige,

Very truly yours,

LEWISOHN BROTHERS.
ADOLPH LEWISOHN,
General Manager.

Rid/f

P. S.—Since writing the previous letter annexed hereto, the 1200 shares have come in, and we are sending them to you herewith as above mentioned."

762 Q. 1409. What amount of money did you, in fact, pay to Lewisohn Brothers in this matter?

[Objected to as incompetent, immaterial, and irrelevant.]

A. June 4, $6400; September 20, $8724.82; a total of $15,124.82.

Q. 1410. After the letter of October 4, what is the next?

[Same objection.]

A. In the way of letters or conversations?

Q. 1411. Either; letters or conversations.

A. Here is another letter I received dated October 4 [producing same].

[Offered in evidence. Same objection.]

Marked "Exhibit 52," and is as follows. It is written on the same printed letterhead and dated,—

"NEW YORK, *October 4th*, 1895.

Mr. Simon H. Stern, 40 Wall Street, New York.

DEAR SIR: We beg to acknowledge receipt of yours of October 3rd. We directed our Boston friends a few days ago to issue the 1200 shares stock which you are entitled to under the subscription. We expect to receive the stock to-day or to-morrow, when we will send the stock to you promptly. In regard to balance, as our Mr. Jesse Lewisohn has already informed you, we are entitled to about 12,000 shares, so you will get 5%, 600 extra, which will be sent to you as soon as received. The reason that we could not tell you the exact amount of these shares is that it has not been determined yet exactly how much of the shares has to be given to the party who brought about the deal, and our Boston friends besides may not know, and we are abiding by their action. Trusting this information will be satisfactory, we remain

Very truly yours,

LEWISOHN BROTHERS.
ADOLPH LEWISOHN,
General Manager."

Q. 1412. In this letter reference is made to information already given you by Mr. Jesse Lewisohn; have you any recollection relative to that matter?

A. Yes.

763 Q. 1413. Did you have some conversation with Jesse Lewisohn?

A. I did.

Q. 1414. What was the conversation?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I asked him the meaning of it and said that I could not understand how his firm could claim that I was only entitled to 1200 shares of stock being 5 per cent of the syndicate, and I related to him things I had heard concerning the original capitalization that was contemplated, and the reason of it, and I said, "This don't look right, and it doesn't satisfy me, and I want to get a detailed account of the interest of Lewisohn Brothers in the Old Dominion Mining Company." He promised me that at one time, but he never gave it to me, nor anybody else connected with Lewisohn Brothers, and I am ignorant to this day as to the final result of Lewisohn Brothers' participation in that syndicate, nor how they worked out the details.

[The answer of the witness is objected to on the ground that it is a commentary by him and not responsive.]

Q. 1415. Did Jesse Lewisohn or Lewisohn Brothers ever furnish you the account?

[Same objection.]

A. They did not. It was promised me several times by Jesse

Lewisohn, although they assured me at the time it was absolutely accurate.

Q. 1416. Did you ever have any conversation with either Leonard or Adolph Lewisohn on this subject?

A. I did not.

Q. 1417. Were you ever informed, from any source, as to the amount of stock received by Lewisohn Brothers or Leonard Lewisohn in this transaction before the beginning of the present suits?

[Objected to as immaterial, incompetent, and irrelevant.]

A. I was.

Q. 1418. When did you get that information?

[Same objection.]

A. In December, 1895, the early part thereof, Jesse Lewisohn informed me that an accurate calculation of my 5 per cent interest in that syndicate amounted to a certain number of shares, I think 600, and then in a letter of December 5, signed on behalf of Lewisohn Brothers by Mr. Adolph Lewisohn, general manager,

764 Q. 1419. Have you that letter?

A. Yes, and I was again informed [producing letter].

[Letter offered in evidence. Same objection.]

Marked "Exhibit 503," and is as follows, being written on the same letterhead and dated December 5, 1895:—

"Mr. Simon H. Stern, City.

DEAR SIR: We beg to acknowledge receipt of your favor of December 4th and send you herewith accordingly 600 shares of Old Dominion Copper Mining & Smelting Company stock in full settlement of your entire interest in the Old Dominion Mining Company matter. Please acknowledge receipt of enclosure on the accompanying form, and oblige

Very truly yours,

LEWISOHN BROTHERS,
ADOLPH LEWISOHN,
General Manager.

Q. 1420. Your letter of December 4, referred to in Exhibit 503, has already been put in evidence as Exhibit 152, on page 187 of the testimony, and in that you refer to Jesse Lewisohn's suggestion that you accept 600 shares. Will you relate the conversation referred to?

[Same objection.]

A. Substantially it was that he asserted that that was all I was entitled to as my syndicate interest, and I told him I did not believe him. That I wanted an account, and he told me that his father was ill—I don't know whether I told him I would see his father or not on the subject, but I did not believe him at all, and I expected to get from his father the truth. He begged me very hard not to disturb his father. He said his father was a sick man, and that he would

look into it again, and protested very warmly that there wasn't anything in the world he would not do for me, if he could; that they would rather decide a doubt against themselves than against me.

Q. 1421. Now subsequent to that time, and up to the time of the beginning of these suits in October, 1902, had you received any further information on the subject?

[Objected to as incompetent, immaterial, and irrelevant.]

765 A. None whatever.

Q. 1422. From any source?

A. From no source.

Q. 1422. Does what you have testified to cover substantially all of your connection with this matter in 1895?

A. Substantially, yes. I met Jesse Lewisohn frequently. We were in the neighborhood, and met him at Delmonico's and luncheon places, and he used to have talks with me, and the burden of his song was usually that I was going to do very well. He was a very cheerful young man.

In the course of taking depositions before Howland Twombly, Esq., notary public, at 161 Devonshire street, Boston, Mass., October 31, 1907.

Appearances:

Louis D. Brandeis, Esq., for the plaintiff.

Alfred Hemenway, Esq., and Eugene Treadwell, Esq., and J. Wells Farley, Esq., for the defendants.

George C. Burpee, stenographer.

Correspondence Introduced by Defendants.

Mr. Hemenway: There was produced at the taking of depositions in New York pertaining to these cases, a list of papers which were examined by counsel for plaintiffs (they being produced by the defendants' counsel) and a list marked "Exhibit A, B, D," was produced, numbered from 1 to 494. I will now, on behalf of the defendants, offer in evidence certain letters that were then identified. And the first letter that I will offer of that evidence is numbered 22, Lewisohn to Belches. (To Mr. Farley.) Will you read that letter?

[It was agreed between counsel that in place of the witness reading this and other letters to be offered, the stenographer should copy into the record the letters introduced as evidence.]

[The letter numbered 22 is as follows:]

"June 5th, 1895.

Mr. J. W. Belches, Boston, Mass.

Dear Sir: The first instalment of 11 per cent., of your subscription of Five thousand dollars to the Old Dominion Syndi-
766 cate, is now due. Kindly therefore remit us the amount of $700, to cover the first instalment, at your convenience, and oblige.

The subsequent payments will be as follows:

2nd instalment,	July 26th:	.....	28 2/3%	$1,433 33
3rd do.	Aug. 25th:	.....	do.	$1,433 33
4th do.	Sep. 24th:	.....	do.	$1,433 34

To the second, third and fourth instalments interest at the rate of 5 per cent. per annum will have to be added.

Very truly yours,

LEWISOHN BROTHERS,
General Manager."

Mr. HEMENWAY: The next letter is No. 181, Lewisohn to Belches.

Mr. TREADWELL: You have stated that wrongly, Mr. Hemenway, it is Belches to Lewisohn.

[The letter numbered 181 is as follows.]

"BOSTON, *July* 15, 1895.

Messrs. Lewisohn Bros., New York.

GENTLEMEN: We enclose herewith check for $4,328.67 amt. due on $5,000 block Old Dominion to pay in full. We understood you allowed us but $5,000, but your telegram gives figures on $10,000 block undoubtedly. Which is correct? We think the new stock will be quickly taken—have ourselves already booked several subscriptions.

Resp'y,

J. W. BELCHES & CO."

Mr. HEMENWAY: Then Nos. 158 and 159.

Mr. TREADWELL: Mr. Hemenway, I will call your attention that one of those is a copy of the other.

Mr. HEMENWAY: Is not one a carbon?

Mr. TREADWELL: No, it is not a carbon, it is a copy, marked "copy."

Mr. HEMENWAY: If they are identically the same, we will put in only 158.

[The letter numbered 158 is as follows:]

767 "The Old Dominion Copper Company in Account with Baltimore Copper Smelting & Rolling Co.

Dr.

To Balance June 1st		$3,512.62
" draft from Globe		$2,500.00
" June Expenses Baltimore		$1,316.68
" draft from Globe	$1,700.00	
	621.30	
		$1,078.70
" June Salaries, Globe Supt.	300.00	
Asst. Supt.	200.00	
		$500.00
		$8,938.00

Cr.

By overcharge a/cs collected—		
Southern Pacific Company	$571.30	
H. C. Frick Company	134.50	
	$705.80	
" cash from L. Lewisohn	$8,232.20	
		$8,938.00"

Mr. HEMENWAY: 142 and 143, Keyser to Lewisohn.

Mr. TREADWELL: No. 142 is with enclosures. The second page of No. 143 is out of order. The second page will be found after No. 148.

[The letters numbered 142 and 143 are as follows:]

"BALTIMORE, *Nov. 2nd*, 1895.

Mr. Leonard Lewisohn, New York City.

DEAR SIR: We have your favor of the 1st, enclosing Ladenburg-Thalman & Co.'s receipt for $8,000 in full settlement of their claim against me. I am also advised by my Counsel that the details connected with the dismission of the suit have been settled and I now have the pleasure of sending you herewith Draft on New York for $1,263.52 in settlement of all matters open between us as shown in the accompanying statement, which I trust will explain themselves.

The first statement shows the winding up of your affairs in connection with the Old Stock-holders of the Old Dominion
768 Copper Company, in which statement you will note that they paid to the Baltimore Copper S. & R. Co. $8,232.20 in settlement of the balance due that Company as of June 1st, and the amounts advanced by that Company to the Old Dominion Copper Company for expenses, etc., after June 1st, in accordance with our understanding at the time.

The second statement is of the Old Dominion Copper Company in account with the Baltimore Copper S. & R. Co., which will tie in with the books of the former Company sent at your request to Boston. I also enclose papers from Globe, Vouchers, etc., covering the various items paid for the account of the Old Dominion Copper Co. as shown in the statement.

Trusting this will be found in order, I remain,

Yours very truly,

WM. KEYSER,
Per R. BRENT KEYSER.

Leonard Lewisohn in Account with Old Stockholders, Old Dominion Copper Company.

Cr.

By Ladenburg, Thalman settlement	$8,000.00
" Balance due as per William Keyser's letter of June 20th, 1895	$1,495.72
	$9,495.72

Dr.

To Cash paid Baltimore Copper S. & R. Company, a/c Old Dominion Copper Company	$8,232.20	
To Check herewith	$1,263.52	
		$9,495.72

"BALTIMORE, *Nov. 6th*, 1895.

Mr. Leonard Lewisohn, New York City.

DEAR SIR: Replying to your letter of the 4th instant, you wi find that I sent you a statement of the Old Dominion Copper Co pany's affairs, separate from any relations we had together, havi had the B. C. S. & R. Company pay all money for their accoun If you will, therefore, turn over to the Old Dominion Copper Co pany the statement of the account between it and the Baltimo Copper S. & R. Co., which I sent you, and have this statemer posted into its books, it will, I think, enable you to understand th matter fully.

769 Referring to the explanation requested in regard to th gross amount being charged on the pay-rolls for June, yo will find that these statements, also, tie in with the Old Dominio Copper Company's books. You will remember that the transfer the property was made by a change of stockholders, and that as fa as the books of the Company are concerned, no change took plac You state that you have no voucher for the balance due to the Balt more Copper S. & R. Co. June 1st—$3542.62. This balance appea upon the Old Dominion Copper Company's ledger as a credit to th B. C. S. & R. Co. as of that date.

In regard to the June vouchers for salaries of Superintendent an Asst. Superintendent at Globe, I would state that you would prob ably find them at Globe, as they have not been sent to us here. Yo must remember that you took charge there on June 20th, and a payments, etc., after that date were attended to by your own people we merely paying their drafts as an accommodation to you. W held the papers which they sent us from time to time, until the 2n instant, when we forwarded on everything that had been receive

Yours very truly,

WM. KEYSER."

Mr. HEMENWAY: No. 60.

Mr. TREADWELL: No. 60 is from William Keyser to Leonar Lewisohn.

[The letter numbered 60 is as follows:]

"The Old Dominion Copper Mining Company of Baltimore City.
Office, Keyser Building, German and Calvert Sts.

BALTIMORE, *June 20th*, 1895.

Mr. Leonard Lewisohn, New York City.

DEAR SIR: I hand you herewith the balance sheet of the Old D minion Copper Company as of June 19th, 1895. This, of cours

does not include any of the expenditures at Globe since June 1st. You will note that the only claim against the Company, shown by the balance sheet, is a loan by the

Baltimore Copper Smelting & Rolling Company.....		$3,542 62
This offsets the Cash at Globe, June 1st.....	$131 10	
and the Overcharge Account of.....	705 80	
		2,046 90
Leaving a balance of.....		$1,495 72

770 which balance, we are to make good to you, personally, either in cash or by credits allowed us under our agreement. We are, also, to make good to you the $705.80 overcharge account, if the money should not be collected from the Railroad Companies.

Yours truly,

WM. KEYSER.
p. p. R. BRENT KEYSER."

Mr. HEMENWAY: And No. 124.

Mr. TREADWELL: This is from Lewisohn Brothers to R. Brent Keyser, dated August 12, 1895.

[The letter numbered 124 is as follows:]

"AUG. 12TH, 1895.

Mr. R. Brent Keyser, Baltimore, Md.

DEAR SIR: In answer to your favor of the 10th, we herewith return your letter from Mr. Louis Walker and the requisition for July.

We will be obliged to you if you will pay the expenses and, as you say, take all these unsettled financial matters up at one time.

We note in the requisition 'expenses Joseph Campbell, $600, account of the old management.'

Very truly yours,

LEWISOHN BROTHERS,
General Manager."

Mr. HEMENWAY: Now No. 172.

Mr. TREADWELL: That is dated June 5, 1895, Lewisohn Brothers to John Stanton, Esq.

[The letter numbered 172 is as follows:]

"JUNE 5TH, 1895.

John Stanton, Esq., City.

DEAR SIR: The first installment of 14 per cent., of your subscription of Five thousand dollars to the Old Dominion Syndicate, is now due. Kindly remit us therefore the amount of $700 to cover the first installment, at your convenience, and oblige.

The subsequent payments will be as follows:

771 2nd installment, July 26th; 28 2/3% $1,433 33
3rd do. Aug. 25th; do. $1,433 33
4th do. Sep. 24th; do. $1,433 34

Very truly yours,

LEWISOHN BROTHERS,
General Manager.

J. R.

To the second, third and fourth installments interest at the rate of 5 per cent. per ann. will have to be added."

Mr. HEMENWAY: No. 136.

Mr. TREADWELL: That is dated October 4, 1895, Lewisohn Brothers to John Stanton.

[The letter numbered 136 is as follows:]

OCT. 4TH, 1895.

John Stanton, Esq., City.

DEAR SIR: Enclosed we hand you Certificate #361, for 400 shares capital stock of Old Dominion Copper Mining & Smelting Company, against your subscription to the Syndicate of $5,000.—in exchange for which please hand bearer the official receipts which you now hold.

Very truly yours,

LEWISOHN BROTHERS,
General Manager."

Mr. HEMENWAY: No. 183.

Mr. TREADWELL: Dated July 19, 1895, Leonard Lewisohn to John Stanton.

[The letter numbered 183 is as follows:]

"NEW YORK, *July 19th*, 1895.

Old Dominion Syndicate.

DEAR SIR: The second installment of 28⅔rds per cent. of your subscription of $5000.00 to the Old Dominion Syndicate, is called for payment July 26th instant.

Your pro-rata amount is 1433.34 ..... $1433 34
and, adding interest at 5% p. a. from May 28th last 11 94

The total sum called for on second instalment is .. $1445 28

Very truly yours,

LEONARD LEWISOHN,
Per JESSE LEWISOHN.

John Stanton, Esqr."

772 Mr. HEMENWAY: No. 364.

Mr. TREADWELL: Charles F. Brooker to Lewisohn Brothers, dated October 10, 1895.

[The letter numbered 364 is as follows:]

"TORRINGTON, CONN., U. S. A., *Oct.* 10, 1895.

Messrs. Lewisohn Bros., New York City.

GENTLEMEN: On my return this morning, I have yours of the 5th inst. enclosing check for $2,123.05, as stated by you, in settlement of the Old Dominion Syndicate account, which I find to be correct, and very satisfactory, and herewith enclose official receipt as requested.

I also have with the same enclosure, Certificate #369 for 200 shares Old Dominion stock—for all of which I am very much obliged.

Very truly yours,

CHAS. F. BROOKER."

Mr. HEMENWAY: No. 356.

Mr. TREADWELL: Lewisohn Brothers to Charles F. Brooker, dated October 5, 1895.

[The letter numbered 356 is as follows:]

"OCT. 5, 1895.

Mr. Chas. F. Brooker, Torrington, Conn.

DEAR SIR: Enclosed please find certificate No. 369 for 200 shares of Old Dominion Copper Mining & Smelting Company's stock made out in your name; also statement showing a credit balance of $2,123.05, being your first and second payments on subscription — the syndicate, less interest on third and fourth payments, for which amount we enclose our check, receipt of which please acknowledge, and oblige,

Yours very truly,

LEWISOHN BROTHERS,
General Manager."

Mr. HEMENWAY: No. 258.

Mr. TREADWELL: Lewisohn Brothers to Charles F. Brooker, dated June 25, 1895.

[The letter numbered 258 is as follows:]

773 "JUNE 25TH, 1895.

Mr. Charles F. Brooker, c/o Coe Brass Manufacturing Company, Torrington, Ct.

DEAR SIR: The first and second payments on your Five thousand dollars subscription to the Old Dominion Syndicate are now due, as follows:—

14% of $5,000.	$700 00
28¾% of $5,000.	1,433 33
Interest from May 28th to June 26th—29 days at 5% p. a.	8 59
Total amounts of first and second payments	$2,141 92

The third payment of 28¾rds per cent. will be due August 25th; and the fourth and last payment of 28¾rds per cent. will be due September 24th, with interest at the rate of 5% per annum from May 28th.

Very truly yours,

LEWISOHN BROTHERS,
General Manager."

Mr. HEMENWAY: No. 273.

Mr. TREADWELL: Letter dated June 24, 1895, Thalmann to Charles J. Brooker.

[The letter numbered 273 is as follows:]

"JULY 24TH, 1895.

Chas. J. Brooker, Esq., Torrington, Ct.

DEAR SIR: A number of the largest subscribers to the Old Dominion Syndicate have requested that they be allowed to take shares in the new Company at their par value of $25 per share, instead of having the amount of their subscription returned to them from the proceeds of sale of stock in the new Company, as proposed.

As a subscriber to the Syndicate you are hereby informed that it has been decided to grant this request; and, the amount of your subscription being $5,000, you can, if you like, have two hundred shares of stock in the new Company (instead of the return of your $5,000) —in addition to which a further two hundred shares in the new Company (equalling the amount of your subscription at $25 a share) will be allotted to you.

If you wish to avail yourself of the option of taking the two hundred shares first mentioned, instead of receiving back the
774 $5,000, which you subscribed to the Syndicate, you must notify me in writing on or before Saturday next the 27th instant, after which date this option will positively expire.

Very truly yours,

—— ——."

Mr. HEMENWAY: No. 275.

Mr. TREADWELL: A letter dated July 25, 1895, Lewisohn Brothers to H. Wallerstein.

[The letter numbered 275 is as follows:]

JULY 25TH, 1895.

H. Wallerstein, Esq., City.

DEAR SIR: We beg to confirm that we have subscribed for your account for five hundred (500) shares of Old Dominion Copper Mining & Smelting Company's stock at $25 a share, which we expect will be delivered about October 1st, when one payment will be required.

Please confirm.

Very truly yours,

LEWISOHN BROTHERS,
General Manager."

Mr. HEMENWAY: No. 291.

Mr. TREADWELL: Letter dated August 6, 1895, Lewisohn Brothers to H. Wallerstein.

[The letter numbered 291 is as follows:]

AUGUST 6TH, 1895.

Mr. H. Wallerstein, c/o Mr. D. Wallerstein, City.

DEAR SIR: The following will give you a little idea of the prospects of the Old Dominion Copper Mining & Smelting Company.

This mine, under the name of the Old Dominion Copper Company, has been in operation for the last 14 years, making copper right along called the Old Dominion copper containing about 97½ per cent. pure copper. This copper has been sold mostly to France and Germany, and some to England of late years; therefore the brand is known all over. It is a very pure copper.

The ores from which this copper is made are mostly carbonates, which ores are materially better than the sulphates, which is the product of the Montana mines. The sulphate ores have first
775 to be concentrated, which costs quite something, and the plant itself is very costly indeed; then it has to be roasted in order to get the impurities out, like arsenic, sulphur, etc.; then, after it is roasted, it has to be made into a matte of about 45 to 50 per cent. copper.

Now, these carbonate ores, of which the Old Dominion mines has enormous quantities opened up now, are ready to be taken out at a moment; and there is quite a lot on the dump. They have simply to be thrown into a blast furnace and 97½ per cent copper is made without any concentrating or roasting. Naturally it is much cheaper to produce and needs nothing like such an expensive plant.

The new company, The Old Dominion Copper Mining & Smelting Company, has all the furnaces and everything ready for making a larger production, and we have $500,000 in cash in the treasury of the company, to be used to add new furnaces and make the production even larger. There is no question about it that the company will be able to declare dividends within six months.

We are not at present making much copper as the railroad will be in Globe, at the mines, sometime late this autumn. The railroad is now 60 miles away—to which distance it was only finished a little while ago from a former distance of 120 miles.

The old company has always made money and made copper very cheap, even hauling in coke 120 miles and bringing out the copper the same distance by mule teams, which was naturally very expensive and on which we will effect an enormous saving.

We believe that the Old Dominion Copper Mining & Smelting Company will produce cheaper copper than any other copper mine in this country—including the Calumet & Hecla, Anaconda and Boston & Montana.

We expect to have a report from the different Engineers who have examined the mine carefully a month or two ago, shortly, and we can then give you further particulars.

Very truly yours, LEWISOHN BROTHERS.

General Manager."

Mr. HEMENWAY: No. 134.

Mr. TREADWELL: Letter dated September 20, 1895, Simon H. Stern to Lewisohn Brothers.

776 [The letter numbered 134 is as follows:]

"SEPTEMBER 20TH, 1895.

DEAR SIRS: Referring to your favor of the 3rd of June last I beg to enclose herein my check for $8600 to cover the third and fourth payments for my interests in the Old Dominion Syndicate as they then existed. Kindly acknowledge receipt of same. If you consider any adjustment of interest necessary please let your bookkeeper make a calculation and send it to me; but inasmuch as I anticipated some of the payments it seemed to me it could not make much difference one way or the other.

Please also send me such certificate of stock as I am entitled to.

Yours truly, SIMON H. STERN.

Mess. Lewisohn Brothers, City."

Mr. HEMENWAY: No. 94.

Mr. TREADWELL: Letter dated July 12, 1895, A. W. Evarts to Leonard Lewisohn.

[The letter numbered 94 is as follows:]

"NEW YORK, *July* 12, 1895.

DEAR MR. LEWISOHN: I enclose deed from you to the Old Dominion C. M. & S. Co. The certificates of organization and the appointment of an agent required by Arizona law to be filed before any business can be done in that territory went by last night's registered mail to be filed & I requested telegraph notice to be sent of their filing which should reach here by Thursday of next week. It would be better not to execute this deed from you to the company until these papers are filed—but if you are to be away for any length of time it can be executed and left by you with me to be delivered later when the deed from the Baltimore Co. is delivered.

If you conclude to execute today, please have two witnesses and acknowledge before a Notary Public who should affix his seal.

Yours very truly, A. W. EVARTS.

Leonard Lewisohn, Esqr., 81 Fulton St."

Mr. HEMENWAY: No. 95.

Mr. TREADWELL: Letter dated July 12, 1895, to Allan W. Evarts.

777 [The letter numbered 95 is as follows:]

"JULY 12, 1895.

Allen W. Evarts, Esq., 52 Wall Street, City.

DEAR SIR: Please find enclosed herewith deed from me to the Old Dominion Copper Smelting & Mining Co., which has been executed

in accordance with the directions contained in your favor of even date.

Yours very truly, —— ——."

Mr. HEMENWAY: No. 276.

Mr. TREADWELL: Letter dated July 25, 1895, to E. Hawley.

[The letter numbered 276 is as follows:]

"JULY 25, 1895.

Mr. E. Hawley.

DEAR SIR: A number of the largest subscribers to the Old Dominion Syndicate having requested that they be allowed to take shares in the new Company at their par value of $25 per share, instead of having the amount of their subscription returned to them from the proceeds of sale of stock in the new Company as proposed, as a subscriber to the Syndicate you are hereby informed that it has been decided to grant this request; and the amount of your subscription being $10,000, you can, if you like, have four hundred shares of stock in the new Company (instead of the return of your $10,000)—in addition to which a further four hundred shares in the new Company (equalling the amount of your subscription at $25 a share) will be allotted to you.

If you wish to avail yourself of the option of taking the four hundred shares first mentioned instead of receiving back the $10,000 which you subscribed to the Syndicate, you must notify me in writing on or before Saturday next the 27th instant, after which date this option will positively expire.

Very truly yours, —— ——."

Mr. HEMENWAY: No. 244.

Mr. TREADWELL: Letter dated May 24, 1895, Lewisohn Brothers to Adolph Lewisohn.

[The letter numbered 244 is as follows:]

"NEW YORK, *May 24th*, 1895.

Adolph Lewisohn, Esq., London.

DEAR SIR: Mr. Meredith got back from Baltimore yesterday and had a conference of a couple of hours' duration with Mr.
778 Keyser, but is none the wiser as to whether this gentleman intends to let us have his two-sevenths of the Old Dominion or not. He intimates that if we make it a different Company with a higher capitalization he would probably not remain in; but he has not decided and is not compelled to decide for sixty days. Having three Directors out of five, they control; and we would have to get one of these Directors on our side—otherwise they would have the running of the Company until next February, when a Meeting will be held and new Directors appointed.

We will have to take our chances on this matter, and we hope he will act fairly.

Mr. Lieberman of Arizona is one of the Directors, we understand, and Mr. Leonard Lewisohn believes we will be able to win him over.

Mr. Simpson also promised to help us in gaining our point there, and it is probable that this matter will right itself in course of time, as it is not likely that Keyser will be very mean when there is not much for him to gain thereby.

Very truly yours, LEWISOHN BROTHERS.
General Manager."

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

Deposition of Joseph F. Costello.

JOSEPH F. COSTELLO, being first duly sworn, in answer to interrogatories propounded by J. WELLS FARLEY, Esq., counsel for the defendants, the witness deposes and says.—

Q. 1. What is your full name?
A. Joseph F. Costello.
Q. 2. Where do you live?
A. Dorchester; 31 East street.
Q. 3. What is your present occupation?
A. I am a reporter for the "Boston News Bureau."
Q. 4. What are these two books that I now show you, marked on the outside, "Boston News Bureau, Vol. 17, July 1st, 1895, to Sept 31, 1895," and "Boston News Bureau, Vol. 16, Jan. 1, 1895, to June 30, 1895," respectively?
A. Those are two bound volumes of the "Boston News Bureau" summaries.
779 Q. 5. Where did you find them?
A. Those came from our vault.
Q. 6. By whom were you directed to bring them here?
A. Mr. Herbert M. Cole.
Q. 7. Who is Mr. Herbert M. Cole?
A. He is the manager in the absence of Mr. C. W. Barron.
Q. 8. Where is Mr. Barron?
A. Where is he now?
Q. 9. Yes.
A. I do not know where Mr. Barron is.
Q. 10. Is he present at or absent from the office?
A. He is absent from the office.
Q. 11. Will you turn to the issue of Saturday, May 25, 1895, and, looking on the last page of that issue (the pages not being numbered), read, or see that I read correctly, the item in regard to Old Dominion?

[Objected to as incompetent, irrelevant, and immaterial.]

Mr. HEMENWAY: This evidence is offered simply for the sake of showing the publicity of these transactions.

Mr. BRANDEIS: The admissibility of the evidence for any purpose is objected to as incompetent, irrelevant, and immaterial.

A. The item is as follows:

"Old Dominion.

Boston—The syndicate that holds an option on five-sevenths of the Dominion copper mine of Arizona will also take the other two-sevenths as soon as arrangements can be made. The syndicate that has taken hold of this property comprises only five or six parties, and there is no intention of placing any stock on the market."

Q. 12. Will you now turn to the issue of Wednesday, May 29, 1895, and, looking on the first page thereof, read the item in regard to Old Dominion?

[Objected to for the reasons above stated.]

A. The item is as follows:

"Old Dominion.

Boston—The Syndicate that holds an option on five-sevenths of the Old Dominion Copper Mining Co. of Arizona closed the same yesterday and will probably later take the other two-sevenths controlled by Mr. Kaiser of the Baltimore Smelting Co. and his friends.

780 Mr. Dodge of Phelps, Dodge & Co. while a large holder or Arizona copper mines securities, is not interested in the Old Dominion.

No plans in regard to the mine have been formulated as yet. The mine is already equipped with machinery.

This mine in no way controls the Arizona copper outputs as reported. Arizona last year produced 44,000,000 lbs. of copper, of which Old Dominion produced about 4,000,000 lbs. Its largest production in one year was 7,500,000 lbs."

Q. 13. Will you now turn to the issue of Friday, May 31, 1895, and, looking on the last page thereof, read the item in regard to Old Dominion?

[Objected to for the reasons above stated.]

A. The item is as follows:

"Old Dominion.

Boston—The purchase of the Old Dominion copper mine has been concluded, and property has passed into the hands of the Bigelow-Lewisohn syndicate."

Q. 14. Will you now turn to the issue of June 13, 1895, and, looking on the first page thereof, read the item in regard to the Old Dominion Copper Company?

[Objected to for the reasons above stated.]

A. The item is as follows:

"Old Dominion Copper Co.

Boston—The Sears building people have received final word that the minority interests of the Old Dominion Copper Co. will sell the last two-sevenths of the property at the price paid for the major interest."

Q. 15. Will you now turn to the issue of June 20, 1895, and looking on the first page thereof, read the item which there appears in regard to the Old Dominion Copper Company?

[Objected to for the reasons above stated.]

A. The item is as follows:

781 "Old Dominion.

Boston—Payment was made today to the Old Colony Trust Co. for the two-sevenths interest in the Old Dominion Co. held by Baltimore people.

Boston—$2000, or 2%, has been bid for a $10,000 subscription to Old Dominion Copper Co."

Q. 16. Will you now turn to the issue of June 24, 1895, and, looking at that issue of June 24, 1895, read the item which there appears in regard to Old Dominion?

[Objected to for the reasons above stated.]

A. The item is as follows:

"Old Dominion.

Boston—We understand that the Old Dominion Copper Co. will be reorganized with capital stock of 100,000 shares, par value $25."

Q. 17. Will you now turn to the issue of June 25, 1895, and, looking at that issue of June 25, 1895, on the first page, read the item that there appears in regard to Old Dominion?

[Objected to for the reasons above stated.]

A. The item is as follows:

"Old Dominion.

Boston—Nothing has been actually done by the trustees of the Old Dominion Copper Co. as yet regarding the organization or capitalization of the company."

Q. 18. Will you now turn to the issue of July 9, 1895, and, looking at that issue of Tuesday, July 9, 1895, read the item that there appears in regard to Old Dominion?

[Objected to for the reasons above stated.]

A. The item is as follows:

"Old Dominion.

Boston—It is not true that Mr. Lewisohn took one-half of the Old Dominion Copper Co. subscription. He took one-half of the five-sevenths, but Boston not only took one-half of the five-sevenths but two-thirds of the two-sevenths.

It is understood that there will be 150,000 shares of the
782 par value of $25 in the new Co. although this is not yet settled, in fact the concern is not yet a public affair and subscriptions are non negotiable.

It is a fact, however, that Boston will have the larger interest in the property and it is understood that Hon. Moses T. Stevens of North Andover and Hon. Joseph G. Ray of Franklin will be directors in the new company, and also Henry M. Whitney of Boston."

Q. 19. Will you now turn to the issue of July 10, 1895, and, looking at that issue of Wednesday, July 10, 1895, on the first page thereof, read the item that there appears in regard to Old Dominion?

[Objected to for the reasons above stated.]

A. The item is as follows:

"Old Dominion.

Boston—New York interests are bidding a premium of 75% for Old Dominion subscriptions and it is figured that subscribers will get their money all back which would make their stock left all gain.

Good judges say that the Old Dominion can produce copper cheaper than any mine in this country. It is believed that if the mine has railroad facilities it can lay down copper in New York at 4c. per pound.

The Old Dominion has always been a paying property. It has paid as high as 20% on its capital stock when its ore had to be carted 120 miles."

Q. 20. Will you now turn to the issue of July 11, 1895, and, looking at that issue, on the first page thereof, read the item that there appears in regard to Old Dominion?

[Objected to for the reasons above stated.]

A. The item is as follows:

"Old Dominion.

Boston—The subscribers of the Old Dominion Copper Co. will probably receive back their money and 40,000 shares in the new organization. There will be offered for subscription 60,000 shares at $25 per share; 40,000 shares to furnish the $1,000,000 paid to original subscribers and 20,000 shares to furnish $500,000 working capital."

Q. 21. Will you now turn to the issue of July 12, 1895,
783 and, looking at that issue of Friday, July 12, 1895, on the first page thereof, read the item which there appears in regard to Old Dominion?

[Objected to for the reasons as above stated.]

A. The item is as follows:

"Old Dominion.

Boston—The following were elected yesterday directors of the 'new' Old Dominion Copper Co.: A. S. Bigelow, Thos. Nelson and Henry M. Whitney of Boston, A. W. Evarts of New York, Jos. G. Ray of Franklin, Leonard Lewisohn of New York, Edgar Buffum of New Jersey. A. S. Bigelow, president, and Thos. Nelson, treasurer. It was necessary in order to obtain a quorum to make Mr. Evarts a director, but he will be succeeded by Moses T. Stevens."

Q. 22. Will you now turn to the issue of July 19, 1895, and, looking at that issue of Friday, July 19, 1895, and looking on the first page thereof, read the item which there appears in regard to Old Dominion?

[Objected to for the reasons as above stated.]

A. The item is as follows:

"Old Dominion.

Boston—A small lot of Old Dominion sold at 30 this morning. Of the 150,000 shares of this company, 20,000 shares have been sold at 25 to give the corporation a working capital of $500.00."

Q. 23. Will you now turn to the issue of July 20, 1895, and, looking at that issue of Saturday, July 20, 1895, on the first page thereof, read the item which there appears in regard to Old Dominion?

[Objected to for the reasons as above stated.]

A. The item is as follows:

"Old Dominion.

Boston—The Old Dominion subscriptions will be allotted about Aug. 1."

Q. 24. Will you now turn to the issue of July 22, 1895, and, looking at that issue for Monday, July 22, 1895, read the item which there appears in regard to Old Dominion?

[Objected to for the reasons as above stated.]

784 A. The item is as follows:

"Old Dominion.

Boston—The following letter has been issued to the Old Dominion syndicate:

'A number of the largest subscribers to the Old Dominion Syndicate have requested that they be allowed to take shares in the new company at their par value of $25, in lieu of the money which they originally advanced, and which was to be repaid to them from the proceeds of the sales of the new stock. As a subscriber to the

syndicate you are hereby informed that it has been decided to grant this request. If you wish to avail yourself of this opportunity, you must notify me in writing on or before Aug. 1, 1895, after which date this option will positively expire.

A. S. BIGELOW."

Q. 25. Will you now turn to the issue of July 25, 1895, and, looking at that issue of Thursday, July 25, 1895, on the first page thereof, read the item which there appears in regard to the Old Dominion?

[Objected to for the reasons as above stated.]

A. The item is as follows:

"Old Dominion.

Boston—Members of the original syndicate in the Old Dominion subscription are very generally taking advantage of the option accorded them to take the new stock."

Q. 26. Will you now turn to the issue of August 3, 1895, and, looking at that issue of Saturday, August 3, 1895, on the last page thereof, read the item which there appears in regard to the Old Dominion?

[Objected to for the reasons as above stated.]

A. The item is as follows:

"Old Dominion.

Boston—Subscriptions to the Old Dominion copper shares at $25 per share are understood to have exceeded 100,000 shares. As all the members of the syndicate elected to keep their stock in preference to parting with it at $25 per share, the subscribing brokerage houses will get nothing outside of their syndicate subscription.

785 Of the 20,000 shares taken at $25 per share for working capital by the original purchasing syndicate a small amount may be surrendered to friends of the Co., but there is no placing of the stock abroad and practically no allotment on the public subscription."

Q. 27. Will you now turn to the issue of the 6th of August, and, looking at that issue of Tuesday, August 6, 1895, on the first page thereof, read the item which there appears in regard to the Old Dominion?

[Objected to for the reasons as above stated.]

A. The item is as follows:

"Old Dominion.

Boston—Mr. Lewisohn estimates that the Old Dominion will in time be as large a producer of copper and as valuable a property as the Boston & Montana. He says it can produce copper at as low a cost as the Montana.

When Mr. Lewisohn secured through Mr. Meredith of Meredith & Grew the option upon five-sevenths of the Old Dominion property from the Simpson estate upon the basis of $1,000,000, the Baltimore Smelting people owning two-sevenths of the property claimed to have an option upon the five-sevenths upon the basis of $800,000, and were very much disappointed when they found they had lost the property."

Q. 28. Will you now turn to the issue of the 7th of August, 1895, and, looking at that issue of Wednesday, August 7th, 1895, on the first page thereof, read the item which there appears in regard to Old Dominion?

[Objected to for the reasons as above stated.]

A. The item is as follows:

"Old Dominion.

Boston—The parties in interest who first proposed to take all the 20,000 shares Old Dominion stock, issued for working capital, have finally agreed to give up the same and consequently there will be little scaling down of the public subscription."

Q. 29. Will you now turn to the issue of September 19, 1895, and, looking at that issue of Thursday, September 19, 1895, on the first page thereof, read the item which there appears in regard to Old Dominion?

[Objected to for the reasons as above stated.]

786 A. The item is as follows:

"Old Dominion.

Boston—The corporate organization of the Old Dominion Copper Co. was completed yesterday at a meeting of the directors, and $500,000 in cash put into the treasury of the new company, although Mr. Hyams just back from the mines reports that he cannot see where more than $50,000 can be expended for the improvement of the property at the present time.

The report from Globe, Arizona, that the company had purchased $350,000 worth of machinery is not true. Only a $750 boiler has thus far been ordered.

Taking the books of the old company as a basis, and adding only the reduction in expenses already made, although many more are contemplated, the cost of the Old Dominion Co.'s copper laid down in New York and sold cannot be above 7½c., and the present price for pig copper is 10⅝c."

Q. 30. How long have you been with the "Boston News Bureau?"

A. Since the 19th of September, 1904. I had been there three years on the 19th of last September.

JOSEPH F. COSTELLO.

[No cross-examination.]

[Recess until 2 P. M.]

Subscribed and sworn to this 5th day of November, 1907, before me,

[SEAL.] HOWLAND TWOMBLY,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

Deposition of Thomas H. O'Neil.

THOMAS H. O'NEIL, being first duly sworn, in answer to interrogatories propounded by Alfred Hemenway, Esq., counsel for the defendants, the witness deposes and says:

Q. 1. What is your full name?
A. Thomas H. O'Neil.
Q. 2. What is your business?
A. I am a reporter for the "Boston Herald."
787 Q. 3. This bound volume of the files of the "Boston Herald," "July and August, 1895," is produced by you, is it not?
A. Yes, sir.
Q. 4. Where did you get this volume?
A. From the "Boston Herald" news room.
Q. 5. Now will you turn to the issue of Friday, July 19, 1895, and read to us what is said about the Old Dominion Company on page 5 of that issue?

[Objected to as incompetent, irrelevant, and immaterial.]

Mr. HEMENWAY: This evidence is offered simply for the sake of showing the publicity of these transactions.

Mr. BRANDEIS: The admissibility of the evidence for any purpose is objected to as incompetent, irrelevant, and immaterial.

A. "Old Dominion (new) stock was quoted 26 and 30 bid privately. It now transpires that the recapitulation as previously understood $2,500,000 is $1,250,000 below the actual. The Herald is always pleased to understate the truth when the exact truth is not stated through ignorance of the full truth. The amendment of supposed fact merely punctuates the comment made upon this subject. The $1,000,000 of 'water' in the capital stock is swollen to a 'flood' of $2,250,000, and it is understood that the original promoters take this added $1,250,000 to themselves. The case stands this way:

Original capital, 25,000 shares at 20	$500,000
Purchasers paid for same 40 a share	$1,000,000
Capitalized same for 150,000 shares at 25	$3,750,000
Put into pockets of purchasers, 50,000 shares at 25	$1,250,000
Gone to subscribers of $1,000,000 purchase money 40,000 shares at 25	$1,000,000
Sold to public 60,000 shares at 25	$1,500,000

And a premium is now bid of 1 to 5 per share for the stock of a company formerly capitalized for $500,000 and considered well sold for $1,000,000 a few days ago, but now recapitalized for 750 per cent. of its former par value and 375 per cent. of the purchase price. What will be the fruit of such financial sowing? What but the inevitable fruit of speculative financiering? It is said that New York took a large amount of the 60,000 shares sold to the public, and that Mr. Leonard Lewisohn stood ready to give his check for the whole block."

788 Q. 6. In what column does that what you have just read appear?

A. In the column headed "Financial."

Q. 7. Is that the morning edition?

A. It is the morning edition.

Q. 8. By whom were you directed to bring this file of newspapers here?

A. By W. H. Ford, the day editor of the "Herald."

Q. 9. Will you now turn to the issue of the "Boston Herald" of Friday morning, July 26, 1895, and read from the third page, in the financial column, what is said about Old Dominion?

[Objected to for the reasons above stated.]

A. "Old Dominion stock was $28\frac{3}{4}$, and sales, while 1 per cent. was reported bid to call it at 31 within 60 days. It is said that members of the original syndicate in the Old Dominion subscription are very generally taking advantage of the option accorded to them to take the new stock. By original syndicate is meant the subscribers to the $1,000,000 paid for the stock of the original company, not the ground floor syndicate which arranged for the deal and voted itself a fee of $1,250,000 par value. Now, the $1,000,000 syndicate had the option of receiving back the $1,000,000 with a bonus of another $1,000,000 par value, to wit, 40,000 shares of stock, or subscribing for 40,000 more shares at par, 25, and receiving 40,000 shares as a bonus. It is said that the members are generally elected to turn the original subscription into stock, which is scarcely amazing. The 80,000 shares will cost the syndicate $1,000,000, or $12\frac{1}{2}$ per share, and this stock is now quoted at $28\frac{3}{4}$—a premium, of $3\frac{3}{4}$—before it is issued. Now, this $1,000,000 syndicate is believed to include the ground floor or sub-cellar syndicate which took to itself the fee, or bonus, or whatever the fitting name, of 50,000 shares, par value $1,250,000. The members of the $1,000,000 syndicate, who subscribed, say, $10,000 and took stock instead of the money in repayment, receives 400 shares for his money and 400 shares as a practical bonus, 800 shares in all, at a cost of $12\frac{1}{2}$ per share. But if he was also in the lower stratum syndicate he gets 500 shares additional, or 1300 shares in all, at a cost of $10,000 for the lot, say about 7 11/16 per share. Here, then, are two classes of shareholders paying $12\frac{1}{2}$ and 7 11/16, respectively, for the new Old Dominion stock. Then there is that other class buying the balance of the 60,000 shares, of which the $1,000,000

syndicate takes 40,000 at 25 per share. Three classes of shareholders, therefore, will exist, the sub-cellar, the ground floor
789 and the attic classes, holding certificates costing in the ratio of 7 11/16, 12½ and 25; or, to express it in dollars, $7.69, $12.50 and $25."

Q. 10. Will you turn to the issue of the "Boston Herald" of September 20, 1895, and, from the financial column on page 5, read any comment upon Old Dominion?

[Objected to for the reasons above stated.]

A. "The Old Dominion Copper Company has completed its reorganization. Agent Hyams sees no need of expending more than $50,000 on improvements, for the present. The story that $350,000 worth of machinery had been purchased is wrong. A boiler to cost $750 is the limit of orders placed to date.

If only $50,000 of money is required for Old Dominion improvements, why was a capital stock of $500,000 multiplied to $3,750,000 and cash equal to the old capital stock put into the treasury? New stock was offered at 25 today. It is not unlikely that a pool will take this stock in hand and put it up to enhance the profits of subscribers who may wish to unload. The first sign of such purpose is seen in the following paragraph:

One-fourth of one per cent. was bid in the local board today to call 1000 shares of Old Dominion at 30 within 30 days."

[No cross-examination.]

THOMAS H. O'NEIL.

Subscribed and sworn to this 6th day of November, 1907.
Before me:
[SEAL.]

HOWLAND TWOMBLY,
Notary Public.

CHARLES H. ALTMILLER, recalled.

CHARLES H. ALTMILLER, having previously been sworn, and having previously testified, being recalled by counsel for the defendants for further cross-examination, in answer to interrogatories propounded by J. Wells Farley, Esq., of counsel for defendants, further deposes and says:

X 216. What is your full name?
A. Charles H. Altmiller.
X 216½. You have been previously sworn in this case?
A. Yes, sir.

X 217. Will you first produce the deed from Leonard
790 Lewisohn to the Old Dominion Copper Mining & Smelting Company of certain mining claims?

A. [Deed produced.]

Mr. FARLEY: I will ask to have this deed marked.

Mr. BRANDEIS: A copy of it had better go in. Have it marked, and a copy made to go in.

Mr. FARLEY: It is agreed that the original deed may be marked, and that a copy shall be submitted to be copied into the record, the copy to be an absolute copy.

Mr. BRANDEIS: Mr. Burpee had better take the deed and make a copy of it.

Mr. HEMENWAY: Not only a copy of the deed, but of the endorsements, when it was recorded, and so forth.

[The original deed, dated July 12, 1895, was marked "Defendants' Exhibit A, G. C. B., October 31, 1907;" and a copy of the deed is as follows:]

"This Indenture made the twelfth day of July in the year One thousand eight hundred and ninety five Between Leonard Lewisohn of the City, County and State of New York party of the first part and Old Dominion Copper Mining and Smelting Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey party of the second part.

Witnesseth: that the said party of the first part for and in consideration of the sum of One hundred dollars and of other good and valuable considerations the receipt whereof is hereby acknowledged hath granted, conveyed, bargained, sold, released and forever quitclaimed and doth by these presents grant, convey, bargain, sell, release and forever quit-claim unto the said party of the second part its successors and assigns all the right, title, interest and estate of the said party of the first part in and to all the following described premises, situate, lying and being in the County of Gila, Arizona Territory, viz:

1st. The Old Dominion Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1883, in the United States Land office at Tucson, Arizona, Entry No. 267, Lot No. 45, situated in Globe Mining District in Gila County, Arizona.

2nd. The New York Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1883, in the United States Land office at Tucson, Arizona, Entry No. 268, Lot No. 46, in Globe Mining District in Gila County, Arizona.

3rd. The Chicago Mine entered by the Old Dominion
791 Copper Mining Company on the 17th day of December 1883, in the United States Land office at Tucson, Arizona, Entry No. 269, Lot No. 51, in Globe Mining District Gila County, Arizona.

4th. The Keystone Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1885, in the United States Land office at Tucson, Arizona, Entry No. 384 Lot No. 54 in Globe Mining District, Gila County, Arizona.

5th. A lot or parcel of land situated near the Bloody Tanks and deeded by E. A. Saxe to the Old Dominion Copper Mining Company, Deed recorded in Book 1, of Deeds of the Recorder of Gila County, Arizona, and reference is hereby made to said record for a fuller description of said parcel of land.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining:

To Have and To Hold all and singular the said premises together with the appurtenances and privileges thereto incident unto the said party of the second part its successors and assigns forever.

In Witness Whereof the said party of the first part hath hereunto set his hand and seal the day and year first above written.

LEONARD LEWISOHN. [SEAL.]

In the presence of,

JOSEPH RECHERT.
SIDNEY RIDDLESDORFFER.

STATE OF NEW YORK,
City and County of New York, ss:

Before me —— ——, a Notary Public of the State of New York residing in the City and County of New York duly commissioned and sworn on the twelfth day of July eighteen hundred and ninety five personally appeared Leonard Lewisohn known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office the day and year last above written.

JOHN F. FOX.
[SEAL.] *Notary Public, New York County.*

792 [Endorsements.]

Dated July 12th, 1895.

Leonard Lewisohn
to
Old Dominion Copper Mining and Smelting Company.

TERRITORY OF ARIZONA,
County of Gila, ss:

I, G. M. Allison, County Recorder in and for said Gila County, Do Hereby Certify, that the within instrument of writing, was filed at the request of J. A. Parnall, Supt. on the 18 day of Jany. A. D., 1896, at 10 minutes past 4 o'clock P. M., and duly recorded at Page 116, Book 3, Records of Deeds to Mines, Gila County, Arizona Territory.

[Seal Gila County, Arizona, Recorder.]

G. M. ALLISON,
County Recorder.

X 218. Will you also produce the deed from the Old Dominion Copper Company to the Old Dominion Copper Mining & Smelting Company of certain mining claims?

A. [Deed produced.]

Mr. FARLEY: The next paper produced by Mr. Altmiller is a deed to be marked "Defendants' Exhibit B," this being a deed from the Old Dominion Copper Company to the Old Dominion Copper Mining & Smelting Company, dated December 28, 1895.

[This deed is marked "Defendants' Exhibit B, G. C. B., October 31, 1907," and a copy of the deed follows:]

"This Indenture made the 28th day of December in the year One thousand eight hundred and ninety five Between The Old Dominion Copper Company, of Baltimore City, a corporation organized and existing under and by virtue of the laws of the State of Maryland, party of the first part and Old Dominion Copper Mining and Smelting Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, party of the second part Witnesseth:

That the said party of the first part for and in consideration of the sum of one hundred dollars and of other goods and valu-
793 able considerations, the receipt is hereby acknowledged hath granted, conveyed, bargained, sold, released and forever quit-claimed and doth by these presents grant, convey, bargain, sell, release and forever quit-claim unto the said party of the second part its successors and assigns all the right, title, interest, and estate of the said party of the first part in and to all the following described premises situate, lying and being in the County of Gila, Arizona Territory, viz:

First. The Globe Mine, patented by the United States Government to B. W. Reagan on the 18th day of October 1881, by patent recorded in the office of the Recorder of Pinal County, Territory of Arizona, on the 19th day of November 1881, to which record reference is made for a fuller description of said Mine.

Second. The Globe Ledge Mine, patented by the United States Government to Benjamin W. Reagan on the eighteenth day of October 1881, by patent recorded in the office of the Recorder of Pinal County, Territory of Arizona, on the nineteenth day of November 1881, to which record reference is made for a fuller description of said Mine.

Third. The Copper Jack Mill Site, of which the location is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 311, and to which record reference is hereby made for a fuller description of said Mill Site, and upon which the Smelting Works, formerly owned by the Old Dominion Copper Mining Co. are situated.

Fourth. The Globe Mill Site, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 311, to which record reference is hereby made for a fuller description of said Mill Site.

Fifth. The Globe Ledge Mill Site, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 310, to which record reference is hereby made for a fuller description of said Mill Site.

Sixth. The Southeast Globe Mine, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 312 and reference is hereby made to said records for a fuller description of said Mine.

Seventh. All of that certain Mining Claim known as the Interloper, in Globe District, County of Gila, Territory of Arizona, and recorded in Globe District Records, on pages 116 and 117 in Book 3, reference to which will more fully show, being the same property conveyed to the said party of the first part by William Key-
794 ser by deed bearing date of June 27th 1888, and recorded as pages 14-16, Book 3 Records of Deeds to Mines, Gila County, Arizona Territory.

Eighth. The Fraction Mine, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 569, to which record reference is hereby made for a fuller description of said Mine.

Ninth. The Alice Mine or Lode, located October 10th, 1875, by A. R. Hammond and J. W. Reed, and notice of location recorded in Book 1, page 131, Globe District Mining Records (now a part of the Records of Gila County) and relocated February 28th 1879, and notice of location recorded in Book 5, Globe District Mining Records (now a part of the Records of Gila County) on pages 184 and 185, said Mine or Lode being more particularly described in the last mentioned notice of location, as follows, to wit: Commencing at this monument of stones in a gulch, being the center of South-west end of claim, and upon which this notice is posted; thence South-east 300 feet to a monument of stones, thence North-east 1400 feet to a monument of stones; thence North-west 300 feet to a monument of stones; being the center of the Northeast end of claim; thence Northwest 300 feet to a monument of stones, thence Southwest 1400 feet to a monument of stones under a tree; thence Southeast 300 feet to the place of beginning, being the same mining claim conveyed to Michael H. Simpson now deceased, by deed of the Globe City Mining Company, dated July 1st 1884, and recorded with Gila County Deeds to Mines Book 2, page 227 et seq:

Tenth. The Mining Claim called and known as the Hypatia Mine situate, lying and being in Globe Mining District, Gila County, Territory of Arizona, and more particularly described in the notice of location recorded at page sixty six (66) Book 2, Records of Mines, Gila County Records, to which record reference is made for a more definite description of said Mine; said Mine was formerly known as the South-west Alice Mine, being the same mining claim conveyed to said Michael H. Simpson, now deceased, by deed of William H. Cook, dated November 18th, 1884, and recorded with Gila County Deeds Book 2, page 305.

Eleventh. Any and all other pieces or parcels of real estate mines, mining rights and claims situate, lying and being in Arizona Territory or elsewhere, which are or may be owned by or on behalf of the party of the first part or in which it is or may be interested; it being the purpose and intent of this indenture to grant and convey to the party of the second part, all the mines, lands, real estate and interest therein of every kind and nature whatsoever and

795 wheresoever situated, which the party of the first part now owns or is entitled to and to which it may at any time hereafter become entitled to.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining.

To have and to Hold all and singular the said premises, together with the appurtenances and privileges thereto incident unto the said party of the second part its successors and assigns forever.

In Witness Whereof the said party of the first part hath caused these presents to be signed by its President and its corporate seal to be hereunto affixed and attested by its Secretary, the day and year first above written.

THE OLD DOMINION COPPER CO.
[SEAL.] By A. S. BIGELOW, *President.*

Attest:
THOMAS NELSON, *Sec'y.*

STATE OF MASSACHUSETTS,
County of Suffolk, City of Boston, ss:

Before me Clarence H. Bissell, a Notary Public duly commissioned and sworn on this twenty eighth day of December eighteen hundred and ninety five, personally appeared A. S. Bigelow and Thomas Nelson to me known and known to me to be the President and Secretary respectively of the Old Dominion Copper Company of Baltimore City, who being by me first duly sworn did depose and say: that they were respectively the President and Secretary of said Company; that they knew the corporate seal affixed to the foregoing instrument was such corporate seal and had been so affixed by authority of a resolution of the Board of Directors of said Company and that they had subscribed said instrument by like authority.

In Witness Whereof I have hereunto set my hand and affixed my official seal the day and year last above written.

CLARENCE H. BISSELL,
[SEAL.] *Notary Public.*

[Endorsements.]

Dated Dec. 28th, 1895.

The Old Dominion Copper Company
to
Old Dominion Copper Mining and Smelting Company.

Deed.

796 TERRITORY OF ARIZONA,
County of Gila, ss:

I, G. M. Allison, County Recorder in and for said Gila County, Do Hereby Certify, that the within instrument of writing, was filed

at the request of J. A. Parnall, Supt. on the 18 day of Jan'y A. D., 1896, at 15 minutes past 4 o'clock P. M., and duly recorded at Page 448-52, Book 3, Records Deeds to Mines Gila County, Arizona Territory.

[Seal Gila County, Arizona, Recorder.]

G. M. ALLISON,
County Recorder."

X 219. From where did you produce these deeds?

A. From our box.

X 220. Will you now produce the check book of the Old Dominion Copper Mining & Smelting Company,—the first check book which that company has?

A. [Check book produced.]

X 221. Let me ask you in regard to the method of keeping the books of the Old Dominion Copper Mining & Smelting Company at the time this check book was kept, that is, from July 12, 1895, and thereafter. What method did you have of keeping a record of the persons from whom cash was received?

A. Well, it was entered on the debtor side of the check book.

X 222. Was that the only method?

A. That was the only method.

X 223. As I understand you, then, the entries on the stub of this check book represent the original entries of persons from whom cash was received, and the amount in cash received from those persons?

A. Yes.

X 224. Did you formerly, in answer to Mr. Hemenway, submit a list, testify to a list, of the names of persons appearing on the first page, the debit side of that check book?

A. Yes, I think I did.

X 225. Will you examine the list which appears on page 42 of your testimony, and say if that is the list then submitted by you?

A. It is.

X 226. Noticing that list as it appears in testimony, did you then omit to state the number of shares of which you had a memorandum in your check book?

[Plaintiff's counsel objects to the use of the words "omit to state," because the list furnished on page 42 of the testimony referred to by defendants' counsel, was a list, in which the witness was requested to give all the dates of payments by parties, by whom payments were made, and the amounts of the payments, the figures presenting the items from which this aggregate of $485,450 is made up.]

797 A. Well, I suppose so. I cannot remember, it is so long ago.

X 227. Will you again look at that list, and see whether or not you did not omit to enter the $1000 received from Lewisohn Brothers?

[Objected to and withdrawn.]

X 228. I will ask you whether, in your previous testimony, you did state the number of shares in response to the interrogatory just referred to by counsel for the plaintiff?

A. No.

X 229. I will ask you whether in your testimony as it appears on page 42 you stated or mentioned the sum of $1000 cash received from Lewisohn Brothers?

A. I do not know whether it is here or not.

X 230. No, I mean on that page,—page 42.

A. No.

X 231. Is it correct, then, to state that, to give a complete transcript of the first page of the stub of your check book, there should be added to the entries as appearing on page 42 of your testimony, the fact that Lewisohn Brothers paid $1000 cash for 40 shares at $25 per share to qualify directors?

A. No. It was put in suspense account, it was not payment for stock, it was money loaned, money advanced.

X 232. Please answer the question; will you read the first entry on the stub of your check book?

A. "July 12, 1895. Suspense account. Received from Lewisohn Brothers for 40 shares, $25 a share, to qualify directors."

X 233. Will you please explain where you find "Suspense Account"?

A. In lead pencil.

X 234. Written slanting across the entry?

A. That is right.

X 235. Then that is an entry which should be added to give a complete list as appearing on the stub of the persons from whom cash was received as shown by the check book?

A. No, I do not think so. I do not think it appears in this list at all.

X 236. It should be added?

A. No, it should not. It was advanced at that time, and the money was returned to him later.

X 237. I understand that, but I am referring to the list.

A. Well, it should not go into it.

X 238. Well, there was $1000 received from Lewisohn Brothers for 40 shares, was there not?

A. Yes, there was at that time.

X 239. Now have you totaled the number of shares which were given, or issued, according to the memoranda on the check book to the parties appearing at those places?

A. No.

X 240. Will you prepare that list, including the 40
798 shares issued in return for the payment from Lewisohn Brothers, and total the same and submit it as soon as you can complete it [handing witness a paper]?

Mr. BRANDEIS: Well, if you will do that; what Mr. Farley wants is a list of them.

A. Yes, certainly.

X 241. You are willing to take this as correct?

A. Yes.

X 242. Now, Mr. Altmiller, will you turn to the stub of your check book, to the entry which shows the amount of money received for shares of stock sold through Stackpole & Gay, and will you read the entry which appears on the stub of the check book under date of September 21, 1897?

A.—

125 shares of treasury stock at 28¼	3,515 63
450 at 28	12,600 00
Total	16,115 63
Less commission	71 88
Leaving a balance of	16,043 75

X 243. Then will you read the entry which immediately follows that, under date of September 23?

A.—

Sept. 23, Sold through Stackpole & Gay 10 shares treasury stock	$275 00
Less commission	1 25
Total	$273 75

X 244. Now there is one other entry. Will you read the entry which appears on the stub of your check book under date of October 8, 1897?

A. —.

Sold through Stackpole & Gay 1 share of treasury stock	$25 00
Less commission	25
Total	$24 75

Marked in lead pencil "Interest account."

X 245. Now will you total the number of shares as per those entries which appear to have been sold through Stackpole & Gay?

A. 586 shares.

799 X 246. Will you now turn to the entry under date of January 1, 1896? Will you now read the entry which appears on the credit side of the check book under date of January 16, 1896; so far as I am concerned, referring only to the entry "Amount due from Buffum," etc.?

A. "Less amount due from Edgar Buffum for 4 shares of stock, $100."

X 247. Let me ask you what that entry which you have just read refers to?

A. That, as near as I can remember, is 4 shares of those 40 shares

that appeared under July 12, 1895, in suspense account, Lewisohn Brothers.

X 248. Is that entry of $100 which you have just read a credit given to Lewisohn on his bill, as appears from the check book?

A. No, it is a charge to Lewisohn.

X 249. Now will you read the rest of the entry?

A.—

"Jan. 16, 1896, Lewisohn Brothers due per account rendered 10,393 83
Add amount received T. Hopkins..... 6 00

Making 10,399 83
Less amt. due from Edgar Buffum..... 100 00

Making a balance of..... 10,299 83"

X 250. And that $10,299.83 represents a check paid or sent to Lewisohn Brothers?

A. It does.

X 251. And the amount of that check was reduced by $100 by reason of this charge on account of money due from Edgar Buffum?

A. Yes.

X 252. Now, taking the shares for which you, according to the stub of your check book on the first two pages, received cash, including the 40 shares sold to Lewisohn Brothers, and adding the shares sold through Stackpole & Gay, and also adding those four shares which were charged to Lewisohn in accordance with the entry you have just read, is it not so, that the total number thus purchased would be 20,780?

A. Well, I have not done it myself; I checked you up the other day, followed you, and believe it is correct.

X 253. Have you any doubt of it?

A. No, I have no doubt of it.

X 254. Now will you, from the stub of the check book, state the several amounts paid out to J. S. Kendall, D. M. Anthony, and M. Luce, stating the dates, and reading the entries in each case?

A. "Sept. 28, 1895, Suspense account, J. S. Kendall. He took 600 shares and $5000 for 200 shares which he did not take—$5000."

X 255. Let me ask you whether that $5000 represents a check paid to Kendall?

A. I suppose so.

800 X 256. According to your entry does that represent cash for 200 shares of stock which he did not take?

A. Yes.

X 257. Now will you turn to D. M. Anthony? Here is one—Arthur D.——

A. "Oct. 1, 1895, Albert E. Hardy, Suspense, money instead of stock, $2000."

X 258. And the amount of $2000 represents a check paid to Hardy?

A. Yes.

X 259. And, according to your entries, for stock which he did not take?

A. I suppose so. I did not make these entries.

X 260. I ask you, according to the entries?

A. Yes, according to the entries it probably was.

X 261. Take the next entry.

A. "Oct. 1, 1895, H. H. Anthony, Suspense, money instead of stock, $5000."

X 262. And that represents a check paid to Anthony?

A. Yes.

X 263. And for 200 shares of stock which he did not take?

A. That is not stated.

X 264. Now M. Luce.

A. "Oct. 31, 1895. Check to B. C. W. Co. on account of subscription of M. Luce to Water Company bonds, $7500."

X 265. And that $7500 represents a check paid to the water company according to the direction of Luce?

A. It is not stated so on the check book here; it says, "check to B. C. W. Co."

X 266. On account of subscription of M. Luce. Have you any doubt that represents——

[Objected to.]

X 267. Do you know what that entry purports to mean?

A. Yes.

X 268. What does it mean?

A. Well, it was—Mr. Luce made a subscription to the water-company bonds, and instead of paying it direct to Mr. Luce, instead of paying this check directly to Mr. Luce and he paying to the water company, it was money turned over directly to the water company by the Old Dominion.

X 269. Are there any other entries which show money paid in lieu of stock which was not taken; if so, what are they?

A. I do not think so. I think those are all.

X 270. Now I will ask you to turn to the list showing persons from whom cash was received, on stubs 1 to 27 of the check book, and ask you whether Foote & French appear in that list?

A. They do.

X 271. For how many shares?

A. 100 shares.

X 272. And if H. T. Coe appears on that list?

A. Yes.

X 273. And for how many shares?

A. 280.

801 X 274. And if J. T. Herrick appears on that list?

A. Yes.

X 275. For how many shares?

A. 100.

X 276. And if Hy. F. Woods appears on that list?

A. Yes.

X 277. For how many shares?

A. 100.

X 278. Does Cannon, Oswald S. ——?
A. Camman, I guess it is.
X 279. For how many shares?
A. 15.
X 280. Does D. W. Cheever appear on that list?
A. Yes.
X 281. For how many shares?
A. 25.

Mr. FARLEY: I think it would be just as well, now, Mr. Brandeis, with your approval, to correct that which I called your attention to this morning. I went over it the other day, with Mr. Altmiller the other day.

X 282. On page 63 of your deposition, in answer to Int. 82, you stated that certificate No. 82 was transferred, or a portion thereof was transferred, to various parties, and among those parties, in your answer as taken down, appears J. T. Howe for 100 shares. Ought not that to be J. T. Herrick?
A. Yes, it ought.
X 28. In your answer as taken down appears Oswald N. Conman for 15 shares. Ought not that to be Oswald N. Camman?
A. Yes.

Mr. FARLEY: Now we reach a point at which the tracing of these shares can be done from the testimony, so I am going ahead in that way and see if there is any trouble about it.

X 284. Now I will ask you from what original certificate the shares to Foote & French, H. T. Coe, J. T. Herrick, Henri F. Woods, Oswald N. Camman, and D. W. Cheever came?
A. I do not know.

Mr. FARLEY: I want to put in now, in view of that answer, the three certificates, one for 100,000 shares, one for 30,000 shares, and one for 20,000 shares.

Mr. BRANDEIS: They are already in, are they not?
Mr. FARLEY: Yes.
Mr. BRANDEIS: Why don't you turn to them in the record?
Mr. FARLEY: The defendant at this point calls the witness' attention to certificate No. 71 and the stub thereof, for 100,000 shares, to certificate No. 72 and the stub thereof, to certificate No. 73 and the stub thereof, which were put in evidence during his former examination and referred to at pages 59 and 60 of his testimony.

X 285. And I will ask you whether those three certificates did not include the total 150,000 shares of the stock of the Old Dominion Company?
A. I do not remember.
Mr. BRANDEIS: Look at them. Can you tell by looking at them?
802 The WITNESS: I can tell by looking at them.
Mr. BRANDEIS: Well, then, do so.
THE WITNESS: [Examining pages referred to.] Yes, they do.

X 286. Then it is true, is it not, that all shares of stock subsequently issued must, by tracing back, come from those original certificates, either No. 71, No. 72, or No. 73, if they are traced through mesne transfers?

A. Yes, I suppose so.

X 287. Refreshing your recollection from your deposition, it is true, is it not, that No. 71 was issued for property purchased?

A. Yes.

X 288. And that No. 72 was issued for property purchased?

A. Well, I do not remember.

Mr. HEMENWAY: Then you will have to take the certificates.

THE WITNESS: Well, this is a copy, and there is nothing marked on the certificate.

Mr. FARLEY: Plaintiff's counsel admits, if it be an admission, that the stock was issued for property.

X 289. And it is true, is it not, that certificate No. 73 was issued for cash, or was issued?

Mr. MCCLENNEN: Everybody concedes that, I suppose.

A. Yes, sir.

X 290. Bearing in mind, then, that all subsequent certificates must be traceable to one of those three, namely, 71 for 100,000 shares, 72 for 30,000 shares, and 73 for 20,000 shares, and refreshing your recollection by examining page 63 of your deposition, will you state whether or not those shares to which I have referred, namely, the shares of Foote & French, H. T. Coe, J. T. Herrick, Henri F. Woods, Oswald L. Camman, and D. W. Cheever, did not come from certificate 82?

A. It is so stated here, and this is taken from the records. I do not know about the transferring part of it.

X 291. Refreshing now your recollection from any means at hand, can you now state from what original certificate, 71, 72, or 73, the shares of Foote & French, H. T. Coe, J. T. Herrick, Henri F. Woods, Oswald N. Camman, and D. W. Cheever came?

A. No. 82.

X 292. No, no; from what original certificate; from 71, 72 or 73?

A. They did not come from either of those.

X 293. No, no——

A. You want to know where that No. 82 came from?

X 294. Yes.

A Balance of certificate No. 71. It came from No. 71.

803 A. 295. Refreshing now your recollection from any means at hand, can you now state from what original certificate, 71, 72, or 73, the shares of Foote & French, H. T. Coe, J. T. Herrick, Henri F. Woods, Oswald N. Camman, and D. W. Cheever came?

A. No. 71.

X 296. Now I will ask you from which of those original certificates the 40 shares issued to directors came?

A. Four shares from No. 75, 4 shares from No. 76, 4 shares from No. 77, 16 shares from No. 78, 4 shares from No. 79, 4 shares from

No. 80, 4 shares from No. 81. They came from certificate No. 71: is that what you mean?

X 297. Yes. I will now ask you from what certificate the 4 shares issued to Buffum came?

A. No. 71.

X 298. I will now ask you whether or not the 200 shares sold by Stackpole & Gay, to which you have referred in your previous testimony, did not come also from certificate No. 71?

A. No.

X 299. Did they not come originally from certificate No. 71, through certain mesne transfers?

A. No. I don't know about that. Yes, I suppose they did.

X 300. You see, Mr. Altmiller, instead of having the certificates, but looking at this testimony, you can figure it up as you please. If you want to use the originals here, why, let them be produced. Of course they are in your possession.

A. Well, I suppose they did.

X 301. Well, did they or did they not?

A. Well, they did.

Mr. BRANDEIS: That appears so, does it?

The WITNESS: No, it don't. Well, they must have.

X 302. Will you now examine the records and determine?

A. [Answer postponed until the next session.]

X 303. Now will you turn to the stub of your check book, and tell us where the so-called syndicate account appears?

A. Yes.

X 304. Will you read that entry?

A.—

Jan. 6, 1896. Check from J. M. Meredith		$202.32
" " " "		1,500.00
Total		1,702.32
Also Ditto		20.98
Also Luce		665.56
Also Coram		665.55
804 Also L. L.		2,528.85
Also T. N.		665.56
A. S. B.	665.55	
Acct. Barron	1,000.00	
	1,665.55	
Less	420.00	
Leaves a balance of		1,245.55

X 305. What do those entries represent?

A. It is not stated.

X 306. What do they purport to represent, according to your best belief?

A. The proportion of payments made to the Old Dominion on account of syndicate account.

X 307. Do those entries represent payments received from various parties, as indicated in your answer?

A. Yes.

X 308. Does the entry "1000 account Barron" represent money paid by Mr. Bigelow?

A. Yes.

X 309. Now will you read the pencil memorandum below on the stub of your check book?

A.—

"Suspense account. Paid..... $18,526.01
Received..... 6,493.87

Balance..... 12,032.14"

X 310. What is the total of the entries of receipts which you spoke of in your previous answer?

A. $7,493.87.

X 311. What is the total of the entries that you referred to in your previous answer?

A. $7,493.87.

X 312. Now if you exclude the entry of "$1000, account Barron," what does that net?

A. $6,493.87.

X 313. Now, referring again to your pencil memorandum, which you have previously read, is that the same amount that appears by that pencil memorandum to have been received?

A. Yes.

X 314. And what does the entry immediately above that pencil entry of $6,493.87, and marked "Paid" $18,526.01, refer to?

A. Refer to?

X 315. Yes.

A. Various payments.

X 316. What was the entry of those payments; what were they in each case?

805 A.—

Jan. 1. Evarts, Choate & Beaman's bill..... $7,689.66
Lewisohn Bros., Jan. 16..... 10,299.83
G. M. Hyams..... 436.52
Edgar Buffum,—Lewisohn Bros., paid acct. Edgar Buffum..... 100.00

X 317. So that the pencil total, as I understand you, represents the total of the items under date of January 1, 1896, a payment of $7,689.66, Evarts, Choate & Beaman's bill; a payment under date of January 16, 1896, a bill of Lewisohn of $10,399.83, and the payment under date of January 20, 1896, to G. M. Hyams, for expenses, with a deduction of $436.52?

A. Yes.

X 318. Now deducting that entry of the amount received, $6493.87, what balance did that leave?

A. $12,032.14.

X 319. What is the further entry, if any, of that balance, or to what book was it posted?

A. It went into the cash book and from there into the ledger.

X 320. Well, will you get the first cash book?

A. I have got the wrong book here.

X 321. Well, omitting until tomorrow morning the entry in the cash book, will you turn to the ledger and find where the balance is posted?

A. On page 18, on the debit side, under suspense account, "1896, January, cash page 11, $12,032.14."

X 322. Is that on page 18 of the ledger, under the heading "Suspense account"?

A. Yes.

X 323. Now will you state what items on the credit side balance that entry on the debit side of $12,032.14, including in your answer, if it is necessary to explain the account, any other entry on the debit side?

A. Under date of August, 1895, "Cash, $300," on the debit side of the ledger, makes a total of $12,332.14.

X 324. On the debit side?

A. On the debit side. The entries opposite, on the credit side, are:—

Aug. 18, 1895,	By mine agent.....	$353.51
Sept.,	By mine agent.....	20
July,	By cash.....	1,000.00
Sept.,	By cash.....	6.00
Feb. 1896,	By mine agent.....	10,972.43

A. 325. Now, taking in turn each one of those items, what was that entry of cash $300, on the debit side?

A. Amount paid N. S. Berry, salary in full to date, August 7, 1895.

806 X 326. And that appears under date of August 7?

A. Yes.

X 327. And Berry was at that time, what? What position did Berry at that time hold?

A. I do not remember.

X 328. Refreshing your recollection, was not he the superintendent at the mines in Arizona?

A. I think so.

X 329. And that, therefore, represents the payment of salary to Berry. For what period was that salary due, do you know?

A. I don't know.

X 330. Do you know what salary he was then receiving?

A. No, I do not; I do not remember.

X 331. Now, taking up the other items that appear on the credit side in their order, what does the entry of "$353.51, by mine agent," represent?

A. I will have to refer to the journal. Under date of August, 1895, "Amount of cash turned over from Old Dominion Copper Company, transferred to Boston books, $353.51."

X 332. That, then, represented cash paid to the new Old Dominion Company from the old Old Dominion Company?

A. I suppose so.

X 333. Have you any doubt of it?

A. I would not swear to it; I think so.

X 334. That is your best information?

A. Yes.

X 335. Now will you take the next item of 20 cents, "by mine agent"?

A. "Sept., 1895, amount of cash turned over from Old Dominion Copper Company, transferred to Boston office, 20 cents."

X 336. That means the same thing?

A. Yes.

X 337. Now the next item?

A. That comes on a cash book which I have not got here.

X 338. And so for the next two items you will have to refer to a cash book which you have not now with you?

A. Yes. Under February, 1896, "Salaries, &c., paid previous to August 1, 1895, transferred to mine books, $10,972.42."

X 339. So that the entry on the credit side, under the date of February, "Mine agent, $10,972.43," is posted to page 3 of the ledger, the heading being "January, 1896," on the ledger page?

A. Yes.

X 340. And this is under the date of February, 1896?

A. Yes.

X 341. And it appears that that entry represents money paid for salaries prior to August 1, 1895?

A. It is so stated.

X 342. And this book which I a moment ago referred to as a ledger, is in fact what?

A. A journal.

[Adjourned to Friday, November 1, 1907, and resumed.]

807 X 343. Now, Mr. Altmiller, reverting to the question in regard to the source of certain stock certificates which I was asking you about yesterday, I will now ask you whether or not 200 of the shares endorsed to and sold through Stackpole & Gay did not come by certain mesne transfers out of certificate No. 71 for 100,000 shares?

A. Yes, sir.

X 344. Yesterday you testified that the 40 so-called directors' shares were taken out of certificate No. 71?

A. Yes, sir.

X 345. I will now ask you whether it is not true that 36 of those 40 shares were not ultimately endorsed to and sold through Stackpole & Gay?

A. It is.

X 346. And that the remaining 4 shares stood in the name of Buffum and were paid for by a charge on the bill of Lewisohn to which we referred yesterday?

A. Correct.

X 347. Now yesterday you testified in regard to the entry on the stub of your check book which showed that $1000 had been received from Mr. Bigelow on the so-called "Account Barron?"

A. Yes.

X 348. I will now ask you what that entry referred to?

A. That is an off-set to the $1000 paid by Lewisohn Brothers in the first place.

X 349. It represented, then——

A. 40 shares of stock at $25 a share.

X 350. Did it not also represent $1000 received from Mr. Bigelow?

A. Yes.

X 351. So that, added to the amount of cash received, as shown by the sales of Stackpole & Gay, and the amount received from the various subscribers, as shown on the stub of your check book, should be added $1000 received from Mr. Bigelow on so-called "Account Barron?"

A. That is correct.

X 352. Will you turn to that entry of "$1000 Account Barron?" So far as you can tell, under what date was that $1000 received?

A. January 6, 1896.

X 353. Now, if you will, turn back to the cash book, to the suspense account, which we were examining yesterday. Now yesterday I asked you what the item on page 18 of the ledger, in suspense account, on the credit side, called "July, by cash, $1000," represented, and you then stated that, not having your cash book, you would defer your answer. Have you now the cash book?

A. Yes, I have.

X 354. Will you now state what that item of $1000 represents?

A. Well, it is posted to page 2 of the cash book, to suspense account, Lewisohn Brothers, $1000.

X 355. Does not that represent cash received from Lewisohn Brothers?

A. It does.

X 356. Now will you state what entry on the credit side in suspense account in the ledger, called "September, by cash, $6," represent?

A. "Suspense account, Lewisohn Brothers, $6."

808 X 357. And that also represents cash received from Lewisohn Brothers?

A. It does, indirectly; it belonged to T. Hopkins, but it represented so much increase of the assets paid by Lewisohn Brothers.

X 358. Have you that list of items which made up the balance of $12,032.14 entry on the debit side, plus the $300? You had it on paper yesterday?

A. Yes.

X 359. Now I will ask you whether or not this is not an accurate statement of what is shown by that account: That account shows that $12,032.14 which, according to the check book, appears to have been still owed for certain bills on account of the syndicate, and also $300 paid by the Old Dominion Company to Berry, who

was then agent at the mines, for salary accrued, prior, at least, to August 7, 1895, is balanced by charges or credits which represent either cash received from the old company or from Lewisohn Brothers, or cash paid out for expenses at the mines prior to August 1, 1895?

A. Yes, it does.

Redirect-examination.

[On redirect-examination, in answer to interrogatories propounded by E. F. McClennen, Esq., of counsel for the plaintiff, the witness further deposes and says:]

Q. 360. Mr. Altmiller, you have stated this morning that of the 586 shares sold to or through Stackpole & Gay in September, 1897, 200 came out through several mesne transfers from certificate 71 for 100,000 shares originally issued in the name of Dumaresq. Is it not a fact that the 200 shares in question were those for which certificates had been made for 100 shares each to Sanborn and A. R. Anthony?

A. It is.

Q. 361. Is it a fact that Sanborn was, or purported to be, a signer of the subscription agreement of July 18, 1895, Exhibit 10, and did not purport to be a signer of the syndicate agreements of May and June, Exhibits 3, 4, 5, and 6?

A. Yes.

Q. 362. Is it a fact that Annie R. Anthony, or A. R. Anthony, does not appear as a signer of the syndicate agreements Exhibits 3, 4, 5, and 6?

A. Yes.

Q. 363. Mr. Altmiller, is it true that the 586 shares sold by Stackpole & Gay in September, 1897, was composed of these shares:

36, which had been part of 40, which had stood in the names of the original directors;

50, certificate B3, issued to Goodale;

100, A13, issued to O. N. Pierce;

100, A5, issued to Eldredge;

809 100, A4, issued to Bartholomew;

100, issued in the name of G. E. Sanborn;

100, issued in the name of A. R. Anthony?

A. Do you want me to look through the records?

Q. 364. I think we are both agreed on that, and I think you can safely answer yes.

A. Yes.

Q. 365. Is it true that Pierce, Eldredge, Bartholomew, Goodale, and Sanborn all appear as signers of the subscription agreement of July 18, Exhibit 10, and do not appear as signers of the syndicate agreement, Exhibits 3, 4, 5, and 6?

A. Yes.

Q. 366. Is it true that the shares which had stood in the names, as stated in the question before, of Pierce, Eldredge, Bartholomew, and Goodale came, by various mesne transfers, out of certificate 73 for 20,000 shares issued to Nelson?

A. Yes.

Q. 367. You stated yesterday that certificate 73 was issued for cash. Is the cash to which you referred that set out on pages 11 and 12 of your original testimony plus the cash ultimately received from Stackpole & Gay?

A. Yes.

Q. 368. To put it in more detail, is this correct: That the moneys received from the subscribers, as appears on pages 11 and 12, amount to $503,750, out of which there was paid out, as appears on page 12, $19,500, leaving $484,250; to which was added $1000, the proceeds of 40 shares of stock to Mr. Barron, $100, the proceeds of 4 shares of stock remaining in the name of Edgar Buffum, one of the directors, and 14,650 being a portion of that received from Stackpole & Gay after deducting a portion of those receipts from Stackpole & Gay which were carried to interest account?

A. Yes.

Q. 369. Making the total sum received $500,000 against the 20,000 shares of stock originally represented by certificate 73?

A. Yes.

Q. 370. Issued in the name of Nelson?

A. Yes.

Q. 371. Mr. Altmiller, have you investigated the accounts of the corporation with a view to determining the receipts and expenditures from 1895 to 1902?

A. Yes.

Q. 372. What were the gross production receipts for the balance of the year 1895, after the corporation acquired the property, and for the whole of the year 1896?

Mr. HEMENWAY: That is objected to as immaterial, incompetent, and irrelevant.

A. $590,963.38.

Q. 373. What were the gross operating expenditures for that period, excepting construction and improvement?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

810 A. $644,656.98.

Q. 374. What was the operating deficit for that period?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. $53,693.60.

Q. 375. What were the construction and improvement expenditures?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. $61,358.91.

Q. 376. What was the total deficit for this period?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. $115,052.51.

Q. 377. Now will you give us the same figures for the year 1897?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A.

Gross receipts from copper, silver, and gold	$201,385 38
Operating expenses, exclusive of construction and improvement	292,555 22
Loss	91,169 84
Construction and improvement	39,811 32
Total deficit	130,981 16

Q. 378. The same for 1898?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A.

Receipts from copper, silver, and gold	$195,000 00
Operating expenses	309,202 49
Loss	114,202 49
Construction	68,406 56
Total deficit	182,609 05

Q. 379. The same for 1899?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A.

Receipts	$985,737 61
Operating	857,583 53
Profit	128,154 08
Construction	93,281 20
Net profit	34,872 88

811 Q. 380. The same for 1900?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A.—

Receipts	$1,594,471.46
Operating	1,152,069.77
Profit	$442,401.69
Construction	36,888.33
Net profit	$405,513.36

Q. 381. From the beginning of the company's operations to the 1st of January, 1901, what were the gross receipts?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Receipts for copper, silver, and gold, $3,567,557.83.

Q. 382. What were the operating expenditures?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Operating expenditures, $3,256,067.99.

Q. 383. What was the net operating profit for the whole period?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. $311,489.84.

Q. 384. What were the total construction expenditures?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. $299,746.32.

Q. 385. What was the final balance of profit after the deduction of construction expenditures?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. $11,743.52.

Q. 386. In the figures that you have given for that entire period what was the tatol amount of the additions shown by the construction account?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. $299,746.32.

Q. 387. In the operating expenses as you have given them for the period from the beginning of the company's operations to the 1st of January, 1901, was there any charge for interest on capital?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Of course we received interests on deposits and that was part of the working capital,—if that is what you mean.

812 Q. 388. No, what I mean is, was a charge made as a running expense, for interest upon the capital invested in the business?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Oh, no, no.

Q. 389. Was there included in that expense account any charge for depreciation?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. No.

Q. 390. Was any charge made to operating expenses by reason of the diminishing of the property by reason of the taking out of the ore?

[Here the numbers of interrogatories skip from 390 to 400. The text of the deposition is complete.]

GEORGE C. BURPEE,
Stenographer.

Mr. HEMENWAY: Objected to as immaterial, incompetent, and irrelevant.

A. No.

Q. 400. In giving the gross receipts for the entire period, have you included the value of the ore on hand and unsold on the 1st of January, 1901?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. 401. Mr. Altmiller, was a division between operating expenses and construction expenses, as you have given them, from year to year, made as you have now stated them, upon the books, from year to year?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. They were, with the exception that stocks on hand to the value of $275,000 do not appear on the books.

Q. 402. That is, you have included in that statement that asset which does not appear on the books?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. It does not appear on the books,—stocks on hand January 1, 1901, to the value of $275,000.

Q. 403. In the three and one-half years from the beginning of operations by this company, that is, from the middle of 1895 up to January 1, 1899, was the operating deficit charged off on the books through profit and loss account?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Yes, it was charged off.

813 Q. 404. Was the expense for this same period for construction also charged off on the books through profit and loss account?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. 405. So that, if I understand you correctly, the books for the period ending January 1, 1901, do not show any increase of assets by reason of the moneys that had gone into the account called construction account?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant, and also as leading.

A. No.

Q. 406. In view of the objection to the preceding question as being leading, will you state what, according to the books of the company now before you, was the apparent effect upon the assets of the company as they stood January 1, 1901, by reason of the sums which had gone into the construction account as you have stated it?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

Mr. BRANDEIS: Namely, the $299,746.32——

Mr. MCCLENNEN: Referred to in your preceding answer.

[Question as amended read by the stenographer.]

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. They were reduced by the sum of $263,256.48.

(By Mr. BRANDEIS:)

Q. 407. You mean that the profit and loss debit appeared as $263,256.48?

Mr. HEMENWAY: That is objected to as incompetent, immaterial, and irrelevant.

A. Yes.

(By Mr. MCCLENNEN:)

Q. 408. Will you explain how you arrive at the difference between this profit and loss debit of $263,256.48, appearing on the books, and the balance of profit for the whole period ending January 1, 1900, which you gave as $11,743.52?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. The stocks on hand January 1, 1901, were not entered on the books—valued at $275,000, were not entered on the books at that time.

(By Mr. BRANDEIS:)

Q. 409. And this $11,743.52 of profits is the balance of profits after deducting from this the sum of $275,000, stocks on hand, the $263,256.48 of deficit as appearing on the books, is it not?

814 Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

(By Mr. BRANDEIS:)

Q. 410. And it is a fact, is it not, that on the books of the company there was charged off to profit and loss, as a part of the expense of conducting the business, not only the items of construction for the period prior to January 1, 1899, but also those items of construction testified to by you made in the years 1899 and 1900?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

(By Mr. MCCLENNEN:)

Q. 411. I notice that while the total receipts, as given by you, for the entire period from the beginning of the company to January 1, 1899, of $3,567,557.83 appear on the report of A. S. Bigelow, president, Exhibit 14 of his deposition of April, 1903, the sum appearing in that report as the gross cost of production at mine and smelter and electrolytic refining, and all expenses of handling copper, such as freight, copper charges, commission, and expense account, is given as $2,714,596.67; whereas your item for that period is $3,256,067.99. Will you explain wherein is the difference of $541,471.32?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. At the time that this report was made up, the report for the year ending January 1, 1900, the report to the stockholders dated April 1, 1901, this amount was charged off for reasons such as extra developments, shut-downs, and so forth.

(By Mr. BRANDEIS:)

Q. 412. Is there any entry anywhere upon the books of account of the Old Dominion Copper Mining & Smelting Company of the item of $541,471.32 deducted in the report to the stockholders from the account of the operating expense for that period, as appearing on the books, and as testified to by him?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. No.

(By Mr. BRANDEIS:)

Q. 413. Are there any items upon the books of account of the Old Dominion Copper Mining & Smelting Company from which an aggregate difference of $541,471.32 can be arrived at?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. No.

(By Mr. MCCLENNEN:)

Q. 414. I notice that you have stated as the construction total from the beginning of the operations of the company to January 1, 1901, $299,746.32, and that the item in the report of Mr. Bigelow as presi-

dent, on April 3, 1901, Exhibit 14 of his deposition in April,
815 1903, gives the item for construction and improvement account and development work at the Globe and Continental mines as $841,217.64. What is the explanation of the difference of $541,471.32?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. It is the amount which was deducted from operating expenses, and charged to construction, improvement, etc., expense.

Q. 415. Was there at any time any entry made upon the books of the corporation showing the transfer of the $541,471.32 of operating expenses, which had already been charged off on the books through profit and loss account in each year, into construction account?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Not during this period.

(By Mr. BRANDEIS:)

Q. 416. How was the amount of $541,471.32, which was taken out of the operating expenses and appears in the annual report to the stockholders, dated April 3, 1901, as part of construction and development expenses arrived at?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I do not remember.

Q. 417. Have you any recollection in regard to the making up of that item of $841,217.64?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. After conversation with either Mr. Ladd or Mr. Hyams, that was arrived at. That is all the reason I can state.

Q. 418. Have you any recollection in regard to what took place at the time that that figure was arrived at and inserted in the annual report to the stockholders?

A. No, I have not.

Q. 419. Are there any data whatever upon the books of account of the Old Dominion Copper Mining & Smelting Company for the period ending January 1, 1901, which show any charges for construction and improvement account and the development work at the Globe and Continental mines other than those items aggregating $299,746.32, which you have already testified to?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant, and as being not a deduction from the books; and that the items themselves ought to be shown by the books.

A. No.

816 Q. 420. In giving for each year for the period ending January 1, 1901, the total operating charges, have you added together several separate accounts as appearing upon the books of the company?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. 421. What are the accounts which enter into that total operating charge for each year, as given by you? State what they are as you go along.

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Mining expense which includes all work at the mine, underground extra development, and so forth; expense account, consisting principally of expenses here in the East; copper charges, covering commission for sales of copper; insurance and various small items in connection with the same; transportation, which includes freight on copper shipments East; refining charges, which includes the expense of refining pig and matte shipments; tax account, which includes New Jersey and Massachusetts taxes; and interest charges, which includes interest on advances on copper accounts, loans, and so forth.

Q. 422. That is, you mean interest on advances made by selling agents or on money borrowed by the company?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. 423. Does the item of mining expense, the account of mining expense which you have given, include all of the expenses of any kind at the mine, include any development work?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. 424. Including that, but not excepting construction. That is true, is it?

Mr. HEMENWAY: Objected to as incompetent, immaterial and irrelevant.

A. Yes, that is true.

Q. 425. Now is there upon the books of the company in the mining expense account anything which could enable you, or any one examining the books, to determine what part, if any, of that expense was devoted to what is called development work?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. You refer to those books here?

Q. 426. These books here.

A. No.

(By Mr. McCLENNEN:)

Q. 427. Is there on the books any charge on account of construction, improvement, or development work, except such as is
817 included in the mining-expense account which you have mentioned, except the construction account to which you have referred?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. No.

(By Mr. BRANDEIS:)

Q. 428. But it is a fact, is it not, that for the years ending *the year* 1895, 1896, and 1897, all expenditures for construction were charged off through the books to mining expense?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. No, no; it was carried as capital account and then charged off.

Mr. BRANDEIS: Strike that out.

Mr. HEMENWAY: No, let it stand.

Q. 429. It is a fact, is it not, that during the years 1895, 1896, 1897, and 1898, the items of construction or improvement as given by you aggregating $169,576.79, which had been carried to capital account, were charged off to profit and loss?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. 430. And at the end of the year 1899, the amount of $93,281.20, representing the construction and improvement in that year, was charged off to profit and loss?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. 431. What was done at the end of the year 1900 with the amount $36,888.33, which you have testified represents the construction and improvement account for the year 1900?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. It was charged off to profit and loss.

(By Mr. McCLENNEN:)

Q. 432. Was there upon the books up to the 1st of January, 1901, any account of construction, improvement, and development work other than the construction account, the sum of which you say was charged off to profit and loss, at the end of the year 1898, for the two and one half years then ending, and charged off at the end of 1899, ar at the end of the year 1900, for the year then ending?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. No.

Q. 433. Mr. Altmiller, what were the gross receipts, operating expense, profit or loss, construction and improvement expense, and final profit or loss, for the year 1901, given in the same way that you gave them for the earlier years?

818 Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I will have to work that out. The gross receipts from copper, silver, and gold for the year ending December 31, 1901, were $1,276,979.83

Total expense	1,163,140.42
Profit from production	113,839.41
Less special construction and improvement on account of development work at Globe and Continental mines	72,179.98
Surplus for the year.....	$41,659.43

Q. 434. I notice that the figures that you have just given for the year 1901 conform to the figures appearing in the report to the stockholders for the year 1901, Exhibit 15, of the deposition of A. S. Bigelow, given on April 10, 1903. Have you any recollection of the facts which led to making this report up in accordance with the books, whereas the other one was not made up in accordance with the books?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. No, I have not.

(By Mr. BRANDEIS:)

Q. 435. Does the item of $72,179.98 appearing in the report for the year 1901, ending December 31, 1901, as special construction and improvement and development work at Globe and Continental mines, include any item except the items which appear upon the books of the company as construction and improvement account?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. One item of $824.95, real estate and property account.

Q. 436. That is, the $72,179.98 is made up of two items appearing upon the books, construction, and improvement, $71,355.03, and real estate and property account, $824.95?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

(By Mr. McClennen:)

Q. 437. In the keeping of the books for the year 1901, was the character of the items of expenditure which were put into the construction and improvement account and the mining-expense account, respectively, any different from what they had been in those two accounts during the preceding period of about five years and a half?

Mr. Hemenway: Objected to as incompetent, immaterial, and irrelevant.

A. No.

819 Recross-examination:

[On recross-examination, in answer to interrogatories propounded by J. Wells Farley, Esq., of counsel for the defendants, the witness further deposes and says:]

X 438. Mr. Altmiller, in answer to Mr. McClennen's question, you stated that the total amount received, less the $19,500 paid back in cash checks was $500,000; and you stated that was made up of the item of $503,750, less $19,500, giving a remainder of $484,250, to which was then to be added $1000 received from Bigelow, account Barron, $1000, by charge to Lewisohn's bill, and $14,650, being the amount received from sales of stock by Stackpole & Gay, less premium. Did you not omit, in that answer, the fact that the cash account should first have been increased by $1000, cash received from Lewisohn Brothers, which $1000 was balanced by the $1000, the amount paid to Lewisohn on the bill he rendered? The substance of my question being whether or not your cash account should not show, in addition to the items you mentioned, $1000 received from Lewisohn Brothers, the same being balanced by $1000 they paid?

A. Yes, that would probably be the correct way to make the item up; I simply left it out as an offset. You mean that should be $20,500 deducted and add $1000 to the receipts?

X 439. Speaking in terms of money, $20,500 received and $1000 paid out?

A. Yes.

X 440. Now in your answer to Mr. McClennen, speaking of the constitution, so to speak, of the 586 shares sold through Stackpole & Gay, there is nothing to in any way qualify your original statement, is there, that 36 of those shares, being part of the directors' shares, came from certificate 71, and 200 more thereof, being shares coming via Samborn and Anthony, also coming from certificate 71?

A. I do not understand what you mean.

X 441. You have no reason to qualify your original statement, which was, in substance, that 236 of the 586 shares sold by Stackpole & Gay can be traced back to certificate 71 as their origin?

A. Yes, I have.

X 442. Well, if so, what is it?

A. Well, certificates No. 1, 2, 3, 4, 5, 6, and 7 were made out in the directors' names; they were surrendered, and certificates 8, 10,

4, 11, 12, 13, and 14 were issued in their places; those certificates were again surrendered, and certificates 75, 76, 77, 78, 79, 80, and 81 were issued in their places; 75, 76, 77, 80, and 81 were again surrendered, and No. 466 for 36 shares was issued in place of them, No. 78 for 4 shares being retained by Edgar Buffman; this
820 certificate 466 was split up into certificates for 25, 10, and 1 shares, and sold through Stackpole & Gay.

X 443. Have you now completed your answer?

A. As far as that is concerned.

X 444. Well, wherein does that answer qualify the original statement you made?

A. These came originally from certificate No. 71.

X 445. Well, did they not?

A. They did.

X 446. Then it does not qualify it, does it?

A. Why, you asked me if they did not come from that.

X 447. Well, in spite of this explanation and history of these shares which you have just given me, it is still true, is it not, that 36 of the 586 shares sold through Stackpole & Gay are traceable to certificate 71?

A. Yes.

X 448. And it is still true that 200 shares of that 586 are also traceable to certificate 71?

A. Yes.

X 449. It is still true that 540 shares, for which you appear to have received cash, according to the list on the stub of your check book, are traceable also to certificate 82, which came from certificate 71?

A. Yes.

X 450. I will now ask you—turn to your check book if necessary—if the Old Dominion Copper Company paid any sums of money on account of mining expense incurred prior to August 1, 1895, except that $300 check to Berry? If so, what were those payments?

A. $10,972.43.

X 451. What have you to show that the Old Dominion Company paid that sum which you have just stated in your answer?

A. Well, it is a balance; it is a balance of the syndicate account, made up of various items of receipts and expenditures.

X 452. Is it not charged off as balancing an amount still due by the syndicate?

A. It is.

X 453. I now repeat my question: what have you to show that the Old Dominion Copper Company of New Jersey paid that amount, except by charging it off against that bill?

A. Well, the books will show that. There are various items.

X 454. I will ask: have you any check, voucher, memorandum, or other paper which shows who in the first instance paid the money constituting the sum of $10,972.43, referred to in your answer?

A. The vouchers are on file somewhere; I don't know where they are, whether they are here.

X 455. Is it not true that every single payment made by the Old

Dominion Copper Company of New Jersey appears on your check book or cash book?

A. Yes.

821 X 456. Will you now turn to any check or any number of checks which will show that the Old Dominion Copper Company of New Jersey made one or many payments which aggregate that sum of $10,972.43 and show me how you trace them from the checks into the entry in your ledger?

A. Checks were paid as follows:—January 16, Lewisohn Brothers, $10,399.83; January 20, G. M. Hyams, $436.12; January 22, Edward C. Perkins, $1000; January 9, 1896, Evarts, Choate & Beaman, $7689.66. That makes a total of $19,526.01. Then we received syndicate receipts under date of January 6 of $7493.87; which leaves a balance of $12,032.14. Now from that is deducted journal entries of the amount of cash on hand at the mines, August, 1895, $353.51; September, 20 cents; deduction of July, 1895, cash, which is the Lewisohn payment, $1000, and under date of September, 1895, $6; total, $1359.71; leaving a balance of $10,673.43; to that add $300 paid to Berry, August, 1895, makes a total of $10,972.43. Do you want to know what was done with them?

X 457. No, I now want you to answer my question. You have now explained very carefully what we have previously been over, that the balance appearing on the debtor side of your ledger, on page 18, was balanced by certain entries, and you have again recounted those items; you explained that "by mine agent," when it first appears, was money turned over to you——

A. Not here, it was at the mine.

X 458. You have explained that the other items were money that you, in one way or another, or your company, received.

A. Yes.

X 459. You, in your previous examination, told me that this entry of $10,972.43 represented money paid out for salaries prior to August 1. I then asked you, in my previous interrogatory, if you could show me where and how that money had been paid, and you undertook to do so.

A. Yes.

X 460. I will now ask you if that money was paid by the Old Dominion Copper Mining & Smelting Company of New Jersey; and if so, when and how, and in what items?

A. I have explained it to you just now, and I can tell you why that entry was made on the journal calling it salaries and so forth.

X 461. But isn't it true that it would be in exact conformity with all the other entries on that ledger if that had been money paid out for the benefit of the Old Dominion Company, in cash, prior to August 1, 1895?

A. It was not paid out for the benefit of the company.

X 462. How do you know it was not?

A. Because it don't say so on these books here.

X 463. Not paid out by you nor by your company, but
822 paid out by others for your company for the benefit of the property which came into your company?

A. It was paid out for various purposes.

X 464. By whom was it paid out?

A. Well, by Lewisohn Brothers, paid out by the Old Dominion Copper Mining & Smelting Company.

X 465. Show me one entry which shows the original payment of any item entering into that.

A. Here it is right here, Lewisohn and Perkins.

X 466. But you have already accounted for this in making up your total of $18,000, which was owed by the syndicate. You have shown that was charged once, and I will ask you to explain, if that money was paid out by the Old Dominion Copper & Smelting Company, how it appears on the credit side of the ledger, whereas the other payments which were made by them appear on the debit side of the account?

A. Well, that is the amount paid out, $12,332.14 was the amount paid out.

X 467. And that was the amount that was, in some form or other, received by them to be credited as a receipt?

A. No, no, it was not a receipt, that is the excess of expenditures.

X 468. Is it not true that the debit side of your ledger, page 18, shows money paid by the Old Dominion Copper Company?

A. Yes.

X 469. Is it not true that the credit side of your ledger purports to show moneys received?

A. Yes.

X 470. Either received in cash or money paid for your benefit?

A. Yes.

X 471. How, then, do you explain that this item of $10,972.43 was a payment by the Old Dominion Copper Company and not in some form a receipt?

A. Why, it shows on the debit balance of the suspense account that it has been paid out for various purposes, and that item simply I have charged up to the mine on the books to balance the account. It is not a receipt; I should call it an expense account.

X 472. Now will you turn to the entry in your journal or cash book from which that ledger entry is posted?

A. I will. I have simply got the expense off our books here; it is balance of expenses, mining expense account, transferred to mine books, debtor to mine agent, $10,972.43.

X 473. Who paid the mine expenses prior to August 1, 1895?

A. That I do not know.

X 474. Well, did the Old Dominion Company of New Jersey? If so, show one payment, with the exception of the one payment to Berry.

A. I have not got anything to show.

X 475. Have you anything in any book to show; if so, what; anything in your possession, except the item of $300 to Berry,
823 which shows a payment of the mine expenses of the Old Dominion Copper Company prior to August 1, 1895?

A. That is not put down as a mine expense.

X. 476. Or any expense, salaries, or anything of that nature?

A. No.

X 477. Or any vouchers?

A. Well, I do not know if it is included in that Lewisohn bunc or not.

X 478. Is this not true, then, so far as you know, that that entr may represent, and probably does represent from its position an constitution, payments made by others for mine expense prior t August 1, 1895?

A. I do not know.

X 479. Now, turning to your testimony in regard to the min reports and accounts—and I wish to ask these questions de bene and by asking them in no way waive our objection to the line o questioning pursued by counsel for the plaintiff,—is it not true tha your testimony in regard to the difference between this report o April 3, 1901, which purported to cover the net and gross result of the Old Dominion Copper Mining & Smelting Company from th formation of the company to January 1, 1901, that the net result o your testimony in regard to that difference is simply this: tha $541,000, approximately, was taken from operating expenses an added in this report to construction account?

A. Yes.

X 480. So that the total result and the total summing up remain absolutely the same?

A. Correct.

X 481. The only difference being that what, according to you calculation, should be charged as operating expenses appears in thi report as charged as part of the item charged to construction ac count?

[Counsel for plaintiff objects to the use of the word "calcula tion."]

A. Not what the books show; the books show it is chargeable the other way. The report was made up one way, and the books show the other way.

X 482. To change the account in conformity with your state ment, then,—is it not so,—that the difference between this report and the books of the company, as shown by your answers, is simply that $541,000, approximately, has been taken from the item of operating expenses——

A. Mining expenses.

X 483. —the item of mining expenses in the books, and included in the total charged to construction account in the report?

A. Yes.

X 484. And the sum of the two accounts in the books and in the report is identical?

A. Yes.

X 485. You testified, in answer to Mr. McClennen or Mr. Brandeis, that you made up these figures?

A. Yes.

824 X 486. Did you also keep the books?

A. Yes; I had charge of them.

X 487. And you testified that Mr. Ladd or Mr. Hyams spoke to

you, and it was the result of that conversation that you made them up in this way?

A. Yes.

X 488. Did Mr. Bigelow speak to you about it?

A. Well, possibly he, in signing the report, might have mentioned it.

X 489. No, no, not possibly, I ask you whether he did, to your personal, absolute knowledge?

A. I do not remember.

X 490. Or did Mr. Lewisohn?

A. No.

X 491. Leonard Lewisohn?

A. No.

——— ———.

Subscribed and sworn to this — day of ———, before me:

——— ———.

Notary Public.

Order Appointing Commissioner.

In the above-entitled case, at the hearing of the same before Mr. Justice Sheldon, it is ordered, under the provisions of Chancery Rules, No. XXXV., at the request of the defendant, that Bates Torrey be, and he hereby is, appointed commissioner to take the evidence in said case, to be reported to the full court.

By the court:

WALTER F. FREDERICK,
Assistant Clerk.

December 10, 1907.

Report of Commissioner on Proceedings in Court, December 10, 1907.

Mr. HEMENWAY: It is agreed that the two cases were tried together; that was the fact, but it does not appear on the record.

Second. That the originals of the exhibits referred to in the evidence may be shown to the full court on the hearing of any appeal.

Third. That the objections to the admission of evidence made by the parties, respectively, and noted by the magistrate on the taking of the several depositions read at the trial, were not waived by the parties, but that such evidence was admitted de bene, and all the rights of the parties are saved. And that, the full court consenting, the cases may be argued together. That is agreed.

SHELDON, J.: Yes.

825 Mr. HEMINGWAY: Now there is one other suggestion that occurs to me while sitting here, just as this last did on hearing the previous case; and that is, whether any order should or could be made by your Honor in reference to the consolidation of the record of the two cases.

SHELDON, J.: I think, now that I have ordered a separate decree in each case, it would be too late, and therefore I do not think they should be consolidated. The questions are the same, and undoubtedly there would be no difficulty before the full court in having them argued together.

Mr. HEMENWAY: I would ask this with regard to the record that goes to the full court, whether it is possible?

SHELDON, J.: I suppose you could have an agreement of both parties, that as the evidence is the same in both cases the evidence and findings of the court be printed in only one case, as they are the same in both; it would be an useless expense, of course, to print all the evidence in duplicate.

Mr. MCCLENNEN: One thing occurs to us, in view of these special statements in the record, and that is the matter of the objections to the admissibility of the evidence. It is improbable in a record of 1400 pages some one question may not have gotten in that does not quite conform to the requirements of the evidence. It is quite improbable that any such answer as that has affected the finding of your Honor. It is obvious that this case ought not to go to the full bench, except to raise questions which are really——

SHELDON, J.: As an appeal is on the evidence, if any evidence I have considered is incompetent the full court would on the appeal consider the case without regard to that evidence; the appeal is on the evidence, so I do not see how it would make any special difference in the effect of excluding any evidence before me if it should be held to be incompetent. The only thing I can see would happen is that, on considering the evidence left, the full court might come to a different conclusion on the evidence.

Mr. MCCLENNEN: It is suggested that it appear on the record the fact that none of the specific objections to the specific questions were, in fact, called directly to your Honor's attention.

SHELDON, J.: Well, I think some of them were.

Mr. MCCLENNEN: With the exception of those which appear on the record as having been called to your attention.

826 Mr. HEMENWAY: It was understood that in order to save time it should be admitted de bene, and Mr. McClennen read without referring at all to the deposition, skipping that portion.

SHELDON, J.: I thought the evidence would be printed on the appeal, and the record would show what was called to my attention and what was not; it was understood by both parties that the evidence received de bene was not to be received with any waiver of objection to its admissibility.

Mr. MCCLENNEN: That is undoubtedly true. The decrees have been seen by Mr. Hemenway, and I understand his position to be simply that he does not consent to it.

Mr. HEMENWAY: I object to them most strenuously; if you will permit me to state my position exactly.

SHELDON, J.: As not conforming to my findings and order?

Mr. HEMENWAY: I did not intend to say anything in regard to it, if your Honor please; I suppose the decrees are very short.

SHELDON, J.: You object to my findings?
Mr. HEMENWAY: Absolutely.
SHELDON, J.: You may read them, Mr. McClennen.
[Mr. McClennen reads the decrees.]
Mr. HEMENWAY: Before the entry of the decree Mr. Burpee was the commissioner in the case. He is not present to-day, but the stenographer of the court is, and I ask that he be appointed commissioner.
SHELDON, J.: He may be appointed a commissioner under the rule to write out these proceedings. The decree is not to be entered until the record is transcribed.

BATES TORREY,
Commissioner.

Filed December 10, 1907.

Copy.
Attest:

——— ———, *Clerk.*

827 *Deposition of Cleveland H. Dodge.*

Taken before me, Mark J. Kätz, a notary public in and for the state of New York, at the office of Phelps, Dodge & Company, No. 99 John street, in the city of New York, this 22d day of October, 1907, at 11.30 a. m., pursuant to consent by and between the attorneys for the respective parties hereto.

OCTOBER 22, 1907, 11.30 a. m.

Appearances:

Louis D. Brandeis, counsel for complainant.
Alfred Hemenway, Edward Lauterbach, and Eugene Treadwell, counsel for defendants.

It is hereby consented that the testimony of Cleveland H. Dodge be taken before Mark J. Kätz, a notary public in and for the state of New York, to be filed and used in both of the actions of the Old Dominion Copper Mining & Smelting Company, complainant, against Albert S. Bigelow, in the Supreme Judicial Court of Massachusetts, and in both the actions wherein the same company is complainant against Frederick Lewisohn et al., in the Circuit Court of the United States for the Southern District of New York.

CLEVELAND H. DODGE, a witness produced and sworn on behalf of the defendants, testified as follows:

Direct examination by Mr. LAUTERBACH:

Q. Mr. Dodge, what is your full name, age, and occupation?
A. My name is Cleveland H. Dodge; my age is forty-seven; and my occupation is that of a merchant.
Q. And a member of what firm?
A. The firm of Phelps, Dodge & Company.

Q. The firm of Phelps, Dodge & Company were stockholders, were they not, in the corporation known as the United Globe Mines, a New York corporation, the mines being situated in Arizona?

A. I am not so sure whether the firm was a stockholder; the individual members were.

Q. Including yourself?

A. Yes.

Q. And you remained such owners, did you not, until the time of a turning over of the shares of stock to another corporation?

A. Yes.

Q. The transferee of the stock was the Old Dominion Company of Maine, was it not?

A. Yes, I think so.

828 Q. At about the time of this transfer did you know of the existence of the Old Dominion Copper Mining & Smelting Company of New Jersey?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Oh, yes.

Q. Do you know whether or not, at about the same time that the Old Dominion Company of Maine became the transferee of your stock it also became the transferee of some of the stock of the Old Dominion Copper Mining & Smelting Company?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Yes, it did.

Q. The Old Dominion Company of Maine became the transferee of the whole of the stock of the Globe Company, did it not?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. I am not sure whether it was all of it; it was practically all of it.

Q. And is that true as to the stock of the Old Dominion Copper Mining & Smelting Company,—that it became practically the owner of it?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. A very large percentage;—a large majority of the stock of the New Jersey company; it is a matter of record.

Q. You were interested in the formation of the Maine company, were you not?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. Were there negotiations that preceded the formation of the Maine company and the disposal of your stock to that company?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Certainly.

Q. Can you recall with whom they were carried on?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. I think Mr. Charles S. Smith of Boston was the person with whom these negotiations were had.

Q. What was his relation to any of the companies I have mentioned?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. He was president of the Old Dominion Copper Mining & Smelting Company of New Jersey.

Q. Do you recall that any one else was interested in conducting the negotiations?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Plenty of others were interested.

829 Q. Was there any one else who conducted the negotiations that led up to the acquisition by the Maine company of the properties?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. We came in contact with Mr. Louis D. Brandeis, counsel of the company, at that time; it was those two gentlemen that we saw in connection with the negotiations.

Q. Do you recall that General Maxwell Woodhull was interested?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Oh, yes.

Q. Did you have any knowledge, prior to the conclusion of the transfer to the Maine company of your stock, of a claim pending in the Massachusetts and New York courts by the Old Dominion Copper Mining & Smelting Company as complainant and Mr. Bigelow as defendant in the Massachusetts court, and the estate of Leonard Lewisohn in the New York courts?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Yes, I did.

Q. Did you know the general character of the claim that was involved in those actions?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. Will you state, as nearly as you can, your knowledge of its character?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. As I recollect it, it was a claim against Mr. Bigelow and the estate of Mr. Lewisohn for having turned over to the company certain claims which the company subsequently did not consider as valuable as they were originally put in at; that was the general character.

Q. In whose favor did you understand that claim to exist before the transfer was effected—the legal claim—the transfer of your stock to the Old Dominion Company of Maine?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. The legal claim, if any, existed in the Old Dominion Company of New Jersey.

Q. Did it continue to exist in the Old Dominion Company of New Jersey after the acquisition of such of the stock of the Old Dominion Copper Mining & Smelting Company of New Jersey as the Old Dominion Company of Maine acquired?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

830 A. Of my own knowledge, I do not know.

Q. Did you know at about the time of this transfer o consolidation or acquisition by the holding company, the Maine company, that the Old Dominion Company of New Jersey had divested itself of that claim to a trustee or trustees or to persons other than itself?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant; objected to, further, as leading, and further objected to as assuming conditions and statements which are not in accordance with facts.

A. I heard such was the case.

Mr. BRANDEIS: Answer objected to as irresponsive and as a statement of hearsay.

Q. From whom did you hear it, Mr. Dodge?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. To the best of my recollection I heard it from Mr. Charles S. Smith and from Mr. Brandeis.

Q. Did you have any conversation with Mr. Charles S. Smith concerning this claim?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. I am not sure that I personally had.

Q. Were you present at any time when a conversation concern-

ing it was had in your hearing with Mr. Charles S. Smith or Mr. Brandeis?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. Will you state, as nearly as you can recollect it, the nature of that conversation.

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. As I recollect it, Mr. Lauterbach, these facts which we have been speaking of were mentioned and the members of our firm thought it as well that they, as new stockholders in the consolidated company, should not have any part in these lawsuits.

Q. And how did you understand, from that conversation, that the consolidated company could be relieved of having any part in the result of these litigations?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant, and as assuming facts which do not exist; among other things, that there is or was a consolidated company.

A. It was suggested that the claim be segregated, and, as I recollect it, put in trust in such a way that the old stockholders of the Old Dominion Company of New Jersey should participate
831 in anything that should be derived from these claims, but that the stockholders of the Old Dominion Company of Maine, which I call the consolidated company, should have no participation in them.

Q. You mean what by the term "consolidated company" which you have used?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. The consolidation of the New Jersey company with the United Globe Mines, forming the Old Dominion Company of Maine.

Q. The Old Dominion Company of Maine is the company which you referred to as the consolidated company?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. In fact what was it, rather than a consolidation; the Old Dominion Company of Maine?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. It was a holding company.

Q. Holding a majority of both stocks?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

941

A. Yes.

Q. To whom, then, as you understood it, were the proceeds, if any, of these litigations to go after their segregation of which you have spoken?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant, and as asking for hearsay and asking for conclusions as to matters of law and contents of written instruments, if any.

A. As I understood it at the time, these proceeds were to be enjoyed by the stockholders of the Old Dominion Company of New Jersey.

Q. The then existing stockholders?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Or their successors.

Q. The Maine company were the successors of the existing stockholders, were they not?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Yes, but what I meant by "successors" was successors to rights that may have existed at the time. I forget how the transaction took place; there were trust certificates which entitled them to proceeds of these litigations; I mean successors to the trust certificates.

Q. Have you any of these certificates?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. No, not to my knowledge. Personally I haven't any.

Q. So that, if I understand you correctly, the proceeds, if any, of these litigations would go, not to the stock of the New Jersey company held by the holding company of Maine, but would go to the holders of these trust certificates?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant, and calling for hearsay contents of written instruments, inference as to matter of law, and as leading and misleading.

A. That was my understanding.

Q. For what reason was this segregation made?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. It was an old matter in which we had no personal interest, and we did not care to be interested in it. When I say "we" I mean the stockholders of the United Globe Mines.

Q. Do you know who the trustees were in the trust certificates that you have mentioned?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. I don't remember.

Q. Do you know by whom they were designated?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. No, I do not.
Q. By Mr. Smith?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. I don't know.
Q. Or by Mr. Brandeis?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. I don't know that either did.
Q. Do you, perhaps, recall that Mr. Smith was one of the trustees?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. I would not swear to it.
Q. To the best of your recollection?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. I really do not know.
Q. You had no further interest in the matter after the segregation?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. No; I, of course, knew at the time, but being ancient history I really do not remember who they were.
Q. Do you recall by whom the expenses of the litigation after the consolidation, as you call it, had been effected, were to be borne?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant, and as calling for hearsay.

A. No, I do not know.
Q. Do you recall that they were to be borne by the Old Dominion Company of New Jersey?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant, and as calling for hearsay.

A. No.
Q. Or were they still to be imposed as a burden upon the assenting stockholders of the Old Dominion Company of New Jersey?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant, and as calling for hearsay.

A. What do you mean by "assenting stockholders," Mr. Lauterbach?
Q. Those who transferred their stock to the holding company.

A. No, my general recollection was it was to be borne by the holders of the trust certificates.

Cross-examination by Mr. BRANDEIS:

Q. Mr. Dodge, it is a fact, is it not, that whatever arrangement of any kind may have been made in regard to the prosecution of these suits was embodied in written instruments?

A. As I recollect it, yes.

Q. Have you been an officer, or director, of the Old Dominion Copper Mining & Smelting Company of New Jersey?

A. I don't think so; no, I have not,—the Old Dominion Company of New Jersey, no.

Q. It is a fact, is it not, Mr. Dodge, that all negotiations and arrangements leading up to the acquisition by the Old Dominion Company of Maine of the interest in the United Globe Mines formerly owned by members of the firm of Phelps, Dodge & Company were conducted by your counsel, Mr. William Church Osborne?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Yes, certainly.

834 Q. It is also a fact, is it not, that you personally have never been present at any of the directors' meetings of the Old Dominion Company of New Jersey?

A. No, I never have.

Q. And you have not, at any time, examined the records of the directors' meetings of the Old Dominion Company of New Jersey?

A. No, I have not.

Q. It is a fact, is it not, that at a time some months prior to the formation of the Old Dominion Company of Maine there had been a plan of a real consolidation of the United Globe Mines with the Old Dominion Copper Mining & Smelting Company of New Jersey, and that that plan was later abandoned?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. And is it not a fact that the talk of segregating certain assets of the New Jersey company was a suggestion made at the time of, and with special reference to, the plan of consolidation?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Redirect examination by Mr. LAUTERBACH:

Q. But this segregation continued to be a feature of the substituted plan, did it not?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Certainly.

Q. Do you know where the instruments, or written documents to which you have referred in answer to Mr. Brandeis' question, are?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. No, I do not.

Q. Have you seen them?

A. Which documents do you mean?

Q. I mean those that Mr. Brandeis asked you about,—whether the arrangement to which you have referred, of the segregation of the claims, was not embodied or formulated in a written instrument or instruments, and you said yes; those are the instruments to which I refer.

A. I do not think I have seen the instruments; as I recollect it, a circular was sent to the stockholders embodying the general plan, but I do not think I saw the actual instruments.

Q. Were you a director, or are you a director, of the Maine company?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

835 Q. And have been since its organization?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. As such director are you advised of the proceedings of the directors of the New Jersey company, the Old Dominion Copper Mining & Smelting Company of New Jersey?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant, and as calling for hearsay.

A. We have a general knowledge of what transpires in their meetings, but not in connection with the trust.

Q. But in respect of other matters?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. And all other corporate matters?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. There is no actual record of the meetings read at the meetings of the Maine company, but we have a general knowledge of what transpires.

Q. But not of the prosecution of these actions?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. No.

Q. No interest is taken in those by the Old Dominion Company of Maine?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. No.

CLEVELAND H. DODGE.

Subscribed and sworn to before me this 25th day of October, 1907.

[SEAL.]

MARK J. KATZ,
Notary Public, New York County,
State of New York.

Dr. Old Dominion Copper Co. Syndicate.

1895.			Ledger Folio.		
May 6	To	Cash. J. M. Meredith	476 C 173		2,000 00
28	"	" Globe National Bank	" " 205		48,000 00
"	"	" A. S. Bigelow	" " "		1,000 00
June 30	"	Expense	" " 95	50 00	
					50 00
18	"	Cash. Travelling exp's L. L. Evarts	" " 233		67 60
29	"	" Typewriter expenses	" " 247		10 00
July 1	"	" Note due with Old Colony Trust Co. Aug. 26	" " 251		204,761 67
	"	" interest on above from May 28 to July 26 35 d at 5%	" " "		995 36
8	"	" note due Sept. 25, 95	" " 263		204,761 67
	"	" interest 42 days at 5%	" " "		1,194 44
	"	" Incorporation New Jersey, Evarts, Choate & B	" " "		750 00
	"	" James Colquhoun	" " "		52 25
9	"	" for deposit	" " "		1,660 00
	"	" services Old Colony Trust Co	" " "		700 00
	"	" G. M. Allison, C. M. Bruce & Y. Cohen	" " 265		195 60
22	"	" Stamp E. A. Tucker & Co	" " 285		40
Aug. 31	"	Transfer Old Dom. Copper Co	304 " "	525 00	
Dec. 31	"	Transfer Balance Old Dominion Syndicate #2	" 349	209,395 69	
					209,920 69
		Carried forward			$675,459 68

61—191

COPPER MINING & SMELTING COMPANY.

953

PAGE BOUND VERTICAL IN BOOK

Old Dominion Copper Co. Syndicate.

1895.	Ledger 476.					Folio.		Cr.
May 17	By Cash, A. S. Bigelow.....					C 188		1,000 60
28	" C. S. Henry, 1st installment on subscription			$5,000	14%	H241	700 00	
	Rosalie Lewisohn	1st	"	$1,000 00	14%	"	140 00	
	Leonard Lewisohn chl'dn	1st	"	5,000 00	"	"	700 00	
	Jesse Lewisohn	1st	"	10,000 00	"	"	1,400 00	
	S. Rosenstamm,	1st	"	2,000 00	"	"	280 00	
	Mrs. Eliza Rechat,	1st	"	2,000 00	"	"	280 00	
	G. M. Hyams,	1st	"	2,800 00	"	"	3,920 00	
	Leonard Lewisohn,	1st	"	169,428 33	"	"	23,719 97	
	Adolph Lewisohn,	1st	"	84,714 17	"	"	11,859 98	
	Theo. Armstrong,	1st	"	3,000 00	"	"	420 00	
	Austin M. Purvis,	1st	"	2,000 00	"	"	280 00	
								43,699 95
June 6	A. S. Mayer,	1st	"	10,000 00	"	C 218	1,400 00	
	Jno. Stanton,	1st	"	5,000 00		"	700 00	
	J. W. Belches & Co.	1st	"	5,000 00		"	700 00	
7	C. C. Beaman,	1st	"	10,000 00		"	1,400 00	
14	S. H. Stern,	1st	"	15,000 00		"	2,100 00	
"	" "	2nd	"	15,000 00	28⅔	"	4,300 00	
July 13	Cash, Refund Old Colony Trust Co.....			.....		270	175 00	
								10,775 00

EXHIBIT 231—Continued.

Old Dominion Copper Co. Syndicate.

CR. (Continued.)

11	½ note paid Old Colony Trust Company July 1.	$204,761.69	100	102,380 83		
"	" " " " " " July 8.	.....	"	102,380 84		
"	⅔ note paid W. Kayser July 2.....	$81,905	"	54,602 33		
"	⅔ " " " " 8.....	$81,905	"	54,602 33		
					313,966	33
15	Cash, Refund Old Colony Trust Co.....	.....	C 272	.....	350	00
	Carried forward.....				$369,791	28

838

1895.

DR.

Brought forward.....	675,459	68
Carried forward.....	$675,459	68

EXHIBIT 231—Continued.

839 Old Dominion Copper Co. Syndicate.

Cr.

CR.

1895.		Brought over						369,791 28
						Folio		
July	16.	Cash J. W. Belches, Balance subscription on	$5,000			274		4,300 00
	23.	" Jno. Stanton 2d pay't " 28⅔ " on	$5,000			284		1,433 34
	25.	" E. Hawley, " " " " " on	$10,000			286		2,866 65
	26.	" Chr. C. Beaman, " " " " " on	$10,000			290		2,866 67
	"	" A. J. Meyer, " " " " " on	$10,000			"		2,866 67
		Ledger.						
Jul.	30.	By C. S. Henry, 2d pay't 28¾% on		5,000 00		1,433 33		
	"	Theo. Armstrong, " "		3,000 00		860 00		
	"	A. M. Purvis, " "		2,000 00		573 34		
	"	Rosalie Lewisohn, " "		1,000 00		286 67		
	"	Ch'dn of Leonard Lewisohn, "		5,000 00		1,433 33		
	"	Jesse Lewisohn, " "		10,000 00		2,866 67		
	"	Sam Rosenstamm " "		2,000 00		573 33		
	"	Elisa Rechert, " "		2,000 00		573 34		
	"	G. M. Hyams, " "		28,000 00		8,026 67		
	"	Leonard Lewisohn " "		169,428 33		48,569 45		
	"	Adolph Lewisohn " "		84,714 17	H270	24,284 72		
								89,480 85
Aug.	1.	Jno. Stanton, 3 & 4 " "		5,000 00	C302			2,866 67
	29.	Chr. E. Beaman, 3d call on			" 334			2,866 67

EXHIBIT 231—Continued.

Old Dominion Copper Co. Syndicate.

CR. (Continued.)

26.	C. S. Henry,	3d pay't 28¾% on	5,000 00	H282	1,433 33	
"	Ch'dn of Leon. Lewisohn,	" "	5,000 00	"	1,433 33	
	Theo. Armstrong,	" "	3,000 00	"	860 00	
	A. M. Purvis,	" "	2,000 00	"	573 34	
	Rosalie Lewisohn,	" "	1,000 00	"	286 67	
	Jesse Lewisohn,	" "	10,000 00	"	2,866 67	
	Sam Rosenstamm,	" "	2,000 00	"	573 33	
	Elisa Rechert,	" "	2,000 00	"	573 34	
	Carried forward					479,338 81

840

DR.

1895.	Brought over	675,459 68

841

$675,459 68

EXHIBIT 231—Continued.

Old Dominion Copper Co. Syndicate.

CR.

1895.	Brought over					479,338 81
Aug. 26.	G. M. Hyams, 3d pay't 28¾% on	28,000 00	H282	8,026 67		
	Leonard Lewisohn, " "	169,428 33	"	48,569 45		
	Adolph Lewisohn, " "	84,714 17	"	24,284 72		
					89,480 85	
Aug. 31.	Transfer to Old Dominion Co		J476			2,825 85
Sep. 20.	Simon H. Stern 3d & 4th pay't sub	15,000 00	C360			8,600 00
24.	A. J. Meyer, 4th pay't, 28⅝% on	10,000 00	" 368			2,866 66
26.	C. C. Beaman " "	10,000 00	" 370			2,866 66
	Ledger 304.					
24.	By C. S. Henry, 4th int. 28⅝% on	5,000 00	J301	1,433 34		
	Theo. Armstrong	3,000 00	"	860 00		
	Austin M. Purvis	2,000 00	"	573 32		
	Rosalie Lewisohn	1,000 00	"	286 66		
	Children of Leonard Lewisohn	5,000 00	"	1,433 34		
	Jesse Lewisohn	10,000 00	"	2,866 66		
	Sam Rosenstamm	2,000 00	"	573 34		
	Elisa Rechert	2,000 00	"	573 32		
	G. M. Hyams	28,000 00	"	8,026 66		
	Leonard Lewisohn	169,428 33	"	48,569 46		
	Adolph Lewisohn	84,714 17	"	24,284 75		
					89,480 85	
						$675,459 68

PAGE BOUND

Old Dominion New Stock Subscription A/C.

DR.

1895.						Folio.		
		Ledger 536.						
Sep.	25.	To Cash 50 shares Old Dom.		27	Cash	369	1,356	25
	"	" " " 50 " " " "		26½	"	"	1,331	25
	"	" " " 200 " " " "		29	"	"	5,825	00
	"	" " " 100 " " " "		28	"	"	2,812	50
	"	" " " 400 " " " "		30	"	"	12,050	00
	"	" " " 10 " " " "		29	"	373	291	25
	"	" " " 100 " " " "		26½	"	367	2,662	50
	"	" " " 100 " " " "		"	"	369	2,662	50
	17.	" C. S. Henry, carrying Aug. 1						
		Bought 200 at 29 $5800.....	$5800					
		Sept. 13 sold 200 at 26½.....	5325					
		Differ.....			Jl.	300	475	00
		Ledger 420.						
	25.	" A. M. Whitney 400 shares Old Dom....		27½	"	302	11,000	00
	30.	" L. Nachman, 1% Comm. on 500 shares.			"	303	500	00
	30.	" E. L. Oppenheim 200 shs.....		25	"	305	5,000	00
Oct.	1.	" Chas. F. Brooks 250 " subscription..		26½ + %	"	322	5,050	20
	4.	" C. S. Henry & Co. Comm. 250 shs. at 50c			"	324	125	00
	21.	" " " " 2000 " " 4 /–			"	327	975	00
	3.	" Cash 45 shs. Old Dom.....		29	Cash	381	1,311	26

EXHIBIT 232—Continued.

Old Dominion New Stock Subscription A/C.

DR.

26.	"	C. S. Henry & Co.	200 shs.	Old Dom..	$25\frac{1}{2}$ + $\frac{1}{8}$ Com.	Jl.	322	5,325	00	
16.	"	Cash	25	" " " ..	22	Cash	403	556	25	
25.	"	"	250	" " " ..	21	"	413	5,281	25	
29.	"	"	100	" " " ..	19 + Com.	"	417	1,912	50	
"	"	"	50	" " " ..	$18\frac{1}{2}$	"	417	931	25	
"	"	"	100	" " " ..	$18\frac{1}{2}$	"	"	1,862	50	
"	"	"	50	" " " ..	$18\frac{1}{2}$	"	"	931	25	
31.	"	"	100	" " " ..	$17\frac{1}{2}$ + $\frac{1}{8}$	"	419	1,762	50	
"	"	"	100	" " " ..	$18\frac{1}{2}$ + $\frac{1}{8}$	"	"	1,862	50	
"	"	Difference on 1000 shares sold at $25\frac{1}{2}$ Collected at 27.....				Jl.	318	1,500	00	
Nov. 7.	"	Commission on 200 shs. Paris.....				"	420	105	89	
		Carried forward						75,458	60	

Old Dominion New Stock Subscription A/C.

CR.

1895.							Folio.		
		Ledger 536.							
Aug.	1.	By Cash	200 shs.	Old Dom.	25		C—		5,000 00
	26.	" "	400 "	" "	27	50			11,000 00
Sep.	30.	N. M. Rothschild Son	1000 "	" "	29		J301	29,000 00	
	"	Waldemar Company	500 "	" "	30		"	15,000 00	
	"	" " "	500 "	" "	32		"	16,000 00	
	"	Ladenburg, Thalman	400 "	" "	25		"	10,000 00	
	"	S. Nachman	500 "	" "	30		"	15,000 00	
	"	E. S. Oppenheim & Co.	2000 "	" "	25			50,000 00	
								————	135,000 00
	24.	Sally M. Manz	200 "	" "	29		J302		5,800 00
	"	E. Lastate	500 "	" "	30		"		15,000 00
		Ledger 420.							
	25.	A. M. Whitney	600 "	" "	27	50	"		16,500 00
	"	" "	400 "	" "	"		"		11,000 00
	30.	S. Lazarus Son	200 "	" "	29		"		5,800 00
	"	C. S. Henry	400 "	" "	30		"		12,000 00
	"	" "	100 "	" "	25		"		2,500 00
Oct.	1.	H. Wallenstein	500 "	" "	25		J324		12,500 00
	2.	J. D. Probst	400 "	" "	"		"		10,000 00
	7.	Lawyer Teutsch	250 "	" "	27		"		6,750 00
	8.	C. S. Henry & Co.	200 "	" "	30		"		6,000 00
	1.	A. Vogel	25 "	" "	25		"		625 00
	"	" "	25 "	" "	"		"		625 00

EXHIBIT 232—Continued.

Old Dominion New Stock Subscription A/C.

CR. (Continued.)

"	Rose Rosenbaum	25	"	"	"	"	"	625	00
"	Bella "	25	"	"	"	"	"	625	00
"	Ike "	25	"	"	"	"	"	625	00
"	Doc. "	25	"	"	"	"	"	625	00
"	Sam. "	40	"	"	"	"	"	1,000	00
"	Baron de Hirsch	2000	"	"	"	30	"	60,000	00
"	Capt. Couch	200	"	"	"	12 50	"	2,500	00
"	T. Wolfson	20	"	"	"	"	"	250	00
"	Edgar Buffon	20	"	"	"	"	"	250	00
"	Theo. Gaden	20	"	"	"	"	"	250	00
	Carried forward							322,000	85

EXHIBIT 232—Continued.

Old Dominion New Stock Subscription A/C.

DR.

844

		Brought over							75,458 60
1895.		Ledger 420.						Folio.	
Nov.	1.	To Cash	400	shares		Cash	423	10,000 00
	2.	" "	100	"	18 Com.	"	425	1,812 50
	6.	" "	50	"	17½ + ⅛	"	427	881 25
	7.	" "	100	"	17¼	"	429	1,737 50
	8.	" "	50	"	15	"	431	756 25
	10.	" 5% Comm. on	200	" London		Jl.	332	300 00
	12.	" Cash	115	"	15	Cash	437	1,739 37
	16.	" "	50	"	17	"	443	856 25
Dec.	11.	To A. A. Fishl	150	shs. Old Dom.	16⅜	Jl.	340	2,456 25
Nov.	26.	C. M. Hyams	760	" " "	26	"	342	19,760 00
Dec.	3.	Cash	100	" " "	15¾	Cash	463	1,587 50
	19.	Jesse Lewisohn	593	" " "	25 68	Jl.	345	15,235 82
	"	5% Comm. on	500	" London		"	"	661 77
Nov.	"	Proceeds of	2000	" Old Dom.	30	"	"	60,000 00
Dec.	19.	Lewisohn, Adolph Lewisohn	6845	" " "	Avge. 27.52	Jl.	346	188,401 38
								381,644 44

EXHIBIT 232—Continued.

Old Dominion New Stock Subscription A/C.

845

CR. (Continued.)

1895.								Folio.		
		Ledger 420.	Brought over,							322,850 00
Oct.	1	C. W. Welch	20	shs.	Old	Dom.	12 50		J324	250 00
	"	W. Faint	20	"	"	"	"		"	250 00
	"	S. Radlostorffer	20	"	"	"	"		"	250 00
	"	H. L. Curey	20	"	"	"	"		"	250 00
	"	J. A. Albrecht	20	"	"	"	"		"	250 00
Oct.	1	By T. Wolfson	25	shs.	Old	Dom.	25	Jl.	324	625 00
	"	Edgar Buffon	25	"	"	"	"	"	"	625 00
	"	H. L. Casey	50	"	"	"	"	"	"	1,250 00
	"	McCoy	25	"	"	"	Gratis			
	"	Cyril Henry	100	"	"	"	"			
	"	Sam Lewisohn	20	"	"	"	"			
	10	A. J. Stern	500	"	"	"	27	"	325	13,500 00
	"	Banque International	500	"	"	"	"	"	"	13,500 00
	29	C. S. Henry	100	"	"	"	19¾	"	"	1,987 50
	30	Mrs. Annie Wolfson	15	"	"	"	18	"	"	271 87
	23	G. M. Hyams	100	"	"	"	21	"	"	2,100 00
	24	" " "	100	"	"	"	19	"	"	1,900 00
	26	" " "	100	"	"	"	18½	"	"	1,850 00
	29	" " "	100	"	"	"	"	"	"	1,850 00
	"	Common	400	"	above			"	"	50 00

EXHIBIT 232—Continued.

Old Dominion New Stock Subscription A/C.

CR.

	"	C. S. Henry & Co.	200	"	Old Dom.	26½ ÷ ⅛	Jl.	313	5,325	00
Nov.	7	Comm. on 400 shares					"	329	50	00
	"	Transfer to Wm. Faint	10	"	"	17	"	"	171	15
	26	G. M. Hyams	270	"	"	24	"	342	6,480	00
		Ledger 421.								
Dec.	5	Cash	15	"	"	16	Cash	464	240	00
	11	C. S. Henry overcharge	2 /—on	800	shs.		Jl.	342	390	00
	19	Jesse Lewisohn	233	shs.		22 87	"	345	5,328	62
	"	Interest recovered from C. F. Brooks					"	"	50	20
									381,644	44

EXHIBIT 233.

Old Dominion Syndicate Sub. #2.

846

DR.

1895.		Ledger 479.				
Jun.	18	To Cash	C233			40,722 22
	"	" "	"235			102,708 07
	20	" Interest paid Louis G. Schiffer	J259	15 17		
	"	" " " H. W. Spencer	"	14 82		29 99
July	1	" note due Aug. 26 discounted Wm. Keyser	C251	81,905 00		
	"	" interest on above from May 28 30d@5%	"	409 52		
	8	" note due Sept. 25th	C263	81,905 00		
	"	" interest 42 days at 5%	"	477 78		164,697 30
	16	" Transfer 1st & 2d payment 42⅜ on 5000 E. L. Oppenheimer & Co.	J269			2,133 33
	"	" " 1-2-3-4 paym't of 2500 paid by D. L. Wallerstein	"			2,500 00
Aug.	14	" Aloa Arow, 1 & 2d pay't on subsc. 1,000 42⅜%	"284			426 67
	1	" D. W. Wallerstein, entry reversed				2,500 00
	15	" Jacob Cohen, Transfer	J285			2,500 00
July	1	" Chas. F. Brooks, reverse				2,133 33

EXHIBIT 233—Continued.

Old Dominion Syndicate Sub. #2.

DR. (Continued.)

		Ledger 484.				
Sept.	1	" Interest G. E. Oppenheim is credited Aug. 26....	1451 25	J300	17 92	
		should have been.....	1433 33			
		Carried forward.....				320,368 83

EXHIBIT 233—Continued.

Old Dominion Syndicate Sub. #2.

847

CR.

			5,000 00	J259	2,133 33	
1895	Ledger 479		5,000 00	"	2,133 33	
Jun. 20.	By Chas. F. Brooks, 1 & 2 payt 42⅔%.....		1,000 00	"	426 67	
"	Children of Adolph Lewisohn 42⅔%.....		25,000 00	"	10,666 67	
"	Sam'l Lewisohn, 1 & 2 payt.....		44,238 33	"	9,170 00	
"	Lewisohn Bros. " "			"	4,585 55	
"	Leonard Lewisohn, " " ⅔ of.....					29,115 00
"	Adolph Lewisohn, " " ⅓			J234		5,015 75
"	L. G. Schiffer full payment.....			"240		4,281 48
24.	A. W. Spencer.....		5,000 00	"250		2,133 33
July 1.	C. F. Brooks, 1 & 2 payt 42⅔% sub.....			C254		2,866 67
5.	A. W. Spencer, 3d payment.....			"266		1,400 00
10.	1st payment, 14% on subs. $10,000.....			"270		2,866 67
11.	last " " " " "		2,000 00	"		853 34
"	A. A. Evarts, 1 & 2 payt subs.....			J271		2,133 33
16.	E. L. Oppenheim & Co. 1 & 2 installmt.....			"272		2,500 00
26.	D. Wallerstein, Subscription to Syndicate....		1,000 00			
Aug. 14.	Aloa Arow 1 & 2 pyt on subs. 42⅔%.....			"284		426 67
15.	Jacob Cohn, " " " " "		2,500 00	"285		1,066 66
2.	D. Wallerstein, full payt of subscription.....			C302		2,500 00
24.	A. J. Mayer, 3d payt 28⅔%.....			"326		2,866 67
26.	E. L. Oppenheim 3d payt		5,000 00	"330		1,451 25
27.	E. O. Hawley, " " "		10,000 00	"		2,866 66

EXHIBIT 233—Continued.

Old Dominion Syndicate Sub. #2.

CR. (Continued.)

	Ledger 484						
26.	Allan W. Evarts, " " "	.....	2,000 00	"332			573 33
"	Chas. J. Brooker, " " "	.....	5,000 00	J282	1,433 33		
"	Children Adolph Lewisohn "	.....	5,000 00	"	1,433 33		
"	Sam Lewisohn, " " "	.....	1,000 00	"	286 67		
	Carried forward.....				3,153 33		64,916 81

848

DR.

	Brought over,				320,368 83
1895	Ledger 486				
Sep. 30.	To amount credited Twice as payt D. Wallerstein		J303.		1,066 66
"	" Readjustment of Jacob Cohn ac.....		" "		1,066 65
					322,502 14

EXHIBIT 233—Continued.

Old Dominion Syndicate Sub. #2.

CR.

1895						
	Brought over			3,153 33		64,916 81
Aug. 26.	Lewisohn Bros 3d payt 28⅔%.....	25,000 00	J282	4,013 32		
"	Leonard Lewisohn " " "	21,492 22	"	6,161 11		
"	Adolph Lewisohn, " " "	10,746 11	"	3,080 55		
"	Aloa Arow, " " "	1,000 00	"	286 67		
						16,694 98
"	Jacob Cohn, " " "	2,500 00	J283			716 66
Sep. 23.	Allan W. Evarts last payt 28⅔% sub. on.....	2,000 00	"366			573 33
"	L. E. Oppenheim " " "	5,000 00	"			1,433 34
"	E. W. Hawley, " " "	10,000 00	"			2,866 67
24.	C. F. Brooker 4 installment sub.....	5,000 00	J300	1,433 34		
"	Children Adolph Lewisohn "	5,000 00	"	1,433 34		
"	Sam Lewisohn, " " " ..... Ledger 484	1,000 00	"	286 66		
24.	By Jacob Cahn, 4th installment sub.....	2,500 00	J300	716 67		
	Aloa Aron, " " "	1,000 00	"	286 67		
	Leonard Lewisohn " "	21,492 22	"	6,161 11		
	Adolph Lewisohn " " "	10,746 11	"	3,080 56		
	Lewisohn Bros, " " "	14,000 00	"	4,013 32		
						17,411 67
Sep. 30.	Cancel entry July 16 D. Wallerstein.....		J303			2,500 00
	" " Aug. 15 L. Bros.....		"			2,500 00
Dec. 31.	Transfer to Old Dominion Syndicate # 1....		J349			209,395 69
"	Interest collected from Sundry Subscribers...		"			3,492 99
						322,502 14

850 EXHIBIT C.

Memorandum.

Commenced searching files 4 P. M., February 25th.

Bigelow, Nelson, Bissell	January 1 to June 30
Bigelow, Nelson, Bissell	July 1 to December 31
Attorneys	January 1 to June 30
"	July 1 to December 31

Quit 5:30 P. M.

Resumed search 7:15 P. M.

Outgoing Letters	January 1 to January 10
	January 11 to January 20
	January 21 to 31
	February 1 to 14
	February 14 to 28
	March 1 to 15
	March 15 to 30
	April 1 to 15

Quit 9:30 P. M.

February 26th. 4:20 P. M.

Outgoing Letters—	April 15 to 30
	May 1 to 15
	May 16 to 31
	June 1 to 10

Quit 5:50

Resumed 7:05.

Outgoing Letters—	June 11 to 20
	June 21 to 30
	July 1 to 10
	July 11 to 20
	July 21 to 31
	Aug. 1 to 10
	Aug. 11 to 20
	Aug. 21 to 31

851 February 27th. 7:10 P. M.

Outgoing Letters— Sept. 1 to 10
Sept. 11 to 20
Sept. 21 to 30
Oct. 1 to 10
Oct. 11 to 20
Oct. 21 to 31
Nov. 1 to 10
Nov. 11 to 20
Nov. 21 to 30
Dec. 1 to 15
Dec. 16 to 31
Miscellaneous File 1893 to 1897

Quit 11 P. M.

February 28th. 2:05 P. M.

Letters Received—

A to Ba to Bl
January 1 to March 1
March 1 to May 25
May 25 to June 30
July 1 to Oct. 1

Quit 5 P. M.

March 1st. 1:55 P. M.

" A Ba to Bl
Oct. 1 to Dec. 31
Bo to By
Jan. 1 to June 30
July 1 to Dec. 31
C
January to March
May to June 30
July 1 to Dec. 31
D
Jan. 1 to June 30
July 1 to Dec. 31
852 E and F
Jan. 1 to June 30
July 1 to Dec. 31
G
Jan. 1 to June 30
July 1 to Dec. 31

Quit 5:20 P. M.

March 1st—continued, 7:30 P. M.

Letters Received—

Ha to He
Jan. 1 to June 30
July 1 to Dec. 31
Hi to J
Jan. 1 to June 30
Hi to J
July 1 to Dec. 31
K
Jan. 1 to June 30
July 1 to Dec. 31
L
Jan. 1 to June 30
July 1 to Dec. 31
Ma to Me
Jan. 1 to June 30
July 1 to Dec. 31 M—
Me to My
Jan. 1 to June 30
N O P
Jan. 1 to May —
June
July 1 to Oct. 15
Oct. 15 to Dec. 31

Quit 11:05

March 2nd, 2:40 P. M.

" Q to R
Jan. 1 to June 30
July 1 to Dec. 31
853 Sa to Sh
January to June
Si to Sy
January to June
Si to Sy
July 1 to Dec. 31

Quit 5:20 P. M.

Resumed 7:15 P. M.

Letters Received—

T U V
Jan. to June
W to Z
January to June
Brokers— June 30th—
July 1 to December 31
Banks— January 1 to June 30
July 1 to December 31

Telegrams Received—
January 1 to May 1
June
July 1 to November 1
Nov. 1 to December 31

Quit 10:30 P. M

March 3rd—3:10 P. M.

New England Electrolytic Copper Co.
January, February and March
April, May and June
October, November and December
Record of Purchases—
N. E. Elec. Copper Co.
December 1, 1894 to September 30/95
Outgoing Letters—
N. E. Elec. Copper Co.
April to December, 1895
Weight Returns— January to June 30
July 1 to Dec. 31
N. J. Meetal Refining Co.—1895
Penn. Salt Mfg. Co.—
April to December—

Quit 6:30 P. M

854 March 3—continued—7:15 P. M.

Letters Received—
Sa to Sh—
July 1 to December 31
T U V
July 1 to Dec. 31
W Z
July 1 to Dec. 31.
Ansonia Refining Co.—
January to June—
July 1 to Dec. 31.
Factory Letters— Jan. 1 to June 30
July 1 to Dec. 31.
Bills of Lading— Jan. 1 to June 30
July 1 to Dec. 31

F. L. R

By JOHN STOCKETT: Commenced search—March 2nd 6 P. M.

N. E. Elec. Copper Co.—
Foreign Statements—
Outgoing Telegrams—

Stopped at 10 P. M

March 3rd, 9:50 A. M.

Telegrams to 5 P. M.
File contracts—6 P. M.
Foreign letters from C. S. Henry to 9:40 P. M.

March 4th—

Incoming Foreign Letters 9:50 A. M. to 4:30 P. M.
Copper Wire Contracts, Order Bills, etc.—8:15 P. M.

By H. A. Asendorf—Tuesday March 3rd—6:20 P. M.

Receipt Files— January to June
July to December
Salesmen— January to June.
July to December
Assay and Weights—Jan. to June.
July to Dec.
855 L. I. & T. Co. 1895—
Mont. Ore Purchasing Co.—Jan. to June.
European Invoices—January to December 1895—
A. Morris—Penn. Salt Mfg. Co.—Jan. to June—1895
Ansonia Refining Co.—Freight Bills—Jan. to May 1895
Pawtuckett Tolls
Slate—1892 to 1895
Freight Claims—
Penn. Lead Co. December 1895.
Purchases—
January to July
Drafts—January to October—1895.
Stenographers' Letters—January—1895.
New Eng. Elec. Copper Co. 1895.
Lewisohn Imp. and Trading Co. July to December 1895.
T. O. C. Copper Wire July 1 to Dec. 31.
" Foreign Metal Contracts—Dec. 1895 to Dec. 1896—
Assays—1895
T. O. C.—January to June 1895
Bills January to March 1895—March to May, 1895. June, and July to September. — Sept. —. to Nov. — Dec.
Cables—1895. Jan. 1 to Apr. 11—June 30—July to Oct.—Nov. to Dec.—

Quit 9:30 P. M.

Exhibit 501 was a certified copy of the certificate of organization of the complainant corporation. The text of it appears on pages 412–415 of this printed record.

Exhibit 504 is a printed copy of the record in the Court of Appeals of New York in the case of Blum v. Whitney, containing the papers on appeal by leave from a judgment of the appellate division affirming an interlocutory judgment sustaining the demurrers to the bill of complaint which is as follows:—

856 *Complaint. Supreme Court, New York County.*

EDWIN BLUM, on Behalf of Himself and all Other Stockholders of the Distilling Company of America Similarly Situated, Plaintiff,
against
HARRY PAYNE WHITNEY, as Executor of the Last Will and Testament of William C. Whitney, Deceased; Thomas F. Ryan, Robert A. C. Smith, Peter A. B. Widener, William L. Elkins, Thomas Dolan, Frederick P. Olcott, Anthony N. Brady, Hugh J. Grant, Frederick S. Flower, Samuel W. Ehrich, John I. Waterbury, Samuel M. Rice, Edson Bradley, George R. Sheldon, Howard J. M. Cardeza, P. Lewis Anderson, Henry D. Macdona and Distilling Company of America, Defendants.

The plaintiff, for his third amended complaint, complains and alleges, upon information and belief, as follows:

I. That the Distilling Company of America is a foreign stock corporation organized under the laws of the State of New Jersey on or about July 11, 1899, and the plaintiff is a stockholder therein, holding 2,800 shares of the common stock thereof of the par value of $100 per share, and brings this action on behalf of himself and all other stockholders therein. The plaintiff is a resident of the City and State of New York, and the Distilling Company of America has its principal business office and place of business in the City, County and State of New York, and a large portion of its property has been since the time of its organization and still is situated in the State of New York; and the individual defendants, with the exception of defendants Widener, Dolan and Elkins, are residents of the State of New York, and the acts hereinafter set forth were committed and performed in the State of New York.

II. That on the 22d day of June, 1899, and at all the times hereinafter set forth, the following corporations existed and were doing business, each of them having many stockholders, many of said stockholders being stockholders in several of said companies, viz.:

(*a*). The American Spirits Manufacturing Company, hereinafter called the Manufacturing Company, a corporation incorporated August 22, 1895, and existing under the laws of the State of New York, with an issued capital stock of $35,000,000, viz.:
857 350,000 shares of the par value of $100 per share, of which $7,000,000 is 5 per cent. non-cumulative preferred stock and $28,000,000 common stock; and that the objects for which said corporation was formed were to manufacture, sell and distribute spirits and other alcoholic products.

(*b*) The Standard Distilling and Distributing Company, hereinafter called the Standard Company, incorporated June 27, 1898, and existing under the laws of the State of New Jersey, with an issued capital stock of $21,000,000, viz.: 240,000 shares of the par value of $100 each, of which $8,000,000 is preferred stock, entitled to a cumulative quarterly dividend at the rate of 7 per cent. per

annum, and $16,000,000 common stock; and that the objects for which said corporation was formed were to manufacture, sell and distribute spirits and other alcoholic products.

(c) The Kentucky Distilleries and Warehouse Company, hereinafter called the Kentucky Company, incorporated February 3, 1899, and existing under the laws of the State of New Jersey, with an issued capital stock of $29,000,000, viz.: 290,000 shares of the par value of $100 each, of which $10,500,000 is preferred stock entitled to a cumulative quarterly dividend at the rate of 7 per cent. per annum, $18,500,000 common stock, and that the objects for which said corporation was formed were to manufacture, sell and distribute Bourbon and Kentucky and other whiskies and spirits and other alcoholic products.

(d) The Spirits Distributing Company, hereinafter called the Distributing Company, incorporated January 6, 1896, and existing under the laws of the State of New Jersey, with an issued capital stock of $6,500,000, viz.: 65,000 shares of the par value of $100 each, of which $1,250,000 is first preferred stock entitled to cumulative dividends at the rate of 6 per cent. per annum, $1,575,000 second preferred stock entitled to non-cumulative dividends at the rate of 2 per cent. per annum and $3,675,000 common stock; and that the objects for which said corporation was formed were to sell and distribute spirits and other alcoholic products. That said common stock of said Distributing Company was and still is owned by said Standard Company above named.

The plaintiff will refer hereafter to said companies together as the "Constituent Companies."

III. That at the times hereinafter mentioned, the defendant Samuel M. Rice was president of said Manufacturing Company, president of said Kentucky Company, first vice-president of said Standard Company, and a director of each of said "Constituent Companies," the defendant Edson Bradley was vice-president and a director of said Kentucky Company, a director of said Manu-
858 facturing Company, and a director and a member of the Executive Committee of said Standard Company, the defendant George R. Sheldon was president and director of said Standard Company, and a director of said Kentucky Company, the defendant Howard J. M. Cardeza was vice-president and a director of said Manufacturing Company, and one Thomas H. Wentworth, of the City of New York, was the secretary and director of said Manufacturing Company, and secretary of said Kentucky Company, and one N. E. D. Huggins was the secretary of said Standard Company and of said Distributing Company, and the firm of Moran, Kraus & Mayer of the City of Chicago were general counsel for all of said "Constituent Companies," and the New York offices of all of said "Constituent Companies" were at 27 William street, New York City.

IV. That the defendants, Samuel M. Rice, Edson Bradley, George R. Sheldon and Howard J. M. Cardeza, being officers and directors of the said "Constituent Companies," as hereinbefore set forth, and William C. Whitney and the defendants Ryan, Smith, Widener, Elkins, Dolan, Olcott, Brady, Grant, Flower, Ehrich, Waterbury,

Anderson and Macdona, being persons of influence in the financial circles of New York City, and able to procure money for the putting through of large financial schemes, confederated together, in or about the summer of 1899, to make for themselves a secret profit at the expense of the stockholders of the "Constituent Companies," hereinbefore mentioned, and at the expense of the Distilling Company of America and its stockholders and this plaintiff, and to that end formed the scheme of consolidating said "Constituent Companies" and other companies by the formation of the Distilling Company of America as a stockholding corporation for the purpose of acquiring the stock of said "Constituent Companies"; and in order to do so without any risk or expense to themselves, and to insure the success of their scheme, before actually incorporating the defendant the Distilling Company of America they formed the plan of requesting the stockholders of the various "Constituent Companies" to deposit their certificate of stock with a depository named by them, with the intention of incorporating the Distilling Company of America, to acquire and take over such stock, after sufficient stock had been deposited to insure the success of the scheme. It was part of their scheme that after said stock had been deposited they would cause the Distilling Company of America to be incorporated and issue a portion of the stock thereof to the stockholders of the "Constituent Companies" who had deposited their stock under the plan, and a large portion of the stock of the Distilling Company of America remaining they would take and appropriate to their own use, without paying any consideration to the said Distilling Company of America therefor, and said scheme was carried out by the said
859 William C. Whitney and the defendants Ryan, Smith, Widener, Elkins, Dolan, Olcott, Brady, Grant, Flower, Ehrich, Waterbury, Rice, Bradley, Sheldon, Cardeza, Anderson and Macdona as hereinafter set forth.

V. In pursuance of said scheme, the said William C. Whitney and the defendants Ryan, Smith, Widener, Elkins, Dolan, Olcott, Brady, Grant, Flower, Ehrich, Waterbury, Rice, Bradley, Sheldon, Cardeza, Anderson and Macdona, obtained an option from the stockholders of the Hannis Distilling Company, a corporation upon about ninety-five per cent. of the stock of said corporation; that the capital stock of said Hannis Distilling Company was $1,000,000, and the said Whitney and others procured an option thereon to purchase the same for the sum of $1,500,000 in cash and $250,000 in preferred stock, and $250,000 in common stock of the Distilling Company of America, a corporation not then formed, but to be organized, as hereinbefore set forth, and the said Hannis Distilling Company, and the stock thereof was not worth more than the said sum of $1,500,000. Thereafter the said persons above mentioned employed and constituted P. Lewis Anderson and Henry D. Macdona, two of the defendants, their agents, associates and representatives, to carry out said scheme, and thereafter and on or about June 22, 1899, the said P. Lewis Anderson and Henry D. Macdona, of the City of New York, designating themselves and hereinafter referred to as the "organizers," proposed to the stockholders of the said "Constituent Compa-

nies" respectively, by printed prospectus and proposed agreement, dated June 21, 1899, and by simultaneous and continued advertisement in the public press, dated June 20, 1899, but beginning June 22, 1899, and by a notice sent to all the stockholders of the said "Constituent Companies" at the instance of the defendants hereinbefore named as officers thereof, the following plan, viz.: That the said "organizers" would organize a corporation to be known as the Distilling Company of America, with an authorized capital of $55,000,000 7 per cent. cumulative preferred stock and $70,000,000 common stock, which the "organizers" would use in acquiring for the Distilling Company of America the capital stock of the said "Constituent Companies" by exchanging the stock of the Distilling Company of America, when issued, for the stock of the said "Constituent Companies" and for the purchase for the Distilling Company of America of certain rye distillery properties, and for an additional working capital of $1,500,000, as therein set forth, leaving in the treasury of the new company for future purposes $23,750,000 of its preferred stock and $23,750,000 of its common stock; and they invited and requested the stockholders of the "Constituent Companies" to co-operate with them therein, and to subscribe for the stock of the Distilling Company of America by depositing the stock of the "Constituent Companies" with the Central Trust Company for the purpose of being exchanged for the stock of the Distilling Company of America
860 when formed. The basis proposed by the "organizers" for the exchange of the stock of the "Constituent Companies" for that of the stock of the Distilling Company of America to be organized was as follows:

(*a*) Holders of stock of the Manufacturing Company to exchange their stock by depositing the same with the Central Trust Company of New York, and receive for each share of the $7,000,000 of the Manufacturing Company's preferred stock 50 per cent. of the par value thereof in preferred stock of the said Distilling Company, and for each share of the $28,000,000 Manufacturing Company's common stock 25 per cent. of the par value thereof in common stock of the said Distilling Company of America.

(*b*) Holders of the stock of the Kentucky Company to similarly deposit their stock and to receive for each share of the $10,500,000 preferred stock of the Kentucky Company 85 per cent. thereof in preferred stock and 15 per cent. thereof in common stock of the said Distilling Company, and for each share of the $18,500,000 common stock of the Kentucky Company 70 per cent. thereof in common stock of the said Distilling Company.

(*c*) Holders of stock of the Standard Company to similarly deposit their stock and receive for each share of the $8,000,000 preferred stock of the Standard Company 85 per cent. thereof in preferred stock and 15 per cent. thereof in common stock of the said Distilling Company 85 per cent. thereof in preferred stock and 15 per cent. thereof in common stock of the said Distilling Company, and for each share of the $16,000,000 common stock of the Standard Company 60 per cent. thereof in common stock of the said Distilling Company.

(*d*) Holders of stock of the Distilling Company to similarly deposit

their stock and receive for each share of the said Distilling Company $1,250,000 6 per cent. first preferred stock 80 per cent. thereof in preferred and 20 per cent. thereof in common stock of the said Distilling Company, and for each share of the $1,575,000 two per cent. second preferred stock of the Distributing Company, 20 per cent. thereof in preferred and 20 per cent. thereof in common stock of the said Distilling Company.

That $3,675,000 common stock of said Distributing Company being owned by the Standard Company, no proposition in relation thereto was made by said "organizers." The defendant further announced in their said prospectus that they would purchase for the said Distilling Company of America at least 95 per cent. of the common stock of the Hannis Distilling Company of Philadelphia and Baltimore, which was engaged in the business of manufacturing rye whiskies, the St. Paul Distillery, situated in St. Paul, Minnesota, also engaged in manufacturing rye whiskies, and supply to the said Distilling Company at least $1,500,000 in cash. The said pro-

861 pectus did not state that the said William C. Whitney and the individual defendants hereinbefore mentioned had an option on or were interested in the Hannis Distilling Company or its stock, or the amount that it was contemplated they should be paid for their said interest, or that they intended to make a profit out of the sale of the said Distilling Company of America for their option on the stock of the said Hannis Distilling Company; nor did the said William C. Whitney or any of the said defendants at any time or in any way state that they were interested in said Hannis Distilling Company or its stock and intended to cause the said Distilling Company of America to acquire the same from themselves, but they fraudulently concealed the same from the stockholders of the "Constituent Companies," and caused the same to be acquired by the Distilling Company of America at the direction of their own agents and representatives as directors, as hereinafter set forth.

Said prospectus further proposed that the stock of the several "Constituent Companies" hereinabove named should be deposited with the Central Trust Company of New York, on or before June 30th, 1899, which should deliver the same to the State Trust Company of New York, upon receiving from the latter the said shares of the Distilling Company of America, it being provided that said "organizers" should make said exchange through said State Trust Company. A copy of the said prospectus and agreement is hereto annexed, marked "Exhibit A" and made a part hereof.

That the proposition of said "organizers" was not made on their own behalf alone, but was the proposition of and was made with the knowledge and at the instance and request of the said Samuel M. Pice, Edson Bradley, George R. Sheldon and Howard J. M. Cuneza, who were directors and officers of said "Constituent Companies," as above set forth; William C. Whitney, Robert A. C. Smith, Peter A. B. Widener, William L. Elkins, Thomas Dolan, Frederick P. Olcott, Anthony N. Brady, Hugh J. Grant, Frederick S. Flower, Samuel W. Ehrich and John I. Waterbury, all of whom collectively will be referred to hereinafter as the "Syndicate."

VI. That accompanying said prospectus issued by the "organizers," the directors of said "Constituent Companies," including the defendants Rice, Bradley, Cardeza and Sheldon, caused to be issued by said "Constituent Companies" and mailed to each stockholder a circular dated June 20th, 1899, signed by the secretaries of said respective "Constituent Companies," and by Moran, Kraus & Mayer, the counsel of all of said "Constituent Companies," wherein it was stated that the proposed plan had received the approval of the officers and directors of each of the "Constituent Companies," a copy of which circular is hereto annexed, marked "Exhibit B" and made a part hereof, and the advertisement mentioned in paragraph V hereof as having been made in the public press was the same as said Exhibit B except that the last paragraph of Exhibit B was omitted from the advertisement, and the advertisement was signed at the end as follows: "Central Trust Company of New York, by F. P. Olcott, President; The State Trust Company, by Walter S. Johnston, President," and thereupon a large number of the stockholders of the said "Constituent Companies," induced thereto by relying upon the statements, propositions and good faith of said "organizers" and of the respective boards of directors of said "Constituent Companies," and believing from the statements made in said prospectus and said circular and said advertisement that all the subscribers to the shares of said Distilling Company of America were being and would be treated alike and equally, and relying upon the good faith of the said "organizers" and of the various directors of said "Constituent Companies" to fully and truly state to them all facts touching their interests which they or any of them might know, and honestly and to fully advise them in the premises; and relying upon the good faith and duty of said George R. Sheldon, Samuel M. Rice, Edson Bradley and Howard J. M. Cardeza, as officers and directors of said "Constituent Companies," as aforesaid, and of the aforesaid general counsel, and believing that the said plan was simply a plan for the consolidation of the various corporations mentioned therein for the mutual benefit of their respective stockholders deposited their respective holdings and subscribed for the stock of the Distilling Company of America; that the holders of the stock of said "Constituent Companies," to the amount of over 90 per cent. of said stocks, so deposited their stock under said plan, and they would not have so deposited their stock under said plan and subscribed for the stock of the Distilling Company of America, had they known the facts herein set forth, and which were then known to the "organizers," and to the members of said "Syndicate," and by them willfully concealed from said stockholders of the "Constituent Companies" and subscribers to the stock of the Distilling Company of America.

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VII. That thereafter, more than a majority of the stock of each of the said "Constituent Companies" having been deposited under the said plain prior to July 7, 1899, the said William C. Whitney and the other defendants, just above mentioned being assured of the success of the said scheme did on the 11th day of July, 1899, through the said "organizers," who acted for and under the direction of the said "Syndicate" cause to be incorporated under the laws of the State of

New Jersey, the said Distilling Company of America with the capital aforesaid. The incorporators of the said Company mentioned in the certificate of incorporation were George E. P. Howard, Francis R. Foraker and Walter S. Dryfoos, who were employees of the firm of Root, Howard, Winthrop & Stimson, the attorneys for the
863 said William C. Whitney and the said individual defendants.

On the following day (July 12, 1899) the said incorporators held their first meeting and elected a board of directors, consisting of the following persons, who were also the agents and employees of the said "Syndicate" and their attorneys, and as employees and representatives acted solely under their instructions: George E. P. Howard, Francis R. Foraker, Walter S. Dryfoos, Roland B. Harvey, David J. Gallert, Lester A. Pyatt, David Nelson, Hoyt F. Spooner, Raymond G. Shipman, Rudd C. Rann and L. W. Ahrens. That on the same day (July 12, 1899), the said board of directors, thus elected and constituted by the said "Syndicate" received in the form of a proposed contract dated July 12, 1899, a proposition from P. Lewis Anderson and Henry D. Macdona, the "organizers" of the said Distilling Company of America under said prospectus, and two of the defendants herein, and the agents and representatives of the other defendants, to deliver to the said Distilling Company of America the stock of the "Constituent Companies" deposited under the said plans hereinbefore set forth, and 95 per cent. of the stock of the Hannis Distilling Company and $1,500,000 in cash in exchange for $31,250,000 of the preferred stock and $46,250,000 of the common stock of the said Distilling Company of America, except such proportion thereof as they caused to be reserved in the treasury of the said Distilling Company to be exchanged for the stock of such stockholders of said "Constituent Companies" as had not deposited their shares under said prospectus; and said proposed contract drawn up by the attorneys for said "Syndicate" at their request and presented to the said Distilling Company of America at the first meeting of its directors by the said P. Lewis Anderson and Henry D. Macdona, two of the defendants herein and the agents and representatives of the others was by a vote of the said directors hereinbefore mentioned, who were also the employees, agents and representatives of the "Syndicate" accepted, and the president and secretary of the company were authorized by said Board of Directors to execute the said contract and to carry it out by the issuance of the stock of the Distilling Company of America; and the said contract was thereafter executed and performed, and the stock of the Distilling Company of America was issued in the amount mentioned in said contract, and the St. Paul Distillery was not included in said contract and was not acquired by the Distilling Company of America.

VIII. That the said "organizers" acting for and on behalf of the said "Syndicate," thereupon received $31,250,000 of preferred and $46,250,000 of common stock, being the entire issued capital stock of said Distilling Company of America, and on receiving said entire issued capital stock of said Distilling Company, viz.
864 $31,250,000 of preferred and $46,250,000 of common stock, thereupon caused to be transferred on the books of the

company $20,540,000 of the preferred and $32,890,000 of the common stock to the Central Trust Company, which distributed the said stock to the holders of stocks of the said "Constituent Companies" who had subscribed under said prospectus for stock of said Distilling Company, and out of the balance, viz., $10,710,000 preferred and $13,360,000 common, they caused to be transferred to George H. Jarden, William Brice, Ephraim Brice and John McGlynn, as a committee of stockholders of the Hannis Distilling Company, $250,000 of the preferred and $250,000 of common stock (less 2½ shares of each kind of stock which they caused to be transferred nominally to said State Trust Company in partial exchange for ten shares of the Hannis stock, which were directors' qualifying shares), and the remainder thereof they caused to be transferred to the said Whitney and the defendants Ryan, Smith, Widener, Elkins, Dolan, Olcot, Brady, Grant, Flower, Ehrich, Waterbury, Rice, Bradley, Sheldon, Cardeza, Anderson and Macdona, and their agents and employees.

IX. On or about June 22, 1899, the stocks of said "Constituent Companies" were reasonably worth and were selling at about the following prices, respectively:

The said Standard Company on the New York Stock Exchange for $64 for each share of the preferred and $17 for each share of the common stock; the Manufacturing Company on said New York Stock Exchange for $32 for each share of preferred stock and $11 for each share of the common stock; the Kentucky Company on the open market in New York for $61 for each share of the preferred and $18 for each share of the common stock, and the said Spirits Distributing Company for $60 and $20 for each share of the first and second preferred stock respectively, and that said stocks were of such value at the time of the formation of the Distilling Company of America, as hereinbefore set forth; that, according to the terms of such deposit and subscription contained in said prospectus, and according to the then market value of the stock so deposited by the stockholders of said "Constituent Companies," they subscribed for and received stock of the Distilling Company of America at and for the price of about $65 for each share of the preferred and $35 for each share of the common stock of the said Distilling Company of America, and the stock of the said Distilling Company of America sold in open market at about said respective prices when first issued, to wit, July, 1899, and for some time thereafter. The highest price at which the stocks of the said Distilling Company of America have sold have been about $70 per share for each share of the preferred stock and about $35 for each share of the common stock. The plaintiff alleges, however, that the capital stock of the Hannis Distilling Company, the amount of which was wil-
865 fully and fraudulently suppressed in said prospectus, although the amount of all the "Constituent Companies" was fully stated therein, consisted of only $1,000,000, and that the price paid by the said "organizers" as the agents and representatives of the members of said "Syndicate," and by the members of said "Syndicate" for said stock of said Hannis Distilling Company on or about July 13, 1899, was only $1,500,000 in cash and $250,000

par value, of preferred stock, and $250,000 par value, of common stock of said Distilling Company of America, and the said Hannis Distilling Company and the stock thereof was not then and never has been worth more than the said sum of $1,500,000; but nevertheless the said "Syndicate" caused to be issued to themselves $10,460,000 of the preferred stock and $13,110,000 of the common stock of said Distilling Company of America for a sum of money not exceeding $3,000,000. That the amount paid by the members of said "Syndicate," that is about $3,000,000 for said $10,460,000 of preferred and $13,110,000 of the common stock of said Distilling Company of America was equal to about $20 for each share of the preferred stock and less than $10 for each share of the common stock of said Distilling Company of America, as against $65 for the preferred and $35 for the common stock of said Company paid by the stockholders of the "Constituent Companies," yielding by this transaction to the said "Syndicate" a profit in fraud of the "Constituent Companies" and of the said Distilling Company of America and its stockholders of about $45 per share on upwards of 100,000 shares of the preferred stock of the said Distilling Company of America, and $25 per share on upwards of 130,000 shares of the common stock thereof appropriated and acquired by them as aforesaid, being an aggregate fraudulent profit of $7,750,000, which amount is still due and owing by them to said Distilling Company of America.

That said profit and issue of said stock to said "Syndicate" was in fraud of the right of the stockholders of the said "Constituent Companies" and of said Distilling Company and of its stockholders, including the plaintiff.

That the price of the stock of said Distilling Company of America, as the result of the taking by the said Whitney and others of so much stock without consideration, has declined in open market from about $65 per share for the preferred and $35 per share for the common, at which the same sold in July, 1899, and at which prices respectively the stockholders of the "Constituent Companies" subscribed therefor at the time of the formation of said Distilling Company of America to a price of $17 per share for the preferred and $4 per share for the common.

X. Plaintiff further alleges that the entire scheme for the formation of said Distilling Company of America herein set forth
866 was not a legitimate business operation intended for the benefit and improvement of the business of said "Constituent Companies" and the profit of its stockholders, but was purely a stock jobbing operation conceived and executed in the manner hereinbefore set forth by said "Syndicate," in order that they might, without the knowledge and consent of the stockholders of the "Constituent Companies," and of the Distilling Company of America and its stockholders, appropriate to themselves a large amount of the stock of said Distilling Company without paying any consideration therefor, and in fraud and derogation of the rights of the stockholders of said "Constituent Companies" and of the said Distilling Company of America and of the stockholders thereof. The plaintiff further alleges that neither at the time of the issuance

of the prospectus and circular and the making of the advertisement, hereinbefore mentioned, nor at the time of the execution or performance of the contract dated July 12, 1899, referred to in Paragraph VII. hereof, nor at any time did the defendants Anderson and Macdona, and the other members of said "Syndicate" defendants herein, own any shares of stock in the Distilling Company of America, and they did not have any of the stock of said Distilling Company to sell, and simply formed the plan hereinbefore set out for the purpose of getting the stockholders of the "Constituent Companies" to join them in the consolidation in such a way as to enable them secretly and by concealing their own interest therein, to take a large profit from the organization of said Distilling Company of America. The said Whitney, Ryan and others, members of said "Syndicate" never revealed to the stockholders of the "Constituent Companies" or to the Distilling Company of America, or to its stockholders or its board of directors or officers or to any one, except to themselves, that they intended to make any profit, or that they did make a profit, or that they or any of them had any interest in the Hannis Distilling Company or its stock, or that they or any of them had an option on the stock of the Hannis Distilling Company; and the Distilling Company of America has never ratified the taking of the said stock by them. The said William C. Whitney and the other individual defendants hereinbefore mentioned have sold a large portion of the said stock, and have never accounted to the Distilling Company of America for any portion thereof. That the actual plan contemplated and actually carried out by the said "organizers" and said "Syndicate" in organizing said Distilling Company of America, was to secure subscription by stockholders of said "Constituent Companies" to the capital stock of the Distilling Company of America to enable the members of said "Sydicate" to secure a secret profit at the expense of the stockholders of said "Constituent Companies" and said Distilling Company of America and its stockholders, and that said agreement and prospectus issued to the stockholders of said "Constituent Companies"
867 was a mere form to enable said "organizers" and "Syndicate" to secure said subscriptions and thus enable them to secure said secret profit. That it was part of the plan of said "organizers" and said "Syndicate" when they issued said prospectus to the stockholders of said "Constituent Companies," and when they caused said Distilling Company of America to be organized, to turn their large secret stock profit into money by selling the stock to the public, and thus get into the Distilling Company of America other stockholders in place of themselves and their representatives, and that they have sold a large proportion of said secret stock profit to the public.

XI. That the plaintiff herein did not learn of the facts herein set forth until the month of June, 1903, and that as soon thereafter as he could be advised by counsel and in said month of, 1903, and before the commencement of this action, the plaintiff, being at that time a stockholder in the Distilling Company of America, duly and fully informed the said distilling company and its said board of directors of all the facts herein set forth, and duly demanded of the

board of directors of said company, and the said company; that the said board of directors take and institute on behalf of the Distilling Company of America, and cause it to take and institute, and that said company take and institute legal proceedings against the said William C. Whitney, Ryan, Smith, Widener, Elkins, Dolan, Olcott, Brady, Grant, Fowler, Ehrich, Waterbury, Rice, Bradley, Sheldon, Cardeza, Anderson and Macdona, to make them account to the Distilling Company of America for the said preferred and common stock of the said company which they had taken and retained as a secret profit as aforesaid, and without paying the defendant company any consideration therefor, and the said Distilling Company of America and its directors have, before the commencement of this action, refused and neglected, and still refuse and neglect to bring the said legal proceedings, or any proceedings whatsoever. The defendant Samuel M. Rice is president of the Distilling Company of America, and he and Edson Bradley, as plaintiff is informed and believes, are directors of and members of the Executive Committee of said Distilling Company, and it would be useless to expect them to cause said company to sue the defendants herein; and said refusal was fraudulent and unwarranted and made simply because the defendants Rice and Bradley and friends of theirs and the other defendants are officers in said company and in control of its operations and policies.

XII. That on or about February 2, 1904, William C. Whitney died in the City of New York, leaving a last will and testament wherein he appointed Harry Payne Whitney, who resides in the City of New York, sole executor thereof, and thereafter such proceedings were had in the Surrogate's Court of Nassau County
868 that on or about March 5, 1904, the said will was duly admitted to probate in said Court by the Surrogate of Nassau County, and letters testamentary were thereupon issued out of said Court by said Surrogate to Harry Payne Whitney, as executor of the last will and testament of the said defendant William C. Whitney, and the said Harry Payne Whitney thereupon duly qualified as such executor, and is now such executor.

Wherefore, the plaintiff, on behalf of himself and all other stockholders of the Distilling Company of America, prays for judgment as follows:

First. That the defendants be ordered, directed and compelled to account to the defendant the Distilling Company of America for each and all of said $10,460,000 of preferred stock and $13,110,000 of common stock retained by them as a secret profit as aforesaid, and any other stock or money retained by them as a secret profit.

Second. That the defendants be ordered, directed and compelled to account to the defendant corporation for all of the stock issued at the time of the organization of the company.

Third. That a Referee be appointed with power to state an account of the amount of said stock and money that the defendants have received and for what they have received them, the amount of said stock that they still have, and the amount of said stock that they have sold and the price received therefor, and the prices at which the stock of the said defendant company has been sold, both by the com-

pany and at public sale, and the market value of the stock of said defendant company at such time after the incorporation of said company as the market value can be determined, and the amount of damage and loss suffered by the Distilling Company of America by reason of the transactions hereinbefore set forth, and that the amount determined to be due to be directed to be paid into the treasury of the said company by the defendants.

Fourth. That the defendants be ordered, directed and compelled to pay the costs and disbursements of this action.

Fifth. That the plaintiff have such other and further relief as to the Court may seem just in the premises.

McELHENY & BENNETT,
Attorneys for Plaintiff, 15 William Street, New York City.

STATE OF NEW YORK,
County of New York, ss:

Edwin Blum, being duly sworn says: That he is the plaintiff in the above entitled action; that the foregoing third amended
869 complaint is true to his own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

EDWIN BLUM.

Sworn to before me this 20th day of April, 1905.

WM. M. BENNETT,
Notary Public, N. Y. Co.

EXHIBIT A.

Deposit Agreement.

Whereas, P. Lewis Anderson and Henry D. Macdona, both of the City and State of New York, hereinafter called organizers, propose to create under the laws of the State of New Jersey, or of some other State to be approved by the counsel of the organizers, a corporation to be known as the Distilling Company of America (or some other name satisfactory to the organizers), hereinafter called the Corporation, the object of which Corporation shall be, among other things, the manufacture, sale, distribution and warehousing of whiskey, spirits and alcohol, which Corporation shall have an authorized capital stock of one hundred and twenty-five million dollars ($125,000,000.00), consisting of fifty-five million dollars ($55,000,000) of preferred stock, evidenced by five hundred and fifty thousand (550,000) shares of seven per cent. (7%) cumulative preferred stock and seventy million dollars ($70,000,000) common stock, evidenced by seven hundred thousand (700,000) shares of common stock. The charter of the corporation shall contain such other provisions as the organizers and their counsel may approve; and

Whereas, There have heretofore been organized and are now in existence in the following companies:

(*a*) American Spirits Manufacturing Company (hereinafter called Manufacturing Co.), organized under the laws of New York, having an issued capital stock of seven million dollars ($7,000,000.00) five per cent. (5%) non-cumulative preferred stock, and twenty-eight million dollars ($28,000,000.00) common stock;

(*b*) Kentucky Distillers and Warehouse Co. (hereafter called Kentucky Co.), organized under the laws of New Jersey, having an issued capital stock of ten million five hundred thousand dollars ($10,500,000.00) seven per cent. (7%) cumulative preferred stock, and eighteen million five hundred thousand dollars ($18,500,000) common stock;

870 (*c*) Spirits Distributing Company (hereinafter called Distributing Co.), organized under the laws of New Jersey, have an issued capital stock of one million two hundred and fifty thousand dollars ($1,250,000.00) six per cent. (6%) cumulative preferred stock; one million five hundred and seventy-five thousand dollars $1,575,000) two per cent. (2%) non-cumulative second preferred stock, and three milion six hundred and seventy-five thousand dollars ($3,675,000.) common stock; all of said common stock being now owned by the Standard Distilling and Distributing Company hereinafter referred to;

(*d*) Standard Distilling and Distributing Company (hereinafter called Standard Co.), organized under the laws of New Jersey, having an issued capital stock of eight million dollars ($8,000,000) seven per cent. (7%) cumulative preferred stock, and sixteen million dollars ($16,000,000) common stock;

Whereas, The organizers contemplate that the Corporation shall acquire and become the owner of at least a majority of the entire issued capital stock of the Manufacturing Co., of the Kentucky Co., and of the Standard Co., and each of them, and shall also acquire and become the owner of at least a majority of the entire issued preferred stock of the Distributing Co; and

Whereas, The organizers contemplate that the Corporation shall acquire and become the owner of either the rye properties hereinafter named or of the entire capital stock (less such nominal number of shares as shall be necessary to qualify directors thereof) a certain other Company which may be organized (which other Company is hereinafter called Rye Co.), and which Rye Co., if organized, shall acquire by purchase or otherwise become the owner of the following rye distilling properties:

(*a*) At least ninety-five per cent. (95%) of the entire capital stock of Hannis Distilling Company of Philadelphia and Baltimore; and

(*b*) St. Paul Distillery; and

Whereas, The organizers further contemplate that the Corporation shall be furnished with a cash working capital of at least one million five hundred thousand dollars ($1,500,000); and

Whereas, The organizers contemplate that the Corporation shall retain in its treasury enough of its preferred and common stock with which to enable it to acquire, if in its discretion it should so decide (but without any obligation so to do), by exchange or purchase, or otherwise, all of the remaining stock of the Manufacturing Co., of the Kentucky Co., of the Standard Co., and of the preferred stock

of the Distributing Co., upon the same or a similar basis to that herein provided for the acquisition of said majority stock of the Manufacturing Co., of the Kentucky Co., of the Standard
871 Co., and of said majority preferred stock of the Distributing Co.; and

Whereas, the organizers further contemplate that in addition to so much of its preferred and common stock that is to remain in the treasury of the Corporation for the acquisition by the Corporation of the remaining stock of the Manufacturing Co., of the Kentucky Co., of the Standard Co., and of the preferred stock of the Distributing Co., as hereinbefore recited, the Corporation shall also retain in its treasury for future purposes twenty-three million seven hundred and fifty thousand dollars ($23,750,000) of its preferred stock, and twenty-three million seven hundred and fifty thousand dollars ($23,750,000) of its common stock; and

Whereas, It is further contemplated that the organizers shall, as a purchase price, receive from and be paid by the Corporation thirty-one million two hundred and fifty thousand dollars ($31,250,000) of its preferred stock, and forty-six million two hundred and fifty thousand dollars ($46,250,000) of its common stock for all of the said issued capital stock of the Manufacturing Co., for all of the said issued capital stock of the Kentucky Co., for all of the said issued capital stock of the Standard Co., and for all of the said issued preferred stock of the Distributing Co., and for said one million five hundred thousand dollars ($1,500,000) cash working capital, and for said rye properties or the entire capital stock of said Rye Co., less the directors' qualifying shares aforesaid, and that for every said share of said stock of the Manufacturing Co., the Kentucky Co., the Standard Co. and the Distributing Co., not turned over and transferred by the organizers to the Corporation, there shall be deducted and retained by the Corporation from said purchase price an appropriate amount of the preferred and common stock of the Corporation, calculated upon the basis hereinafter specified; and

Whereas, For the purpose of carrying out this agreement, the Central Trust Company of New York (hereinafter called Trust Company) is hereby designated and made the Depository hereunder; and

Whereas, The undersigned are respectively the holders and owners of the certain number of preferred and common shares of said Manufacturing Co., of the Kentucky Co., of the Standard Co., and of the preferred stock of the Distributing Co., set opposite their respective names; and

Whereas, The undersigned are willing and desire to sell, transfer and assign their said respective shares to the organizers, for and in consideration and upon the basis of exchange hereinafter specified;

Now, therefore, in consideration of the premises and in further consideration of the sum of one dollar ($1.00) to each of
872 the undersigned by the organizers in hand paid, the receipt of which by each of the undersigned is hereby respectively acknowledged, the undersigned do hereby severally, but not jointly, agree to and with the organizers as follows:

I. The undersigned do hereby severally agree to sell to the organizers and do deposit with the Trust Company, properly indorsed in blank, and bearing the proper revenue stamps, certificates representing certain of the preferred and common shares of the Manufacturing Co., the Kentucky Co., the Standard Co. and of the preferred shares of the Distributing Co., the amount of which is designated opposite their respective names. The Trust Company shall issue appropriate temporary negotiable receipts evidencing such deposits.

II. For each of said preferred shares and each of said common shares so deposited hereunder, the undersigned respectively shall be entitled to receive from the Central Trust Company when this agreement shall have become operative and when and as the new securities shall have been received by said Trust Company, the following:

For every said preferred share of the Manufacturing Co. fifty per cent. (50%) thereof in preferred stock of the Corporation;

For every said common share of the Manufacturing Co., twenty-five per cent. (25%) thereof in common stock of the Corporation;

For every said preferred share of the Kentucky Co. eighty-five per cent. (85%) thereof in preferred stock and fifteen per cent. (15%) thereof in common stock of the Corporation;

For every said common share of the Kentucky Co. seventy per cent. (70%) thereof in common stock of the Corporation;

For every said preferred share of the Standard Co. eighty-five per cent. (85%) thereof in preferred stock and fifteen per cent. (15%) thereof in common stock of the Corporation;

For every said common share of the Standard Co. sixty per cent. (60%) thereof in common stock of the Corporation;

For every said share of first preferred stock of the Distributing Co. eighty per cent. (80%) thereof in preferred stock and twenty per cent. (20%) thereof in common stock of the Corporation;

For every said share of second preferred stock of the Distributing Co. twenty per cent. (20%) thereof in preferred stock and twenty per cent. (20%) thereof in common stock of the Corporation.

873 III. This agreement shall not become binding, operative and effective unless there shall have been deposited hereunder with the Central Trust Company or under similar agreements certificates representing a majority of the entire issued capital stock of the Manufacturing Co., Kentucky Co., Standard Co., and of each of them, and of the preferred stock of the Distributing Co.

The Central Trust Company may, in its discretion, in lieu of the actual deposit with it of certificates for shares, accept an agreement in writing to make such deposit upon five days' notice from the Trust Company so to do; and the deposit when made shall be deemed to have been made within the time limited or extended as herein provided. In computing a majority of stock to render this agreement operative there shall be included any and all shares as to which obligations to deposit the same shall be accepted by the Trust Company.

IV. When this agreement has become binding, operative and effective, the Central Trust Company shall deliver to The State Trust

Company all of the stock deposited hereunder upon the Central Trust Company receiving from The State Trust Company shares of stock of the Corporation adequate and sufficient to pay the said purchase price of the stock so deposited hereunder.

V. June 30, 1899, is hereby designated as the date of the expiration of the time for the deposit of the shares hereunder, but such time may be extended, not exceeding thirty days thereafter by agreement between the organizers, the Central Trust Company and The State Trust Company; and in case The State Trust Company shall not within thirty days after said June 30, 1899, or after the expiration of any extended time, notify the Central Trust Company that the organizers are ready to complete the purchase of the shares so deposited hereunder, the shares deposited hereunder, shall be returned by the Central Trust Company without charge to the depositor of the same respectively, or to the holders of said receipts upon the surrender to the Central Trust Company of said receipts duly endorsed.

VI. For the purpose of convenience copies of this instrument may be signed, and when so signed all of such copies shall be considered as originals, and signatures thereto shall be considered the same as though appended to one copy thereof.

VII. The deposit with the Central Trust Company of shares hereunder shall have the same force and effect as though the one making such deposit signed this instrument.

Dated New York, June 21, 1899.

874 EXHIBIT B.

To the Stockholders of American Spirits Manufacturing Company, Kentucky Distilleries and Warehouse Company, Spirits Distributing Company and Standard Distilling and Distributing Company:

An agreement has been lodged with The State Trust Company contemplating the formation of The Distilling Company of America with an authorized capital stock of $55,000,000 seven per cent. (7%) cumulative preferred stock and $70,000,000 common stock which the organizers propose shall be applied towards the purchase of the capital stock of the above-mentioned companies, and certain rye distillery properties, and for an additional working capital of $1,500,000, leaving in the treasury of the new company for future purposes $23,750,000 of its preferred stock and $23,750,000 of its common stock.

The basis proposed by the organizers for the purchase of the stock of the above mentioned companies is as follows:

For preferred stock of the American Spirits Manufacturing Company, 50 per cent. of preferred stock of the new company.

For common stock of the American Spirits Manufacturing Company, 25 per cent. in common stock of the new company.

For preferred stock of the Kentucky Distilleries and Warehouse Company, 35 per cent. in preferred stock and 15 per cent. in common stock of the new company.

For common stock of the Kentucky Distilleries and Warehouse Company, 70 per cent. in common stock of the new company.

For first preferred stock of the Spirits Distributing Company, 30 per cent. in preferred stock and 20 per cent. in common stock of the new company.

For second preferred stock of the Spirits Distributing Company, 20 per cent. in preferred stock and 20 per cent. in common stock of the new company.

For preferred stock of the Standard Distilling and Distributing Company, 85 per cent. in preferred stock and 15 per cent. in common stock of the new company.

For common stock of the Standard Distilling and Distributing Company, 60 per cent. in common stock of the new company.

A deposit agreement has been lodged with the Central Trust Company of New York, and the stockholders of the existing companies desiring to avail of the benefits of that agreement are requested to deposit their certificates with the Central Trust Company and receive deposit receipts therefor. The time within which to deposit shares of stock under the agreement will expire on June 30, 1899.

The said deposit agreement will not become operative until 875 & 876 the owners of a majority of the issued capital of the American Spirits Manufacturing Company, Kentucky Distilleries and Warehouse Company, and Standard Distilling and Distributing Company, and of the issued preferred stock of the Spirits Distributing Company shall agree to sell their holdings upon the above basis.

A number of the large shareholders have already signed the deposit agreement and the proposed basis of sale has received the approval of the officers and directors of each of the companies. The legality of the plan has been approved by the general counsel of all of the existing companies.

Copies of the deposit agreement may be obtained from the Central Trust Company of New York, of No. 54 Wall Street, New York, and The State Trust Company, of No. 100 Broadway, New York.

It is intended that the stock retained in the treasury of the new company will in due course be applied to the purchase of other rye distilleries and towards the procurement of a further working capital of three million five hundred thousand dollars ($3,500,000). The foregoing, with the present working capital of the existing companies will make an aggregate working capital of over ten millions dollars ($10,000,000).

New York, June 20, 1899.

T. H. WENTWORTH.
Secy. American Spirits Mfg. Company.
T. H. WENTWORTH.
Secy. Kentucky Distilleries and Warehouse Company.
N. E. D. HUGGINS.
Secy. Spirits Distributing Company.
N. E. D. HUGGINS.
Secy. Standard Distilling and Distributing Company.

MORAN, KRAUS & MAYER,
Counsel.

Copy.
Attest,

——— ———, *Clerk.*

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" "		20	776
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" Bigelow		27	394
" Caspary	Oct.	1	750
from Stern		4	741
to Stanton		4	741
" "		4	771
" Stern		4	742
" "		4	761

" "		4	762
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" Gaston, Attorney		5	742
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" "		6	768
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" Grout		17	558
" Wood		17	534
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" "		18	316
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" Smith		18	577
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" Swift		23	547
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" Pierce		5	470
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" " "			4	771
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877 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court.

No. 8098. In Equity.

OLD DOMINION COPPER MINING & SMELTING COMPANY
v.
ALBERT S. BIGELOW.

No. 8099.

SAME
v.
SAME.

Before Braley, J.

Appearances:

Messrs. Brandeis, Dunbar & Nutter (Louis D. Brandeis and Edward F. McClennen, Esqs.), Counsel for Complainant;
Alfred Hemenway and J. Wells Farley, Esqs., Counsel for Respondent.

Order Appointing Commissioner.

In the above-entitled cases, at the hearing of the same before Mr. Justice Braley, it is ordered, under the provisions of Chancery Rules, No. XXXV, that Richard H. Jones and John C. Miller be, and they hereby are, appointed commissioners to take the evidence in said cases upon the petition of plaintiff for an injunction to be reported to the full court.

By the Court:

WALTER F. FREDERICK, *Clerk.*

August 11, 1908, as on August 7, 1908.

878 Edward F. McClennen, Sworn.

(By Mr. BRANDEIS:)

Q. Mr. McClennen, you have been counsel, with other members of the law firm of Brandeis, Dunbar & Nutter, for the Old Dominion Copper Mining & Smelting Company in the litigation against Bigelow and against Lewisohn?

A. I have.

Q. And have also been counsel in the litigation undertaken, not only in Massachusetts, but also that in the federal court and the Supreme Court of the United States, and in New Jersey, in the suit there instituted by Mr. Bigelow before the chancellor?

A. I have.

Q. And you are familiar with the course of the proceedings in each of those courts?

A. I am.

Q. Now will you state what that course of proceedings has been and particularly with reference to the course of proceedings in New Jersey, in the suit begun by Mr. Bigelow?

A. Of course most of the course of proceedings, as far as the case in Massachusetts is concerned, is apparent from an inspection of the record of the case here. Some of the things do not appear, and I will refer to them. The case before the full bench was on the printed list for argument in January——

Q. 1908?

A. 1908. At that time I was present at the calling of the list, on January 6, 1908, and Mr. Hemenway said to the court, "I have asked for a postponement of this case until March, so that the other cases the defendant appeals may be argued at the same time;" and the court thereupon announced, through the chief justice, "The court is unanimously of the opinion that the case should be continued, and assigned for the first case at the March sitting." I have inspected the original bill of complaint in New Jersey, and it was——

Mr. HEMENWAY: Wait a moment. You have certified copy of that here, I suppose. If so, I should prefer the certified copy.

Mr. Brandeis says that I may ask a question to clear up matters in your Honor's mind.

(By Mr. BRANDEIS:)

Q. There were two cases pending in the Supreme Court that were heard by Mr. Justice Sheldon?

A. Yes.

Q. And in each of those cases the plaintiff took an appeal?

A. Yes.

Q. And in each of the cases the defendant took an appeal?

A. Yes.

Q. So that there were four cases, and only two of them on the list in January, the appeal of the defendant not having been entered in season, so that——

A. Well, that——

Q. So that wasn't my suggestion that the four cases should
879 be argued together, and that, because of the length of the record which you had ordered printed, it was not ready, and it was impossible to prepare a brief and properly argue the cases at that time?

A. That was substantially your suggestion to the court at that time. The exact fact with reference to the appeals was that we had appealed, and entered the cases, with the entire record, and that the thirty days within which the appeal could be taken by the respondent did not expire until, I think, January 10, and that appeal was taken on the 6th day of January, and the clerk was given this printed slip of the appeal, and that was appended to the record that had already been filed with the clerk of the court for the

commonwealth by us. I do not find, Mr. Hemenway—returning to what you asked me about a moment ago—that I have a certified copy of that bill of complaint.

Q. If you have your own office copy——

A. I have an office copy; that is—well, I had several copies made, of which one is the copy attached to the petition filed in this case for the injunction; and, without having compared it word for word, I practically know that that is the text of the bill filed in New Jersey. That bill was filed on the 26th of Febraury, 1908. The first service that I have ever heard of, that came to my attention in any way, was a service on the 28th of February, 1908, of a restraining order and preliminary injunction. The terms——

Q. Filed on the 26th, you say?

A. Filed on the 26th, and the restraining order issued on that day. The service was made on the 28th. The restraining order, I, in the same way, know, without having compared it word for word, was in the terms of the order, a copy of which is also attached to the petition now filed for an injunction. In the present petition the copy which is annexed contains bodily all the exhibits except Exhibit C, and Exhibit C is in fact one of the printed records, pages 1 to 78 of the case as prepared in the county court, and filed before the full bench, or the Supreme Court for the Commonwealth.

Now at the time that this injunction was obtained the office of the company was in Jersey City, and——

(By the COURT:)

Q. New Jersey?

A. Jersey City, N. J., it being a New Jersey corporation. The local counsel for the company, who signed the bill of complaint, had an office in Jersey City, and I have not heard of his having any office elsewhere, and I believe that he has not. The Court of Chancery of New Jersey is presided over by a chancellor, who has as his advisers seven vice-chancellors, who sit in various parts of the state. The vice-chancellor applied to was the one, with one exception, sitting most remotely from Jersey City; and Jersey City is, as I presume the court knows, judicially, the point of approach to New Jersey from this state.

880 On receiving the service of the order of notice and the preliminary restraining order, Mr. Brandeis and I, on February 28, went to New York, and on February 29, which was Saturday, made an application to the vice-chancellor to modify the restraining order sufficiently to permit of the argument of the case. He said that he would hear us on Monday, and we notified counsel; and on Monday, March 2, we had a hearing before him upon the subject of whether the restraining order would be modified. He declined to modify it, but entered an order advancing the case upon the order of notice to the 11th of March. It had previously been returnable upon the 20th of March. On the 11th of March we had another hearing before him on the question of granting the preliminary injunction. He finally granted the preliminary injunction, expressly reserving any opinion as to the merits of the cause. That

hearing was participated in by Mr. Brandeis, local counsel, and myself for the company; and Mr. Charles H. Tyler and Mr. Bolles and local counsel in New Jersey for Mr. Bigelow. Mr. Farley, of Mr. Hemenway's office, was also present, I believe, at that hearing. He was either present at that hearing or at the hearing when we sought to have the restraining order modified.

(By Mr. HEMENWAY:)

Q. State who were the counsel, please. You said "local counsel."

A. The local counsel for the company were ex-Judge Collins and William H. Corbin, of the firm of Collins & Corbin. They were not present at both hearings, both of them. One was present at one hearing, and the other was present at the other hearing. Counsel for the complainant were John Gritlin—I have forgotten whether he has a middle initial or not—of Jersey City, ex-Judge Van Syckel and John C. Spooner—I think it is John C. Spooner——

Q. Ex-Senator Spooner, you mean?

A. Ex-Senator Spooner, from——

Q. Wisconsin?

A. Wisconsin, and now a member of the New York bar.

Q. And ex-Judge Van Syckel is ex-Judge Van Syckel of Trenton?

A. I will accept that as the fact. I am not aware of that fact, but I dare say that is so. On April 6——

Q. I am not sure whether you, after stating the names of the counsel for the company, made a sufficient pause, so that it will appear that these were counsel for the defence. Mr. Tyler states that you said "counsel for the company." I wish the stenographer would read what you stated about that.

A. The counsel for the company were Mr. Collins, Mr. Corbin, Mr. Brandeis, and myself; and the counsel for Mr. Bigelow were Mr. Tyler, Mr. Bolles,—Mr. Eames was also present, associated with Mr. Tyler,—ex-Senator Spooner, Mr. Gritlin, and Mr. Van Syckel. I think that covers the entire list.

881 Mr. BRANDEIS: And Mr. Farley?

Mr. HEMENWAY: Mr. Farley was not employed.

The WITNESS. On the 6th of April, or a few days before the 6th of April, we gave notice to the other side of a motion to dismiss the bill of complaint. I have not consulted the New Jersey statutes or rules in detail, but I think I know that a motion to dismiss a bill of complaint is equivalent to a demurrer, and that an order granting it disposes of the case, as far as that court is concerned. That case was argued on the 6th of April before the chancellor, Chancellor Pitney. The prior proceedings had been before Vice-Chancellor Walker.

By Mr. BRANDEIS.

Q. The vice-chancellor sitting with the chancellor?

A. On the 6th of April, when the application was made to dismiss the bill before the chancellor, the vice-chancellor was sitting. I ought to say this also, that by the law there, as I am credibly informed, the constitutional authority is in the chancellor. The legislature has enacted that he may have the advice of certain vice-chan-

cellors appointed by him, the labor being more than one man can perform. The judicial officer is the chancellor. The orders bear the form "advised by" so-and-so, "vice-chancellor," but bear the attest of the chancellor.

At the hearing on April 6 Mr. Charles Corbin argued the case for the company, and Mr. Brandeis and I were present. Mr. Charles Corbin was another Mr. Corbin who was a member of the same firm of Collins & Corbin. The argument for Mr. Bigelow was chiefly by Mr. Van Syckel. Mr. Tyler, I think, was present; Mr. Griffin was present; and Mr. Farley, I think, was not. Mr. Eames, I think, was present. Mr. Spooner, I think, was not present. The chancellor reserved his decision.

In the latter part of July, about the 25th to the 28th, we received a telegram from the chancellor that on the following Tuesday he would enter an order dismissing the bill. The following Tuesday was the 4th of August, and we were present before the chancellor at Morristown on the 4th of August,—Mr. Collins, Mr. Brandeis, and I for the company; Mr. Spooner, Mr. Tyler, Mr. Van Syckel, and Mr. Griffin were there for Mr. Bigelow. The chancellor read his opinion from rough notes that he had before him, largely typewritten, and somewhat written, and he stated to us that he would still make verbal corrections in it. It was an opinion that, with rapid reading, took, I should think, about two hours to read, and it took up the various grounds urged why the bill should not be maintained in New Jersey, and passed favorably, I think, upon all of them.

He first entered an order, of which I have a certified copy,
882 allowing certain verbal amendments to the bill of complaint.

He then entered a decree, of which I have a certified copy, dismissing the bill of complaint——

Q. Won't you read that, Mr. McClennen?

Mr. HEMENWAY: Wouldn't it be best to read the bill itself? I have never heard it read, and have no copy of it.

Mr. BRANDEIS: You mean the bill which——

Mr. HEMENWAY: The bill itself.

The WITNESS: Shall I read the original bill, or the amended bill? There are very slight changes in it, but there are some. I should not like, as a physical matter, to have to read both of them.

Mr. HEMENWAY: I am willing that you should read the amended bill.

The WITNESS: The amended bill is as follows: [reading]

[Amended bill attached to petition for injunction filed August 6, 1908. See Pleadings, printed pages 86–104.]

Mr. BRANDEIS: Proceed.

The WITNESS: After the allowance of that amendment, by the order of which I have a copy, the court entered a decree dismissing the bill and dissolving the injunction, and also declined to consider issuing an interim stay unless upon the terms that Mr. Bigelow would furnish a bond for the payment of such decree as might ultimately be entered in Massachusetts or might be entered in New Jersey. Those terms were declined, and no interim stay was ordered.

In announcing his opinion the chancellor dealt with all these claims that are set out in the bill, and stated in terms that under the laws of New Jersey, they were not well founded, that there was not any difference upon the facts as set out in the finding of Mr. Justice Sheldon between the law of Massachusetts and the law of New Jersey; that, in his judgment, there was no difference in policy; that the case was not to be determined by the policy of New Jersey, but was a transitory matter depending upon the rights between the parties, and to be determined by the law of the forum. He dealt with the question of the effect of the decree dismissing the bill against Lewisohn, the decree entered in accordance with the order of the United States Supreme Court, and stated that it seemed to him (I mean his language was) little short of absurd to contend that that could in any manner be a defence by Mr. Bigelow, but that if it was a defence it was as well a defence in the courts of Massachusetts as in the courts of New Jersey. And in like manner he dealt with the other contentions set up in the bill, and stated that none of them were well founded under the laws of the state of New Jersey. His opinion is a very elaborate one, and replete
883 with citations from the New Jersey authorities, as well as from the authorities from our courts, he adopting, apparently, the decision in the case of Carson v. Dunham, of our own court as being a correct exposition of the law.

It appears, if the New Jersey law as a fact is of any interest to your Honor in this connection, that the state of New Jersey has flatly recognized the principle which has been announced by our court, that the court first taking jurisdiction of a case should keep jurisdiction thereof.

In Home Insurance Co. v. Howell, 24 N. J. Eq. 238, a suit had been brought by an insurance company in New Jersey to obtain a cancellation on account of fraud of policies which had been issued in Illinois to a resident of Illinois, covering property in Illinois. Some evidence was taken in that case. The resident in Illinois subsequently brought a suit in Illinois, in the state court, against the company, to realize upon the policies. The company caused that to be removed to the Circuit Court on account of diversity of citizenship,—the United States Circuit Court,—and the resident of Illinois reserved that case for hearing. Thereupon the insurance company in New Jersey applied in the pending suit to the chancellor in New Jersey to grant a restraining order to prevent the going on with the suit in Illinois. That restraining order was granted. A motion was made to dissolve it, and that motion was denied, and the chancellor said,—

"This Court having the power to hear and determine the subject-matter in controversy, and having first obtained possession of the controversy, is fully at liberty to retain it until it shall have disposed of it. The general rule is that as between courts of concurrent and co-ordinate jurisdiction, (and the Circuit Court of the United States and the State Courts are such in certain controversies—such as that involved in this suit, for example—between citizens of different states) the Court that first obtains possession of the controversy

must be allowed to dispose of it, without interference from the co-ordinate court. Riggs v. Johnson County, 6 Wall. 166, 196. In Peck v. Jenness, 7 How. 624, in which it was held, that over a suit pending in a court of Common Pleas of New Hampshire, the District Court of the United States, sitting in bankruptcy could exercise no control either directly or indirectly, by enjoining the plaintiff, the Court said: "It is a doctrine of law too long established to require citation of authorities, that where a court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested
884 or taken away by proceedings in another court. These rules have their foundation not merely in comity, but in necessity. For if the one may enjoin, the other may retort by injunction, and thus the parties be without remedy, being liable for a process for contempt in one, if they attempt to proceed in the other.'

"Nor does it matter that the policies for instance were issued in another state, upon property in that state, and that the loss occurred there. Where a party is within the jurisdiction of this Court, so that on a bill properly filed here this court has jurisdiction of his person, although the subject-matter of the suit may be situated elsewhere, it may, by the ordinary process of injunction and attachment for contempt, compel him to desist from commencing a suit at law, either in this state or in foreign jurisdiction, and of course from prosecuting one commenced after the bringing of the suit in this court. Mead v. Merritt, 2 Paige, 402. The defendant's suit at law was manifestly commenced after the filing of the bill in this cause. The petition so alleged, and the defendant, in his affidavit, made for use in this motion, and read accordingly, does not deny it.

"The bill prayed an injunction to restrain the defendant from bringing suit at law against the complainants on the policies, although no injunction was applied for on the filing of the bill. If bringing a suit at law was not a contempt of this court, under the circumstances, it surely was a proceeding that this Court will discountenance."

(By Mr. HEMENWAY:)

Q. That was an abstract from the opinion, I take it?

A. No; that was a quotation that I was reading from the opinion.

Q. That is what I said,—an abstract of the opinion.

A. Well, my only distinction is, it was not my language; it was the language of the court.

Q. That is the way I understand it.

A. The chancellor, in announcing his opinion, stated that if an error had been made by Mr. Justice Sheldon in his findings of fact, that error was correctible upon appeal to the full banch of Massachusetts, and he saw no reason why he should sit to revise the decision of Mr. Justice Sheldon; if Mr. Justice Sheldon had not made an error as to the facts in his finding, then, in his judgment of the

law of the state of New Jersey, the decrees entered were warranted by the facts found. I am, of course, not stating his exact language; I can't do it at this length of time; but that was the substance of his opinion upon that subject.

With respect to the other matter, the matter of the application to the New Jersey legislature, I don't know that I have personal knowledge with respect to that matter. I have seen the text of the bill that was before the——

885 Mr. HEMENWAY: Well, one moment.

The WITNESS: —that was before the——

Mr. HEMENWAY: Well, one moment. I pray your Honor's judgment.

The WITNESS: I was confining myself entirely to that part that I did have knowledge of.

(By Mr. BRANDEIS:)

Q. Yes. Produce any text of a bill that you know anything about.

A. It is outside the jurisdiction of this court and in the possession, presumably, of the legislative authorities of the state of New Jersey, and I assumed that I was not transgressing the rule in putting in secondary evidence of it, so long as I kept myself within my own knowledge. I have seen the text of the bill, in form, in language, of that attached——

Mr. HEMENWAY: I pray your Honor's judgment on that.

The WITNESS: —of that attached to the petition.

The COURT: Do you object to it?

Mr. HEMENWAY: Yes.

The COURT: Is it signed by Bigelow?

The WITNESS: It is not signed by Bigelow.

Mr. BRANDEIS: We shall have to connect that by other evidence, your Honor. I think we can do that.

The WITNESS: Mr. Tyler is here.

Mr. BRANDEIS: Mr. Tyler is here.

The COURT: Can you show that the petition for legislation is Mr. Bigelow's petition?

Mr. BRANDEIS: I think we can. Mr. Tyler is here, and undoubtedly will admit the facts.

The COURT: You say the petition is out of the jurisdiction?

The WITNESS: The paper is out of the jurisdiction,—the original paper.

The COURT: The witness says that the document is out of the jurisdiction, and he has examined it and knows its substance.

Mr. HEMENWAY: Yes. Does he say that it was signed by Mr. Bigelow?

The WITNESS: I say it was not signed by Mr. Bigelow.

The COURT: No; but counsel say that they propose to connect it and show that it was his act. If they do, I think the evidence is admissible; if they do not, I think it is not admissible. They must show, of course, that it is his act.

Mr. HEMENWAY: I would prefer to be heard later as to its pertinency to this case.

The COURT: I will hear you fully later, if it is at all material.

886 Mr. HEMENWAY: I don't make any admission, because I am not in a position to do that.

The COURT: I understand you can't do it, Mr. Hemenway.

Mr. HEMENWAY: But I will state, from what has just been told me, that I don't propose to put in any evidence that Mr. Bigelow was not responsible for that legislation.

The COURT: Go on.

The WITNESS: Other cases in New Jersey which confirm this same principle, that the court of New Jersey——

Mr. HEMENWAY: One moment. That was ruled in, the contents of that.

The WITNESS: Oh, well, the contents is, in terms, as set out in the petition.

Mr. BRANDEIS: Has that bill been read to the court?

The COURT: Do you say that it is a petition for proposed legislation; is that it? It has not been enacted into a statute?

The WITNESS: It has not been enacted into a statute. It was not passed and the legislature has adjourned.

The COURT: Then it is ended, isn't it?

The WITNESS: It is ended, except as we judge of the future only by the past, and it is one of the grounds for our apprehension that we will not remain unmolested in our effort to get judgment in Massachusetts.

The COURT: When was the New Jersey assembly begun; in January?

Mr. HEMENWAY: In January.

The COURT: Well, you offer it upon the ground that it has some tendency to show further resort by Bigelow to the courts?

The WITNESS: Yes; the text indicates that.

The COURT: That was a petition to the legislature by him?

The WITNESS: As the text will show, your Honor, it was a petition to invest the courts of New Jersey with a jurisdiction which the courts of New Jersey do not now possess.

Mr. BRANDEIS: And which they would not exercise if they did possess it.

Mr. HEMENWAY: You speak for the court?

Mr. BRANDEIS: And which I think the chancellor's decision has just shown that they would not exercise if they possessed it.

The WITNESS: Yes; I think the chancellor's opinion did take the ground rather that, while any court of equity might have jurisdiction to do this thing, as a matter of proper decision in equity it would not exercise that jurisdiction.

887 The COURT: Well, it was really for legislation in aid of a suit which was then pending?

The WITNESS: Yes; it certainly was that.

The COURT: So that, if the jurisdiction was doubtful, to put it be-

yond question by granting to the court further power; and that is all determined by the dismissal of the bill, is it not, except that an appeal from the decision of the chancellor——

The WITNESS: I think that——

The COURT: I do not think that you ought to spend any more time on it.

The WITNESS: There are several other cases in New Jersey, among them being New Jersey Zinc Co. v. Franklin Iron Co., 29 N. J. Eq. 422; Title Guaranty & Trust Co. v. Trenton Potteries Co., 56 N. J. Eq. 441; Shaw v. Frye, 69 N. J. Eq. 321; Minchin v. Second National Bank, 36 N. J. Eq. 436, all in support of the proposition that the second court will not injure the litigant in the first court, unde reircumstances such as are presented in the present case.

(By Mr. HEMENWAY:)

Q. All those cases that you mentioned are set forth in your bill, are they?

A. Yes, sir; they are right in the petition.

The COURT: Well, if there are other facts I think we should go on. I don't think you ought to spend any more time on what is fundamental.

Mr. HEMENWAY: Simply I wanted to be sure that I had got them all down.

The WITNESS: That is all, at the moment. I recall of the facts that fairly come within your question, Mr. Brandeis.

Mr. BRANDEIS: Except so far as they appear of record in this court, of record in the proceedings of this court?

The WITNESS: Yes. I have expressly not stated, except incidentally, anything which appears of record in this court. The full printed record is in this court on file.

Mr. BRANDEIS: I suppose that that record may be considered in evidence. That is all.

Cross-examination.

(By Mr. HEMENWAY:)

Q. In reading the bill you omitted to read Exhibit L. Will you state what Exhibit L was, and if you——

Mr. BRANDEIS: He didn't read any of the exhibits, did he, Mr. Hemenway?

Mr. HEMENWAY: No. That is what I am going to ask him about.

888 A. I don't recall, at the moment, Exhibit L.

Q. Is it the trust agreement?

A. F? Isn't that Exhibit F?

Q. I understood from your rapid reading it was Exhibit L, followed by the Old Dominion receipt.

A. Well, it was, in fact, F.

Q. Well, that is the one I wish, and I would like to have you

produce, if you haven't it here, at the next hearing, the original of that, unless you can furnish an exact copy to take the place of the original. Read that, please.

A. Except F is an agreement between the Old Dominion Company, a corporation organized under the laws of Maine, and Charles Sumner Smith and D. Blakely Hoar.

"Whereas, pursuant to a proposal embodied in an agreement signed by F. S. Mosely & Company and others, dated December 30th, 1903, the Old Dominion Company has been organized and is the corporation referred to in said agreement as the Maine Company, and is about to acquire one hundred thousand eight hundred and four (100,804) shares of the capital stock of the Old Dominion Copper Mining and Smelting Company (hereinafter called the Mining Company); and

"Whereas, by Article First, section 6, of said agreement, it is stipulated that upon such acquisition of stock by said Old Dominion Company, it shall provide for realizing upon certain assets of said Mining Company and the distribution of the proceeds thereof, as in said agreement, to which reference is hereby made, more fully set forth; and

"Whereas Charles Sumner Smith and D. Blakely Hoar (hereinafter called the Trustees) have consented to act as trustees, under a declaration of trust of even date herewith executed by them, for the benefit of said assenting stockholders of said Mining Company referred to in said agreement:

"Now, Therefore, This Agreement Witnesseth:

"First. The Old Dominion Company acknowledges that the assets of the Mining Company referred to in Article First, section 6, of the agreement above referred to, comprise certain claims against one Albert S. Bigelow and against the estate of one Leonard Lewisohn, deceased, on which suits are now pending brought by said Mining Company in the Supreme Judicial Court of Massachusetts for the County of Suffolk and in the Circuit Court of the United States for the Southern District of New York, together with the other assets enumerated in the schedule hereto annexed marked 'A.'

"Second. Said Old Dominion Company covenants and agrees with said Trustees to use all reasonable efforts:

889 "1. To cause said Mining Company to realize upon said other assets specified in Schedule 'A' in such a manner as said Trustees may from time to time direct, subject, however, to the provisions hereinafter contained.

"2. To cause said Mining Company actively to prosecute said claims above referred to against said Bigelow and against the estate of said Lewisohn, in such manner and through such counsel and attorneys as said Trustees may from time to time request, and upon like request to make any settlement and adjustment of said claims or any of them, subject, however, to the provisions hereinafter contained.

"3. To cause said Mining Company, if and so far as any sums of money are realized from said other assets or from said claims:

(*a*) To pay all expenses that may have been incurred in realizing

on said other assets or said claims, including the repayment of all sums that may have been advanced by said Trustees and the satisfaction of all liabilities that may have been incurred by them in realizing on said other assets or said claims; or authority to do so;

(*b*) To apply any surplus moneys then remaining to the payment of all debts and unliquidated claims of said Mining Company incurred prior to January 1, 1904, in excess of Twenty five thousand ($25,000) dollars, other than those incurred for new construction;

(*c*) To reserve such part, if any, as said Trustees may request of any surplus then remaining for use in providing for the further expenses of prosecuting said claims and realizing on said other assets, if and so far as the same have not been finally disposed of and realized on;

(*d*) To distribute any surplus then remaining as a dividend among its stockholders, if it lawfully may do so, and if it cannot then lawfully make such a dividend to make the same as soon thereafter as any legal impediment is removed.

"Third. The Old Dominion Company agrees to pay over to said Trustees, after making the deductions hereinafter provided for, any and all sums received by it as a stockholder in said Mining Company, or that would have been so received by it if it had at all times remained the holder of the same proportions of the capital stock of said Mining Company outstanding as all the stock in said Mining Company now held and that may hereafter be acquired by said Old Dominion Company bears to the capital stock of said Mining Company now outstanding, whether so received under the foregoing provisions of this agreement or otherwise, so far as each sum is derived from the other assets and claims of said Mining Company herein referred to.

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"Said Old Dominion Company shall first deduct from sums so payable amounts advanced under this agreement by the Old Dominion Company for expenses, including counsel fees of the Old Dominion Interest, so called, in connection with the proposal and agreement dated December 30th, 1903, above referred to. It shall pay over the balance of sums so payable to the Trustees from time to time as the same are received or would have been received for distribution by said Trustees among the assenting stockholders of said Mining Company and their assigns, but without responsibility on the part of said Old Dominion Company for the application of any sum so paid over.

"Fourth. The Old Dominion Company agrees to use all reasonable efforts, so far as it lawfully may in the performance of Article Second, Section 1, of this agreement, to cause said Mining Company to permit said Trustees in the name and behalf of said Mining Company, but for the purposes set forth in this agreement, to take from time to time all such action as said Trustees shall deem desirable in prosecuting or settling or otherwise realizing on or discounting said claims or any of them, of said other assets or any of them; and to cause said Mining Company from time to time and as often as in writing requested, at the expense of said Trustees so far as any expenditure is required but without charge so far as acts by the officers or employees of the Mining Company or of the

Old Dominion Company are concerned, to assist said Trustees in preparing and maintaining any and every suit at law or in equity or other proceedings now pending or that may hereafter be brought to enforce or realize on any of said claims or other assets, and particularly to permit said Trustees to have free access at all reasonable times to the papers and records of said Mining Company relating thereto, and to take for use in any suit or other proceeding any document or books relating to said corporation.

"Fifth. Said Old Dominion Company agrees, in case for any reason it is impossible lawfully to carry out this agreement in the manner hereinbefore provided or any part thereof, to do all that it lawfully and reasonably can do to cause said Mining Company to take such action that said other assets and claims shall be realized on to the best advantage reasonably possible, and the net proceeds thereof as defined in said proposal and agreement distributed among the stockholders in said Mining Company, and all sums received by said Old Dominion Company as a stockholder in said Mining
891 Company or that would have been so received by it had it at all times remained the holder of the same proportion of the capital stock of said Mining Company outstanding that all the stock in said Mining Company now held and that may hereafter be acquired by said Old Dominion Company bears to the capital stock of said Mining Company now outstanding"——

The COURT: What is the object of having that exhibit read? It is utterly impossible for me to grasp it unless I take it and read it myself. It cannot go into the record, because, of course, there is no need of repeating in the record what is already of record as an exhibit.

Mr. HEMENWAY: What is that, your Honor?

The COURT: It will not go into the record, because it is not necessary to put it into the record.

Mr. HEMENWAY: I propose to put it in as an exhibit.

The COURT: You can; but there is no need of having it read. Put it all in as an exhibit. Have it put into the record of the case.

The WITNESS: May I make a suggestion? It is attached to the very petition on which we are proceeding now.

Mr. HEMENWAY: What?

The WITNESS: It is attached to the petition on which we are proceeding now, as an exhibit, so that it is all there.

Mr. HEMENWAY: Yes. The purpose of it, if your Honor please, is to show that this very suit that is being prosecuted against Mr. Bigelow and the suit that is being prosecuted against Mr. Lewisohn are for the benefit of trustees whose beneficiaries are the owners of certain certificates, and that those certificates are sold daily in the market. That goes to the question of discretion in this case.

The COURT: Discretion in this case, as I understand it, is confined to one branch, which was called to my attention yesterday, as to whether Bigelow should be restrained and enjoined from beginning any more suits similar to the New Jersey suit. That is the only question I have to decide; and I understood that petition to be based upon the grounds, which have already been stated here, that, prior to some of the New Jersey cases, the whole four corners of the litiga-

tion were being tried out in proceedings here. That I don't know, of course, until I examine the papers and compare them.

Mr. HEMENWAY: Of course I don't know what was represented or stated to your Honor.

The COURT: Well, I have told you that I am trying that
892 one issue, Mr. Hemenway. I am trying that one issue, whether Mr. Bigelow shall be restrained and enjoined, while this litigation is pending here, from bringing more suits to try in other jurisdictions the same question that is now involved here.

Mr. HEMENWAY: I suppose your Honor refers, by "more suits," to the appeal in the pending suit?

The COURT: I have not said anything about the appeal in the pending suit. That is another and distinct question, as to whether he should be restrained and enjoined from going on in the pending case by perfecting, if he can perfect, an appeal; and on that I do not understand that you are apart at all.

Mr. HEMENWAY: I beg your Honor's pardon?

The COURT: I do not understand that you are apart upon the facts, so far as they relate to what has been done in New Jersey, on the present condition of the record there?

Mr. HEMENWAY: I do not think so, your Honor.

Q. Then the position of the suit, if I may make a brief statement of your testimony, is this: that the bill was filed in February last; that a hearing—a temporary injunction—was allowed; that subsequently a motion to dissolve that temporary injunction was refused; and then a further hearing before the chancellor—was that an appeal, or how did you get before the chancellor?

A. That was not an appeal. The chancellor is the constituted court there. The vice-chancellors are merely his advisers.

Q. Yes. Well, how did you get it before the chancellor? It was you that carried it,—that is, the Old Dominion Company that carried it—before the chancellor? How did you do that?

A. A motion was filed in the case, addressed to the chancellor, to dismiss the bill for want of equity.

Q. Yes. And that motion was heard, and the chancellor has dismissed the bill and refused to continue the injunction, and that order was dated August 3?

A. August 4. That hearing was by the chancellor and the original vice-chancellor, sitting concurrently, and the original vice-chancellor concurred in the final judgment.

Q. Was the vice-chancellor there when this opinion was read?

A. He was not. But the chancellor stated—I have no personal knowledge of this—the chancellor stated that the vice-chancellor concurred in the result, and had expressed no opposition to any principle announced in the opinion.

Mr. BRANDEIS: He sets that out in the opinion.

The WITNESS: Yes; that is set forth there. It is read as being the opinion of the chancellor with the vice-chancellor in concurrence.

893 Q. Well, now, the defendant, or rather the complainant, Mr. Bigelow, appealed?

A. We are not aware whether he has or not. He expressed an intention to do so.

Q. Now what was said about an appeal at that time by his counsel? He was not present, was he?

A. He was not present. Well, a great deal was said from time to time. Undoubtedly enough was said to indicate that there was an intention to appeal, if that covers your question.

Q. Yes. And within what time must that appeal be perfected?

A. Thirty days, I am informed.

Q. Within thirty days?

A. That is, I haven't investigated the subject directly, but I have been so informed by counsel in New Jersey.

Q. And when could that appeal be entered in court in New Jersey? To what court can it be appealed?

A. The appeal is to the Court of Errors and Appeals. That is the court of last resort, as I understand, both on matters of equity and matters of law.

Q. Yes. That is the highest court in the state?

A. That is the court which is presided over by the chancellor who has just rendered this opinion. I am afraid that I can't state the exact thing which is analogous to our entry here.

Q. When do they meet?

A. The Court of Errors and Appeals comes in, we are advised, on the 10th of September next, but we have no knowledge, beyond experience in other cases, as to when these cases will be reached for argument.

Mr. BRANDEIS: If Mr. Hemenway would like to have me state, merely for the information of the court——

Mr. HEMENWAY: It is not necessary.

Mr. BRANDEIS: This is merely as to the date.

Mr. HEMENWAY: Well, it is the 10th of September, isn't it?

Mr. BRANDEIS: No. The court merely comes in at that time. The appeal is entered, according to Mr. Griffin, to be heard in November, as I understand it.

Q. No other papers, and no other case, has been brought to your attention, other than the appeal of the pending case, has there, on the part of Mr. Bigelow?

A. No. Our apprehension was that there wouldn't be.

Q. Well, of what other suits are you apprehensive? By "you" I mean the corporation that you represent.

A. I am apprehensive of suits the number and place of which will be determined by the ingenuity of counsel, whoever thought of this application to the New Jersey court, and which may be quite as unfounded, and perhaps more unfounded than that in New Jersey. I haven't been able to think of a court where they could legally
894 and properly apply, but before this application to New Jersey was made I should have asserted as a matter of law that there was no court to which they could legally and properly apply. So that my apprehensions are beyond definition.

Q. They are as vague as you state them?

A. Yes. I can say that I have thought of some court to which

another application might be made, but I would rather not tell which court that is, with Mr. Tyler present.

Q. I am quite sure Mr. Tyler would like to hear you say it. Perhaps it is beyond my imagination. I would like to have made as an exhibit, and a part of the record, the Old Dominion certificate, as well as——

A. That is attached to our petition also.

Q. Yes. And you admit that both of them are true copies of the originals in the possession of the plaintiff?

A. Oh, yes; for the purposes of this trial we certainly do. I haven't compared them, but I haven't the slightest doubt that they are.

Redirect examination.

(By Mr. BRANDEIS:)

Q. It is a fact, Mr. McClennen, is it not, that at the hearing before the chancellor on Tuesday last, on August 4, counsel for Mr. Bigelow indicated an intention to renew their application for a stay before the Court of Errors and Appeals in New Jersey, upon its convening on September 10?

A. The conversation was so general that it is a little difficult for me to answer. I certainly reached the conclusion that that was their intention, and that there was also a possibility that they might consider another application to the chancellor for a stay meanwhile.

(By Mr. HEMENWAY:)

Q. Well, didn't you state there that there was nothing that you could do before the 10th of September?

A. No.

Q. Nothing of the kind?

A. No.

Q. Well, did Mr. Brandeis state it?

A. No.

Q. Didn't Mr. Collins state it?

A. No.

Q. You make that denial absolute, without any reservation, do you?

A. Yes.

Mr. HEMENWAY: It is now 4 o'clock.

The COURT: Mr. Brandeis, I can come in Monday at 2 o'clock. About how much longer do you think your hearing is likely to take?

Mr. BRANDEIS: I should not suppose, your Honor, that it would take a very long time; I mean that I do not suppose that on the question of fact——

The COURT: I am not seeking to limit you. I am only trying to get an estimate of the length of time it will take; that is all.

Mr. BRANDEIS: I should suppose that it could be finished in the afternoon.

895 The COURT: Mr. Hemenway, about how much longer should you think it would take?

Mr. HEMENWAY: I should think it could be finished in two hours. Of course you know that——

The COURT: Oh, I understand. I am not seeking to tie you down. I should suppose that if we ran over into Tuesday morning we could finish by 1 o'clock, at any rate?

Mr. HEMENWAY: I should think so.

The COURT: I should suppose that we could finish Monday afternoon and Tuesday forenoon without much doubt.

Mr. HEMENWAY: I should think so.

The COURT: Well, I think I will come in Monday at 2 o'clock.

Mr. BRANDEIS: Does your Honor make any intimation as to any action by Mr. Bigelow in the meantime? Perhaps a stipulation by counsel that no action will be taken will be satisfactory.

Mr. HEMENWAY: If your Honor please, before answering that question, I will say that I am not in a condition to make any stipulation, but if your Honor can stay us from appealing even if we entered an appeal, you can stay us from going any further, so that no trouble would happen.

The COURT: As I said to Mr. Brandeis, on the record, as the matter came up, as it now stands on the record, I cannot see why you are not fully protected. That is to say, if, to-morrow morning, with this proceeding pending, Mr. Bigelow, or anybody in his behalf,—he is domiciled in Massachusetts, as I understand it,—started proceedings elsewhere, and I came to the conclusion that if I had to decide the case this afternoon, I should decide it with you, I should unhesitatingly grant an injunction restraining him, and his servants, agents, and attorneys, from doing anything of the sort.

[Adjourned to 9.30 o'clock a. m. Monday, August 10, 1908.]

BOSTON, MASS., *August* 10, 1908—2 p. m.

The COURT: Proceed.

Mr. BRANDEIS: We have no further evidence, your Honor.

Mr. HEMENWAY: Did you produce those papers that I asked for?

Mr. MCCLENNEN: No, I did not. I assumed that it was
896 simply the text that you wanted, and that when we said copies were correct, that was enough. I can send for them if you wish.

Mr. HEMENWAY: Yes, I shall want them.

Mr. MCCLENNEN: They are in the same terminology as those copies.

Mr. HEMENWAY: It is the action of the corporation that I want.

Mr. MCCLENNEN: That is attached to the petition.

Mr. HEMENWAY: It is an allegation in another case, and I want it as a fact in this case.

Mr. MCCLENNEN: A copy is attached to this very petition.

Mr. HEMENWAY: If your Honor please, the trust deed that Mr. McClennen was reading Friday is attached to this petition, and also a copy of the certificates that have been issued by the corporation. Now what I wish——

Mr. McCLENNEN: What is that?

Mr. HEMENWAY: A copy of the certificate issued by the corporation.

Mr. McCLENNEN: You mean by the trustees.

Mr. HEMENWAY: By the trustees. Now what I would offer to show—they admit that this trust deed was a trust deed made by the corporation——

Mr. McCLENNEN: No.

Mr. BRANDEIS: No, no; the corporation had nothing to do with it.

Mr. McCLENNEN: The trust agreement is between the Old Dominion Company, a corporation organized under the laws of Maine, and Charles Sumner Smith. It has nothing to do with the existing New Jersey Company. The existing company was never a party to it in any way.

Mr. HEMENWAY: I think I would like the originals that I asked for, then; or, as Mr. Tyler suggests, if you have a copy of the deposition of Altmiller, perhaps that will answer the purpose. That was taken by Mr. Tyler. We have the interrogatories on one side.

Mr. McCLENNEN: I have a copy of the deposition that Mr. Tyler took. It is attached to the New Jersey record, but it can be read right from that, or taken out. It can be read right in just as well. I am willing to agree that that deposition may be considered in, if that will save any time, if it is deemed to be relevant by the court.

Mr. HEMENWAY: Mr. Farley will read the deposition.

Mr. FARLEY: It is the deposition of Charles H. Altmiller.

"CHARLES H. ALTMILLER, being first duly sworn, in answer to interrogatories propounded by H. EUGENE BOLLES, Esq., counsel for the defendant, deposes and says.—

897 "Int. 1. What is your full name"?——

The COURT: Are you familiar with that deposition?

Mr. FARLEY: To some extent, your Honor.

The COURT: State what the deponent testified to.

Mr. FARLEY: I should hesitate to do so without first refreshing my recollection.

The COURT: How long is the deposition?

Mr. FARLEY: About eight or nine pages.

The COURT: Very well; read it.

Mr. FARLEY: [Reading:]

"Int. 1. What is your full name?

"Ans. Charles H. Altmiller.

"Int. 2. You live where?

"Ans. Townsend, Mass.

"Int. 3. Have you any connection with the Old Dominion Copper Mining & Smelting Company of New Jersey?

"Ans. Yes.

"Int. 4. What is your connection with that company?

"Ans. Secretary, treasurer, and director.

"Int. 5. How long have you held all three of those offices?

"Ans. I have held the office of secretary and treasurer since 1902. I do not remember the exact date I was chosen director."——

The COURT: How am I to get any aid from your reading? For what purpose do you put in the evidence?

Mr. FARLEY: Mr. Hemenway requested Mr. McClennen, as I think your Honor will remember, to produce a certain trust agreement and a certificate. The deposition in question covers all the facts now to be presented in relation to those two matters, and is offered, in the first place, in lieu of putting in the original trust agreement and certificate which were requested. As to the bearing of that, we submit that it has several bearings in this issue. In the first place, admitting fully that your Honor has the power to enjoin this defendant as within the jurisdiction, at least potentially, it is a matter in which your Honor has a discretion to exercise, and we submit this evidence for the purpose of showing that the character of the litigation in issue in the principal suits is one which should obtain no aid from your Honor's discretion; that it is at present a suit conducted, not for the benefit—not, at least, for the pecuniary benefit—of the real plaintiff, but a suit in which the cause of action, if any there be, has been segregated in the hands of certain trustees, and is carried on for the benefit of speculators,—speculators who, if the issue is successful, will obtain all, or all but a de minimis proportion, of this recovery, except a large percentage which is to
898 go to the trustees of which a member of the firm appearing for the ostensible plaintiff is one; in other words, that it is a litigation which, if not actually, is practically, champertous.

Further, the deposition will show value, the value of the property and the value of the stock. That has a bearing on the question of whether there is any real detriment to either the plaintiff, the practical plaintiff or the ostensible plaintiff, and that they need no exercise of your Honor's discretion for any protection.

Mr. HEMENWAY: Mr. Farley says, admitting that—that was a promise—if, admitting that, your Honor had the power to enjoin—that is what I wish to be heard upon.

The COURT: Go on.

Mr. FARLEY: In other words, to summarize, this deposition, in place of a more extended examination of Mr. McClennen after the production of the documents that were requested, will show that the present plaintiff in this action, or this action or motion, whatever it may be, now pending before your Honor, and also in the original litigation, has in equity no real standing in court.

The COURT: I am not familiar, of course, with the trial of the case on the merits in this court. I am familiar with the decision on the demurrer. Didn't you try this issue before the single judge?

Mr. FARLEY: No, your Honor.

The COURT: No part of it. Did you try it in New Jersey, or any part of it?

Mr. FARLEY: I do not feel that I should state what took place in New Jersey, as I was present merely in the capacity of advising as to the contents of the record in one of the many cases.

The COURT: Do you understand this to be a new position which you are taking——

Mr. FARLEY: In this court.

The COURT: —as to the fact that the name of the Old Dominion Company is simply used for the benefit, as you say, of a band of speculators?

Mr. FARLEY: In this court, your Honor, absolutely. I should limit that by saying that there are one or two lines in the original record of the case as tried before Mr. Justice Sheldon on which that contention might be based, but on which it was not based, and on which it is, perhaps, doubtful whether it can be fully based.

The COURT: Well, do you claim that your suit in New Jersey was upon that basis, and therefore to enjoin the corporation from being used in this way, permitting its name to be used in this way?

Mr. FARLEY: I do not, your Honor, feel that I should answer that question.

899 The COURT: Why shouldn't you answer a question which is important on an issue which I am to determine?

Mr. FARLEY: I would willingly if I could. I can only plead ignorance as an excuse to your Honor. But I will confer with persons who will, I think, be able to inform me in a moment.

The COURT: No. I think that you should be posted on a question which I think is important if the suggestion which you make is borne out by the facts.

Mr. FARLEY: If your Honor will pardon me a moment I will endeavor to ascertain that fact.

The COURT: No, it is for you to answer. If you can't answer it you may proceed with the reading of the deposition.

Mr. HEMENWAY: I did not understand the question that was asked by your Honor. The question asked was in regard to what was tried, or something of that kind?

The COURT: The question was: Mr. Farley says that the suit in the name of the corporation is simply a suit by a band of speculators, using the name of the corporation for certain purposes. I asked him if that issue was tried before a single judge. He thinks it was not really, though there might be something in the record upon which you could predicate such an assumption. I then asked him whether that issue was tried in New Jersey, and he said that he did not know, because he was not there; and I said that some one ought to be able to tell me whether it had been tried or not, but it would take less time to read the deposition through and see what it says there.

Mr. FARLEY: [Resuming the reading of the deposition of Charles Altmiller:]

"Int. 6. How long have you been treasurer of that company?

"Ans. Since April 7, 1902. I have been secretary and treasurer, as I have said; I do not remember when I was appointed a director.

"Int. 7. As such secretary and treasurer have you the custody of the papers and records of the company?

"Ans. I have.

"Int. 8. Are you familiar with its financial transactions and doings?

"Ans. Yes.

"Int. 9. Have you now before you the minutes of the directors' meetings of that company?

"Ans. Yes.

"Int. 10. Are the copies of the records attached to this testimony true copies of the records of the minutes of the meetings of the boards of directors of that company, as they purport to be?

"Ans. Yes.

900 "Int. 11. I now call your attention to the records of the meeting held January 21, 1904, and to a vote passed at that meeting that certain assets named in the vote should be held until the further order of the board as a separate fund, etc., and I will ask you whether or not those assets included the claim in suits in New York against Mr. Lewisohn and in Massachusetts against Mr. Bigelow?

"Ans. No, they did not.

"Int. 12. Will you state what was the total value of the funds so set apart?

"Ans. Well, it is not stated here, but, in round figures, something over $90,000.

"Int. 13. After that meeting were the assets comprising that fund as a matter of fact reduced to cash?

"Ans. They were.

"Int. 14. And were certain expenses with which that fund was charged for the payment subsequently paid out of the fund?

"Ans. Yes. That fund was kept separate and apart, entirely as a bookkeeping matter; as a matter of fact, the money was mingled with other funds of the company, but a separate memorandum account was kept of it, and it was agreed that interest, so far as used for purposes other than those set forth in the vote was charged with certain expenses, a part of which were the expenses of conducting litigation in New York against the Lewisohn estate, and in Massachusetts against Mr. Bigelow, and the expenses of certain litigation against the company in Arizona. In determining the amount to be set apart, the amount of certain other demands against the company had to be first deducted. The fund on December 31, 1907, was $91,657.44. Of this fund $84,557.44 was in cash and is being used by the company for other purposes, and on that amount interest is credited in a memorandum account of this fund at the rate of 6 per cent; the remaining $7000 is represented by 7 per cent school-district bonds, which were in the fund originally and were never sold; on that the company received interest at the rate of 7 per cent.

"Int. 15. What property interests do the trust certificates represent; the trust certificates of the Old Dominion Trust?

"Ans. They represent merely this. The Maine Company has agreed with the trustees of the Old Dominion Trust, so called, that if the Maine Company receives any dividend on its stock in the New Jersey Company, which dividends are derived from certain assets, which consist of this $91,000 fund and the claims against Bigelow and Lewisohn, the Maine Company will pay over to the trustee any such amount as they get in the way of dividend on their holding of the New Jersey Company's stock. The trustees,

under their declaration of trust, have agreed that they will divide the amount so received less expenses among the holders of the trust certificates.

901 "Int. 16. In other words, is this not true: that the holders of the trust certificates are not entitled to receive any payments whatever except such as may be ultimately and indirectly derived by them from this fund of $90,000, and from the proceeds of the two suits pending against Mr. Bigelow in Boston, and the two suits pending against the estate of Lewisohn in New York?

"Ans. That is correct.

"Int. 17. Did you know Mr. Leonard Lewisohn in his lifetime, and did you know Mr. Albert S. Bigelow?

"Ans. Yes, I did know them both.

"Int. 18. Since when have you known them, or known of them, as men interested in mining affairs?

"Ans. Since about 1886.

"Int. 19. Were you familiar with their abilities in managing and operating mines?

"Ans. I was.

"Int. 20. You knew, did you not, that they were instrumental in the organization of the Old Dominion Copper Mining & Smelting Company of New Jersey?

"Ans. I did.

"Int. 21. Now won't you state generally in regard to them, what you know of their experience and ability as owners and operators of mines. And name, if you will, some of the chief mines with which they have been connected.

"Ans. Leonard Lewisohn and Albert S. Bigelow had, prior to the purchase of the Old Dominion properties, in June, 1895, been largely interested in copper-mining companies, and managed and controlled several large copper-mining companies, including the Boston & Montana Mining Company, the Butte & Boston Mining Company, the Tamarack Mining Company, and the Osceola Consolidated Mining Company.

"Int. 22. Will you state whether or not those companies were all well known and successful companies?

"Ans. They were.

"[In answer to interrogatories propounded by Charles H. Tyler, Esq., of counsel for the defendant, the witness further deposes and says,—]

"Int. 23. When did the Maine Company take over the stock of the New Jersey Old Dominion Copper Mining & Smelting Company?

"Ans. About January 15, 1904.

"Int. 24. How many shares did they then take over?

"Ans. They took over at that time over 100,000 shares, and a short time afterwards they acquired a large number of additional shares.

"Int. 25. How many shares of the total 150,000 shares have they acquired by exchange?

"Ans. Somewhere in the neighborhood of 143,000 shares.

902 "Int. 26. So that of the original issue of 150,000 shares of the Old Dominion Copper Mining & Smelting Company of New Jersey, the Maine Company owns all but about 7000 shares?

"Ans. To be correct, I think all but about 6200 shares.

"Int. 27. Has the Old Dominion Copper Mining & Smelting Company of New Jersey, since its stock was thus acquired by the Maine Company, increased its capital stock?

"Ans. Yes.

"Int. 28. To what extent?

"Ans. By 12,000 shares, making 162,000 shares in all.

"Int. 29. What did the Old Dominion Copper Mining & Smelting Company of New Jersey receive for those 12,000 additional shares?

"Ans. Well, $50 a share, or $600,000.

"Int. 30. The par being $25 per share?

"Ans. Yes.

"Int. 31. About when was it sold?

"Ans. About June 1, 1907.

"Int. 32. Was it sold without a commission to an underwriting syndicate readily?

"Ans. Well, we had an underwriting syndicate, but there was no commission.

"Int. 33. So that you readily sold it at twice par?

"Ans. Yes.

"Int. 34. Now to go back to the Maine Company: will you kindly exhibit the balance sheets of the Maine Company, the Old Dominion Company, for each year since its incorporation?

"Ans. I will. Here they are: they are attached hereto. See page 11-14, inclusive.)

"Int. 35. Will you be good enough to state just the process of exchange of shares of the Old Dominion Company of Maine for shares of the Old Dominion Copper Mining & Smelting Company of New Jersey?

"Ans. What was done was this: Prior to the formation of the Maine Company, a large majority of the stockholders of the New Jersey Company had deposited their stock through F. S. Moseley & Company with the National Shawmut Bank; when the Maine Company was organized, the owner of each share of stock in the New Jersey Company so depositing received in exchange for each share in the New Jersey Company one share of stock in the Maine Company and a certificate for one share in the Old Dominion Trust, so called. The New Jersey stock then went to the Maine Company.

"Int. 36. That is to say, there was an exchange of Maine stock for New Jersey stock, share for share, wasn't there?

"Ans. No, not exactly that. For each share in the New Jersey Company which was turned over to the Maine Company, the holder received in exchange a share of stock in the Maine Company

903 and a certificate for one share in the Old Dominion Trust. Those exchanges were all made in Boston, either at the National Shawmut Bank, the depository of the stock, or were made

at our office by the direction of the National Shawmut Bank. Smaller amounts of stock were taken subsequently, and the exchanges were made in such cases at the office of the Maine Company, of which Mr. Smith and I are officers, and where Mr. Smith, one of the trustees under the Old Dominion Trust, has his office.

"Int. 37. Will you kindly exhibit the financial statements of the Old Dominion Copper Mining & Smelting Company, and its balance sheets from year to year, and also all the annual reports that have been issued to the stockholders?

"Ans. I do, and here they are. (See pages 15-17, inclusive, on exhibit annexed.)

"Int. 38. Since the Maine Company acquired the majority of the stock of the New Jersey Company, what has been expended by the New Jersey Company in improvement of its property?

"Ans. There was expended between January 1, 1904, and January 1, 1908, $1,875,627.19.

"Int. 39. Where did this money come from that was so expended?

"Ans. The only sources from which the company has received money other than from its earnings during that period were $600,000 from the proceeds of the new stock sold in August, 1907, and the amounts borrowed from time to time by the company. These loans have varied from $240,818 to $796,675.04.

"Int. 40. So that all of this sum of $1,875,627.19 has come from the earnings of the mine itself except the proceeds of the sale of the 12,000 shares of stock, and except the amounts borrowed?

"Ans. Yes, that is correct.

"Int. 41. How much was owed December 31, 1907, for money borrowed?

"Ans. $712,117.60.

"Int. 42. At this time what did you have in the way of cash in the bank or other quick assets?

"Ans. Do you call supplies quick assets, from your way of looking at it?

"Int. 43. Yes.

"Ans. $1,607,999.02.

"Int. 44. This is exclusive of the mine itself, is it?

"Ans. Yes. Besides the amount we had borrowed, we had what shows on the balance sheet, approximately $733,173.18.

"Int. 45. How much of this seven hundred and odd thousand has been paid off since December, should you say; approximately?

"Ans. None of it.

"Int. 46. How much additional real estate or other property has the Old Dominion Copper Mining & Smelting Company purchased since January 1, 1904?

"Ans. I should think somewhere about $25,000.

"Int. 47. Is this property so purchased since January, 1904?

"Ans. Yes.

"Int. 48. Had there been any property acquired by the Old Dominion Copper Mining & Smelting Company since 1895, when it was incorporated, to January 1, 1904?

"Ans. Yes, considerable.

"Int. 49. How much?

"Ans. $109,821, it stands on the books.

"Int. 50. How has this money been expended, amounting to $2,352,267.59 since January, 1902, according to your account, up to December 31, 1907?

"Ans. In new plant account.

"Int. 51. What did it amount to on December 31, 1907?

"Ans. On December 31, 1907, it stands at $2,352,267.59.

"Int. 52. How much of this new plant account had been expended to January, 1904?

"Ans. January 1, 1904, we had expended $476,640.40.

"Int. 53. Have you spent, out of earnings, a great deal of money underground since January, 1904?

"Ans. Yes.

"Int. 54. Would that be charged to new plant account?

"Ans. Part of it was: that which went for a new shaft and pumps, for instance.

"Int. 55. But the greater part of it was not?

"Ans. The greater part of it was not.

"Int. 56. How much of it was spent underground?

"Ans. Well, that is something pretty hard to work out and tell; I cannot tell.

"Int. 57. Would it run up to a million dollars?

"Ans. I could not say.

"Int. 58. Well, it is a very considerable amount, isn't it?

"Ans. Yes, it is. It might be well to state, in that connection, that all that is expended underground is in connection with the present and future extraction of ores.

"Int. 59. When did the Old Dominion Copper Mining & Smelting Company pay a dividend?

"Ans. August 1, 1907.

"Int. 60. What was this dividend?

"Ans. One dollar and a quarter per share. That is the only dividend it has ever paid.

"Int. 61. There are no bonds on the property, are there?

"Ans. No.

"Int. 62. What is the situation with reference to this new 12,000 shares that you have issued; are they entitled to participation in the proceeds, if any, of the lawsuits against Lewisohn and Bigelow?

"Ans. No. Those 12,000 shares are held in large part by the Maine Company, and the balance are held by various persons who availed themselves of an opportunity to subscribe. The holders of those shares, like the holders of other shares of the New Jersey Old Dominion Copper Mining & Smelting Company, are entitled to receive any dividend that the New Jersey Company may pay. You must distinguish between the stockholders in the New Jersey Company and the stockholders in the Maine Company. The Maine Company itself, being a large stockholder in the New Jersey Company, receives, and must receive, the dividend that the New Jersey Company pays. A holder of stock in the Maine

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Company of course receives only the dividend that the Maine Company pays. Of course the dividend in the Maine Company may be larger or smaller than the dividend in the New Jersey Company; and it is necessary to distinguish clearly between the stocks of those two companies.

"Int. 63. Are the copies hereto annexed of extracts from the New Jersey records true copies thereof?

"Ans. Yes, they are.

"Int. 64. And the same question with reference to the Maine records?

"Ans. Yes."

Mr. HEMENWAY: Will you let me see the petition in this case? [A document is passed to Mr. Hemenway.] Is this the petition that was filed?

Mr. McCLENNEN: Yes; that is the petition that is now being heard.

THE COURT: A copy of the bill in New Jersey is annexed to your petition?

Mr. McCLENNEN: Yes, your Honor.

THE COURT: I thought so. And you read from it. I thought it was annexed, but I was not quite sure.

Mr. HEMENWAY: That is what I was looking for, if your Honor please.

Mr. McCLENNEN: If your Honor please, if it is of interest to your Honor, I, of course, am in position to state to your Honor precisely what occurred in New Jersey with reference to this matter.

THE COURT: No; I can read the bill; it is in the bill. As it was read Friday I did not get anything more than a mere outline of it. This deposition I suppose I shall have a copy of, the deposition that was read?

Mr. FARLEY: Yes, your Honor.

THE COURT: Very well.

Mr. HEMENWAY: I am a little in doubt as to the nature of this petition, and I would like to inquire if it is to be considered as a motion in the cases numbered 8098 and 8099 in equity, or whether it is an original proceeding in order to enjoin us from appearing in the New Jersey court. I think counsel ought to state that be-
906 cause—

Mr. McCLENNEN: Well, if anything that I can say will make that clearer I shall be very glad to state it.

Mr. HEMENWAY: I had supposed, the numbers not being on the copy that was given to me, that it was an original proceeding, and your Honor will remember that I asked if I would be allowed to put in an answer later, if this was a petition for a temporary injunction.

Mr. McCLENNEN: I suppose that answering the question will be merely construing the petition from my standpoint, but it is entitled with the name of the principal case, and then begins, "The complainant in the above-entitled cases says as follows," and the numbers are upon this copy. It was designed to be a petition asking for

incidental relief or protection in the main cases, but not as an independent suit.

Mr. HEMENWAY: Here is a certificate of the result of the case in the United States Supreme Court.

Mr. MCCLENNEN: The paper offered by Mr. Hemenway is a certified copy of the record of the United States Circuit Court for the Southern District of New York in the case of the Old Dominion Copper Mining & Smelting Company against Lewisohn. We have no objection to the form of the proof; I presume that it is proper; but we do object to the admission of the testimony as being immaterial matter. If your Honor desires to accept it and rule upon it later, it will be entirely satisfactory to us.

Mr. HEMENWAY: Well, if your Honor please, you may glance through this to see what it is. I will have it marked. I do not think it is necessary to read it all. It is simply that the demurrer was sustained,—that is the judgment of the Court of Appeals, which was, on certiorari, tried by the full bench at Washington. I might state the Supreme Court sustained the Court of Appeals, and the mandate came down in the usual course the 23d day of July last; and in considering that case it may be convenient for your Honor to have this printed opinion of Judge Holmes in the case.

Mr. MCCLENNEN: That is reported, Mr. Hemenway, at 210 U. S. 206.

Mr. HEMENWAY: Yes. I didn't know but it might be convenient, because we do not all of us carry the reports in our pockets.

[A certified copy of the record of the United States Circuit Court for the Southern District of New York, in the case of Old Dominion Copper Mining & Smelting Co. v. Lewisohn, is introduced in evidence and marked "Exhibit 1, R. H. J."]

907 COMMONWEALTH OF MASSACHUSETTS,
Suffolk County:

Supreme Judicial Court.

In Equity.

No. 8098.

OLD DOMINION COPPER MINING & SMELTING COMPANY
v.
ALBERT S. BIGELOW.

No. 8099.

SAME
v.
SAME.

Hearing on Matters set up in Supplemental Answers, and for Reversal or Modification of Original Decrees.

Before Hammond, J.

Appearances:

L. B. Brandeis, Esq., E. F. McClennen, Esq., for complainant;
Alfred Hemenway, Esq., Eugene Treadwell, Esq., J. W. Farley, Esq., for Defendant.

Order Appointing Commissioner.

In the above-entitled cases, at the hearing of the same before Mr. Justice Hammond, it is ordered, under the provisions of Chancery Rules No. XXXV, at the request of both parties, that George C. Burpee be, and he hereby is, appointed commissioner to take the evidence in said cases to be reported to the full court.

By the Court:

WALTER F. FREDERICK, *Clerk.*

September 29, 1908.

908 BOSTON, *September* 29, 1908.

Evidence.

[George C. Burpee was appointed and sworn as stenographer.]

New York Record.

Mr. FARLEY: The first evidence we offer your Honor is a copy of the New York record. I think perhaps the New York record can well be marked as one exhibit, with the several parts thereof designated

as they are in the answer, so that they may be equally well distinguished and may be easily referred to.

Mr. McCLENNEN: I am a little uncertain just what papers have been included in the record. They may be some that may be immaterial and some that are not.

Mr. FARLEY: I think every paper in the New York litigation is in this that I offer as an exhibit.

Mr. McCLENNEN: Then there may be some papers in the proposed offer to which we object as not being part of the record. If I may see that, perhaps I can tell.

The first paper in the record offered to which we object, as not being part of the record, is what purports to be the opinion of Judge Lacombe of the Circuit Court. We believe that opinion is no part of the record, and object to its being introduced.

HAMMOND, J: What do you say, gentlemen?

Mr. HEMENWAY: Well, if your Honor please, in regard to this matter the course pursued with reference to the testimony, in the taking of this large mass of testimony, was that the objections were made, and Mr. Justice Sheldon, I think, with one or two rare exceptions, admitted everything de bene, stating, when he did so, that if it were admissible it would be before the court, and if not admissible it would be disregarded by them. For that reason, we thought the better way was not to take up time in discussing the testimony.

Mr. McCLENNEN: The difficulty with that arrangement, which was undoubtedly a very reasonable one at the former trial, is that hypothetical questions have been put to a considerable number of gentlemen, members of the New York bar, as we are informed; if this opinion goes in, one hypothesis will be proper; if it stays out another hypothesis will be proper. It is difficult to see how that question can be dealt with unless the opinion is excluded, if it should be; and we think it should be.

Mr. HEMENWAY: That is also admissible as evidence of what the New York law is. If there are questions based upon an hypothesis, the question whether the hypothesis is based upon admissible
909 or inadmissible evidence seems to me to strengthen the propriety of admitting the evidence and leaving it for the full court to decide as to its ultimate admissibility; especially, if, as I gather from the ntimation of your Honor, it is proposed that this testimony taken here points to a reservation for the full court.

Mr. McCLENNEN: I think the decisions in New York and the decisions in the federal court both state with positiveness that the opinion is not part of the record. Therefore it is not one of those questions of grave doubt which would warrant the receiving of testimony with a string attached to it.

HAMMOND, J.: I think, under the circumstances under which this case is heard now, I will admit this language de bene, and note your objection and exception.

Mr. McCLENNEN: I should like to make the same objection and save the same exception to the admission of the opinion of the Cir-

cuit Court of Appeals and the opinion of the Supreme Court of the United States.

HAMMOND, J.: I will admit them de bene; if they are finally adjudged to be admissible, they will be considered by the court which is to consider them; otherwise they will be thrown out. I will note your objection to them and your exception to either one of these opinions.

Mr. HEMENWAY: Of course it is not an objection to the full record, but to a part of the record.

HAMMOND, J.: I understand that goes in de bene.

Mr. McCLENNEN: The record is so voluminous that, while it may be that in other respects I should have no objection to it, yet I should like to save, pending the trial, the right to point out any other part to which I object.

HAMMOND, J.: If there is anything in that document which is now being marked as an exhibit to which you want to object after looking it over, you may have the privilege of doing so.

Mr. FARLEY: I understand the entire record is to be marked as one exhibit?

HAMMOND, J.: Consisting of how many pages?

Mr. FARLEY: I hesitate to say, your Honor.

Mr. McCLENNEN: All those papers have a different letter, have they?

Mr. FARLEY: Yes, with exception of Exhibit R, which has a number of stipulations and so forth.

[The principal part of the record offered is marked "Exhibit 1, G. C. B., Sept. 29, 1908. In three parts;" and each of the two subsidiary sections is marked "Part of Exhibit 1, Sept. 29, '08, G. C. B."]

910 Mr. FARLEY: It is understood, if your Honor please, that that is the record of the first suit, but we offer it in evidence not only for the first suit, but the second.

HAMMOND, J.: The effect of it will be considered hereafter.

Mr. HEMENWAY: To make it clear that these two cases were being tried together. All the evidence in the case is so taken.

Mr. FARLEY: Perhaps it would be too nearly interminable to read the entire (New York) record. The course of procedure is outlined in the supplemental answer.

HAMMOND, J.: I do not think it is necessary to read this record to me now. It contains the allegations and various proceedings, which finally ended in the dismissal of the bill. Unless the other side desires to have it read, I do not think it is necessary to read it. It may be referred to.

Mr. McCLENNEN: I think we would prefer that it should not be read.

HAMMOND, J.: Well, then it goes in, and that is all there is to it. You only put in one record, and that is the record of the 30,000 share suit in New York?

Mr. FARLEY: Yes, your Honor.

[The New York record, Exhibit 1, will be found attached to the defendant's amended answer.]

Previous Testimony.

Mr. FARLEY: I suppose there is no question but what, the decrees having been vacated, and this hearing bearing upon the whole matter, although limited by the rescript to the supplemental answer, the defendant is to have the use of all the evidence heretofore introduced by him, as well as the present evidence now to be introduced? If there be any doubt about it, I should like to raise that question.

HAMMOND, J.: My understanding is, from hearing the rescript read, that this case is sent down for the purpose of hearing and taking such additional evidence upon those answers as the parties desire to put in; do you understand that when the evidence is all taken, then, in connection with the findings of Judge Sheldon—not the evidence before him, but the findings—then the case will be decided?

Mr. FARLEY: Yes, your Honor. There might be possibly some question raised as to whether, in entering new decrees, the defendant could have the advantage, not only of the present evidence, but of the past; also as bearing on this particular question in issue under the supplemental answer, there are portions of the evidence heretofore taken that are relevant to this. We wish to reserve the
911 right to take advantage of that portion which is specifically applicable to this issue, and of all portions as applicable to the general issue.

HAMMOND, J.: Well, I will not decide on that now. I should not decide any way upon that without hearing the other side. I do not see how that question is involved now.

Mr. FARLEY: I merely want to put in a caveat, so that we may not be held to have waived the right to use the previous evidence, or to have rendered it unavailable.

Mr. HEMENWAY: It is always a great deal easier to meet a question in the concrete. There are certain allegations in this answer. One of the allegations is that there was participation in the defence of these suits in common. It will appear by the evidence already in the case that Mr. Treadwell, the associate of Mr. Lauterbach, who were counsel of record in New York, was present in this court and took part in the trial, and his name appears in the printed evidence that was taken. It is not necessary to go back and recall that testimony and put it in now.

HAMMOND, J.: You propose to put that in that is not already in?

Mr. HEMENWAY: Will you please repeat your question? I was interrupted.

HAMMOND, J.: I supposed we were now upon the documentary part of the case, and I thought if you were on that, it would be hardly necessary now to consider this other question which you have in mind.

Mr. HEMENWAY: Not while the documentary evidence is being considered; certainly not.

HAMMOND, J.: I think, therefore, I will consider that when it comes up in the regular offering of testimony.

Mr. HEMENWAY: Shall we offer the testimony that is already in the case?

HAMMOND, J.: Do you think we can decide that question now, while we are considering the documentary evidence?

Mr. HEMENWAY: It might demand consideration, perhaps.

HAMMOND, J.: What testimony do you offer now?

Mr. HEMENWAY: If the testimony that is already in the case is not in for all purposes, then I should have to go through and pick out the portions.

HAMMOND, J.: Well, it is a mere matter of time in discussing this matter. If you want a ruling upon that question, and if you get it now, it will aid in the conduct of the case. I am ready to rule upon it now. What do you now ask to have done? To have considered the evidence that is already in as in on the question of the answer so far as material, and not inconsistent with the findings of Judge Sheldon?

Mr. HEMENWAY: Yes.

912 HAMMOND, J.: Now that raises it.

Mr. MCCLENNEN: We see no objection to that, except the one that we want to know what is being offered. There are twelve hundred pages of testimony, more or less, and included in that there can be but very little.

HAMMOND, J.: Now is there any objection to marking it upon the record and indicating to the other side what of the evidence that is already in you offer as bearing upon the questions raised in this answer?

Mr. HEMENWAY: I think we can do that.

HAMMOND, J.: Very well. Such parts of the evidence as either side claims to bear upon the questions raised by this answer, not inconsistent with the finding which has been made by Mr. Justice Sheldon, may go in; each party to indicate to the other what part they rely on; is that satisfactory?

Mr. HEMENWAY: If it is not, we can come again, if your Honor please.

HAMMOND, J.: Well, in general terms, we will consider that to be the situation.

Deposition of Charles T. Terry.

Mr. FARLEY: If the court please, we will now proceed with the reading of the depositions. The first deposition is that of Charles T. Terry. I take it that the course of proceeding is that these depositions should be opened. We then ask that they be filed and then we put them in evidence. They have not been filed, as they only arrived this morning.

[The deposition of Terry was opened and filed by the clerk.]

Mr. FARLEY: I take it your Honor does not care to have me read

the formal parts of the deposition. I will say of all of these depositions that we offer them as the opinions of experts, who, I believe, qualify by their answers as to what is the New York law, as to the effect of the Lewisohn decree as bearing on actions against Mr. Bigelow of the same, or substantially the same, nature as those now pending before this court.

HAMMOND, J.: That is, the bearing there, you mean?

Mr. HEMENWAY: The bearing there; and, in pursuance of the constitution, it stands the same here.

HAMMOND, J.: I understand; but you are only proceeding on the New York law?

Mr. HEMENWAY: Yes, they are all on the New York law; and the statute, combined with court usage, is the law of the state.

913 Mr. FARLEY: This is the deposition of Charles T. Terry. I will read the interrogatories and the answers, as applicable one to the other.

[The objections of counsel for plaintiff to the interrogatories to Terry and to the answers made by him were orally stated; subsequently the objections to interrogatories were formulated to apply to the same interrogatories put to Terry and other deponents, and in the case of Terry are substituted for the oral objections; the objections to answers vary according to the answers of the several deponents.]

Mr. FARLEY: [Reading:]

"Q. 1. State your name, age, and place of residence.

"A. Charles Thaddeus Terry; forty-one; 62 East Fifty-eighth street, New York city.

"Q. 2. State your occupation and place of business.

"A. Lawyer; 100 Broadway, New York city.

"Q. 3. If, in answer to the preceding interrogatory, you have testified that you are an attorney at law, state when you were admitted to the bar, and in what state or states, and how long you have been engaged in the practice of law in said state or states, and with what firms, if any, you have been or are connected.

"A. In the year 1893, in the state of New York. I have been engaged in the practice of law continuously for fifteen years in the state of New York, and some twelve or fifteen other states, and I was for six years a member of the firm of C. H. & J. A. Young & Terry.

"Q. 4. State what, if any, judicial, or other public or official, positions you hold, or have held.

"A. I have for five years held an appointment by successive governors of the state of New York—the office of commissioner for the state of New York on the uniformity of legislation throughout the United States.

"Q. 5. State any other matters relating to your experience in your profession and as to your familiarity with the law and usages governing the practice in the state and federal courts in New York, both in law and in equity, and also as to your familiarity with the laws and usages of the state of New York relating to former adjudication and estoppel by judgment.

"A. For fifteen years I have been successively lecturer upon law

subjects in the Law School of Columbia University in the city of New York, assistant professor, and professor; held the chair in contracts in that law school. The subjects which I have taught in Columbia law school cover a rather wide range in law and equity in addition to the course in contracts, which is given four hours
914 each week during the whole scholastic year. I have been engaged in suits, during the course of my practice, in various states of the United States, and in the federal courts in New York state and in other states. In the course of my work as instructor in the Columbia law school I have had to investigate and give instruction on the subject of the effect of former adjudications and of estoppel by judgment, and in that connection have examined and given instruction with reference to the laws in the state of New York.

"Q. 6. Assuming that an action in equity is brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters, to recover from him the profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, at a price in excess of the price which they paid for it and of its fair value, and assuming that in this action a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to a similar action, substantially identical with the first and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

"[The plaintiff objects to the 6th interrogatory, on the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter sustaining the claim against him upon the merits. It does not assume that there had been a prior decision by the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first.]
915 "[The court overruled the objection, admitted the question, and saved the exception of the plaintiff.]

"A. Its effect would be to bar such action, and, in the language of the decisions, operate as an estoppel by judgment, for the reason that, under the doctrine of res adjudicata, a judgment under the law of the state of New York binds not only the actual parties to litigation, but also those who are in privity with such parties; and in the case of persons jointly interested in and jointly concerned in the transaction which is the subject of a suit, a judgment relating to one of such persons, does, under the law of the state of New York, bind and affect the other, in such a state of facts as assumed in this interrogatory.

"Q. 7. Assuming that two actions in equity are brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters, to recover from him profits alleged to have been received by him and his associates secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, and assuming that such property is alleged to have been sold, pursuant to said joint plan and conspiracy, in two separate parcels, in each of which both promoters were jointly interested, and that said two actions were brought to recover the respective profits received from the sale of the two parcels, respectively, and assuming that the bills of complaint in the two actions were substantially identical, except as to the particular relief sought, and assuming that certain profits were alleged to have been made by said promoters on each parcel, and assuming that in one of said actions a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to two similar actions, substantially identical in form with those above described and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

"[The plaintiff objects to the 7th interrogatory, on the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume material facts,
916 namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there has been a prior decision by the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer

in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first.]

"[The court overruled the objection, admitted the question, and saved the exception of the plaintiff.]

"A. It would operate as a bar to the action or as an estoppel by judgment, for the reasons stated in the answer to the 6th interrogatory, and for the additional reason, based upon the theory of the doctrine of res adjudicata, which is that, in order to put at rest litigation, a determination once made by a court having jurisdiction of the subject matter and of the persons, binds all those who are identified in interest with the parties to the suit, equally with such parties to the suit where such identity of interest arises from the relationship of principal and agent, master and servant, trustee and cestui que trust, or a precisely and thoroughly joint interest with no variation of facts relating to those so jointly interested respectively.

"Q. 8. Have you examined a copy of the record in the action of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn in the Circuit Court of the United States for the Southern District of New York, such as is hereto annexed and marked (1), the respective portions of said record being marked A to R, inclusive?

"[The plaintiff objects to the 8th interrogatory, on the ground that it assumes that the copies shown are the record of the case, whereas, in fact, they contain also copies of the opinion of the court, which are not a part of the record.]

"[The court overruled the objection, admitted the question, and saved the exception of the plaintiff.]

"A. I have.

"Q. 9. Have you examined copies of the proceedings in
917 the above-entitled causes, to wit, the two causes of the Old Dominion Copper Mining & Smelting Co. v. Bigelow in the Supreme Judicial Court in Massachusetts, such as are hereto annexed and marked, respectively, (2) and (3)?

"A. I have.

"Q. 10. Assuming that there were now pending in the courts of the state of New York proceedings against Albert S. Bigelow identical in all respects (except as the practice might require formal changes) with the copies of the proceedings referred to in the 9th interrogatory, and assuming that said courts had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record, copies of which are referred to in the 8th interrogatory, were sufficiently pleaded and proven in defence of said proceedings, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in each of these bills of complaint were respectively, the same persons, and that the contracts, acts, matters, and transactions mentioned in each of these bills of complaint were, respectively, the same contracts, acts, matters, and transactions, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said

court, what would be the effect, under the law and usages of the state of New York, of said decree and record as a defence to said proceedings assumed to be so pending?

"[The plaintiff objects to the 10th interrogatory, on the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the district of New York was upon the merits. It does not assume that there has been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision by the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first. It assumes the action against the second person as being in New York.]

"[The court overruled the objection, admitted the question, and saved the exception of the plaintiff.]

918 "A. It would be a complete defence in bar of the action on the doctrine of res adjudicata or estoppel by judgment.

"Q. 11. Assuming the facts stated in the 10th interrogatory, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewis-ohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would these additional facts affect your answer to the preceding interrogatory?

"[The plaintiff objects to the 11th interrogatory, on the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision by the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first. It assumes the ac-

tion against the second person as being in New York. It also assumes that there has been participation on the part of the other in the defence of the suit in the federal court. It also assumes that there has been participation on the part of Bigelow in the defence of the suit against Lewisohn,—of which there is no evidence and of which no evidence can be offered.]

"[The court overruled the objection, admitted the question, and saved the exception of the plaintiff.]

"A. In my judgment, these additional facts would affect the question in that they would be a piece of evidence, and a strong piece of evidence, going to show the identity in interest of Mr. Bigelow and Mr. Lewisohn, that the joint interest of each of those gentlemen was precisely the same in the venture and that each of them so regarded it; otherwise these additional facts would not affect the question.

919 "Q. 12. Assuming the facts stated in the 10th interrogatory, and assuming the facts stated in the 11th interrogatory, and assuming that the participation of the defendant, Bigelow, as stated in the 11th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers to the two preceding interrogatories?

"[The plaintiff objects to the 12th interrogatory, on the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision by the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first. It assumes the action against the second person as being in New York. It also assumes that there had been participation on the part of the other in the defense of the suit in the federal court. It also assumes that there has been participation on the part of Bigelow in the defence of the suit against Lewisohn,—of which there is no evidence and of which no evidence can be offered. It assumes that the plaintiff had knowledge of the participation in the defence,—of which knowledge there is *not* evidence and can be none.]

"[The court overruled the objection, admitted the question, and saved the exception of the plaintiff.]

"A. Not at all.

"Q. 13. Assuming that there were now pending in the courts

of the state of New York a proceeding against Albert S. Bigelow identical in all respects with the proceeding numbered 8098, referred to in the 9th interrogatory, and assuming that the course of the proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree
920 and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8098, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8098 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8098, described in the 9th interrogatory?

"[The plaintiff objects to the 13th interrogatory, on the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision of the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first. It assumes the action against the second person as being in New York.]

"[The court overruled the objection, admitted the question, and saved the exception of the plaintiff.]

921 "A. It would be a bar to the action, operate as a complete defence on the doctrine of res adjudicata, and would operate as an estoppel by judgment.

"Q. 14. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8099, referred to in the 9th interrogatory, and assuming that the course of proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8099, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not determined by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8099 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, and assuming that the bill of complaint in said Circuit Court, and the prayers thereof, relate to one part of an entire transaction comprising said contracts, acts, matters, and transactions, and that the bill of complaint corresponding to the one numbered 8099 in Massachusetts and the prayers thereof relate to another part of the same entire transaction, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8099, described in the 9th interrogatory?

"[The plaintiff objects to the 14th interrogatory, on the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other
922 alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision of the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit

against the other was brought first. It assumes the action against the second person as being in New York.]

"[The court overruled the objection, admitted the question, and saved the exception of the plaintiff.]

"A. Its effect would be to bar the action and operate as a complete defence on the doctrine of res adjudicata, for the reason that under the facts assumed in the interrogatory, the exact identity in interest, so far as the causes of action referred to are concerned, of Bigelow and Lewisohn is clearly established, and a judicial determination as to one of them with respect to that cause of action would necessarily bind or inure to the benefit of the other, as the case might be.

"Q. 15. Assuming the facts stated in the 13th and 14th interrogatories, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would these additional facts affect your answers, or either of them, to the 13th and 14th interrogatories?

"[The plaintiff objects to the 15th interrogatory, on the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision by the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court
923 was for want of parties, namely, the absence of the other, or that the suit against the other was brought first. It assumes the action against the second person as being in New York. It also assumes that there has been participation on the part of the other in the defence of the suit in the federal court. It also assumes that there has been participation on the part of Bigelow in the defence of the suit against Lewisohn,—of which there is no evidence and of which no evidence can be offered.]

"[The court overruled the objection, admitted the question, and saved the exception of the plaintiff.]

"A. My answer is the same as my answer to the 11th interrogatory.

"Q. 16. Assuming the facts stated in the 13th, 14th, and 15th interrogatories, and assuming that the participation of the defendant,

Bigelow, as stated in the 15th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers, or either of them, to the 13th, 14th, and 15th interrogatories?

"[The plaintiff objects to the 16th interrogatory on the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced, and it fails to assume material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern District of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision by the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first. It assumes the action against the second person as being in New York. It also assumes that there has been participation on the part of the other in the defence of the suit in the federal court. It also assumes that there has been participation on the part of Bigelow in the defence of the suit against Lewisohn,—of what there is no evidence and of which no evidence can be offered. It assumes that the plaintiff had knowledge of the participation in the defence,—of which knowledge there is no evidence, and can be none.]

924 "[The court overruled the objection, admitted the question, and saved the exception of the plaintiff.]

"A. My answer to this interrogatory is the same as my answer to the 12th interrogatory.

"Q. 17. If you have not already done so, state your reasons for your answers to interrogatories 6th to 16th, inclusive.

"[The plaintiff objects to the 17th interrogatory on the ground that it is inadmissible for the various reasons assigned for the inadmissibility of the several questions referred to in this, namely, 6th to 16th, inclusive.]

"[The court overruled the objection, admitted the question, and saved the exception of the plaintiff.]

"A. I have already done so."

Mr. FARLEY: That is the end of the direct interrogatory. I will state, without reading them, that Mr. McClennen's objections were duly taken to the same interrogatories which he has objected to upon the hearing.

Mr. MCCLENNEN: The cross-interrogatories the plaintiff puts de bene without waiving the foregoing objections, but expressly insisting thereon.

Cross-interrogatories.

"X. 1. Is it a principle of the law of the state of New York that the law decided in a case in the court of last resort in overruling a demurrer becomes the law of the case, to be applied when the case is heard upon the facts?

"A. Yes, as far as such law is applicable.

"X 2. Is it the law of New York that there is no right of exoneration or contribution between defendants jointly and severally liable ex delicato and not ex contractu?

"A. That is a general principle of the law of the state of New York.

"X 3. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered that Bigelow might—but for said defence, if any—be under a liability to the plaintiff in the suits against Bigelow?

"A. Yes.

"X 4. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability that Bigelow might—but for said defence, if any—be under as a liability jointly with Lewisohn?

"A. Yes.

"X 5. In determining whether or not the decree dismissing
925 the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability jointly and severally with Lewisohn?

"A. Yes.

"X 6. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability arising ex delicto?

"A. Yes.

"X 7. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability ex delicto jointly and severally with Lewisohn?

"A. Yes.

"X 8. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

"A. I think not. At least, not necessarily.

"X 9. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by

the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability ex delicto with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

"A. I think not.

"X 10. Is it a principle of the law of the state of New York that the liability of joint wrongdoers is joint and several?

"A. There is a general proposition of the law of New York to that effect.

"X 11. Is it sometimes a principle of New York law that estoppel by former adjudication must be mutual?

"A. Under some states of facts it is the law of New York that an estoppel by judgment would ['must' in pencil] be mutual; under other states of facts it has been laid down in decisions by the highest court in the state of New York that a judgment of estoppel need not be mutual.

"X 12. If so, what, if any, are all the occasions of which you have knowledge on which they need not be mutual?

"A. Judgment by estoppel need not be mutual in such cases as those contemplated by the court in the case of the Portland
926 Gold Mining Co. v. Stratton's Independence, reported in 158 Fed. Rep. p. 63, one of which is that —

"'In actions of tort such as trespass if the defendant's responsibility is necessarily dependent upon the culpability of any who was the immediate actor and who in an action against him by the same plaintiff for the same tort has been adjudged not culpable, the defendant may have the benefit of that judgment as an estoppel, even though he would not have been bound by it, had it been the other way.'

"And the same principle would apply to any set of instances where the same reason would be found.

"X 13. Assuming that Bigelow took no part in the Lewisohn suit, in your opinion is the law of New York such that Bigelow would have been estopped in another suit to deny his liability as a matter of law on the same facts, by a final decree against Lewisohn in the first suit?

"A. Yes.

"X 14. Assuming that Lewisohn's executors took part in the suits against Bigelow, in your opinion is the law of New York such that said executors would have been estopped in another suit to deny their liability as a matter of law on the same facts, by a final decree against Bigelow in these suits?"

HAMMOND, J.: I understand that question to be, in substance, that if this complainant prevailed against Lewisohn, then, on the state of facts which is alleged here, Bigelow would have been barred from any defence.

Mr. FARLEY: I understand that to be one of the possible interpretations of the question.

Mr. McCLENNEN: If my construction is of any importance, that was the intention of the question.

HAMMOND, J.: Well, that is the view of the question that I got from the hasty reading of it. I don't know that there is anything else about it.

[Mr. Farley continues to read the deposition:]

"A. Yes.

"X 15. Assuming that Bigelow took part in the defence of the suits against Lewisohn's executors, and that the plaintiff knew this, what, by name and reference, are all the decisions, if any, in New York which you have considered, and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation and knowledge,
927 operate as an estoppel in favor of Bigelow?

"A. On the proposition that a former judgment in a controversy in res adjudicata, as to all matters necessarily determined therein, both in respect to the parties to the former action and to their privies, and is a bar to any further litigation as to the matters determined therein, the following:—

Pray v. Hegeman, 98 N. Y. 351.
Jordan v. Van Epps, 85 N. Y. 436.
Smith v. Smith, 79 N. Y. 634.
Clemens v. Clemens, 37 N. Y. 59.
Castle v. Noyes, 14 N. Y. 329.
Doty v. Brown, 4 N. Y. 71.
Griffin v. L. I. R. R. Co., 102 N. Y. 452.
C. P. P. & M. Co. v. Walker, 114 N. Y. 7.
Hymes v. Estay, 116 N. Y. 509.
Thompson v. Saunders, 118 N. Y. 257.
Reich v. Cochran, 151 N. Y. 127.
Earle v. Earle, 173 N. Y. 482.

"Upon the further proposition that the defendant Bigelow occupies in respect to the suit brought in the Circuit Court for the Second Circuit such relation to the parties therein as to give him the benefit of the decree in that action, dismissing the complaint of the plaintiff:—

People v. Stephens, 51 How. Pr. 235, affirmed 71 N. Y. 527.
Williams et al. v. Barkley, 165 N. Y. 48.
Emma Silver Mining Co. v. Emma Silver Mining Co., 7 Fed. Rep. 401.
Doremus v. Root et al., 23 Wash. 710.
Featherstone v. N. & C. Turnpike, 71 Hun. 109, and editor's note to 23 Wash. 710, found in 54 L. R. A. 649.

"X 16. Assuming that Bigelow took part in the defence of the suit against Lewisohn's executors, and that the plaintiff did not know this, what, by name and reference, are all the decisions, if any, in New York which you have considered, and which tend, in your opinion, to support the view that the final decree in favor of

Lewisohn's executors may, by reason of such participation, without plaintiff's knowledge, operate as an estoppel in favor of Bigelow?

928 "A. The same authorities as above cited; and see my answer to the 11th direct interrogatory.

"X 17. Assuming that Bigelow did not take part in the defence of the suit against Lewisohn's executors, what, by name and reference, are all the decisions, if any, in New York which you have considered, and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may operate as an estoppel in favor of Bigelow?

"A. The same as cited in my answer to the 15th cross-interrogatory; and see my answer to the 11th direct interrogatory.

"X 18. Have you considered any decisions or language of the courts in New York which may have any tendency to support the view that there is no estoppel in Bigelow's favor growing out of the decree in favor of Lewisohn's executors?

"A. There is some loose language in some decisions intended by the court to apply only to the specific facts before the court, which were not the facts, nor similar to the facts, in the case at bar, nor which could be construed to cover the case at bar, but the clear weight of authority in the law of the state of New York, as is the clear weight of reason also, is that the decision in favor of Lewisohn would be a bar to an action brought against Bigelow in the state of New York on the same facts.

"[The plaintiff moves that the last portion of the answer be stricken out as not responsive to the interrogatory.]

"[The court overruled the motion, allowed the answer to stand, and saved the exception of the plaintiff.]

"X 19. If so, what, by name and reference, are all of these which you have considered?

"A. I do not now recall them and, as stated in my last preceding answer, they are not authorities relating to the case at bar, but merely loose statements or general statements relating to the specific facts of the case in which the utterances are found.

"[The plaintiff moves, in view of the answer, that the deposition be stricken out, as showing that the witness has not been qualified upon the question, and he not being able to recall even the names of the cases tending to the opposite conclusion.]

"[The court overruled the motion, allowed the answer to stand, and saved the exception of the plaintiff.]

"X 20. Have any arguments been submitted or suggested to you by defendant's counsel, or have you thought of any, in sup-

929 port of the view that there was, by the law of New York, no estoppel in favor of Bigelow growing out of the decree in favor of Lewisohn's executors?

"A. In my judgment, all the arguments, both as a matter of reason and logic and as a matter of law, in the decisions of the state, are in favor of the proposition that the judgment in favor of Lewisohn would be a bar to an action by the same plaintiff against

Bigelow in the courts of the state of New York, and I firmly believe that there are no good arguments, either in logic or reason or based upon any decisions in the New York law, which could be adduced to the contrary, and none such have been suggested to me by defendants's counsel, nor have I thought of any, except that I have prepared myself to state what, to my mind, are clear distinctions between the class of cases of which the case at bar is one, and some decisions which I thought might be cited on the other side.

"[The plaintiff objects to the answer to the 20th cross-interrogatory, and moves that the first part of the answer be stricken out as not responsive.]

"[The court overruled the motion, allowed the answer to stand and saved the exception of the plaintiff.]

"X 21. If so, what are all of said arguments?

"A. As stated above, there are no such arguments.

"X 22. What, in your opinion, constitues privity under the law of New York to a judgment?

"A. By 'privity,' as used in the law of New York, whether in decisions or otherwise, I understand to be meant either identity of interest in the subject matter or interest by succession or by some other relationship, whether the identity of interest arises from the fact of joint undertaking or transaction or whether such succession or relationship be by virtue of the relation of trustee and cestui que trust, principal and agent, master and servant, assignor and assignee or the like, and I mean by 'the like,' such relationship as would (going back to the first phrase) mean, in spirit and in substance, the identity of interest.

"X 23. In determining whether there was an estoppel in the present case, have you assumed or considered that Bigelow was in privity to the parties of record in the suit against Lewisohn's executors?

"A. I have assumed, and do consider, that Mr. Bigelow was in privity with the defendants in that suit in the sense and spirit in which the word 'privity' is used in the cases and in the law of the state of New York.

"X 24. In considering whether there was any estoppel in the case, have you assumed or considered that Bigelow had any legal interest to defend in the suit against Lewisohn's executors
930 beyond such interest as he might have to secure a favorable precedent?

"A. I consider that Bigelow had, in the suit against Lewisohn, a very vital interest of defeating the plaintiff in that suit, because he was aware, or should have been aware, that a judgment against Lewisohn's executors in that suit would be fatal to him in an action against him upon the same facts.

"X 25. If so, precisely what have you assumed to be said legal interest?

"A. In my judgment if in the suit against Lewisohn's executors the plaintiff had been successful, the only matter to be litigated in an action upon the same facts against Bigelow in the state of New York would be the character of the relief to be decreed by

court, the amount of damages, etc.; because the cause of action would have been determined in the previous suit and would have become res adjudicata.

"X 26. Unless Bigelow would have been bound in favor of the plaintiff by estopped by a decision adverse to Lewisohn's executors, even if Bigelow did not participate in the defence of the suit against them, did Bigelow, in your opinion, have a legal interest to defend in that suit?

"A. The question means nothing to me as it stands.

"[The plaintiff objects to the answer to Cross-Int. 26, and moves that the deposition be stricken out because the witness has disqualified himself to express an opinion upon such a serious question, or because he has sought to evade the question.]

"[The court overruled the motion to strike out, allowed the answer to stand, and saved the exception of the plaintiff.]

"X 27. If so, by precise description, what, in your opinion, was said legal interest?

"A. See my answer to Cross-Int. 25, and also my answer to the 26th.

"X 28. In determining whether there was any estopped in this case, have you assumed that the plaintiff consented to the participation, if any, by Bigelow in the support of the demurrers of Lewisohn's executors?

"A. No.

"X 29. Is it a principle of New York law that if the defendant in one suit sustains merely the character of a cotrespasser with the defendant in another suit by the same plaintiff, the recovery against one defendant is not thereby made competent evidence against the other?

"A. No.

"X 30. Is it a principle of New York law that the judgment in favor of one of two persons jointly and severally liable for the wrongful conversion of the plaintiff's property is no bar to a subsequent suit against the other because torts are joint and several?

"A. If the action is brought in form upon the joint obliga-
931 tion of the two, a decision in favor of the defendant joint tort feasor will be a bar to an action against the other brought similarly on the joint obligation.

"[The plaintiff objects to the answer as not responsive, asks that it be stricken out, and makes the same motion in regard to the entire deposition.]

"[The court overruled the motion to strike out, allowed the answer to stand, and saved the exception of the plaintiff.]

"X 31. Is it a principle of New York law that an adjudication acts as an estopped only between the parties thereto or those in privity with them, or, in other words, the estopped must be mutual?

"A. This question involves two separate questions, both of which I have heretofore answered. As to the mutuality question, I have

answered this interrogatory in my answer to Cross-ints. Nos. 11 and 12, and the former part of this question I have answered in my answer to direct Int. 15. This former part of the question I have answered also in my answers variously to the direct interrogatories.

"[The plaintiff objects to the answer to the 31st cross-interrogatory as not responsive, and moves to strike out the deposition as a whole on the ground that the witness has not answered the question.]

"[The court overruled the motion to strike out, allowed the answer to stand, and saved the exception of the plaintiff.]

"X 32. Is it a principle of New York law that a judgment in favor of one co-trespasser may not be used by another co-trespasser not a party to it, by way of estoppel?

"A. No, I think not.

"X 33. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were Bigelow's agents in the suit against them which has been dismissed?

"A. I have assumed that the transactions involved in the suit made the interest of Bigelow and Lewisohn identical in all respects, that their interest in the contract to sell was identical, that they were both parties to those contracts; and it makes no difference whether one considers that Lewisohn was acting as principal for Bigelow in part, or that he was acting as trustee for Bigelow in part, or that the relations of the two men were reversed, and that Bigelow was acting as agent or trustee, because all of those elements are involved in their relationship under the facts as assumed in these interrogatories?

"[The plaintiff objects to the answer as not responsive.]

"[The court overruled the objection, admitted the answer, and saved the exception of the plaintiff.]

"X 34. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were trustees for
932 Bigelow of the stock sought to be recovered in the suit against them which has been dismissed?

"A. My answer to Cross-int. 33 is also in answer to this interrogatory.

"[The plaintiff moves that the deposition be stricken out, as this question has not been answered.]

"[The court overruled the motion, allowed the answer to stand, and saved the exception of the plaintiff.]

"X 35. Is it a principle of New York law that, in action at law against one or some of several joint tort feasors, the controversy may be determined as between the parties before the court,—i. e., the plaintiff and defendant,—and without prejudice to the rights of others; and the judgment will completely determine the controversy between them, and will not be res adjudicata between the plaintiff and any of the joint tort feasors who is not a defendant and may be sued later?

"A. There may be such cases.

"X 36. Have you stated all your reasons for the opinions expressed by you, or the statements made by you, in answer to the 6th, 7th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th direct interrogatories?

"A. All that were called for by those interrogatories and all that occurred to me at the time such interrogatories were put to me.

"X 37. If not, what are all your reasons for the opinion or statements given by you in answer to each of said interrogatories?

"A. I repeat here my answer to the last preceding interrogatory.

"X 38. Have you now stated all your reasons for said answers?

"A. Yes.

"X 39. Were you, prior to the taking of your deposition on the foregoing cross-interrogatories, shown them, or any of them, or any copies of any of them, or given any information concerning the substance of them?

"A. No.

"X 40. Has each of your answers in its final form been given in the language in which it now appears, before you were aware of the substance of any subsequent cross-interrogatory?

"A. I neither saw any of the cross-interrogatories which have now been administered to me nor had the slightest intimation what they, or any of them, was to be in form or in substance in any manner whatsoever; and I learned them only when each of them was put to me subsequently just before I gave my answers to them.

"X 41. Have you since September 22, 1908, discussed in any way with any other person who is named as a witness in the caption to these cross-interrogatories or with any one on behalf of the defendant, any of the subjects dealt with in the foregoing interrogatories
933 or in your answers thereto?

"A. I spent not to exceed five minutes in the office of Honorable Martin L. Stover on the 23d instant., and spoke to him not at all about the subject matter of the interrogatories except to ask him whether he had read over copies of the direct interrogatories which were to be administered to us, and received his reply that he had examined them, and we commented upon the length of the interrogatories. Apart from that, my answer to the question is 'No.'"

CHARLES THADDEUS TERRY.

In the presence of

WILLIAM A. FERGUSON,
Notary Public, New York County, No. 167.

HAMMOND, J.: Are your interrogatories the same in the other depositions?

Mr. FARLEY: Yes, your Honor, both direct and cross they are identical in all the depositions. That is true, is it not, Mr. McClennen?

Mr. McCLENNEN: Yes.

HAMMOND, J.: How many depositions have you?

Mr. FARLEY: We have twelve here.

HAMMOND, J.: Well, gentlemen, will you step this way a moment?

[Counsel confer with the court at the bench.]

HAMMOND, J.: This case may be suspended until Friday. On Friday you come in with the depositions and they will then be admitted, with your objections and such others as the other side may have.

I understand these depositions are to be now filed?

Mr. HEMENWAY: No, your Honor, not yet; for the reason that we are entitled to look at them. We may not want to file them after we have read them; but the probability is that we shall.

HAMMOND, J.: Well, you will find out by to-morrow morning?

Mr. McCLENNEN: I really think we should be getting these depositions instanter. I think we ought to proceed as fast as if we were here.

HAMMOND, J.: I understand these depositions are to be looked at by counsel now and filed as rapidly as possible, and I don't see why they cannot be filed as early as to-morrow at 12 o'clock.

Mr. HEMENWAY: I think they can, but it takes almost as long to read them with the eye as it does with the voice. All that I
934 can say is that I will deal in good faith.

Mr. McCLENNEN: I am perfectly willing to go to Mr. Hemenway's office for them as fast as they read them.

Mr. HEMENWAY: Certainly, as fast as we read them.

HAMMOND, J.: The case goes over to Friday, October 2, 1908.

FRIDAY, *October* 2, 1908.

HAMMOND, J.: [After motions had been disposed of.] I will take up the first case.

The CLERK: Old Dominion Copper Mining & Smelting Co. v. Bigelow.

Mr. HEMENWAY: If your Honor please, in that case we have had copies of the depositions made and have submitted them to counsel for the complainant; and I understand that they are having typewritten their objections, and they will also indicate them in the originals. The originals have not yet been returned from their office, and therefore I suppose that, constructively, what we can do is to send for them.

Mr. McCLENNEN: I have sent for them; they will be here in a few moments.

Mr HEMENWAY: So when the original deposition gets here—we will assume its presence now—I will put in the deposition of Guy Fairfax Cary. I will also put in the deposition of James Byrne. I will also put in the deposition of Edward W. Hatch. I will put in the deposition of Charles F. Brown. I will put in the deposition of Martin L. Stover. I will put in the deposition of John B. Stanchfield. I will put in the deposition of William A. Keener. I will put in the deposition of Peter B. Olney. I will put in the deposition of William H. Wadhams. I will put in the deposition of Denis O'Brien. The depositions which we are endeavoring to get, of Alton B. Parker and of John G. Milburn, have not yet arrived. I will put them in when we get them.

Mr. McCLENNEN: And that of Francis Lynde Stetson; what is your conclusion with reference to that?

Mr. HEMENWAY: I have not offered it.

HAMMOND, J.: Now I assume there are some objections to these depositions.

Mr. HEMENWAY: In regard to these objections, I am told that the

objections are being put into typewriting and will be submitted later.

935 Mr. McCLENNEN: I shall have a copy to hand to the commissioner and one to Mr. Hemenway.

HAMMOND, J.: You have the right to put in your objections when you please.

Mr. McCLENNEN: As to these later depositions, no objections have been made to the answers. As to the questions, a uniform objection has been made as the question has been put to the witness, and I assume that in making up the record those respective objections may be put against each question, and repeated each time.

HAMMOND, J.: Will all your depositions, Mr. Hemenway, take in the whole list of interrogatories which appeared in the first deposition?

Mr. HEMENWAY: Yes, your Honor.

HAMMOND, J.: And you, Mr. McClennen, want the objections which you made to the interrogatories there to apply to the same interrogatories here?

Mr. McCLENNEN: Yes, your Honor.

HAMMOND, J.: Have you any additional objections?

Mr. McCLENNEN: I have put the objections to each deposition in the same form.

HAMMOND, J.: Then it is not worth while to encumber the record by repeating those; but such additional objections as you care to make you may state as the questions are put; if you have any particular objection which will be common to all the answers to some of the questions, you can make that.

Mr. McCLENNEN: There is none such. I assume as the record is printed the objection ought to be repeated so that the court will have before it what the record is.

HAMMOND, J.: The court will be at liberty to understand what the objection is.

Mr. McCLENNEN: I should not want to be responsible for the feeling of the court when it had to refer back to different pages to find the objection.

HAMMOND, J.: My own idea would be that those objections which are common to all the depositions could be stated once, and that would be enough. I do not think the other members of the court will criticise that way of making up the record; they are more anxious to have a record which contains what it should contain, than to have it extended.

Designation of Previous Evidence.

Mr. HEMENWAY: Mr. Farley will make a statement in regard to the evidence that has already been taken.

HAMMOND, J.: The stenographer may take down what you 936 say in regard to that.

Mr. FARLEY: May it please the court, it was suggested at the last hearing that we should call attention to those portions of the evidence previously taken which we should contend were applicable

to the issues raised in these supplemental answers. There are two issues which we conceive are raised by the answers to which that evidence applies. One is what we contend to be the entirety of the entire transaction and its inseverability. In relation to that, we do not feel that there is any particular portion of the evidence which we can exclude. Our contention is that it is an entire transaction, and that the entire evidence shows that, and we have assumed that the evidence already in was in for all purposes. So on that issue we wish to rely on all the evidence as showing the non-severability of the transaction. Beyond the evidence to be used for that purpose for the contention of the defendant, I think the only portions of the record and evidence which we wish to call attention to are those portions wherein it appears that New York counsel participated in the trial, the hearing, the argument, and the taking of the evidence. For instance——

HAMMOND, J.: Where?

Mr. FARLEY: Here, in all the hearings in which the depositions were taken, and, if not in all, in practically all. For instance, the evidence will show, I think, that at the taking of almost all of the depositions, either Mr. Lauterbach, who is counsel in both cases, or Mr. Treadwell, who is his representative, was present; that in several instances Mr. Lauterbach examined the witnesses; in some cases, Mr. Treadwell; then, at the actual hearing before Mr. Justice Sheldon, that Mr. Treadwell, representing Mr. Lauterbach, was present, that he signed, as I understand, an amendment to the pleadings as of counsel, and that he examined at least one of the witnesses.

HAMMOND, J.: Signed what?

Mr. FARLEY: He signed the amended pleadings as of counsel.

HAMMOND, J.: What, in this case?

Mr. FARLEY: Yes, sir.

HAMMOND, J.: As counsel for whom?

Mr. FARLEY: As counsel for Mr. Bigelow. The record will show that in one instance he participated in an argument which arose in regard to an amendment to the plaintiff's bill, and that he was throughout both counsel of record and counsel participating in the hearing here. These facts as spread upon the record and evidence are scattered throughout it, and it would be a long task to refer to the specific pages, and would make, I think, more difficulty than to present it in the present form. So we ask that for this purpose those portions of the whole evidence be considered.

937 Mr. McCLENNEN: If your Honor please, one of the very reasons why we are desirous of having pointed out what they say may bear on this issue is this: We never have tried the issue that we are now trying. Matter which might have been of not the slightest consequence, or highly objectionable, might have been admitted in the course of the other trial; no one would care to take the time to go out and discuss it, and it might now be assumed to be material. If it was assumed by one side to be material, we should have the opportunity to test the question by making objection to it if we thought it was objectionable. There are many things that are mere trifling matters of typing that might be thought to have a

bearing now that were of absolutely no importance then. If they are to be pressed, we ought to have an opportunity either to object to them for their inadmissibility or to introduce evidence explaining them, if they require explanation, or to introduce evidence in opposition to them if they are not in accordance with the fact. That may become important.

Mr. FARLEY: If your Honor please, I am a little at a loss to know which portion of the statement or suggestion which I have made Mr. McClennen's statement refers to. If, as I understand it, he intends to state that the issue of the entirety of the transaction has not heretofore been in issue, I can only say that I think the most cursory examination of the pleadings and the argument will show that that was one of the defendant's contentions.

HAMMOND, J.: Well, with a view to what?

Mr. FARLEY: With a view to almost every other issue which can arise in the case, and the remedy to be given by this court, the right of the plaintiff to recover at all.

HAMMOND, J.: But not with a view to its bearing in an action against one?

Mr. FARLEY: It may be, as confined to that specific pleading, not, but the entirety of the transaction goes to every possible issue.

HAMMOND, J.: To every point raised in the case?

Mr. FARLEY: The entirety was raised, your Honor.

HAMMOND, J.: It comes up now, does it not, that there was no question of estoppel or the effect of a prior judgment? There was no question as to estoppel prior to this amended answer, I take it.

Mr. FARLEY: No, your Honor. But if your Honor will allow me to state the way it previously arose, I think it will indicate that it is almost identical in its application.

HAMMOND, J.: You may state that, although I think I understand what you will say on that question.

938 Mr. FARLEY: The question of entirety was raised at the hearing and in the argument before Mr. Justice Sheldon to show that the two transactions must stand or fall together, and could not be separated as the plaintiff claims. Now that is exactly the purpose, and the only purpose.

HAMMOND, J.: I do not understand what you mean by your statement that "they must fall together;" do you mean there could be no intervening——

Mr. FARLEY: Yes, your Honor.

HAMMOND, J.: That is what you mean?

Mr. FARLEY: No, sir, it is not joined.

HAMMOND, J.: Then I do not understand.

Mr. FARLEY: The plaintiff sought to divide the transaction, and as to one portion of the transaction claimed recission; as to the other portion it claimed no recission, but claimed damages or profits, or whatever they may be called. We contended at the original hearing that recission, if there were any remedy, was the only possible remedy, and that if recission was granted it could not rescind one portion and allow the other to remain.

HAMMOND, P.: This question of entirety had reference to these transactions?

Mr. FARLEY: Yes.

HAMMOND, J.: And they were all one?

Mr. FARLEY: Yes, your Honor.

HAMMOND, J.: That was with reference to the transactions themselves?

Mr. FARLEY: Yes, your Honor. And that is the only way we now raise the question of entirety. We said at the previous hearing that if the plaintiff did not rescind one he could not rescind the other. We say now, if this is a bar in one action, it is in the other, if they are entire, and we contend that they are; they must stand on this issue, as well as on the other, together.

HAMMOND, J.: That is, the entirety depends on whether it must be considered as one transaction?

Mr. FARLEY: Yes, your Honor.

HAMMOND, J.: And that was involved before, as you claim?

Mr. FARLEY: Yes, your Honor.

HAMMOND, J.: Do you want the evidence of entirety to apply to any other issue than that?

Mr. FARLEY: No, except if I understand your suggestion, we now wish it to apply to our contention that, not only on the issue before raised, if the decrees are to be redrawn, but also on this point,
939 that if it is to be a bar in one action it is equally a bar in the other, because they are linked inseparably together. If I have now stated myself clearly, that is the only way.

HAMMOND, J.: Is there a judgment with reference to both of these separate parts that you speak of as parts of one transaction; that is, is there a judgment in favor of the plaintiff there on the 30,000 shares and on the 100,000 shares, or only on one?

Mr. FARLEY: I can answer that only by saying this: the plaintiff's bill in the first suit here sets forth both transactions in New York, but the prayers for relief are confined to the matters for which relief is here sought by the first bill, disclaiming relief as to the other transaction. We contend the whole transaction is involved as he set it forth, but he disclaims in his prayer his relief as to the other portion.

HAMMOND, J.: What other portion?

Mr. FARLEY: That portion which he here asks and there asks relief for as to the 100,000 share transaction.

HAMMOND, J.: I may be a little dull about it, but, as I understand these bills, they want to get relief for both the 30,000 shares and the 100,000 shares transactions. What I ask you is whether the bill filed in New York asks for relief for the 30,000 shares and the 100,000 shares transactions.

Mr. FARLEY: No, your Honor.

HAMMOND, J.: It asks relief only for the 30,000 shares?

Mr. FARLEY: For the 30,000 shares.

HAMMOND, J.: And that is the one in which judgment was granted in favor of the defendant?

Mr. FARLEY: Yes.

HAMMOND, J.: Now you, having no estoppel in New York expressly in the 100,000 shares transaction, claim that the judgment on the 30,000 share transaction involves this, the transaction being there, and that the judgment for the defendant as to the 30,000 shares, ipso facto, is judgment for the defendant as to the 100,000 shares?

Mr. FARLEY: Yes, your Honor.

HAMMOND, J.: And you say that has bearing on the point you claim that the transactions were alike?

Mr. FARLEY: Yes, alike and inseverable.

HAMMOND, J.: And on that you want to get in this evidence in the case as tried before Judge Sheldon?

Mr. FARLEY: Yes.

HAMMOND, J.: And you contend that whatever evidence was there on that point is applicable to the contention you make here?

940 Mr. FARLEY: Yes.

HAMMOND, J.: So much for that. Now what about the other?

Mr. FARLEY: Well, about the other, it was not a fact in issue—that is, the participation; it is merely we now claim that there was participation throughout this trial.

HAMMOND, J.: Did they participate in any way except as counsel for Bigelow?

Mr. FARLEY: As to that, we shall introduce further evidence; and as part of that evidence of participation we say that the appearance of New York counsel and their participation here, is already apparent on the face of the record and the evidence, having once been put in, should now go in on that point as bearing on this question. Of course, we can now introduce independent testimony; but I take it Mr. McClennen will admit the facts that Mr. Treadwell was here and that Mr. Lauterbach was here.

HAMMOND, J.: I suppose it may be claimed that he was here in the capacity of counsel.

Mr. McCLENNEN: That is one of the reasons why I thought we ought to have the specific parts of the record indicated. There would not be any question but what Mr. Eugene Treadwell, a New York lawyer, appeared in court at the time the case was tried on its merits.

Mr. HEMENWAY: And that it was the same Mr. Treadwell?

Mr. McCLENNEN: And that he was the same Eugene Treadwell who, at another time and in another court, had appeared for another client, and had argued a case there. Thus far there would be no difference. But when a record of fourteen hundred pages is offered as if it were a record of an entire transaction, as bearing on this issue, I don't know how we can know what really is being offered. Take this first question of the entirety of the original transaction; at once there is confusion. Your Honor limited the amount of the record that could be introduced by the words that nothing would be allowed here inconsistent with Mr. Justice Sheldon's findings. Mr. Justice Sheldon has made findings and decrees by which he has established that there were two transactions so separate that he has

given two separate decrees in two separate suits based upon those transactions. Now if we do not know exactly what is offered, at once there is going to be very serious difficulty in determining what is in this record for the purpose of this matter of prior communication.

HAMMOND, J.: I have not read Mr. Justice Sheldon's findings in these cases; perhaps I ought to have read them.

Mr. HEMENWAY: It seems to me that a mere statement of
941 the case would make our position perfectly clear as to the evidence already in the case. We do not ask to have that stricken out; they do not ask, on the other side, to have any portion of it stricken out. Therefore, on an appeal of this case upon a reservation, or however it goes up, all the evidence will go up; but, as it seems to me, they are asking a ruling in substance, by their argument, that no part of the evidence already taken shall apply to the amended or supplemental answer. Of course, as broadly as that, they cannot expect that that will be granted. They the suggestion is that we point out the parts we think applicable to the matters in the supplemental answer. When we come to point it out, taking page by page, and there being some eight hundred printed pages of testimony, it would take a long time to sift out that in order to determine its applicability. Now what they claim is, what they desire is, just the same as in a charge given to a jury, that you have got to indicate those portions to which you object, and cannot object to the whole charge. Now they cannot object to the whole evidence; but when they ask us to point out these different pages of testimony, and sift out that which is absolutely immaterial, it imposes upon us a great deal of labor, it seems to me, because one of the facts alleged in the supplemental answer is that it was an entire transaction. Now the evidence as to its entirety runs through all these pages of evidence. Of course there are pages that are immaterial, and that can be stricken out. Therefore we thought our general designation, relying upon it in the general way stated by Mr. Farley, was enough for their purposes. Otherwise, it would take days to do it.

Mr. MCCLENNEN: It seems to me most surprising for Mr. Hemenway to suggest that we are asking to have anything stricken out. If this record now printed is part of this case for the purposes of this issue, it is; it does not require any affirmative action from your Honor. But this was started by Mr. Hemenway saying that they desired to have it considered part of this case. We say if it takes some affirmative action to make it part of this case, if it is not part of the case already of its own force, if it takes some affirmative action, your Honor ought not to take that affirmative action until the particular parts are called to the court's attention; if it is nothing more than that the record is there before the court anyway, and the court cannot help seeing it, why then there is nothing to be said by your Honor or any one of us; but if they want to do this thing which they characterized as having a particular part of the printed record considered as part of the present record, then I say your Honor should not take that action, but should limit the portion of the record that should be considered, as far as it is within your Honor's province, to those things which they now specifically point out, so that we

may have a chance to consider those parts of the record in the light of the issue upon which they are now presented.

942 Mr. HEMENWAY: It seems to me that the answer to that is simply that if the evidence is admitted in the trial of a cause, if it is applicable to any issue, there it is for that purpose; if it is not, it is of no use.

HAMMOND, J.: Well, my understanding of this case, at the present stage of it, is that is was tried before a single justice who came to certain conclusions and stated them; in those decisions he ordered a decree; from that there was an appeal; the appeal carried the propriety of the decree up to the full court upon all the evidence, which is open there for counsel to argue, upon all the evidence and the pleadings then in this case, whether that decree should stand or should be modified in any way. Then it was suggested by counsel for the defendant that there were certain proceedings which had taken place in a case in New York, which had not taken place until after this appeal, which they deemed to be material and vital to the question, and they asked to have an opportunity to have the decree vacated in order that they might file an additional answer setting up this new matter, and if the answer was filed, and they might be heard upon the allegations of it. The answer was filed, and the case is now here to be heard upon those allegations, that the decree should be vacated, that the facts found by the single justice are not to be disturbed, and that this trial is to be raised simply by this answer, with the idea that finally the whole matter was to come before the full court; not generally, I take it, but one way or the other; but the general idea is that finally the whole evidence was to go to the full court and the case there be decided by them as on appeal from a decree on wrong facts, upon all the evidence, with the findings of Justice Sheldon standing. Now I think that no action is needed by this court, by me at this time, with reference to this question of whether the evidence shall be selected now as applicable to the issues of this answer. My idea about it would be that the evidence in the case already in is to be considered by the court on the allegations of this answer, except that no conclusion is to be drawn inconsistent with the conclusions which Mr. Justice Sheldon drew as to the others. Now under that idea I do not think there is any need here of any order in this matter; but if there be need for an order, if it be necessary for the defendant to here put in the evidence which has been already put in which they think is applicable to this case, then I see no answer to Mr. McClennen's claim that, if it be necessary, the evidence should be specified; but I don't think it is necessary.

Mr. HEMENWAY: In regard to one matter, as to the findings of Mr Justice Sheldon; as I understand the case, Mr. Justice Sheldon's findings stand just as though we were to appeal from them now.

HAMMOND, J.: Exactly.

943 Mr. HEMENWAY: Exactly. And the basis of that rescript was that this whole case was not to be opened.

HAMMOND, J.: I don't see the need for any order one way or the other about that.

Mr. HEMENWAY: I do not know that there is any need of an

order in regard to it, and I didn't think there was until I heard the argument of the plaintiff. I brought the question up by suggesting it, and it was at a time that I did not know but that we would argue the whole case here.

HAMMOND, J.: I think we should all agree that it would be useless work to argue the whole case here.

Mr. HEMENWAY: I think so myself. I would like, if I could, to finish the case to-day, but I have not my evidence here, and I should like it to go over until Monday, when I will specify for him the portions upon which I rely as applicable to this issue.

HAMMOND, J.: I should say it would have to stand, no matter what objection he now makes.

Mr. HEMENWAY: I do not see anything else to do.

HAMMOND, J.: Do either one of you think that there is any need of any order whatever about this?

Mr. HEMENWAY: No, your Honor, I do not think there is need of any order, but in view of what the counsel for the plaintiff has said, perhaps it would be a little wiser in me to point out the testimony.

HAMMOND, J.: Very well.

Mr. HEMENWAY: And I will have it when we finish the case.

HAMMOND, J.: Very well, that may be done, then. I do not believe that the amount of labor will be very great.

Mr. HEMENWAY: What day could we go on and finish the case?

HAMMOND, J.: I assumed we were going on to-day to finish it. Have you anything more that you want to put in?

Mr. HEMENWAY: Yes, there will be some oral evidence.

HAMMOND, J.: Are you prepared to put it in to-day?

Mr. HEMENWAY: I am not prepared to-day.

HAMMOND, J.: Could you be prepared by Monday?

Mr. HEMENWAY: I should be glad if it could go over until Wednesday.

Mr. MCCLENNEN: Mr. Brandeis has to go away pretty soon, and he is going to be away until November.

944 Mr. HEMENWAY: Call it Tuesday.

HAMMOND, J.: How long do you think you will take with your oral evidence?

Mr. HEMENWAY: I do not think we will take, with the oral evidence, over an hour.

HAMMOND, J.: What do you say, Mr. McClennen?

Mr. MCCLENNEN: I do not know what the oral evidence is to be. We should not have any oral evidence, I do not suppose, if the other side had not. I should think we might go on Monday if your Honor is to be here. I supposed that the oral evidence would go in to-day.

HAMMOND, J.: I supposed we were going to finish to-day; at the same time, I do not think it ought to make much difference. I should prefer to go on Monday. Can you get ready for Monday?

Mr. HEMENWAY: Perhaps on Monday at 2 o'clock.

HAMMOND, J.: Well, I will hear you Monday at 2 o'clock.

Depositions.

Mr. HEMENWAY: The original depositions are all here now.

HAMMOND, J.: I understand they have been filed.

Mr. HEMENWAY: No, they have not been filed; they are to be filed.

HAMMOND, J.: Mr. Clerk, will you file the depositions which are now handed to you? I do not know whether you have used them all or not, or whether you intend to.

Mr. MCCLENNEN: Well, with the exception of Mr. Stetson's, they have all been introduced now as far as they have been returned.

The CLERK: Do you wish to take them out any further?

Mr. HEMENWAY: No.

[Following are the depositions introduced by Mr. Hemenway at page 934. The objections of the plaintiff to the direct interrogatories are the same as those incorporated in the deposition of Charles T. Terry, which commences at page 913. They are introduced here in consolidated form, will not be repeated, but will be referred to in the depositions hereafter printed as commencing at page 945; objections to the answers to cross-interrogatories, if any, will be found in the text of the deposition.]

945 *Memorandum of Objections Made to the Respective Questions to the Following Witnesses.*

Alton B. Parker,
James Byrne,
John G. Milburn,
John B. Stanchfield,
Guy Fairfax Cary,
William H. Wadhams,
Martin L. Stover,
Edward W. Hatch,
Peter B. Olney,
Charles T. Terry,
Charles F. Brown,
William A. Keener,
Denis O'Brien.

To the 6th interrogatory:

On the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there

had been a prior decision by the court of last resort in the sui
against him, overruling a demurrer to the same bill of complaint
and that these decisions were in a court having jurisdiction of th
other. It does not assume that the other was not a resident of Nev
York, or subject to its jurisdiction, or that one of the grounds o
demurrer in said suit in the federal court was for want of parties
namely, the absence of the other, or that the suit against the othe
was brought first.

To the 7th interrogatory:

On the ground that it is immaterial, irrelevant, and incompeten
and calls for an answer which is immaterial, irrelevant, and in
competent. It assumes facts of which there is no evidence and
which no evidence can be introduced; and it fails to assume ma
terial facts, namely, it assumes that the decree dismissin
946 the bill of complaint in the federal court for the souther
district of New York was upon the merits. It does not a
sume that there had been a prior decree against the other allege
promoter, sustaining the claim against him upon the merits.
does not assume that there had been a prior decision by the court
last resort in the suit against him, overruling a demurrer to th
same bill of complaint, and that these decisions were in a cou
having jurisdiction of the other. It does not assume that the oth
was not a resident of New York, or subject to its jurisdiction,
that one of the grounds of demurrer in said suit in the federal cou
was for want of parties, namely, the absence of the other, or th
the suit against the other was brought first.

To the 8th interrogatory:

It assumes that the copies shown are the record of the ca
whereas, in fact, they contain also copies of the opinions of t
court, which are not a part of the record.

To the 10th interrogatory:

On the ground that it is immaterial, irrelevant, and incompete
and calls for an answer which is immaterial, irrelevant, and
competent. It assumes facts of which there is no evidence, and
which no evidence can be introduced; and it fails to assume mater
facts, namely, it assumes that the decree dismissing the bill of co
plaint in the federal court for the southern district of New Yo
was upon the merits. It does not assume that there had been
prior decree against the other alleged promoter, sustaining the cla
against him upon the merits. It does not assume that there h
been a prior decision by the court of last resort in the suit agai
him, overruling a demurrer to the same bill of complaint, and th
these decisions were in a court having jurisdiction of the other.
does not assume that the other was not a resident of New York,
subject to its jurisdiction, or that one of the grounds of demur
in said suit in the federal court was for want of parties, name
the absence of the other, or that the suit against the other
brought first. It assumes the action against the second person
being in New York.

To the 11th interrogatory:

On the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrevelant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume material facts, namely, it assumes that the decree dismissing the bill
917 of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision by the court of last resort in the suit against him overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first. It assumes the action against the second person as being in New York. It also assumes that there has been participation on the part of the other in the defence of the suit in the federal court. It also assumes that there has been participation on the part of Bigelow in the defence of the suit against Lewisohn,—of which there is no evidence and of which no evidence can be offered.

To the 12th interrogatory:

On the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision by the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first. It assumes the action against the second person as being in New York. It also assumes that there has been participation on the part of the other in the defence of the suit in the federal court. It also assumes that there has been participation on the part of Bigelow in the defence of the suit against Lewisohn,—of which there is no evidence and of which no evidence can be offered. It assumes that the plaintiff had knowledge of the participation in the defence,—of which knowledge there is not evidence and can be none.

948 To the 13th interrogatory:

On the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision by the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first. It assumes the action against the second person as being in New York.

To the 14th interrogatory:

On the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision by the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first. It assumes the action against the second person as being in New York.

To the 15th interrogatory:

On the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume
949 material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision by the court of last resort in

the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first. It assumes the action against the second person as being in New York. It also assumes that there has been participation on the part of the other in the defence of the suit in the federal court. It also assumes that there has been participation on the part of Bigelow in the defence of the suit against Lewisohn,—of which there is no evidence, and of which no evidence can be offered.

To the 16th interrogatory:

On the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts in which there is no evidence, and of which no evidence can be introduced, and it fails to assume material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision by the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first. It assumes the action against the second person as being in New York. It also assumes that there has been participation on the part of the other in the defence of the suit in the federal court. It also assumes that there has been participation on the part of Bigelow in the defence of the suit against Lewisohn,—of which there is no evidence and of which no evidence can be offered. It assumes that the plaintiff had knowledge of the participation in the defence,—of which knowledge there is no evidence and can be none.

950 To the 17th interrogatory:

On the ground that it is inadmissible for the various reasons assigned for the inadmissibility of the several questions referred to in this, namely, 6th to 16th, inclusive.

There should be inserted,—

"The court overruled each objection, admitted the question, and saved the exception of the plaintiff."

Deposition of Guy Fairfax Cary.

The deposition of Guy Fairfax Cary, taken in behalf of the defendant Bigelow, and filed by his counsel, subject to the objections and exceptions of counsel for the complainant, The Old Dominion Copper Mining & Smelting Company, to be found at pages 945–950.

[Commission and notarial certificate omitted.]

Q. 1. State your name, age, and place of residence.

A. My name is Guy Fairfax Cary; I am twenty-nine years old, and reside at No. 54 Park avenue in the borough of Manhattan, city of New York.

Q. 2. State your occupation and place of business.

A. I am an attorney at law, and my place of business is at No. 59 Wall street in the borough of Manhattan, city of New York.

Q. 3. If, in answer to the preceding interrogatory, you have testified that you are an attorney at law, state when you were admitted to the bar, and in what state or states, and how long you have been engaged in the practice of law in said state or states, and with what firms, if any, you have been or are connected.

A. I was admitted to the bar in the state of New York in December, 1904, and have since practised in this state. I am a member of the firm of Cary & Robinson, whose office is at No. 59 Wall street in this city.

Q. 4. State what, if any, judicial or other public or official positions you hold or have held.

A. I have not held official position.

Q. 5. State any other matters relating to your experience in your profession, and as to your familiarity with the law and usages governing the practice in the state and federal courts in New York, both in law and in equity, and also as to your familiarity with the laws and usages of the state of New York relating to former adjudication and estoppel by judgment.

A. I am engaged in general practice, involving the conduct of litigated cases in the state and federal courts in New York
951 and elsewhere, and I have previously, in my practice, had occasion to examine carefully the rules governing the application of the doctrine of res adjudicata and of estoppel by judgment. In preparation for the evidence which I am giving in these causes I have very carefully examined the decisions in this state on those matters.

Q. 6. Assuming that an action in equity is brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters, to recover from him the profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, at a price in excess of the price which they paid for it and of its fair value, and assuming that in this action a final decree upon the merits is entered for the defendant

upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to a similar action, substantially identical with the first and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted: exception.—See pages 945-950.]

A. Under the law of the state of New York, the decree would absolutely bar any recovery by the complainant in the substantially identical action brought against the other promoter in the courts of this state.

Q. 7. Assuming that two actions in equity are brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters, to recover from him profits alleged to have been received by him and his associates secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, and assuming that such property is alleged to have been sold, pursuant to said joint plan and conspiracy, in two separate parcels, in each of which both promoters were jointly interested, and that said two actions were brought to recover the respective profits received from the sale of the two parcels, respectively, and assuming that the bills of complaint in the two actions were substantially identical, except as to the particular relief sought, and assuming that certain profits were alleged to have been made by said promoters on each parcel, and assuming that in one of said actions a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets
952 forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to two similar actions, substantially identical in form with those above described and based upon the same cause of action brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 946-950.]

A. The decree being a final adjudication of a court of competent jurisdiction upon the merits of the transaction out of which both causes of action spring, its effect would be to absolutely bar any recovery by the complainant in the substantially identical actions against the other promoter in the courts of this state.

Q. 8. Have you examined a copy of the record in the action of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn, in the Circuit Court of the United States for the Southern District of New

York, such as is hereto annexed and marked (1), the respective portions of said record being marked A to R, inclusive?

[Objected to; admitted; exception.—See pages 946-950.]

A. I have.

Q. 9. Have you examined copies of the proceedings in the above-entitled causes, to wit, the two causes of the Old Dominion Copper Mining & Smelting Co. v. Bigelow in the Supreme Judicial Court in Massachusetts, such as are hereto annexed and marked, respectively, (2) and (3)?

A. I have.

Q. 10. Assuming that there were now pending in the courts of the state of New York proceedings against Albert S. Bigelow identical in all respects (except as the practice might require formal changes) with the copies of the proceedings referred to in the 9th interrogatory, and assuming that said courts had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record, copies of which are referred to in the 8th interrogatory, were sufficiently pleaded and proven in defence of said proceedings, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in each of these bills of complaint were, respectively, the same persons, and that the contracts, acts, matters, and transactions mentioned in each of these bills of complaint were, respectively, the same contracts, acts, matters, and transactions, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said
953 action against said Lewisohn's executors in said court, what would be the effect, under the law and usages of the state of New York, of said decree and record as a defence to said proceedings assumed to be so pending?

[Objected to; admitted; exception.—See pages 946-950.]

A. Such decree and record under the laws and usages of the state of New York would be an absolute defence to both proceedings.

Q. 11. Assuming the facts stated in the 10th interrogatory, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would those additional facts affect your answer to the preceding interrogatory?

[Objected to; admitted; exception.—See pages 946-950.]

A. They have some tendency to support the answer given to the preceding interrogatory as further exhibiting the community of interests between Bigelow and Lewisohn.

Q. 12. Assuming the facts stated in the 10th interrogatory, and assuming the facts stated in the 11th interrogatory, and assuming that the participation of the defendant, Bigelow, as stated in the 11th interrogatory, was with the knowledge of the plaintiff, how, if at all,

would this additional fact affect your answers to the two preceding interrogatories?

[Objected to; admitted; exception.—See pages 947-950.]

A. The fact here assumed is in line with the facts assumed in the 11th interrogatory, and also has some tendency to support my answers to the 10th and 11th interrogatories.

Q. 13. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8098, referred to in the 9th interrogatory, and assuming that the course of the proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of
951 the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8098, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8098 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8098, described in the 9th intrrogatory?

[Objected to; admitted; exception.—See pages 948-956.

A. The decree and record, if pleaded as assumed, would conclude the plaintiff and afford an absolute defence to the defendant in a proceeding in New York corresponding to No. 8098, referred to in the 9th interrogatory.

Q. 14. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8099, referred to in the 9th interrogatory, and assuming that the course of proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof; assuming that the final decree and record in the case

of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8099, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the
955 Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8099 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, and assuming that the bill of complaint in said Circuit Court and the prayers thereof, relate to one part of an entire transaction comprising said contracts, acts, matters, and transactions, and that the bill of complaint corresponding to the one numbered 8099 in Massachusetts, and the prayers thereof, relate to another part of the same entire transaction, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8099, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

A. Assuming the further facts here stated, the decree and record, if pleaded as assumed, would also conclude the complainant, and afford an absolute defence to the defendant in a cause in New York corresponding to No. 8099 in Massachusetts.

Q. 15. Assuming the facts stated in the 13th and 14th interrogatories, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would these additional facts affect your answers, or either of them, to the 13th and 14th interrogatries?

[Objected to; admitted; exception.—See pages 948-950.]

A. These additional facts would have some tendency to support my answers to the 13th and 14th interrogatories.

Q. 16. Assuming the facts stated in the 13th, 14th, and 15th interrogatories, and assuming that the participation of the defendant, Bigelow, as stated in the 15th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers, or either of them, to the 13th, 14th, and 15th interrogatories?

[Objected to; admitted; exception.—See pages 949-950.]

956 A. The further fact here assumed is in line with the facts stated in the 15th interrogatory, and would have some tendency to support my answers to the 13th, 14th, and 15th interrogatories.

Q. 17. If you have not already done so, state your reasons for your answers to Ints. 6th to 16th, inclusive.

[Objected to; admitted; exception.—See page 650.]

A. I have already partially stated my reasons for my answers to the interrogatories named. The conclusions reflected in my answers are based upon the following considerations:

An examination of the bills in the Massachusetts suits against Mr. Bigelow and in the New York suits against Mr. Lewisohn's executors reveals that the suit relating to the 30,000 share transaction in each jurisdiction and the suit relating to the 100,000 share transaction in each jurisdiction are to all intents and purposes respectively, identical, the only differences being in the parties defendant and in the fact that the absence of Mr. Bigelow from the New York jurisdiction is stated in the Lewisohn bills and the absence of Mr. Lewisohn from the Massachusetts jurisdiction is stated in the Massachusetts bills, and in some minor formal differences. These bills reveal that Bigelow and Lewisohn were joint actors throughout the transactions complained of. The complainant's language is that they conspired together to acquire to themselves the alleged unlawful profits. It sufficiently appears that Lewisohn either occupied the relation to Bigelow of a trustee, agent, or joint adventurer,—and I am inclined to think that if their relationship were the subject of judicial consideration in this state it would be defined as that of joint adventurers for a particular enterprise. We have, then, at the outset, an identity of subject matter of the two litigations, an identity in the form of the bills and in the relief prayed for, and a relation of privity between the defendants. This being so, and their relation to the complainant corporation being the same, it is impossible that a liability should rest upon the one, growing out of their joint acts, while the other went free. There cannot be two rules of law applicable to one and the same state of facts.

Turning now to the result of the litigation in New York, we find that, while the litigation in Massachusetts is still pending, a final decree upon the merits is rendered in favor of the New York defendant. The court rendering the decree was undoubtedly one of competent jurisdiction, and the effect of the decree, according to well-settled principles, must be to bind and estop the parties to the litigation and their privies as to all matters covered by the
957 adjudication or necessarily involved in the litigation leading thereto in all cases where the same matters are sought to be again brought into question. It follows from this, and from the relation of privity between Bigelow and Lewisohn, that if Bigelow was sued in this jurisdiction on matters which have been adjudicated upon in the Lewisohn suit, he would be entitled to the benefit of the Lewisohn decree, not merely as setting up a precedent which

the New York state court would be likely to follow in accordance with the doctrine of stare decisis, but he would be able to avail himself of the decree as an absolute defence in the nature of an estoppel by judgment in the suit against him. The general principle sometimes stated, that an estoppel of this character can exist only where the estoppel would be mutual, cannot be invoked to defeat this conclusion. The general principle is open to certain well-marked exceptions, and has been so limited in this state. I refer, in this connection, to the cases of Stamp v. Franklin, 141 N. Y. 607, and People v. Stephens, 51 How. Pr. 235; and also to the case of Portland Mining Co. v. Stratton's Independence, 158 Fed. Rep. 63.

The remaining question to be considered is the effect of the Lewisohn decree on a suit against Mr. Bigelow in this jurisdiction based upon so much of the transaction as is comprised in the so-called 100,000 share suits. The language of the bills of complaint leaves no room for doubt that, though these matters are sued upon separately, they are really parts of one entire transaction. It follows, therefore, that Mr. Bigelow could avail himself of the decree against the one suit as fully as against the other.

Cross-interrogatories.

Without waiving the foregoing objections, but expressly insisting thereon, the plaintiff puts de bene the following cross-interrogatories:—

X 1. Is it a principle of the law of the state of New York that the law decided in a case in the court of last resort in overruling a demurrer becomes the law of the case to be applied when the case is heard upon the facts?

A. In considering the law of the case to be applied to the facts, the court might conceivably overrule its prior decision when the case came up on demurrer, but, as a practical matter, the doctrine of stare decisis would generally prevent this result, and therefore, subject to this limitation, my answer is that there is such a principle of the law of this state.

X 2. Is it the law of New York that there is no right of exoneration or contribution between defendants jointly and severally liable ex delicto and not ex contractu?

A. Generally speaking, there is no right of exoneration or contribution in New York between defendants jointly and
958 severally liable ex delicto, but this can only be stated as a general rule applicable to ordinary cases of joint tort feasors and is subject to the exception that there may be such right or rights where the liability arises by operation of law from acts innocently intended and free from moral turpitude and not involving wilful wrongdoing.

X 3. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered that Bigelow might—but for said defence, if any—be under a liability to the plaintiff in the suits against Bigelow?

A. If the question refers to Massachusetts and if there were no Lewisohn decree, there would, of course, be a prima facie liability upon Bigelow in the present state of the litigation in Massachusetts; but I assume that the question refers to New York, and my answer is that, if there were no Lewisohn decree, Bigelow's liability would be an open question until determined by our courts, and while I do not think he would be held liable in this state upon the transactions revealed by the bills, I have, of course, considered the possibility of such liability in connection with any general examination of the questions involved in these suits.

X 4. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability that Bigelow might—but for said defence, if any—be under as a liability jointly with Lewisohn?

A. Yes, I have considered this feature of the case.

X 5. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability jointly and severally with Lewisohn?

A. Yes, I have considered this feature also.

X 6. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability arising ex delicto?

A. Yes, I have also considered this.

X 7. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability ex delicto jointly and severally with Lewisohn?

A. Yes; I make the same answer as to the preceding interrogatory.

X 8. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that
959 liability be, under the law of New York, a joint and several liability with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. Interpreting as well as I am able the Massachusetts decision, I understand that its effect is to impose on Bigelow a liability arising out of an equitable tort, so called. Whether, under our law, an equitable liability for the breach of an equitable duty would be a joint and several liability would depend upon the inherent nature of the transactions involved in a given case, and I know of no decision in this state determining the nature of such a liability as that sought to be imposed by the Massachusetts decision, and I cannot, therefore, give a definite answer to the question whether or not a liability of the character referred to would be held to be a joint and several liability under the law of New York.

X 9. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability ex delicto with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. What I have said in answer to the preceding interrogatory upon the question whether such liability would be joint and several applies equally here; but with regard to the additional question, as to whether the liability would be ex delicto or not, I desire to say this: An equitable liability for the breach of an equitable duty might well be referred to as a liability ex delicto in the sense that any breach of duty, equitable or legal, as distinguished from breach of a purely contractual obligation, involves dereliction, but a breach of an equitable duty might impose a liability in the absence of intentional wrongdoing or moral turpitude. In the absence of any decision of our courts known to me on the facts analogous to the facts assumed in this interrogatory, I am unable to state definitely whether our courts would denominate a liability of the character referred to as a liability arising ex delicto.

X 10. Is it a principle of the law of the state of New York that the liability of joint wrongdoers is joint and several?

A. There is such a general principle of our law, but it is subject to limitations and exceptions.

X 11. Is it sometimes a principle of New York law that estoppel by former adjudication must be mutual?

A. Yes.

X. 12. If so, what, if any, are all the occasions of which you have knowledge on which they need not be mutual?

A. Estoppels need not be mutual in cases analogous to Portland Mining Co. v. Stratton's Independence, 158 Fed. Rep. 960 63, and the case of Emma Silver Mining Co. in 7 Fed. Rep. Other instances are referred to in the cases of Stamp v. Franklin, 144 N. Y. 607, and People v. Stephens, 51 How. Pr. 235. There is also a class of cases where there exists a right of contribution or exoneration between the defendants in the respective suits.

X 13. Assuming that Bigelow took no part in the Lewisohn suit, in your opinion is the law of New York such that Bigelow would have been estopped in another suit to deny his liability as a matter of law on the same facts, by a final decree against Lewisohn in the first suit?

A. Under the facts assumed, I am in doubt whether Bigelow would have been estopped to deny his liability in another suit by a decree against Lewisohn in the first suit, but I incline to the opinion that the case would come within the rule of Portland Mining Co. v. Stratton's Independence, above referred to.

X 14. Assuming that Lewisohn's executors took no part in the suits against Bigelow, in your opinion is the law of New York such that said executors would have been estopped in another suit to deny

their liability as a matter of law on the same facts, by a final decree against Bigelow in these suits?

A. This interrogatory is practically the converse of the preceding interrogatory, and my answer is that I am in doubt whether the executors would be estopped in another suit, although I do not think this would necessarily be so.

X 15. Assuming that Bigelow took part in the defence of the suits against Lewisohn's executors, and that the plaintiff knew this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation and knowledge, operate as an estoppel in favor of Bigelow?

A. I suppose this question involves the participation of Bigelow in the defence of the Lewisohn suit, and I desire to say that I have not attached great weight to this circumstance in arriving at my conclusions. I have, however, examined a number of authorities and can at the present time refer to the following:—

Carlton v. Lombard, 149 N. Y. 137.
Woodhouse v. Duncan, 106 N. Y. 527.
Van Koughnet v. Dennis, 68 Hun, 179.
Kelley v. 42d St. Ry. Co., 37 App. Div. 500.

X 16. Assuming that Bigelow took part in the defence of the suit against Lewisohn's executors, and that the plaintiff did not know this, what, by name and reference, are all the decisions, if any, in New York you have considered and which tend, in your opinion, to support the view that the final decree in favor of
961 Lewisohn's executors may—by reason of such participation without plaintiff's knowledge—operate as an estoppel in favor of Bigelow?

A. I refer to the cases cited in my answer to the preceding interrogatory.

X 17. Assuming that Bigelow did not take part in the defence of the suit against Lewisohn's executors, what, by name, and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may operate as an estoppel in favor of Bigelow?

A.—

Castle v. Noyes, 14 N. Y. 329.
Tuing v. Clarke, 9 Hun, 269.
Matter of Estate of Strant, 126 N. Y. 201.
Carter v. Bowe, 11 Hun, 516.
Kerrison v. Stewart, 93 U. S. 155.
People v. Stephens, 51 How. Pr. 235.
King v. Barnes, 109 N. Y. 267.
Greenleaf on Evidence, vol. 1, at page 523.
Pray v. Hegeman, 98 N. Y. 351.
Clemens v. Clemens, 37 N. Y. 171.
Hymes v. Esty, 116 N. Y. 509.

Reich v. Cochran, 151 N. Y. 122, 127.
Griffin v. L. I. R. R. Co., 102 N. Y. 449.
Lorillard v. Clyde, 122 N. Y. 41.

I have examined many other cases which I cannot cite by name and page at the present time.

X 18. Have you considered any decisions or language of the courts in New York which may have any tendency to support the view that there is no estoppel in Bigelow's favor growing out of the decree in favor of Lewisohn's executors?

A. Yes.

X 19. If so, what, by name and reference, are all of these which you have considered?

A. I cannot at the present time refer by name and page to such cases. I have made a careful examination of the New York authorities on this subject without finding any case which might fall within the description of the interrogatory which did not seem to me clearly distinguishable from the case at bar.

X 20. Have any arguments been submitted or suggested to you by defendant's counsel, or have you thought of any, in support of the view that there was by the law of New York no estoppel in favor of Bigelow growing out of the decree in favor of Lewisohn's

962 executors?

A. I have endeavored to anticipate all possible arguments for the plaintiff's position in making up my mind upon this general subject.

X 21. If so, what are all of said arguments?

A. As I have already indicated, there are no such arguments which have impressed me as valid. In brief, the arguments which I have considered are those which might be predicated upon cases announcing the general principle of mutuality of estoppel, cases dealing with the relations of joint tort feasors generally, and cases discussing the question of privity. On all these subjects there are cases which express principles applicable to different states of facts from the present case or are clearly distinguishable from the present case for various reasons, but which suggest possible arguments to the effect that there would be no estoppel in favor of Bigelow. I have found no valid arguments of this character, and therefore cannot state any.

X 22. What, in your opinion, constitutes privity under the law of New York to a judgment?

A. This question can really only be answered with reference to the particular facts of a given case. In general, I understand privity to mean either community of interest by relationship, as, for instance, between a trustee and his cestui que trust, and as between persons jointly acting in pursuance of a common enterprise, or community of interest in a given subject matter.

X 23. In determining whether there was an estoppel in the present case, have you assumed or considered that Bigelow was in privity to the parties of record in the suit against Lewisohn's executors?

A. The defendants of record in the Lewisohn suit were not Mr. Lewisohn, but his executors. I consider, upon the facts shown by the bills and records in the various cases, that Bigelow was in privity

with Mr. Lewisohn in the transactions out of which the litigation has arisen, and I further consider that there is a relation of privity between Bigelow and the Lewisohn executors by reason of their succession in interest to Mr. Lewisohn, deceased.

X 24. In considering whether there was any estoppel in this case, have you assumed or considered that Bigelow had any legal interest to defend in the suit against Lewisohn's executors beyond such interest as he might have to secure a favorable precedent?

A. I consider that his legal interest in that suit was the interest of a proper party defendant, if not a necessary one.

X 25. If so, precisely what have you assumed to be said legal interest?

A. My answer to the preceding interrogatory answers this one also.

X 26. Unless Bigelow would have been bound in favor of the plaintiff by estoppel by a decision adverse to Lewisohn's executors, even if Bigelow did not participate in the defence of the suit
963 against them, did Bigelow, in your opinion, have a legal interest to defend in that suit?

A. I do not understand what "unless Bigelow would have been bound in favor of the plaintiff by estoppel," means, and therefore I cannot answer the question.

X 27. If so, by precise description, what, in your opinion, was said legal interest?

A. I am hampered in answering this question by the fact that the preceding one appears to have been mutilated, and therefore I cannot understand it; but I refer to my answer to the 24th interrogatory.

X 28. In determining whether there was any estoppel in this case, have you assumed that the plaintiff consented to the participation, if any, by Bigelow, in the support of the demurrers of Lewisohn's executors?

A. No.

X 29. Is it a principle of New York law that if the defendant in one suit sustains merely the character of a co-trespasser with the defendant in another suit by the same plaintiff, the recovery against one defendant is not thereby made competent evidence against the other?

A. There is an old decision to this effect in this state in the case of Marsh v. Berry, reported in 7 Cow. 344, but I have not traced the decision to see how it has since been construed, and the distinction between that case and the case at bar seems to me clear.

X 30. Is it a principle of New York law that the judgment in favor of one of two persons jointly and severally liable for the wrongful conversion of the plaintiff's property, is no bar to a subsequent suit against the other, because torts are joint and several?

A. This might be called a broad statement of a principle, but inaccurate, unless limited. For instance, if the first action was predicated upon the joint actions of the defendants, and was brought to establish a liability upon them jointly, a judgment in favor of the defendant first sued would bar any recovery in a subsequent suit against the other defendant.

X 31. Is it a principle of New York law that an adjudication acts as an estoppel only between the parties thereto or those in privity with them, or, in other words, the estoppel must be mutual?

A. The interrogatory states a general principle of New York law, but one which is subject to the qualifications and limitations suggested in my answer to the 12th cross-interrogatory.

X 32. Is it a principle of New York law that a judgment in favor of one co-trespasser may not be used by another co-trespasser not a party to it, by way of estoppel?

A. No, I do not know of such a general principle. I am aware of the case of Lansing v. Montgomery, 2 Johns. 382, but in that case the judgment was not actually pleaded as an estoppel, and the jury found that there was, in fact, no prior judgment.

X 33. In considering the question of estoppel, have you
964 assumed or considered that Lewisohn's executors were Bigelow's agents in the suit against them which has been dismissed?

A. In so far as the executors represented Lewisohn's interest, and Lewisohn had been Bigelow's trustee in the transactions complained of, I think the executors might be considered Bigelow's agents or trustees for the purpose of faithfully conducting the litigation, but I have not assumed or considered that there was any special arrangement or agreement between Bigelow and the executors with regard to the conduct of the suit.

X 34. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were trustees for Bigelow of the stock sought to be recovered in the suit against them which has been dismissed?

A. I refer to my answer to the preceding interrogatory in answer to this interrogatory.

X 35. Is it a principle of New York law that in an action at law against one or some of several joint tort feasors, the controversy may be determined as between the parties before the court,—i. e., the plaintiff and defendant,—and without prejudice to the rights of others; and the judgment will completely determine the controversy between them, and will not be res adjudicata between the plaintiff and any of the joint tort feasors who is not a defendant and may not be sued later?

A. There is no principle of New York law which can be stated in the words used in the interrogatory. The principles governing such cases are always subject to the qualifications and limitations which I have already indicated in my answers to preceding interrogatories.

X 36. Have you stated all your reasons for the opinions expressed by you, or the statements made by you, in answer to the 6th, 7th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th direct interrogatories?

A. I believe I have stated all the reasons called for by such interrogatories, and all that I am now able to state within the limits of this examination.

X 37. If not, what are all your reasons for the opinions or statements given by you in answer to each of said interrogatories?

A. I make the same answer as to the preceding interrogatory.

X 38. Have you now stated all your reasons for said answers?

A. All that I am able to state within the limits of this examination.

X 39. Were you, prior to the taking of your deposition on the foregoing cross-interrogatories, shown them, or any of them, or any copies of any of them, or given any information concerning the substance of them?

A. Yes.

X 40. Has each of your answers in its final form been given in the language in which it now appears before you were aware of the substance of any subsequent cross-interrogatory?

A. No.

965 X 41. Have you, since September 22, 1908, discussed in any way with any other person who is named as a witness in the caption to these cross-interrogatories, or with any one on behalf of the defendant, any of the subjects dealt with in the foregoing interrogatories, or in your answers thereto?

A. Yes, I have generally discussed the case, but not with any of the other persons named as witnesses.

GUY FAIRFAX CARY.

Before me, this 26th day of September, A. D. 1908.

[SEAL.] H. M. HEWSON,
Notary Public, Westchester County.

Certificate filed in New York County.

Deposition of James Byrne.

The Deposition of James Byrne, Taken in Behalf of the Defendant Bigelow, and Filed by His Counsel, Subject to the Objections and Exceptions of Counsel for the Complainant, The Old Dominion Copper Mining & Smelting Company, to be Found at Pages 945–950.

[Commission and notarial certificate omitted.]

Q. 1. State your name, age, and place of residence.

A. My name is James Byrne; my age is fifty-one years; my place of residence is New York city.

Q. 2. State your occupation and place of business.

A. My occupation is attorney and counsellor at law; my place of business is 24 Broad street, New York city.

Q. 3. If, in answer to the preceding interrogatory, you have testified that you are an attorney at law, state when you were admitted to the bar, and in what state or states, and how long you have engaged in the practice of law in said state or states, and with what firms, if any, you have been or are connected.

A. I was admitted to the bar in the state of New York in 1883. I have been actively and continuously engaged in the practice of law in that state ever since. Some time after I was admitted to the bar of the state of New York,—I do not remember exactly when, but

many years ago,—I was admitted to practice in the federal courts in New York. I have been admitted to practice in the United States Supreme Court and in a number of federal and state courts. I have been engaged in litigation in many other states than the state of New York. I have been a member of the firm of Chamber-
966 lain, Carter & Hornblower, Carter, Hornblower & Byrne, Hornblower, Byrne & Taylor, Hornblower, Byrne, Miller & Potter, and am now a member of the firm of Byrne & Cutcheon.

Q. 4. State what, if any, judicial or other public or official positions you hold or have held.

A. I have held no judicial position, except that I have occasionally acted as referee. I have held no public or official position except that I was for several years a trustee of the college of the city of New York.

Q. 5. State any other matters relating to your experience in your profession and as to your familiarity with the law and usages governing the practice in the state and federal courts in New York, both in law and in equity, and also as to your familiarity with the laws and usages of the state of New York relating to former adjudication and estoppel by judgment.

A. I have the familiarity with the laws and usages governing the practice in the state and federal courts of New York that comes from having been connected with many cases in those courts both in law and in equity. I have been engaged in lawsuits in both the state and federal courts of New York, in which defences have been set up relating to former adjudication and estoppel by judgment. Those cases have been contested over many years. I was one of the counsel in the case of Thorn v. De Breteuil, in which several former adjudications were set up as estoppels. The opinion of the appellate division of the Supreme Court of the state of New York for the second department is reported in 86 App. Div. 405. The opinion of the Court of Appeals of the state of New York is reported in 179 N. Y. 64.

Q. 6. Assuming that an action in equity is brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters, to recover from him the profits alleged to have been received by him and his associates secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, at a price in excess of the price which they paid for it and of its fair value, and assuming that in this action a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to a similar action, substantially identical with the first and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 945–950.]

967 A. The decree would, in my opinion, be held in the courts of New York state to be a complete defence. These are my reasons for this opinion: The cause of action of the corporation, according to its own statement, is based on a joint plan and conspiracy. The federal court has held that there was no such joint plan and conspiracy and that the facts alleged to constitute fraud in the sale made in pursuance of such alleged joint plan and conspiracy do not amount to fraud. On the plaintiff's own statement, if the so-called promoter has committed a fraud, his associate has; if he has not committed a fraud, his associate has not; and on the facts stated, the court has held that the so-called promoter is under no liability to the corporation.

In a suit against the associate, the inclination of the court would be—in view of the fact that the corporation has had the one opportunity which, as Judge Choate said in 7 Fed. Rep. public policy gives every man to prove his case, and to which one opportunity it limits every man, and has lost its case on grounds which showed that it had no case against the so-called promoter or his associate; and in view of the desirability of avoiding the chance of the law punishing one man for doing the identical thing for which the law had said the other man ought not to be punished—to hold the former judgment conclusive if there were any precedent that could be said to justify such holding. Such a precedent would be found in the case of People v. Stephens, 51 How. Pr. 235, the judgment in which was affirmed by the general term and by the Court of Appeals.

In that case the state brought an action against four principal defendants, claiming damages for a fraudulent combination and conspiracy in obtaining a contract from the state. Previously the state had commenced an action against two of the same defendants for precisely the same cause, and upon demurrer judgment had been rendered for the defendants. The court held that the judgment on the demurrer in favor of the two defendants was rendered on the merits of the action, and presented a complete estoppel in their favor in the present action, that the two defendants not sued in the former action were in privity with the two defendants in the former action, and the estoppel in their favor was as effectual as the estoppel in favor of the two defendants in the former action.

The intermediate appellate court, the general term, affirmed the conclusions reached by the trial court. The Court of Appeals also affirmed it, and while it put its opinion on two grounds other than those of the trial judge of which I have just spoken, it did not express dissent from them. So far as I know, there never has been any adverse comment on the opinion in 51 How. Pr. 235, that I have referred to.

968 Q. 7. Assuming that two actions in equity are brought in the federal court for the southern District of New York by a corporation against one of two persons alleged to have been jointly its promoters to recover from him profits alleged to have been received by him and his associates secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization,

and assuming that such property is alleged to have been sold pursuant to said joint plan and conspiracy in two separate parcels, in each of which both promoters were jointly interested, and that said two actions were brought to recover the respective profits received from the sale of the two parcels, respectively, and assuming that the bills of complaint in the two actions were substantially identical, except as to the particular relief sought, and assuming that certain profits were alleged to have been made by said promoters on each parcel, and assuming that in one of said actions a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to two similar actions, substantially identical in form with those above described and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 946-950.]

A. In my opinion it would be a conclusive defence.

Q. 8. Have you examined a copy of the record in the action of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn in the Circuit Court of the United States for the Southern District of New York, such as is hereto annexed and marked (1), the respective portions of said record being marked A to R, inclusive?

[Objected to; admitted; exception.—See pages 946-950.]

A. I have.

Q. 9. Have you examined copies of the proceedings in the above-entitled causes, to wit, the two causes of the Old Dominion Copper Mining & Smelting Co. v. Bigelow in the Supreme Judicial Court in Massachusetts, such as are hereto annexed and marked, respectively, (2) and (3)?

A. I have.

Q. 10. Assuming that there were now pending in the courts of the state of New York proceedings against Albert S. Bigelow, identical in all respects (except as the practice might require formal
969 changes) with the copies of the proceedings referred to in the 9th interrogatory, and assuming that said courts had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record, copies of which are referred to in the 8th interrogatory, were sufficiently pleaded and proven in defence of said proceedings, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in each of these bills of complaint were, respectively, the same persons, and that the contracts, acts, matters, and transactions mentioned in each of these bills of complaint were, respectively, the same contracts, acts, matters, and transactions, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against

said Lewishon's executors in said court, what would be the effect, under the law and usages of the state of New York, of said decree and record as a defence to said proceedings assumed to be so pending?

[Objected to; admitted; exception.—See pages 946-950.]

A. The decree and record would be a complete defence.

Q. 11. Assuming the facts stated in the 10th interrogatory, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would those additional facts affect your answer to the preceding interrogatory?

[Objected to; admitted; exception.—See pages 946-950.]

A. They would not affect it.

Q. 12. Assuming the facts stated in the 10th interrogatory, and assuming the facts stated in the 11th interrogatory, and assuming that the participation of the defendant, Bigelow, as stated in the 11th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers to the two preceding interrogatories?

[Objected to; admitted; exception.—See pages 947-950.]

A. They would not affect it.

Q. 13. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow,
970 identical in all respects with the proceeding numbered 8098, referred to in the 9th interrogatory, and assuming that the course of the proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8098, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8098 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, what, under the laws

and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8098, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

A. A decree and record would be a complete defence.

Q. 14. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8099, referred to in the 9th interrogatory, and assuming that the course of proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8099, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in
971 said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8099 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, and assuming that the bill of complaint in said Circuit Court, and the prayers thereof, relate to one part of an entire transaction comprising said contracts, acts, matters, and transactions, and that the bill of complaint corresponding to the one numbered 8099 in Massachusetts, and the prayers thereof, relate to another part of the same entire transaction, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8099, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

A. The decree and record would be a complete defence.

Q. 15. Assuming the facts stated in the 13th and 14th interrogatories, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal

and on certiorari, how, if at all, would these additional facts affect your answers, or either of them, to the 13th and 14th interrogatories?

[Objected to; admitted; exception.—See pages 948-950.]

A. They would not affect it.

Q. 16. Assuming the facts stated in the 13th, 14th, and 15th interrogatories, and assuming that the participation of the defendant, Bigelow, as stated in the 15th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers, or either of them, to the 13th, 14th, and 15th interrogatories?

[Objected to; admitted; exception.—See pages 949, 950.]

A. They would not affect it.

972 Q. 17. If you have not already done so, state your reasons for your answers to Ints. 6th to 16th, inclusive.

[Objected to; admitted; exception.—See page 950.]

A. My reasons are as follows:

30,000 share case.—The law as to estoppel by judgment in New York is stated in Embury v. Conner, 3 N. Y. 511, at 522, as follows:

"The general rule is, that an allegation on record, upon which issue has been once taken and found and a judgment has been rendered, is, between the parties taking it and their privies, conclusive, according to the finding thereof, so as to estop the parties respectively from again litigating that fact once so tried and found; whether it is plead in bar, or given in evidence."

See also Pray v. Hegeman, 98 N. Y. 351.
Thorn v. de Breteuil, 179 N. Y. 64.

The real estate and mining claim, sold for 30,000 shares of stock, stood in the name of Lewisohn. The offer to sell the property, the title to which stood in his name, was made by Lewisohn.

The suit against Lewisohn, in which judgment has been rendered in his favor, was brought to rescind the contract which had been made in his name in regard to property that stood in his name. It would have been proper to bring a suit to enforce the contract against Lewisohn alone. It was proper to bring a suit to rescind it against Lewisohn alone. The judgment against him, or in his favor, in either case would bind Bigelow, for whom Lewisohn was a trustee.

Matter of Straub, 126 N. Y. 201.
Bracken v. Atlantic Trust Co., 36 App. Div. 67.

In answering the 11th and 12th interrogatories, I have said that the additional facts therein set out would not affect my answer to the 10th interrogatory.

If, for any reason, it should be considered that Bigelow did not stand to Lewisohn in the 30,000 share sale as cestui que trust, it must be admitted that he stood to him in the relation of joint adventurer; and the general principles of partnership are applicable to their relations. See:

Getty v. Devlin, 54 N. Y. 403.
King v. Barnes, 109 N. Y. 267.

973 The suit against Lewisohn which has been decided in his favor was, as the Supreme Court of the United States has said, to rescind the contract for the sale of the real estate and mining claims, and to recover back the consideration. Whether as a partner of Lewisohn or as a principal, Bigelow, in a suit for the rescission of the contract, had an interest in opposing the rescission. He was in such privity with Lewisohn in a suit to enforce or rescind the contract that if he took part in the defence of the action he could not be regarded as a stranger; having such privity, on the assumption that the facts assumed in the 11th interrogatory are true, the judgment *was* binding in his favor as a judgment in favor of the corporation would have been binding against him.

100,000 share case.—The suit against Lewisohn in which judgment has been entered was brought, as stated by Mr. Justice Holmes, "to rescind a sale to it [the Old Dominion Copper Mining Company] of certain mining rights."

The complaint says:

"The complainant desires to rescind the sale. * * * Wherefore the complainant prays that the Court will declare said sale of said parcels of real estate conveyed by said Leonard Lewisohn to the complainant, as hereinbefore set forth, rescinded. * * *"

The decree in the Lewisohn case is an adjudication that there is no right to rescind the sale. It is an adjudication that, inasmuch as Bigelow and Lewisohn owned all the capital stock of the corporation, even though they did not state, when they made the sales to it, that they were making a profit, there was nothing wrongful in the transaction. It is an adjudication that at the time of the sale there was no fiduciary relationship between them and the corporation, because they were the corporation; and one cannot be in a fiduciary relationship to himself—just as one cannot be an agent of himself. It is an adjudication that they were under no duty to provide an independent board of directors for the corporation, and to disclose to that board that they were making a profit in the sale to the corporation. It was an adjudication that if they could properly be called promoters before the corporation was organized or any stock issued, when they became the sole stockholders, and so long as they remained the sole stockholders, they had "stripped themselves of the character of trustees." Those issues are res adjudicata, not only in another suit for the same cause of action, such as the second suit to rescind the sale of the 30,000 shares of stock, or an action in equity or at law for dam-

974 ages arising from the action of Lewisohn or Bigelow for wrongfully taking from the company the 30,000 shares of stock, but in any other suit where the same issues arise.

The rule is that a judgment upon the question directly involved in a suit is conclusive in a second suit between the same parties and their privies dependent upon the same question, although the subject matter of the second action is different.

All the complaints, both in the two suits against Lewisohn and the two suits against Bigelow, treat the sale of the property of the Baltimore Old Dominion Company and of the real estate and mining claims that stood in the name of Lewisohn as parts of one plan,

scheme, and conspiracy. The two officers were presented and accepted at the same meeting, on July 11, 1895, one immediately after the other, and it was voted at the same meeting to issue the stock in payment therefor.

As was said by the Supreme Court of Massachusetts (74 N. E. 656):

"The scheme of the defendant and Lewisohn, as to this capital stock of $3,750,000 divided into 150,000 shares, was to issue 80,000 shares * * * to the syndicate * * * 20,000 shares * * * to themselves for their services and expenses as promoters, 20,000 shares * * * to the public for cash for working capital * * * and the balance 30,000 shares, * * * * to themselves for the real estate here in question, and this scheme was carried out. * * *

The scheme thus described has been the subject of adjudication in the Lewisohn case and the adjudication made was that it was not wrongful. The fact that the form that the transactions assumed was the making of two contracts of sale does not prevent the adjudication of issues in a suit asking for a rescission of one of the contracts for being conclusive upon similar issues in a suit relating to the other contract.

In the case of Bouchaud, Executor of Brunel, v. Dias, 3 Den. 238, is precisely in point. There one Castro imported goods and on a certain day executed two bonds to the United States for the payment of the duties, on which bonds Brunel, the testator of Bouchard, and the defendant were sureties. The bonds were alike in penalty and condition, except that they were payable at different periods. The plaintiff, as executor of Brunel, paid one of the bonds, and in this action sought to recover one half of the amount from the defendant as a co-surety with the testator. The defence was that the defendant, with the consent of the plaintiff, had been released from his obligation by the Secretary of the Treasury. The defendant gave in evidence the judgment record from which it appeared that the plaintiff had previously sued the defendant for contribution, the declaration in the former case being precisely like the declaration in this case, except that the other bond was set out as a part of the ground of action.

In that action the defendant pleaded in bar the release and
975 consent. The plaintiff demurred and the court rendered judgment for the defendant. The plaintiff objected to the introduction of the record because the bonds were not the same in both suits. The court said, at page 243:

"We have then the judgment of a court of concurrent jurisdiction directly upon the point made by this suit; and nothing is better settled than that such a judgment, so long as it remains in force, is conclusive between the same parties in another action upon the same matter. It is true that there is a shade of difference between the two cases as to the necessary proof on the part of the plaintiff to sustain the action. Different bonds are mentioned in the two declarations. But so far as relates to the principal question in controversy, to wit: the right of the plaintiff to demand and the duty of the defendant as co-surety to make contribution, the two cases are precisely alike. The defence is precisely the same in both actions. The matter

which the plaintiff now attempts to agitate anew is res judicata * * * and the judgment rendered in that action is a conclusive bar to any new litigation of the same matter."

So in the present litigation different shares of stock are mentioned in the prayers for relief. There is hardly, however, the "shade of difference" between the two cases as to what the plaintiff regards as the necessary proof on its part to sustain the action, for presumably it has alleged nothing in any of the actions which it was not necessary for it to prove, and it has alleged exactly the same facts in both. "The matter which the plaintiff attempts to agitate anew" in the 100,000 share case, is res adjudicata and the judgment in the 30,000 share case is a conclusive bar in favor of Lewisohn and his privy, Bigelow, "to any new litigation of the matter."

Cross-interrogatories.

Without waiving the foregoing objections, but expressly insisting thereon, the plaintiff puts de bene the following cross-interrogatories:—

X 1. Is it a principle of the law of the state of New York that the law decided in a case in the court of last resort in overruling a demurrer becomes the law of the case to be applied when the case is heard upon the facts?

A. I so understand it.

X 2. Is it the law of New York that there is no right of exoneration or contribution between defendants jointly and severally liable ex delicto and not ex contractu?

A. I understand that to be the general principle of law,
976 but I also understand the law of New York to be that if one —like a servant, for instance—does a wrongful act in obedience to the request of the superior, not knowing the act to be wrongful, it would be the duty of the superior to indemnify. How far this exception would be extended, and whether it would authorize contribution between defendants jointly and severally liable ex delicto, where they were not knowingly doing a wrongful act, I am unable to say.

X 3. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered that Bigelow might—but for said defence, if any—be under a liability to the plaintiff in the suits against Bigelow?

A. I have not considered that question especially in connection with this case. My opinion would be the same whether Bigelow would or would not, but for said defence, be under a liability to the plaintiff in the suits against him.

X 4. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability that Bigelow might—but for said defence, if any—be under as a liability jointly with Lewisohn?

A. I have considered whether the liability that Bigelow might be under would be a liability jointly with Lewisohn.

X 5. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability jointly and severally with Lewisohn?

A. I have considered whether the liability that Bigelow might be under would be a liability jointly or severally with Lewisohn.

X 6. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability arising ex delicto?

A. To have considered whether the liability which Bigelow might be under would be a liability arising ex delicto.

X 7. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability ex delicto jointly and severally with Lewisohn?

A. I have considered whether it might be a liability ex delicto jointly and severally with Lewisohn.

X 8. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be,
977 under the law of New York, a joint and several liability with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. I have given that question a very great deal of consideration. I understand the decision of the Supreme Judicial Court of Massachusetts to mean that the plaintiff had these courses open to it, and probably a third course. The two courses I mean are, first, to rescind the contract and upon the rescission to sue "upon the implied contract to return the consideration;" the other course, to waive the remedy founded upon the implied contract and to sue for a wrongful act on the part of one occupying a trust relation to the corporation. This latter liability I understand the Massachusetts decision to deem a joint and several liability. Under the law of New York, in my opinion, the corporation might rescind the contract and recover the consideration on an implied contract, which would be a joint liability. If one of the two so-called promoters had contracted in his own name and was, as to the property sold, a trustee for himself and the other, the corporation could rescind and sue him alone. If Lewisohn and Bigelow were promoters and they made a secret profit out of the corporation, and their act was wrongful against the corporation, I should say that the case was like a partnership committing a breach of duty in some matter where they were acting as agents and that a cause of action would lie against them jointly and severally.

X 9. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these

facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability ex delicto with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. I think my answer to Cross-Int. 8 answers this question.

X 10. Is it a principle of the law of the state of New York that the liability of joint wrongdoers is joint and several?

A. In my opinion it is.

X 11. Is it sometimes a principle of New York law that estoppel by former adjudication must be mutual?

A. It is very frequently so said.

X 12. If so, what, if any, are all the occasions of which you have knowledge on which they need not be mutual?

A. The case of People v. Stevens, in 51 Howard's Practice, cited in my answer to the 6th direct interrogatory, is a case which might be cited to the effect that an estoppel need not be mutual. If in that case the plaintiff had sued the two defendants who were not parties to the original suit by the plaintiff, and had claimed that the defendants were bound by the judgment which had been obtained against the two defendants who were parties to the former
978 suit, the defendants in the later suit would not have had their day in court. I do not think, therefore, that the judgment against the defendants in the former case referred to in People v. Stevens would be res adjudicata against the new defendants in a subsequent case reported in 51 Howard's Practice. A judgment against the indemnitors of a sheriff who makes a wrongful levy has been held in — to be an estoppel in a suit subsequently brought against the sheriff. In my opinion the judgment against the indemnitors would not be res adjudicata in a suit against the sheriff. A judgment in favor of one charged with having placed an obstruction in a highway is a bar to a suit against the city, or those of its officials responsible for the highways. In the case of the sheriff and of the obstruction to the highway the person allowed to set up the bar has been indemnified, or has the right to be indemnified, by the other, for that is given as a reason why such person should be allowed to set up the bar, but the fact remains that the estoppels are not mutual. In my opinion the principles laid down by the Circuit Court of Appeals in Portland Gold Mining Co. v. Stratton's Independence, 158 Fed. Rep. p. 68, and by Judge Choate, now a distinguished lawyer of New York in the Emma Mine Case, 7 Fed. Rep., will both be followed in the state courts of New York. I have not, however, examined the case exhaustively on this point.

X 13. Assuming that Bigelow took no part in the Lewisohn suit, in your opinion is the law of New York such that Bigelow would have been estopped in another suit to deny his liability as a matter of law on the same facts, by a final decree against Lewisohn in the first suit?

A. Yes.

X 14. Assuming that Lewisohn's executors took no part in the suits against Bigelow, in your opinion is the law of New York such that said executors would have been estopped in another suit to deny their liability as a matter of law on the same facts, by a final decree against Bigelow in these suits?

A. I do not think that this follows. The grounds upon which I answered that Bigelow would be bound by the judgment against Lewisohn in the New York 30,000 share suit is that the contract was made in the name of Lewisohn; that Lewisohn was a trustee, was the agent authorized by Bigelow to make the contract. I have stated these at length in my answer to the 16th direct interrogatory. In the corresponding Massachusetts suit, the 30,000 share suit against Bigelow, it cannot be said that Bigelow was a trustee for Lewisohn. Bigelow was not the person in whose name the contract was made. The reasons given in the Emma Mine Case, 7 Fed. Rep., and in the Portland Case, 158 Fed. Rep., why a judgment
979 against the plaintiff should bar him, do not apply to a judgment in his favor. In the former case the plaintiff has had his day in court. In the latter Lewisohn has not.

X 15. Assuming that Bigelow took part in the defence of the suits against Lewisohn's executors, and that the plaintiff knew this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation and knowledge, operate as an estoppel in favor of Bigelow?

A. I assume that this question is based on the assumption that the judgment would not operate as an estoppel unless there were participation on the part of Bigelow. On that assumption, the case which I have considered, and which tends, in my opinion, to support the view that a final decree in favor of Lewisohn's executors might, by reason of such participation and knowledge, operate as an estoppel in favor of Bigelow, if there were any such participation, is Castle v. Noyes, 14 N. Y. 329. I have considered other cases, the names of which I do not at this moment recall. I do not understand that the law of the state of New York on this subject is peculiar.

X 16. Assuming that Bigelow took part in the defence of the suit against Lewisohn's executors, and that the plaintiff did not know this, what, by name and reference, are all the decisions, if any, in New York you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation without plaintiff's knowledge, operate as an estoppel in favor of Bigelow?

A. I do not recall any particular case in the courts of New York. In Alexander v. Taylor, 4 Denio, 302, in which it was sought to have a judgment against plaintiff's agent treated as a bar in a suit subsequently brought by plaintiff, the court decided that it was not a bar, saying that the plaintiff did not participate in the replevin suit, and he had no part in the act upon which it was founded; that it did not appear that he had ever heard of the former suit, or the act for which it was prosecuted, until the record of judgment was brought up against him on the trial. In Castle v. Noyes I think it

plainly appears from the facts that the other side must have known that the master took charge of the defence of the servants, but that statement is not in terms in the case as I recollect it. In my opinion the case of Rumford Chemical v. Hygienic Chemical, 159 Fed. Rep. 436, opinion of the Circuit Court of Appeals, Second Circuit, states the general doctrine on the subject. It seems to me participation, rather than knowledge, determines whether a party becomes bound by a former judgment.

X 17. Assuming that Bigelow did not take part in the de-
980 fence of the suit against Lewisohn's executors, what, by name, and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may operate as an estoppel in favor of Bigelow?

A. To the effect that a judgment in a suit against a trustee is binding upon a beneficiary, Matter of Straub, 126 N. Y. 201, Bracken v. Atlantic Trust Co., 36 App. Div. 67. To the effect that the relation of promoters to each other is that of joint adventurers and that the law of partnership is applicable to such relation, Getty v. Devlin, 54 N. Y. 403; King v. Barnes, 109 N. Y. 267. Generally, People v. Stevens, 51 How. Pr. above referred to. I have considered many other decisions, but I have not made notes of them, and there is no particular one that I have especially in mind.

X 18. Have you considered any decisions or language of the courts in New York which may have any tendency to support the view that there is no estoppel in Bigelow's favor growing out of the decree in favor of Lewisohn's executors?

A. I have seen no decision or language of the courts of New York which, in my opinion, support the view that there is no estopped in Bigelow's favor growing out of the decree in favor of Lewisohn's executors. There are statements in the New York cases to the effect that a judgment in favor of one co-trespasser could not be used by another co-trespasser, not a party to it, by way of estoppel. There are very many statements of the highest court that estoppels must be mutual. These expressions or decisions have, in my opinion, no application to a case by a corporation to rescind a contract against one who is a trustee for another, or against one who is a partner or joint adventurer with another where the partner or joint adventurer participates in the defence of the action; nor to a case like People v. Stevens, 51 How. Pr.

X 19. If so, what, by name and reference, are all of these which you have considered?

A. Lansing v. Monegomery, 2 Johns, 382; Atlantic Dock Co. v. Mayor &c., 53 N. Y. 64, at page 68. My recollection is that I have seen other cases containing the statement about a judgment in favor of one co-trespasser not being a bar to a suit against the other, but I do not recall them now. There are many cases in which the statement is made that estoppel must be mutual. Of course I do not mean that these cases do support the view mentioned in Cross-Int. 18.

X 20. Have any arguments been submitted or suggested to you by defendant's counsel, or have you thought of any, in support of the view that there was by the law of New York no estoppel in favor

of Bigelow growing out of the decree in favor of Lewisohn's executors?

A. No argument has been submitted to me by counsel for the defendant in support of the claim that the decision in the Lew-
981 isohn case is not a bar in the Bigelow case, except that they have submitted to me arguments or assumptions which might be made by counsel for the complainant, and have shown by an analysis of the argument and cases that in their opinion the argument was not a good one. They have stated to me that the complainant will doubtless rely upon the argument or assumption that Bigelow and Lewisohn are in the position of joint tort feasors, and that therefore, it will be claimed that a judgment in favor of one is not a bar to a suit against the other. Practically, what has been submitted to me by counsel for the defendants are arguments to show that the arguments that would probably be made by the complainant are not sound ones, and that the cases upon which they will rely are distinguishable from a case where it appears on the plaintiff's statement that the allegations against both alleged joint tort feasors are the same and judgment in favor of one has been rendered on the merits against the other. No argument has occurred to me which I regard as sound. Having frequently had to consider the subject of res adjudicata under the decisions of the state of New York, I knew of the statements that a judgment in favor of one co-trespasser could not be used as a bar in a suit against the other, and the doctrine that judgment against one tort feasor is not a bar to an action against another tort feasor unless the judgment has been satisfied or released.

X 21. If so, what are all of said arguments?

A. I have answered this cross-interrogatory in my answer to Cross-Int. 20.

X 22. What, in your opinion, constitutes privity under the law of New York to a judgment?

A. It is impossible to answer this question except at great length. In O'Donnell v. McIntyre, 118 N. Y. at page 162, the Court of Appeals say in its general legal signification "stranger" is opposed to the word "privy." By "privy" is meant the mutual or successive relationship to the same rights of property, and "privies" are classified according to the manner of relationship. In Mygatt v. Coe, 124 N. Y. 212, at page 219, the court, quoting says "there are three manners of privities, viz: (1) Privity in case of estate only. (2) Privity in respect to contract only. (3) Privity in respect to estate and contract together. * * * The term privity in estate denotes mutual or successive relationship to the same rights of property." "Privity" is used with reference to estoppel by judgment to describe the relationship between a party to the judgment and some one who is affected by that judgment simply because of his relationship to the party and without his having participated in or even known of the judgment. "Privity" is also used to describe the relationship of a party to another who is a defendant in lawsuit which will justify participating in the defence, and thereby making the judgment binding in favor of or against the person not a party to the
982 record. Thus, in one case, a master is held to be in privity with his servant so as to be bound by the judgment where the

master assumed control of the litigation; in another case the master is held not to be bound by the judgment against his servant, because he did not participate in the suit.

X 23. In determining whether there was an estoppel in the present case, have you assumed or considered that Bigelow was in privity to the parties of record in the suit against Lewisohn's executors?

A. I have.

X 24. In considering whether there was any estoppel in this case, have you assumed or considered that Bigelow had any legal interest to defend in the suit against Lewisohn's executors beyond such interest as he might have to secure a favorable precedent?

A. I have.

X 25. If so, precisely what have you assumed to be said legal interest?

A. The contract in regard to 30,000 shares was made in the name of Lewisohn intentionally on the part of Lewisohn and Bigelow; the title to the real estate stood in the name of Lewisohn; the corporation had the right to treat Lewisohn as the person with whom it could litigate in regard to the recission of the contract which had been made by him; Lewisohn being dead, they had the right to sue the executors; in any suit to enforce or rescind the contract made by Lewisohn, Bigelow stood to Lewisohn, or Lewisohn's legal representatives upon his death, in the relation of beneficiary, and Lewisohn and his executors in the relation of trustees. By reason of that relationship Bigelow, in my opinion, was a privy in such sense that if he had not participated in the Lewisohn case the judgment would bind him. Lewisohn and Bigelow, if promoters, were, under the laws of New York, joint adventurers, and their relations would be governed generally by the law of partnership. There was a privity between them that there is between partners. If there was not the relationship of trustee and beneficiary between Lewisohn (and after his death his executors) and Bigelow, there was this partnership relation, and the privity there is such that in a suit to rescind the contract, the executors of Bigelow's partner being sued, he had such an interest in sustaining the contract as allowed him to participate, and by participating become bound by the judgment.

X 26. Unless Bigelow would have been bound in favor of the plaintiff by estoppel by a decision adverse to Lewisohn's executors, even if Bigelow did not participate in the defence of the suit against them, did Bigelow, in your opinion, have a legal interest to defend in that suit?

A. He had.

X 27. If so, by precise description, what, in your opinion, was said legal interest?

A. I don't think I can add to my previous answers. He
983 had an interest in the contract which was made by Lewisohn, and he had the interest that any person who contracts as a co-contractor or as a partner would have in having the contract held to be good and valid, and not one subject to recission in a case where he is not a party to the record, but his co-contractor or agent is. I may misunderstand the meaning of Cross-ints. 26 and 27. In a sense it may be said that a man has no interest, legal or otherwise,

in something which cannot affect him. I assume that the question means: Was Bigelow, in the case supposed, a stranger to the suit against Lewisohn, or had he such an interest in the contract which was sought to be rescinded as would result in a decision subsequently that, by participating in the defence of the Lewisohn suit, he became bound by it?

X 28. In determining whether there was any estoppel in this case, have you assumed that the plaintiff consented to the participation, if any, by Bigelow in the support of the demurrers of Lewisohn's executors?

A. In giving my answer to the 10th direct interrogatory and to the 13th and 14th direct interrogatories I have not assumed it, nor in giving my answers to the 11th and 15th direct interrogatories. What I would like to make clear is, I have assumed it only where the interrogatory assumed it. On re-reading the cross-interrogatory, I appreciate that the word "consent" is used, not "knowledge." I have not assumed "consent" in giving any of my answers, only "knowledge," and that only where the interrogatory uses — word "knowledge."

X 29. Is it a principle of New York law that if the defendant in one suit sustains merely the character of a co-trespasser with the defendant in another suit by the same plaintiff, the recovery against one defendant is not thereby made competent evidence against the other?

A. My understanding is that is the New York law, although I do not recall the particular case in which that is so held.

X 30. Is it a principle of New York law that the judgment in favor of one of two persons jointly and severally liable for the wrongful conversion of the plaintiff's property is no bar to a subsequent suit against the other because torts are joint and several?

A. I do not recall a decision in point. The mere fact of a judgment in favor of one of two persons jointly and severally liable for conversion clearly would be no bar to a suit against the other after such judgment. If, however, the judgment in favor of one of two persons jointly and severally liable for the wrongful conversion of the plaintiff's property was upon a state of facts which shows that the conversion was a single act, so that if one of the two persons is guilty the other is, and vice versa, then I should think, in a suit against the second person upon precisely that state of facts, the opinion in

People v. Stevens, 51 Howard's Practice, should apply.

984 X 31. Is it a principle of New York law that an adjudication acts as an estoppel only between the parties thereto or those in privity with them, or, in other words, the estoppel must be mutual?

A. That is the general principle of New York law; but see my answer to the 12th cross-interrogatory.

X 32. Is it a principle of New York law that a judgment in favor of one co-trespasser may not be used by another co-trespasser not a party to it, by way of estoppel?

A. There is a statement to that effect in the case of Atlantic Dock Co. v. The Mayor of New York, 53 N. Y. 64, and in Lansing v.

Montgomery, 2 Johns. 382, —, and there is no doubt that unless the case was such as is mentioned in People v. Stevens, and cases like those referred to in my answer to the 12th cross-interrogatory, that doctrine would be applied in New York.

X 33. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were Bigelow's agents in the suit against them which has been dismissed?

A. I have considered that Lewisohn stood in the relation of a trustee to Bigelow, that he was the person in whose name the contract was made for the benefit of himself and another, and was therefore, for the purpose of binding the beneficiary, a trustee. I have considered that during his lifetime the corporation could sue him alone for the rescission of the contract, and on his death it could sue his legal representatives, and therefore that they stood in connection with a suit upon that contract just as a trustee would to Bigelow. I have considered also that Bigelow and Lewisohn were joint adventurers, and that upon Lewisohn's death the executors stood in Lewisohn's place.

X 34. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were trustees for Bigelow of the stock ought to be recovered in the suit against them which has been dismissed?

A. I think I have already answered this question. I have not assumed or considered that Lewisohn's executors were trustees for Bigelow for stock sought to be recovered in the suit against them.

X 35. Is it a principle of New York law that in an action at law against one or some of several joint feasors, the controversy may be determined as between the parties before the court,—i. e., the plaintiff and defendant,—and without prejudice to the rights of others; and the judgment will completely determine the controversy between them, and will not be res adjudicata between the plaintiff and any of the joint tort feasors who is not a defendant and may be sued later?

A. It is, I understand, the principle of New York law that an action at law may be brought against one of several joint tort feasors without joining the others, and that a judgment in that suit will completely determine the controversy between them, and
985 that a judgment against the defendants thus sued will not be res adjudicata between the plaintiff and any of the joint tort feasors who were not made defendants, and the latter could be sued later. The question of whether the judgment in favor of one of the joint tort feasors first sued, where the facts are precisely the same as those in a subsequent suit against others of the joint tort feasors, is res adjudicata has been decided in People v. Stevens, 51 Howard's Practice, in the affirmative, the court asking, "Has it ever been held that upon the same proof against two the same court would be justified in holding the one guilty of actionable conduct whilst the other was not?"

X 36. Have you stated all your reasons for the opinions expressed by you, or the statements made by you, in answer to the 6th,

7th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th direct interrogatories?

A. Yes.

X 37. If not, what are all your reasons for the opinions or statements given by you in answer to each of said interrogatories?

A. I do not think of any other reasons.

X 38. Have you now stated all your reasons for said answers?

A. To the best of my belief I have.

X 39. Were you, prior to the taking of your deposition on the foregoing cross-interrogatories, shown them, or any of them, or any copies of any of them, or given any information concerning the substance of them?

A. I was not.

X 40. Has each of your answers in its final form been given in the language in which it now appears, before you were aware of the substance of any subsequent cross-interrogatory?

A. No, I was very anxious to finish as speedily as possible and I assumed the commissioner was also anxious to have me finish, and after committing myself (to the best of my recollection) to an answer to every interrogatory, I think, but two, I said I would not delay the matter, but would hasten to answer all the interrogatories and then have my answers read over to see that they were grammatical and correct. When I came to the interrogatory requesting a definition of what constituted privity, I thought I would leave that and answer it more or less at length, according as I had more or less time when I had finished with the others, and when I came to the 30th cross-interrogatory, as I did not recall any particular case in point, but thought I might recall a case while going on with the other questions, I said that I would answer that when I had finished. I do not think that my answer to any question has or will be affected by my knowledge of the substance of any cross-interrogatory.

X 41. Have you, since September 22, 1908, discussed in any way with any other person who is named as a witness in the caption to these cross-interrogatories, or with any one on behalf of the defendant, any of the subjects dealt with in the foregoing interrogatories or in your answers thereto?

986 A. I understand the question to be whether I have discussed, with any of the persons named, these cross-interrogatories or any of the subjects dealt with in these cross-interrogatories or my answers thereto. I have not. I saw Mr. Olney by chance on the train Saturday afternoon, and he told me that he had been testifying in the case that morning. I talked with him a very few moments on the general subject of the question raised by the 6th direct interrogatory.

JAMES BYRNE.

Before me,

PERCIVAL WILDS,
[SEAL.] *Notary Public.*

Deposition of Edward W. Hatch.

The Deposition of EDWARD W. HATCH. Taken in behalf of the Defendant, Bigelow, and Filed by His Counsel, subject to the objections and exceptions of counsel for the complainant, The Old Dominion Copper Mining & Smelting Company, to be found at pages 945-950.

[Commission and notarial certificate omitted.]

Q. 1. State your name, age, and place of residence.

A. Edward W. Hatch; fifty-six years old; legal residence, Buffalo, N. Y., domiciled in New York city and practising law therein.

Q. 2. State your occupation and place of business.

A. Lawyer, 3 South William street, New York city.

Q. 3. If, in answer to the preceding interrogatory, you have testified that you are an attorney at law, state when you were admitted to the bar, and in what state or states, and how long you have been engaged in the practice of law in said state or states, and with what firms, if any, you have been or are connected.

A. I was admitted to the bar at Buffalo in the state of New York, in June, 1876. I have been engaged in the practice of the law in the state of New York continuously since my admission to the bar. I at first practised law alone, then formed a co-partnership with Thomas Corlett, afterwards a judge of the Supreme Court of the state of New York, in the city of Buffalo. Upon his election to the Supreme Court bench I entered the firm of Box, Hatch & Norton, and continued in that relation for about three years. In 1905 I became associated with a firm of lawyers in the city of New York under the firm name of Parker, Hatch & Sheehan, and have continued the practice of law in that firm since that time, and am so presently engaged.

987 Q. 4. State what, if any, judicial or other public or official positions you hold or have held?

A. I was elected district attorney of Erie county in 1880, for a term of three years, and was re-elected to the succeeding term of three years, which expired on the 31st day of December, 1886. I was then elected a judge of the Superior Court of Buffalo for a term of fourteen years, and served therein until the last of December, 1895, when I resigned, having, in 1895, been elected a justice of the Supreme Court of the state of New York. I was appointed, on the 1st day of January, 1896, by Governor Morton, a judge of the appellate division of the Supreme Court for the second department, such court sitting in the city of Brooklyn, and served therein as an associate justice of such court until in April, 1900, when I was transferred, by Governor Roosevelt, to the appellate division in the first department, sitting in the city of New York, where I served as an associate justice of such court until the 30th day of September, 1905, when I resigned as a Supreme Court justice of the state of New York, and entered upon the practice of law in the firm of Parker, Hatch & Sheehan.

Q. 5. State any other matters relating to your experience in your profession, and as to your familiarity with the law and usages governing the practice in the state and federal courts in New York, both in law and in equity, and also as to your familiarity with the laws and usages of the state of New York relating to former adjudication and estoppel by judgment.

A. In my service upon the bench and at the bar, I have frequently had occasion to consider the subject matters embraced within this interrogatory, and have written several opinions discussing the legal phases of such questions, and have argued such questions before the courts of the state of New York upon a number of occasions.

Q. 6. Assuming that an action in equity is brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters, to recover from him the profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, at a price in excess of the price which they paid for it and of its fair value, and assuming that in this action a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed, and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to a similar action, substantially identical with
988 the first and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to: admitted: exception.—See pages 945–950.]

A. I think it would be a bar; I think it would be res adjudicata of the question, and a bar to such action if properly pleaded.

Q. 7. Assuming that the two actions in equity are brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters to recover from him profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, and assuming that such property is alleged to have been sold, pursuant to said joint plan and conspiracy, in two separate parcels, in each of which both promoters were jointly interested, and that said two actions were brought to recover the respective profits received from the sale of the two parcels, respectively, and assuming that the bills of complaint in the two actions were substantially identical, except as to the particular relief sought, and assuming that certain profits were alleged to have been made by said promoters on each parcel, and assuming that in one of said actions a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint

sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to two similar actions, substantially identical in form with those above described and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 946–950.]

A. In my opinion it would constitute a bar to the same.

Q. 8. Have you examined a copy of the record in the action of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn, in the Circuit Court of the United States for the Southern District of New York, such as is hereto annexed and marked (1), the respective portions of said record being marked A to R, inclusive?

[Objected to; admitted; exception.—See pages 946–950.]

A. Yes.

989 Q. 9. Have you examined copies of the proceedings in the above-entitled causes, to wit, the two causes of the Old Dominion Copper Mining & Smelting Co. v. Bigelow in the Supreme Judicial Court of Massachusetts, such as are hereto annexed and marked, respectively, (2) and (3)?

A. Yes.

Q. 10. Assuming that there were now pending in the courts of New York proceedings against Albert S. Bigelow identical in all respects (except as the practice might require formal changes) with the copies of the proceedings referred to in the 9th interrogatory, and assuming that said courts had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record, copies of which are referred to in the 8th interrogatory, were sufficiently pleaded and proven in defence of said proceedings, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in each of these bills of complaint were, respectively, the same persons, and that the contracts, acts, matters, and transactions mentioned in each of these bills of complaint were, respectively, the same contracts, acts, matters and transactions, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, what would be the effect, under the law and usages of the state of New York, of said decree and record as a defence to said proceedings assumed to be so pending?

[Objected to; admitted; exception.—See pages 946-950.]

A. In my opinion the effect of the decree would be to constitute a bar to any action against either Lewisohn's executors or Bigelow.

Q. 11. Assuming the facts stated in the 10th interrogatory, and assuming that the defendant, Bigelow, participated, through his

counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would those additional facts affect your answer to the preceding interrogatory?

[Objected to; admitted; exception.—See pages 946-950.]

A. The fact that Bigelow participated in the defence of the action, although not a party thereto, would, in my opinion, simply emphasize the fact that the decree therein constituted a bar against further proceedings for that cause of action until the same should be
990 reversed or set aside; but the mere fact of participation in the defence of such action, in my opinion, would not, and does not, change the legal effect of the decree as a bar to the subsequent action; it would still be and remain a bar, whether Bigelow had participated in the defence or not.

Q. 12. Assuming the facts stated in the 10th interrogatory, and assuming the facts stated in the 11th interrogatory, and assuming that the participation of the defendant, Bigelow, as stated in the 11th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers to the two preceding interrogatories?

[Objected to; admitted; exception.—See pages 947-950.]

A. I have answered the 10th interrogatory that, assuming the facts therein, it constituted a bar against a subsequent action based upon the same matters. As a matter of law, the participation of the defendant, Bigelow, in that defence would not be to add to, or take away from, the strength of the adjudication as a bar to the subsequent action, although it would emphasize the relation between Bigelow and Lewisohn and their joint interest. Its legal effect, however, would not be changed; it would still remain a bar, whether Bigelow participated in the defence or not, and the fact of the knowledge of the plaintiff, while strengthening the legal position, would not, in my opinion, affect the result.

Q. 13. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8098, referred to in the 9th interrogatory, and assuming that the course of the proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8098, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that

said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York,
991 and in said bill of complaint numbered 8098 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8098, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948–950.]

A. It would constitute a bar thereto and be res adjudicata of such question, in my opinion.

Q. 14. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8099, referred to in the 9th interrogatory, and assuming that the course of proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the State of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof; assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8099, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8099 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, and assuming that the bill of complaint in said Circuit Court, and the prayers thereof, relate to one part of an entire transaction comprising said contracts, acts, matters, and transactions, and that the bill of complaint corresponding to the one numbered 8099 in Massachusetts, and the prayers thereof, relate to another part of the same entire transaction, what, under the laws and usages of the state of
992 New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceed-

ing corresponding to the cause numbered 8099, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

A. In my opinion it would constitute a defence thereto and be res adjudicata of the question involved.

Q. 15. Assuming the facts stated in the 13th and 14th interrogatories, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would these additional facts affect your answers, or either of them, to the 13th and 14th interrogatories?

[Objected to; admitted; exception.—See pages 948-950.]

A. It would not affect them at all. My opinion is that the decree of the federal court constitutes a binding adjudication of the questions involved therein, and that the court having jurisdiction of the subject matter and of the person had the power to render a valid judgment, and, so far as the plaintiff is concerned, such judgment became binding upon, and may be invoked in favor of, Bigelow, although not a party thereto, and upon the same facts, in an attempt by the same plaintiff to enforce the same cause of action against him, the decree of the federal court becomes in his favor a binding valid adjudication, whether he participated therein or not. The fact, however, of his participation, adds emphasis to the facts surrounding the transaction, in showing the identity of the subsequent cause of action and the person, but in legal effect, in my opinion, it constitutes a bar, whether he participated in the defence or not.

Q. 16. Assuming the facts stated in the 13th, 14th, and 15th interrogatories, and assuming that the participation of the defendant, Bigelow, as stated in the 15th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers, or either of them, to the 13th, 14th, and 15th interrogatories?

[Objected to; admitted; exceptions.—See pages 949, 950.]

A. My answer to this interrogatory is the same as the answer given to the last interrogatory.

993 Q. 17. If you have not already done so, state your reasons for your answers to interrogatories 6th to 16th, inclusive.

[Objected to; admitted; exception.—See page 950.]

A. I annex hereto an opinion delivered after an examination of this case, as my reasons in the law for the answers which I have given.

Cross-interrogatories.

Without waiving the foregoing objections, but expressly insisting thereon, the plaintiff puts de bene the following cross-interrogatories:—

X 1. Is it a principle of the law of the state of New York that the law decided in a case in the court of last resort in overruling a demurrer becomes the law of the case to be applied when the case is heard upon the facts?

A. It may or may not. A demurrer admits the facts averred in the complaint for the purpose of presenting questions of law to the court, but an answer interposed after the decision of the court which puts in issue the facts averred in the complaint, may change the whole application of the law, and the questions of law decided upon the demurrer may have very little application to the questions presented to the trial court for determination.

X 2. Is it the law of New York that there is no right of exoneration or contribution between defendants jointly and severally liable ex delicto and not ex contractu?

A. It is scarcely possible to answer this question. As to the defendant's liability, ex delicto, a judgment against them is satisfied by the discharge of one, whether it be contribution or not, and there can be but one satisfaction, whether against one or the whole. I do not know of any principle which can compel contribution among wrongdoers. As to the actions upon contract, it may be enforced against one or all severally liable.

X 3. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered that Bigelow might—but for said defence, if any—be under a liability to the plaintiff in the suits against Bigelow?

A. I have assumed that the cause of action against Bigelow was precisely the same cause of action as against Lewisohn, the enforcement of which was sought by the same plaintiff.

X 4. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability that Bigelow might—but for said
994 defence, if any—be under as a liability jointly with Lewisohn?

A. If by this question it is meant to propound what would be the legal rule if Lewisohn and Bigelow were joint debtors, then I have so considered it.

X 5. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability jointly and severally with Lewisohn?

A. Yes.

X 6. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability arising ex delicto?

A. Yes.

X 7. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability ex delicto jointly and severally with Lewisohn?

A. Yes.

X 8. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. It would have been a joint and several liability, in my opinion.

X 9. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability ex delicto with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. It would have been a liability under the determination of the court of Massachusetts, as they occupied a fiduciary relation to the corporation, which they had betrayed. The liability would be ex delicto, if I understand that decision.

X 10. Is it a principle of the law of the state of New York that the liability of joint wrongdoers is joint and several?

A. Yes, it is joint and several.

X 11. Is it sometimes a principle of New York law that estoppel by former adjudication must be mutual?

A. Yes.

X 12. If so, what, if any, are all the occasions of which you have knowledge on which they need not be mutual?

995 A. They are always mutual in a sense; they are always required to be mutual in a sense, and that mutuality is absolute when a common plaintiff seeks to enforce a cause of action against persons jointly and severally liable where he procures service upon one in a court of competent jurisdiction and there litigates the questions upon which liability is to be determined as against both, and is defeated; in such a sense, then, the law recognizes the required mutuality when upon the same facts he attempts to proceed against the other person jointly and severally liable to enforce a recovery upon the same facts.

X 13. Assuming that Bigelow took no part in the Lewisohn suit, in your opinion is the law of New York such that Bigelow would have been estopped in another suit to deny his liability as a matter of law on the same facts by a final decree against Lewisohn in the first suit?

A. Yes, upon the same facts.

X 14. Assuming that Lewisohn's executors took no part in the

suits against Bigelow, in your opinion is the law of New York such that said executors would have been estopped in another suit to deny their liability as a matter of law on the same facts, by a final decree against Bigelow in these suits?

A. Yes, upon the same facts.

X 15. Assuming that Bigelow took part in the defence of the suits against Lewisohn's executors, and that the plaintiff knew this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation and knowledge, operate as an estoppel in favor of Bigelow?

A. I have attached but little importance to Bigelow's participation in the defence. I have attached but little importance to this feature of the case, and, consequently, have not examined authorities, if any exist, bearing thereon.

X 16. Assuming that Bigelow took part in the defence of the suit against Lewisohn's executors, and that the plaintiff did not know this, what, by name and reference, are all the decisions, if any, in New York you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation without plaintiff's knowledge, operate as an estoppel in favor of Bigelow?

A. I have considered this question as a mere incident, and as not controlling upon the question of res adjudicata, and have not sought for authorities bearing thereon.

X 17. Assuming that Bigelow did not take part in the defence of the suit against Lewisohn's executors, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the
996 final decree in favor of Lewisohn's executors may operate as an estoppel in favor of Bigelow?

A. They are cited in the opinion written by me attached to the 17th direct interrogatory, and many other authorities not cited in the opinion; those upon which I relied, however, are therein referred to.

X 18. Have you considered any decisions or language of the courts in New York which may have any tendency to support the view that there is no estoppel in Bigelow's favor growing out of the decree in favor of Lewishon's executors?

A. Yes.

X 19. If so, what, by name and reference, are all of these which you have considered?

A. They are all either referred to in the opinion annexed to the 17th direct interrogatory, or are cited in the opinion in the cases of which the title is given. There are a number of other cases that I have examined, the names of which I do not now recall, and there is no library now present to which I can make reference.

X 20. Have any arguments been submitted or suggested to you by defendant's counsel, or have you thought of any, in support of the view that there was by the law of New York no estoppel in favor

of Bigelow growing out of the decree in favor of Lewisohn's executors?

A. Some authorities were submitted to me from Mr. Lauterbach's office, and some statement of what they held accompanied them, but no extended argument of the question was contained in any brief which I examined. I have made a general examination of the subject, both for and against the proposition.

X 21. If so, what are all of said arguments?

A. The answer to the 19th cross-interrogatory answers this interrogatory.

X 22. What, in your opinion, constitutes privity under the law of New York to a judgment?

A. Where a plaintiff brings an action against one only of two parties jointly and severally liable, and against such person and in such action is defeated in his recovery, and judgment absolute passed against him, and thereafter in another action the same plaintiff, upon the same facts, attempts to enforce the same claim against the other party jointly and severally liable, such last-named party stands in privity to the first judgment.

X 23. In determining whether there was an estoppel in the present case, have you assumed or considered that Bigelow was in privity to the parties of record in the suit against Lewisohn's executors?

A. Yes.

X 24. In considering whether there was an estoppel in this case, have you assumed or considered that Bigelow had any legal interest to defend in the suit against Lewisohn's executors beyond such interest as he might have to secure a favorable precedent?

A. Yes.

X 25. If so, precisely what have you assumed to be said legal interest?

997 A. I have not assumed that Bigelow had any legal interest in the Lewisohn suit during its prosecution. The legal interest which I have assumed that he had was after the judgment was pronounced against the plaintiff upon the facts set up in the complaint.

X 26. Unless Bigelow would have been bound in favor of the plaintiff by estoppel by a decision adverse to Lewisohn's executors, even if Bigelow did not participate in the defence of the suit against them, did Bigelow, in your opinion, have a legal interest to defend in that suit?

A. He had no legal interest to defend in that suit necessarily, because the estoppel of that judgment would not operate to cut him off from any defence which he had, but it did operate to bar the plaintiff therein, after its defeat, from maintaining an action against Bigelow upon those same facts, and upon the same facts in an action against Bigelow the judgment would operate as an estoppel against him; his defence would need to consist in new matter, else he would not have it.

X 27. If so, by precise description, what, in your opinion, was said legal interest?

A. This interrogatory is answered by the answer last preceding.

X 28. In determining whether there was any estoppel in this case, have you assumed that the plaintiff consented to the participation, if any, by Bigelow in the support of the demurrers of Lewisohn's executors?

A. Yes.

X 29. Is it a principle of New York law that if the defendant in one suit sustains merely the character of a co-trespasser with the defendant in another suit by the same plaintiff, the recovery against one defendant is not thereby made competent evidence against the other?

A. I cannot answer this question with any degree of certainty or satisfaction to myself, as I have not examined that question; my impression of the law is that such judgment would not be admissible against the co-trespasser unless the facts upon which the judgment was based in both actions were the same.

X 30. Is it a principle of New York law that the judgment in favor of one of two persons jointly and severally liable for the wrongful conversion of the plaintiff's property is no bar to a subsequent suit against the other, because torts are joint and several?

A. I cannot answer the question at this time.

X 31. Is it a principle of New York law that an adjudication acts as an estoppel only between the parties thereto or those in privity with them, or, in other words, the estoppel must be mutual?

A. Yes.

X 32. Is it a principle of New York law that a judgment in favor of one co-trespasser may not be used by another co-trespasser not a party to it by way of estoppel?

A. Not if the subsequent action is based upon the same facts which defeated the former.

X 33. In considering the question of estoppel, have you as-
998 sumed or considered that Lewisohn's executors were Bigelow's agents in the suit against them which has been dismissed?

A. I did not put my opinion upon the doctrine of agency.

X 34. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were trustees for Bigelow of the stock sought to be recovered in the suit against them which has been dismissed?

A. There might have been such relations.

X 35. Is it a principle of New York law that in an action at law against one or some of several joint tort feasors, the controversy may be determined as between the parties before the court,—i. e., the plaintiff and defendant,—and without prejudice to the rights of others; and the judgment will completely determine the controversy between them, and will not be res adjudicata between the plaintiff and any of the joint tort feasors who is not a defendant and may be sued later?

A. I cannot conceive of such a case upon the same facts unless there be a recovery upon the part of the plaintiff, and I do not now recall of any such authority in the state of New York where such a case as supposed exists.

X 36. Have you stated all your reasons for the opinions expressed

by you, or the statements made by you, in answer to the 6th, 7th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th direct interrogatories?

A. Substantially, yes.

X 37. If not, what are all your reasons for the opinions or statements given by you in answer to each of said interrogatories?

A. I have nothing to answer to this interrogatory than what I have already stated.

X 38. Have you now stated all your reasons for said answers?

A. The answer to this interrogatory is the same as to the last.

X 39. Were you, prior to the taking of your deposition on the foregoing cross-interrogatories, shown them, or any of them, or any copies of any of them, or given any information concerning the substance of them?

A. No.

X 40. Has each of your answers in its final form been given in the language in which it now appears, before you were aware of the substance of any subsequent cross-interrogatory?

A. Yes, except the 8th and 9th cross-interrogatories, which I declined to answer until I could re-examine the case in the 188th Massachusetts, and the answers to those two interrogatories were suspended until I could make such examination. The remainder of the interrogatories were therefore propounded before such examination was made and the 8th and 9th cross-interrogatories answered.

X 41. Have you, since September 22, 1908, discussed in any way with any other person who is named as a witness in the caption to these cross-interrogatories, or with any one on behalf of the defendant, any of the subjects dealt with in the foregoing interrogatories or in your answers thereto?

999

A. No.

EDWARD W. HATCH.

Before me,

PERCIVAL WILDS,
Notary Public.

This is the opinion referred to by witness in his answer to direct interrogatory 17th.

[SEAL.]

PERCIVAL WILDS,
Notary Public.

"COMMONWEALTH OF MASSACHUSETTS:

OLD DOMINION COPPER MINING & SMELTING CO.
v.
ALBERT S. BIGELOW.

"The bill of complaint in this case is in every substantial respect the same as the bill of complaint of this plaintiff against Frederick Lewisohn et al. brought in the United States court held in and for the southern district of New York.

"Therein a demurrer was interposed to the bill of complaint upon the ground, among others, that the complainant failed to state a cause of action and the demurrer was sustained; the case was carried

to the Circuit Court of Appeals, where the judgment was affirmed, and, by writ of certiorari, reached the Supreme Court of the United States, where the decree appealed from was affirmed, and it does not appear that any leave was given to plead over, in consequence of which the judgment became final and absolute; and it was then and there conclusively and distinctly adjudicated that, upon the facts appearing in the complaint, the plaintiff had no cause of action against the defendants therein named.

"The question now arising is whether an action in the state court of the state of New York can be maintained upon the same facts as set forth in the bill of complaint in the federal court. In other words, is the determination of the Supreme Court of the United States res adjudicata of the questions therein involved and binding upon parties and privies thereto as a final and conclusive adjudication?

"In this opinion it is unnecessary to rehearse the facts of the case. For present purposes it is sufficient to say that the defendant Lewisohn in the federal court and the defendant Bigelow in the Massachusetts court stand upon exactly the same footing, so far as liability is concerned, for the things charged against them.

1000 The facts upon which liability could be established, if the law permitted it, are precisely the same in one case as in the other, and whatever defence is possessed by Lewisohn is also possessed by Bigelow. No distinction can be drawn, either of law or fact, as between these two persons. In the case of Lewisohn it has been held that the facts averred, neither at law or in equity, created any liability against him. It would seem to follow that such fact having been established by a binding adjudication, rendered by a court having jurisdiction of the subject matter and of the person, would be conclusive upon the same party plaintiff in that action who proceeded against Bigelow upon the same facts.

"The bills of complaint in each of the above-mentioned cases are quite voluminous. They have been fully set out in the decision of the court of Massachusetts, and in the Supreme Court of the United States, and therefore it is not needful that we rehearse them here.

"The plaintiff in the present case seems to occupy the position of enforcing a plain right of its own and also of enforcing such right as it may represent existing in other persons who would profit by any judgment which it might obtain.

"The defendant, Lewisohn, if he were sued in the state courts of the state of New York, if well advised, would immediately plead in bar judgment rendered in his favor by the federal court, and I am unable to see why such plea would not be effectual in bar of the action.

"In Embury v. Conner, 3 N. Y. 511-522, it was held:

" 'The general rule is, that an allegation on record, upon which issue has been once taken and found, and a judgment has been rendered, is, between the parties taking it and their privies, conclusive, according to the finding thereof, so as to estop the parties respectively from again litigating that fact once so tried and found; whether it is pleaded in bar or given in evidence.'

"See Leavitt v. Wolcott, 95 Id. 212.

"And such judgment, it is said, is 'Res adjudicata and therefore binding upon all the world.'

"Park Hill Co. v. Herriott, 41 App. Div. 324.

"Taking the situation as it exists, it conclusively appears that the relation of Lewisohn and Bigelow is precisely alike, both in
1001 fact and in law, whether there be applied thereto legal or equitable principles. Both were promoters of the same scheme, both were sharers in the ultimate results, both hold the property which they received from the beginning to the end by precisely the same tenure, and obtained the same by the same means.

"Assume that the facts created between the corporation or the subscribers to the stock or to others a fiduciary relation, and, for present purposes, assume that their acts were wrongful; they would then stand in the relation to those to whom they were required to respond as trustees by construction, either in the ordinary relation of trustee and cestui trust or as trustees ex maleficio.

"Brewster v. Hatch, 122 N. Y. 349.

"Matter of Will of O'Hara, 95 Id. 403.

"Under such circumstances how could it be possible to say that the complainant could pursue one trustee and be defeated by a binding solemn adjudication in one tribunal having jurisdiction of the subject matter and of the person, and then in another tribunal or in another action pursue the other trustee upon the same facts and precisely the same grounds and be unaffected by the judgment which had bound his co-trustee? Such, it is believed, is not the law of the state of New York.

"In Castle v. Noyes, 14 N. Y. 329, it was said by one of the most learned judges that the state of New York ever produced, that 'The well settled rule on this subject is that the judgment of a court of competent jurisdiction upon a question directly involved in the suit is conclusive in a second suit between the same parties depending upon the same question although the subject matter of the second action is different.'

"Therein the rule was applied where a prior adjudication had been had between a different party and the defendant, but it was held that as the facts involved in the second action were the same as the first, such party stood in privity to such judgment and consequently it was binding upon him. A long line of authorities support this principle.

"Western R. R. Co. v. Nolan, 49 N. Y. 513.

"Matter of Estate of Strout, 126 N. Y. 201.

"Lawrence v. Schaffer, 19 Misc. 239. (Affirmed 20 App. Div. 80.)

"Applying the doctrine of these cases to the present situation, it would necessarily follow that where trustees exist, no matter
1002 what their character, where liability is to be determined upon a given state of facts, and where the respective litigations relate to the same matter and there could be no change, the result in a determination by one court of competent jurisdiction that no liability exists, must remain the law of that case until reversed,

and is binding upon all parties and privies in connection therewith, and the party who as a co-trustee or particeps in that transaction may avail himself of such judgment is a privity thereto as against the same plaintiff who defeated in one action, seeks to enforce liability in another. I know of no exception to such rule.

"In the present case the plaintiff was defeated in an attempt to enforce a claimed cause of action by a decisive and final adjudication. That adjudication is binding as against it to enforce the same cause of action against another individual upon the same facts no matter in what court such attempt be made. The rule in such cases is not that of stare decisis but of res adjudicata.

EDWARD W. HATCH."

Deposition of Charles F. Brown.

The Deposition of Charles F. Brown, Taken in Behalf of the Defendant, Bigelow, and Filed by his Counsel, Subject to the Objections and Exceptions of Counsel for the Complainant, The Old Dominion Copper Mining & Smelting Company, to be Found at Pages 945-950.

[Commission and notarial certificate omitted.]

Q. 1. State your name, age, and place of residence.

A. My name is Charles F. Brown; I am sixty-four years of age; I reside at Newburgh, Orange county, N. Y.

Q. 2. State your occupation and place of business.

A. I am a lawyer; my office is at No. 60 Wall street in the city of New York.

Q. 3. If, in answer to the preceding interrogatory, you have testified that you are an attorney at law, state when you were admitted to the bar, and in what state or states, and how long you have been engaged in the practice of law in said state or states, and with what firms, if any, you have been or are connected.

A. I was admitted to the bar in the month of May, 1868, in the state of New York. I was a member of the firm of Cassiday & Brown, practising my profession at Newburgh, N. Y., from that date until the 31st day of December, 1882; I have also practised my profession in the city of New York from some time in the month of March, 1897, until the present time. I have been admitted also to practice in the Circuit Court of the United States for the
1003 Southern District of New York, and also in the Supreme Court of the United States at Washington. Since resuming practice in 1897, I have had no connection with any other lawyer or firm.

Q. 4. State what, if any, judicial or other public or official positions you hold or have held.

A. I have held the position of district attorney and county judge of the county of Orange, state of New York, and justice of the Supreme Court of the state of New York, and during a period of four years I was a member of the second division of the Court of Appeals of the state of New York.

Q. 5. State any other matters relating to your experience in your profession and as to your familiarity with the law and usages governing the practice in the state and federal courts in New York, both in law and in equity, and also as to your familiarity with the laws and usages of the state of New York, relating to former adjudication and estoppel by judgment.

A. Well, I am familiar with the law and usages covering the practice in the state of New York and in the federal courts of New York, both in law and equity; I am familiar with the law and usages in the state relating to former adjudications and estoppel by judgment; I have derived this familiarity during my practice as an attorney at law, and also during my service as judge.

Q. 6. Assuming that an action in equity is brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters to recover from him the profits alleged to have been received by him and his associates secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, at a price in excess of the price which they paid for it and of its fair value, and assuming that in this action a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to a similar action, substantially identical with the first and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 945-950.]

A. It would be conclusive, in my judgment, against the plaintiff in the similar action, if that is the term used there, and would bar any recovery by the plaintiff therein.

1004 Q. 7. Assuming that two actions in equity are brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters, to recover from him profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, and assuming that such property is alleged to have been sold, pursuant to said joint plan and conspiracy, in two separate parcels, in each of which both promoters were jointly interested, and that said two actions were brought to recover the respective profits received from the sale of the two parcels, respectively, and assuming that the bills of complaint in the two actions were substantially identical, except as to the particular relief sought, and assuming that certain profits were alleged to have been made by said promoters on each parcel, and assuming that in one of said actions a final decree upon the

merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed, and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to two similar actions, substantially identical in form with those above described and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 946-950.]

A. It would be conclusive against the plaintiff in the similar actions, and bar any recovery by the plaintiff in those actions.

Q. 8. Have you examined a copy of the record in the action of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn in the Circuit Court of the United States for the Southern District of New York, such as is hereto annexed and marked (1), the respective portions of said record being marked A to R, inclusive?

[Objected to; admitted; exception.—See pages 946-950.]

A. Yes.

Q. 9. Have you examined copies of the proceedings in the above-entitled causes, to wit, the two causes of the Old Dominion Copper Mining & Smelting Co. v. Bigelow in the Supreme Judicial Court in Massachusetts, such as are hereto annexed and marked, respectively, (2) and (3)?

A. Yes.

1005 Q. 10. Assuming that there were now pending in the courts of the state of New York proceedings against Albert S. Bigelow, identical in all respects (except as the practice might require formal changes) with the copies of the proceedings referred to in the 9th interrogatory, and assuming that said courts had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record, copies of which are referred to in the 8th interrogatory, were sufficiently pleaded and proven in defence of said proceedings, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in each of these bills of complaint were, respectively, the same persons, and that the contracts, acts, matters, and transactions mentioned in each of these bills of complaint were, respectively, the same contracts, acts, matters, and transactions, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, what would be the effect, under the law and usages of the state of New York, of said decree and record as a defence to said proceedings assumed to be so pending.

[Objected to; admitted; exception.—See pages 946-950.]

A. It would be conclusive against the plaintiff in the actions against Bigelow.

Q. 11. Assuming the facts stated in the 10th interrogatory, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would those additional facts affect your answer to the preceding interrogatory?

[Objected to; admitted; exception.—See pages 946-950.]

A. It wouldn't change my answer; I do not attach any weight or importance to the facts set out in the 11th interrogatory.

Q. 12. Assuming the facts stated in the 10th interrogatory, and assuming the facts stated in the 11th interrogatory, and assuming that the participation of the defendant, Bigelow, as stated in the 11th interrogatory, was with the knowledge of the plaintiff, if at all, would this additional fact affect your answers to the two preceding interrogatories

[Objected to; admitted; exception.—See pages 947-950.]

A. I would answer this interrogatory the same as I answered the last.

1006 Q. 13. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8098, referred to in the 9th interrogatory, and assuming that the course of the proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8098, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8098 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8098, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

A. I think it would be conclusive against the plaintiff, and would bar any recovery by the plaintiff against Bigelow.

Q. 14. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8099, referred to in the 9th interrogatory, and assuming that the course of proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8099, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8099 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, and assuming that the bill of complaint in said Circuit Court, and the prayers, thereof, relate to one part of an entire transaction, comprising said contracts, acts, matters, and transactions, and that the bill of complaint corresponding to the one numbered 8099 in Massachusetts, and the prayers thereof, relate to another part of the same entire transaction, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8099, described in the 9th interrogatory

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[Objected to; admitted; exception.—See pages 948-950.]

A. It would be conclusive against the plaintiff, and a bar to any recovery against Bigelow.

Q. 15. Assuming the facts stated in the 13th and 14th interrogatories, and assuming that the defendant, Bigelow, participated through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would these additional facts affect your answers, or either of them, to the 13th and 14th interrogatories.

[Objected to; admitted; exception.—See pages 948-950.]

A. My answer would be the same; I do not attach any importance or weight to the facts stated in the 15th interrogatory.

Q. 16. Assuming the facts stated in the 13th, 14th and 15th interrogatories, and assuming that the participation of the defend-
1008 ant, Bigelow, as stated in the 15th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers, or either of them, to the 13th, 14th, and 15th interrogatories?

[Objected to; admitted; exception.—See pages 949, 950.]

A. My answer to this interrogatory is the same as that to the preceding one.

Q. 17. If you have not already done so, state your reasons for your answers to interrogatories 6th to 16th, inclusive.

[Objected to; admitted; exception.—See page 950.]

A. The reasons for the opinion I have expressed in answer to the 10th, 13th, and 14th interrogatories are as follows:—

First. As to the effect of the final judgment entered in favor of Lewisohn's executors in the federal court upon the plaintiff's right to prosecute and recover against Bigelow in the action in Massachusetts wherein it is sought to rescind the sale of the parcels of real estate conveyed to the plaintiff by Lewisohn and recover 30,000 shares of stock issued therefor.

In the transaction upon which both of these actions are based Lewisohn was a trustee for Bigelow and his agent. The allegation of the bill is that Bigelow and Lewisohn, or the two in conjunction for their common benefit, acquired the real estate from Keyser for the same consideration paid for the shares of stock, and that said real estate was conveyed by Keyser to Lewisohn for the common benefit of Lewisohn and Bigelow.

The judgment rendered in favor of Lewisohn's executors upon the demurrer is conclusive upon the plaintiff in any action against Bigelow based upon the same facts upon which recovery was sought against said executors.

This is clearly so, in my opinion, on the ground that a judgment in favor of a trustee or agent is binding upon and inures to the benefit of the beneficiary of the trust or the principal.

Second. As to the effect of the judgment upon both actions pending against Bigelow in the courts of Massachusetts.

Bigelow and Lewisohn stood in mutual relationship to the property and transaction which is made the basis of a recovery in all the actions. They were partners in the enterprise of acquiring the property of the Old Dominion Copper Company of Baltimore City and in selling it to the plaintiff. If there was any wrong done in the transaction, Bigelow and Lewisohn were joint wrongdoers.

Such is the allegation of all the bills. The acts are alleged to have been joint acts done pursuant to a conspiracy between Bigelow
1009 and Lewisohn, and to have been wrongful towards the plaintiff and to the future stockholders therein. The specific al-

legation is that they "conspired to carry out said plan and thereby injured said corporation to be formed as aforesaid [meaning the plaintiff] and the future stockholders in said corporation and to secure for themselves as the promoters and organizers thereof, a large secret profit."

Upon these allegations it is plain that as a legal conclusion Lewisohn could not be held innocent and Bigelow guilty, or that a right to recover damages could exist against Bigelow and not against Lewisohn.

Consequently a judgment in favor of Lewisohn, that the fact alleged in the suit in which the demurrer was sustained created no cause of action, is conclusive against the plaintiff in an action against Bigelow.

Otherwise, we would have two rules of law applied to the same transaction, and diverse legal conclusions against the two alleged wrongdoers arising out of the same facts.

The judgment in favor of Lewisohn's executors is conclusive that in the sale of the property to the plaintiff there was nothing illegal and no wrong done to the plaintiff by either Bigelow and Lewisohn, for, considering the mutual relationship of the parties to the transaction and to the property sold to the plaintiff, if wrong had been done by Bigelow, Lewisohn would have been liable therefor and the demurrer would have been overruled.

Bigelow would clearly have had a right to appear and defend the 300,000 share action in the federal court. He was interested in the subject matter and the legality of his own acts was a subject of judicial inquiry.

The rule of res adjudicata is that the deliberate judgment of a competent tribunal having jurisdiction of a subject matter, is, upon the same state of facts, final and conclusive of the question litigated between the parties and those in privity with them, and forever sets the controversy at rest.

In the application of this rule, the term "parties" is not confined to the parties to the action, but includes all parties to the transaction which was the subject of investigation by the tribunal rendering the judgment.

In the interrogatories addressed to me the same facts are made the basis of a right to recover in the 100,000 share suit as in the 30,000 share suit, the variation existing only as to the specific property conveyed to the plaintiff.

Considering the mutual relation-ship of Bigelow and Lewisohn to the transaction and to the property, the judgment of the
1010 federal court in the action upon the demurrer is final and conclusive as to the title to the property—as to the legality of the transaction—and as to the alleged wrongdoing of both Bigelow and Lewisohn.

The decided cases in the New York court sustain the opinions I have expressed, and the reasons I have stated lead me also to answer the 6th and 7th interrogatories as I have done.

Cross-interrogatories:

Without waiving the foregoing objections, but expressly insisting thereon, the plaintiff puts de bene the following cross-interrogatories:—

X 1. Is it a principle of the law of the state of New York that the law decided in a case in the court of last resort in overruling a demurrer becomes the law of the case to be applied when the case is heard upon the facts?

A. If a demurrer is overruled in the state of New York ordinarily the defendant is given leave to answer, and the case is then heard upon the issues that are raised upon the bill of complaint and the answer. If, however, the answer raises no other question of fact, except such as appeared upon the face of the bill of complaint, why, then, the judgment of the Court of Appeals would be conclusive, and would state the law of the case.

X 2. Is it the law of New York that there is no right of exoneration or contribution between defendants jointly and severally liable ex delicto and not ex contractu?

A. As a general proposition I think it is; but there are some exceptions to the rule.

X 3. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered that Bigelow might—but for said defence, if any—be under a liability to the plaintiff in the suits against Bigelow?

A. I have not assumed that he would be under any liability to the plaintiff, but I have assumed that the liability which Bigelow and Lewisohn would sustain to the plaintiff would be the same, and that each would be responsible for each other's acts.

X 4. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability that Bigelow might—but for said defence, if any—be under as a liability jointly with Lewisohn?

A. I have.

X 5. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability jointly and severally with Lewisohn?

A. I have.

X 6. In determining whether or not the decree dismissing
1011 the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability arising ex delicto?

A. Yes.

X 7. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability ex delicto jointly and severally with Lewisohn?

A. Yes.

X 8. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts, as applied to these facts in said suit, there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. In my opinion, upon the allegations of the bill, Lewisohn and Bigelow are jointly and severally liable; each is liable for the other's acts.

X 9. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts, as applied to these facts in said suit, there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability ex delicto with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. In my opinion it would.

X 10. Is it a principle of the law of the state of New York that the liability of joint wrongdoers is joint and several?

A. Yes.

X 11. Is it sometimes a principle of New York law that estoppel by former adjudication must be mutual?

A. Yes.

X 12. If so, what, if any, are all the occasions of which you have knowledge on which they need not be mutual?

A. I don't think of any at the present moment.

X 13. Assuming that Bigelow took no part in the Lewisohn suit, in your opinion is the law of New York such that Bigelow would have been estopped in another suit to deny his liability as a matter of law on the same facts, by a final decree against Lewisohn in the first suit?

A. Yes.

X 14. Assuming that Lewisohn's executors took no part in the suits against Bigelow, in your opinion is the law of New York such that said executors would have been estopped in another suit to deny their liability as a matter of law on the same facts, by a final decree against Bigelow in these suits?

1012 A. I think they would not; I think the judgment would not have been conclusive upon them in the sense of its being a bar or estoppel against them, but I think the court would undoubtedly have followed the law that was decided in the Bigelow case, assuming the two suits to have been in the same jurisdiction.

X 15. Assuming that Bigelow took part in the defence of the suits against Lewisohn's executors, and that the plaintiff knew this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation and knowledge, operate as an estoppel in favor of Bigelow?

A. I don't think the decree in favor of Lewisohn's executors operates as an estoppel against plaintiff, because Bigelow appeared and took part in the defence; I do not rest my opinion upon any such ground, and I have so stated in my answers to the direct interrogatories.

X 16. Assuming that Bigelow took part in the defence of the suit against Lewisohn's executors, and that the plaintiff did not know this, what, by name and reference, are all the decisions, if any, in NewYork you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation without plaintiff's knowledge, operate as an estoppel in favor of Bigelow?

A. My answer to the preceding interrogatory answers this interrogatory.

X 17. Assuming that Bigelow did not take part in the defence of the suit against Lewisohn's executors, what, by name and reference, are all the decisions if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may operate as an estoppel in favor of Bigelow?

A. Well, I have given no special examination of authorities upon this subject, but I think the case of Castle v. Noyes, 14 N. Y. 329, is an authority which sustains my opinion; also the cases of—

Tyng v. Clarke, 9 Hun, 269.
In the Matter of Straut, 126 N. Y. 201.
King v. Barnes, 109 N. Y. 267.
People v. Stephens, 51 How. Pr. 235; affirmed 71 N. Y. 527.

X 18. Have you considered any decisions or language of the courts in New York which may have any tendency to support the view that there is no estoppel in Bigelow's favor growing out of the decrees in favor of Lewisohn's executors?

A. I have not.

1913 X 19. If so, what, by name and reference, are all of these which you have considered?

A. I have not.

X 20. Have any arguments been submitted or suggested to you by defendant's counsel, or have you thought of any, in support of the view that there was by the law of New York no estoppel in favor of Bigelow growing out of the decree in favor of Lewisohn's executors?

A. No.

X 21. If so, what are all of said arguments?

A. No.

X 22. What, in your opinion, constitutes privity under the law of New York to a judgment?

A. Succession in title to the property involved; succession in blood, or succession in contract. As, for instance, a judgment determining the title to a piece of land would be conclusive as to all purchasers subsequent to the judgment; subsequent purchasers would be said to be in privity with the original parties.

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X 23. In determining whether there was an estoppel in the present case, have you assumed or considered that Bigelow was in privity to the parties of record in the suit against Lewisohn's executors?

A. I do not think, in the strict sense of the term, that Bigelow can be said to be in privity with Lewisohn's executors; I put my opinion upon the ground that they are parties to the same transaction and that the same liability attaches to one as attaches to the other upon the facts that are alleged in the several bills of complaint.

X 24. In considering whether there was any estoppel in this case, have you assumed or considered that Bigelow had any legal interest to defend in the suit against Lewisohn's executors beyond such interest as he might have to secure a favorable precedent?

A. I think he had a legal interest to defend, inasmuch as the charge made in the bill against Lewisohn involved his acts, and involved the title to the property which he purchased and conveyed, or caused to be conveyed, to the plaintiff.

X 25. If so, precisely what have you assumed to be said legal interest?

A. I have answered this interrogatory in my answer to the preceding interrogatory.

X 26. Unless Bigelow would have been bound in favor of the plaintiff by estoppel by a decision adverse to Lewisohn's executors, even if Bigelow did not participate in the defence of the suit against them, did Bigelow, in your opinion, have a legal interest to defend in that suit?

A. I think he had a right to appear and defend that suit, one which the courts of the state of New York would recognize and would have permitted him to intervene and serve an answer and defend. I have already stated that I do not think that a judgment in favor of the plaintiff against Lewisohn's executors in another action to which Bigelow was not a party could be said to be conclusive against him or estop him from denying the facts upon which the recovery was sought, but I also am of opinion that the judgment would have been strong evidence of his liability, and the law involved in the judgment would probably have been followed by the court in an action against Bigelow.

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X 27. If so, by precise description, what, in your opinion, was said legal interest?

A. I have already answered this question in response to the 24th, 25th, and 26th cross-interrogatories.

X 28. In determining whether there was any estoppel in this case, have you assumed that the plaintiff consented to the participation, if any, by Bigelow in the support of the demurrers of Lewisohn's executors?

A. I do not attach any weight to the fact that the plaintiff consented to the participation by Bigelow in support of the demurrer of Lewisohn's executors.

X 29. Is it a principle of New York law that if the defendant in one suit sustains merely the character of a co-trespasser with the defendant in another suit by the same plaintiff, the recovery against

one defendant is not thereby made competent evidence against the other?

A. I think the recovery against one defendant is not competent evidence against the other in the case stated.

X 30. Is it a principle of New York law that the judgment in favor of one of two persons jointly and severally liable for the wrongful conversion of the plaintiff's property is no bar to a subsequent suit against the other because torts are joint and several?

A. A judgment in favor of one of two persons who are alleged to be jointly and severally liable for a wrongful conversion of plaintiff's property is a bar to a subsequent suit against the other upon the same state of facts alleged in the suit against the defendant in whose favor the judgment was rendered.

X 31. Is it a principle of New York law that an adjudication acts as an estoppel only between the parties thereto or those in privity with them, or, in other words, the estoppel must be mutual?

A. It is a principle that the judgment operates as an estoppel between those who are parties and those who are in privity with them; ordinarily estoppel must be mutual.

X 32. Is it a principle of New York law that a judgment in favor of one co-trespasser may not be used by another co-trespasser not a party to it, by way of estoppel?

A. No.

X 33. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were Bigelow's agents in the suit against them which has been dismissed?

A. No; I have given no consideration to that fact.

X 34. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were trustees for
1015 Bigelow of the stock sought to be recovered in the suit against them which has been dismissed?

A. No; I have not considered the question of agency or trusteeship further than I have stated in my answer to the 17th direct interrogatory.

X 35. Is it a principle of New York law that in an action at law against one or some of several joint tort feasors, the controversy may be determined as between the parties before the court,—i. e., the plaintiff and defendant,—and without prejudice to the rights of others; and the judgment will completely determine the controversy between them, and will not be res adjudicata between the plaintiff and any of the joint tort feasors who is not a defendant and may be sued later?

A. No.

X 36. Have you stated all your reasons for the opinions expressed by you, or the statements made by you, in answer to the 6th, 7th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th direct interrogatories?

A. Yes.

X 37. If not what are all your reasons for the opinions or statements given by you in answer to each of said interrogatories?

A. I refer to my answer to the preceding interrogatory.

X 38. Have you now stated all your reasons for said answers?

A. Yes.

X 39. Were you, prior to the taking of your deposition on the foregoing cross-interrogatories, shown them, or any of them, or any copies of any of them, or given any information concerning the substance of them?

A. I was not.

X 40. Has each of your answers in its final form been given in the language in which it now appears, before you were aware of the substance of any subsequent cross-interrogatory?

A. Yes.

X 41. Have you, since September 22, 1908, discussed in any way with any other person who is named as a witness in the caption to these cross-interrogatories, or with any one on behalf of the defendant, any of the subjects dealt with in the foregoing interrogatories, or in your answers thereto?

A. No.

CHARLES F. BROWN.

Before me, this 28th day of September, A. D. 1908.

[SEAL.] H. M. HEWSON,
Notary Public, Westchester County.

Certificate filed in New York County.

Deposition of Martin L. Stover.

The Deposition of Martin L. Stover, Taken in Behalf of the Defendant Bigelow, and Filed by his Counsel, Subject to the Objections and Exceptions of Counsel for the Complainant
1016 the Old Dominion Copper Mining & Smelting Company, to be Found at Pages 945-950.

[Commission and notarial certificate omitted.]

Q. 1. State your name, age, and place of residence.

A. My name is Martin L. Stover; I am sixty-two years of age, and I reside in New York city.

Q. 2. State your occupation and place of business.

A. I am an attorney and counsellor at law, and do business at No. 60 Wall street, New York city.

Q. 3. If, in answer to the preceding interrogatory, you have testified that you are an attorney at law, state when you were admitted to the bar, and in what state or states, and how long you have been engaged in the practice of law in said state or states, and with what firms, if any, you have been or are connected?

A. I was admitted to the bar in 1870 at Albany in the state of New York, and have practised law from that time until the present, except during the fourteen years when I was on the bench of the Supreme Court of the state of New York. I am now connected with the firm of Stover, Hull & Freeman.

Q. 4. State what, if any, judicial or other public or official positions you hold or have held.

A. I have been a member of the legislature of the state of New York, and was, for fourteen years, from 1892 to 1906, a justice of the Supreme Court of the state of New York.

Q. 5. State any other matters relating to your experience in your profession and as to your familiarity with the law and usages governing the practice in the state and federal courts in New York, both in law and in equity, and also as to your familiarity with the laws and usages of the state of New York relating to former adjudication and estoppel by judgment.

A. During my term as justice of the court, I sat at trial terms and for two years in the appellate division of the fourth department of the state of New York, and had such experience as would come from the position which I held.

Q. 6. Assuming that an action in equity is brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters, to recover from him the profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, at a price in excess of the price which they paid for it and of its fair value, and assuming that in this action a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to a similar action, substantially identical with the first and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

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[Objected to; admitted; exception.—See pages 945-950.]

A. My opinion is that it would be a complete bar.

Q. 7. Assuming that two actions in equity are brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters, to recover from him profits alleged to have been received by him and his associates secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, and assuming that such property is alleged to have been sold, pursuant to said joint plan and conspiracy, in two separate parcels, in each of which both promoters were jointly interested, and that said two actions were brought to recover the respective profits received from the sale of the two parcels, respectively, and assuming that the bills of complaint in the two actions were substantially identical except as to the particular relief sought, and assuming that certain profits were alleged to have

been made by said promoters on each parcel, and assuming that in one of said actions a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence of two similar actions, substantially identical in form with those above described and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to, admitted; exception.—See pages 946-950.]

A. I think the latter action would be barred by the judgment in the former action.

Q. 8. Have you examined a copy of the record in the action of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn in
1018 the Circuit Court of the United States for the Southern District of New York, such as is hereto annexed and marked (1), the respective portions of said record being marked A to R, inclusive?

[Objected to; admitted; exception.—See pages 946-950.]

A. I have.

Q. 9. Have you examined copies of the proceedings in the above-entitled causes, to-wit, the two causes of the Old Dominion Copper Mining & Smelting Co. v. Bigelow, in the Supreme Judicial Court in Massachusetts, such as are hereto annexed and marked, respectively, (2) and (3)?

A. I have.

Q. 10. Assuming that there were now pending in the courts of the state of New York proceedings against Albert S. Bigelow, identical in all respects (except as the practice might require formal changes) with the copies of the proceedings referred to in the 9th interrogatory, and assuming that said courts had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record, copies of which are referred to in the 8th interrogatory, were sufficiently pleaded and proven and in defence of said proceedings, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in each of these bills of complaint were, respectively, the same persons, and that the contracts, acts, matters, and transactions mentioned in each of these bills of complaint were, respectively, the same contracts, acts, matters, and transactions, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, what would be the effect, under the law and usages of the state of New York, of said decree and record as a defence to said proceedings assumed to be so pending?

[Objected to; admitted; exception.—See pages 946-950.]

A. In my judgment it would be a complete defence and bar to the maintenance of the latter action.

Q. 11. Assuming the facts stated in the 10th interrogatory, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would those additional facts affect your answer to the preceding interrogatory?

[Objected to; admitted; exception.—See pages 946-950.]

1019 A. I should regard it as a circumstance to be considered in the matter, and of some weight, and particularly if such participation and expenditure was done with the knowledge of the complainant in the action.

Q. 12. Assuming the facts stated in the 10th interrogatory, and assuming the facts stated in the 11th interrogatory, and assuming that the participation of the defendant, Bigelow, as stated in the 11th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers to the two preceding interrogatories?

[Objected to; admitted; exception.—See pages 947-950.]

A. As I have stated in my former answer, I think that is a circumstance that may properly be considered in judging the situation, but I should not, however, consider it a controlling consideration.

Q. 13. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8098, referred to in the 9th interrogatory, and assuming that the course of the proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8098, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York, and in said bill of complaint numbered 8098 in Massachusetts, were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in

the proceeding corresponding to the cause numbered 8098, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

1020 A. I think it would be a complete defence.

Q. 14. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8099, referred to in the 9th interrogatory, and assuming that the course of proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8099, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8099 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, and assuming that the bill of complaint in said Circuit Court and the prayers thereof relate to one part of an entire transaction comprising said contracts, acts, matters, and transactions, and that the bill of complaint corresponding to the one numbered 8099 in Massachusetts and the prayers thereof relate to another part of the same entire transaction, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8099, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

A. I think it would be a complete defence.

Q. 15. Assuming the facts stated in the 13th and 14th interrogatories, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence

1021 thereof on appeal and on certiorari, how, if at all, would these additional facts affect your answers, or either of them, to the 13th and 14th interrogatories?

[Objected to; admitted; exception.—See pages 948-950.]

A. I should say that it was a circumstance to be considered.

Q. 16. Assuming the facts stated in the 13th, 14th, and 15th interrogatories, and assuming that the participation of the defendant, Bigelow, as stated in the 15th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers, or either of them, to the 13th, 14th, and 15th interrogatories?

[Objected to; admitted; exception.—See pages 949, 950.]

A. I should not consider it a controlling circumstance, but I should say that other circumstances of the case would make a complete defence even without such a consideration as that—in other words, I should say that, while the expenditure of money and participation in the expense was a matter proper to be considered, it is not of such controlling effect as, of itself, to determine the question either one way or the other.

Q. 17. If you have not already done so, state your reasons for your answers to Ints. 6th to 16th, inclusive.

[Objected to; admitted; exception.—See page 950.]

A. I can briefly state the reason in this way: that while there are many rules and restrictions, distinguished according to the circumstances of each particular case, in which a former adjudication may be pleaded as a bar, yet, in my judgment, the underlying principle really governing former adjudications is, primarily, that the party seeking to enforce a remedy or to right a wrong shall have a full opportunity to present his case to the court and to have it properly passed upon, or, as is generally expressed, that he shall have his day in court, and having had this opportunity, and having once presented this matter to the court, that question, so far as regards him, is settled, and the judgment is available against him by any one who stands in the like position, as the defendants in the suit which has been heard. This last proposition, the one of privity, is, of course, subject to many distinctions, but the general rule governing that is that all persons in privity with the successful party in the first litigation are entitled to the protection of the judgment. So much for the general proposition involved. As to the particular cases here involved, it seems to me that it would be impossible for the complainant to present a case against one of the defendants, that is, either Bigelow or Lewisohn, without involving the other to
1022 the same extent and in the same manner; in which case, in order to establish his cause of action against either of the defendants, he must necessarily involve the other, and that the action of each is a necessary part of the cause of action against either. A judgment which determines that the action of both of these defendants does not constitute a cause of action in favor of the plaintiff against either of them, necessarily determines that no cause of action exists, and the plaintiff, having been heard, is bound thereafter as to any party acting with or under the direction of the defendant against whom the action was brought.

These are some of the controlling features of the case, but are not by any means an exhaustive statement of the principles and reasoning governing the matters involved.

Cross-interrogatories.

Without waiving the foregoing objections, but expressly insisting thereon, the plaintiff puts de bene the following cross-interrogatories:—

X 1. Is it a principle of the law of the state of New York that the law decided in a case in the court of last resort in overruling a demurrer becomes the law of the case to be applied when the case is heard upon the facts?

A. A final judgment upon a demurrer is an adjudication that the facts are as alleged, and, assuming those facts to be true, no cause of action exists.

X 2. Is it the law of New York that there is no right of exoneration or contribution between defendants jointly and severally liable ex delicto and not ex contractu?

A. Generally, that is the rule.

X 3. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered that Bigelow might—but for said defence, if any—be under a liability to the plaintiff in the suits against Bigelow?

A. If I understand the question aright, there could be no such condition as a judgment that there is no cause of action, and yet that the same state of facts might constitute a cause of action. If they do not constitute a cause of action against Lewisohn, they would not constitute a cause of action against Bigelow, and that the same questions presented in the same manner against Bigelow would result in the same judgment as against Lewisohn.

X 4. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability that Bigelow might—but for said defence, if any—be under as a liability jointly with Lewisohn?

A. If I understand the question, there might have been a joint liability, but the question as to the joint liability is not necessarily controlling.

1023 X 5. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability jointly and severally with Lewisohn?

A. I have considered such features of the case.

X 6. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability arising ex delicto?

A. I have considered all of the facts, and have considered that

the pleader may have undertaken to allege a cause of action ex delicto.

X 7. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability ex delicto jointly and severally with Lewisohn?

A. I have considered that the pleader may have intended to set forth a cause of action ex delicto against Lewisohn and Bigelow, jointly and severally.

X 8. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. I have not the Massachusetts case at hand, and would not like to hazard an opinion without an examination of the case.

X 9. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability ex delicto with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. I have not the Massachusetts case at hand, and am not able to give an opinion upon the case without an examination for that purpose.

X 10. Is it a principle of the law of the state of New York that the liability of joint wrongdoers is joint and several?

A. It is.

X 11. Is it sometimes a principle of New York law that estoppel by former adjudication must be mutual?

A. I do not understand it so.

1024 X 12. If so, what, if any, are all the occasions of which you have knowledge on which they need not be mutual?

A. I should say they need not be mutual in any case where the complainant has been fully heard and the party who is in any relation of privity towards the successful litigant is sought to be held for the same cause of action which has once been adjudicated in favor of the party under whom or through whom privity is claimed, and this notwithstanding that the party seeking to avail himself of the prior adjudication was not a party to the record and not even bound by its judgment.

X 13. Assuming that Bigelow took no part in the Lewisohn suit, in your opinion is the law of New York such that Bigelow would have been estopped in another suit to deny his liability as a matter

of law on the same facts, by a final decree against Lewisohn in the first suit?

A. It is my opinion that he would be so estopped.

X 14. Assuming that Lewisohn's executors took no part in the suits against Bigelow, in your opinion is the law of New York such that said exectuors would have been estopped in another suit to deny their liability as a matter of law on the same facts, by a final decree against Bigelow in these suits?

A. It is my opinion that they would be estopped. I regard the fact of Bigelow's participation in that former action as a circumstance merely, and not controlling.

X 15. Assuming that Bigelow took part in the defence of the suit against Lewisohn's exectuors, and that the plaintiff knew this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation and knowledge, operate as an estoppel in favor of Bigelow?

A. There are authorities of this character. I have not the authorities at hand, but would be glad to furnish them to counsel if counsel would give me the opportunity to do so.

X 16. Assuming that Bigelow took part in the defence of the suit against Lewisohn's exectuors, and that the plaintiff did not know this, what, by name and reference, are all the decisions, if any, in New York you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation without plaintiff's knowedge, operate as an estoppel in favor of Bigelow?

A. I have not the authorities at hand that I have considered, nor am I able at this time to give them. I have examined the questions, but I have not the memorandum of all the authorities that I consulted and am not able at this time, without some examination, to give the authorities that I did consult.

X 17. Assuming that Bigelow did not take part in the de-
1025 fence of the suit against Lewisohn's executors, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may operate as an estoppel in favor of Bigelow?

A. My answer to this cross-interrogatory is the same as to the 16th cross-interrogatory. While I have not a memorandum of the authorities I have examined, I shall be glad to furnish counsel with such authorities if counsel desire it, upon having an opportunity to obtain them.

X 18. Have you considered any decisions or language of the courts in New York which may have any tendency to support the view that there is no estoppel in Bigelow's favor growing out of the decree in favor of Lewisohn's exectuors?

A. The best answer I can make to this question is that during my examination of the question as to the effect of a former adjudication, I examined a great number of authorities, some tending to

the view of the privities required, others to mutuality, and a great number of cases decided upon varying circumstances, each case being, of course, dependent upon the particular circumstances surrounding it. It would be next to impossible, within the limits of an examination of this character, to undertake a digest or synopsis of the cases examined.

X 19. If so, what, by name and reference, are all of these which you have considered?

A. My answer is the same as to the last cross-interrogatory.

X 20. Have any arguments been submitted or suggested to you by defendant's counsel, or have you thought of any, in supoprt of the view that there was, by the law of New York, no estoppel in favor of Bigelow growing out of the decree in favor of Lewisohn's executors?

A. I have received no such argument from the defendant's counsel: I have given the facts of this case consideration and have examined the authorities, and in the course of such examination and consideration, I have necessarily considered that there were differences of opinion with reference to the situation, and have given such considerations as occurred to me, or have been suggested by any examination, such weight as I have deemed them entitled to.

X 21. If so, what are all of said arguments?

A. It would be impossible for me now to recall the various circumstances surrounding the cases that I examined or the suggestions that occurred to me during the examination.

X 22. What, in your opinion, constitutes privity under the law of New York to a judgment?

A. In my judgment, privity, within the rule relating to the conclusiveness of judgment, means the relation to the rights of property and participation in interest in respect to any action, or thing, or connection existing, or arising from an interest in which the parties are interested or affected alike.

1026 X 23. In determining whether there was an estoppel in the present case, have you assumed or considered that Bigelow was in privity to the parties of record in the suit against Lewisohn's exectuors?

A. I have considered that Bigelow was in privity within the rule with the parties of record.

X 24. In considering whether there was any estoppel in this case, have you assumed or considered that Bigelow had any legal interest to defend in the suit against Lewisohn's executors beyond such interest as he might have to secure a favorable precedent?

A. I think that he had the same interest that parties affected alike in a litigation or in the result of a transaction might have, and that his interest in the Lewisohn suit was such that he might have a legal right to intervene, and if the word "legal" in the question is limited to the technical legal result in the action, I should say that his legal interest in the particular action would affect the procurement of a favorable decision.

X 25. If so, precisely what have you assumed to be said legal interest?

A. I have, perhaps, anticipated, by my former answer, the answer to this question. He had a legal interest to protect the enterprise which he was jointly charged with being interested in with Lewisohn, and his legal interest in his cause of action, or upon the cause of action upon which the action was based, was such, I think, as would entitle him to have become a party to the record.

X 26. Unless Bigelow would have been bound in favor of the plaintiff by estoppel by a decision adverse to Lewisohn's executors even if Bigelow did not participate in the defence of a suit against them, did Bigelow, in your opinion, have a legal interest to defend in that suit?

A. I think he may have had a legal interest that he might have defended; whether he was bound to defend or not might be another question.

X 27. If so, by precise description, what, in your opinion, was said legal interest?

A. The legal interest that he had was that he was sought to be charged jointly with Lewisohn; that the situation was such that a hostile adjudication might have embarrassed him and affected his interest.

X 28. In determining whether there was an estoppel in this case, have you assumed that the plaintiff consented to the participation, if any, by Bigelow in the support of the demurrer of Lewisohn's executors?

A. I do not consider the defendant, Bigelow's participation at all controlling, whether consented to or not, as in my judgment the estoppel is complete without such participation.

X 29. Is it a principle of New York law that if the defendant in one suit sustains merely the character of a co-trespasser with
1027 the defendant in another suit by the same plaintiff, the recovery against one defendant is not thereby made competent evidence against the other?

A. The recovery against one co-trespasser is not competent evidence against another.

X 30. Is it a principle of New York law that the judgment in favor of one of two persons jointly and severally liable for the wrongful conversion of the plaintiff's property is no bar to a subsequent suit against the other because torts are joint and several?

A. The general rule is that a judgment against one joint tort feasor is not a bar to an action against another joint tort feasor.

X 31. Is it a principle of New York law that an adjudication acts as an estoppel only between the parties thereto or those in privity with them, or, in other words, the estoppel must be mutual?

A. It need not necessarily be mutual.

X 32. Is it a principle of New York law that a judgment in favor of one co-trespasser may not be used by another co-trespasser not a party to it, by way of estoppel?

A. That is not the inexorable rule.

X 33. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were Bigelow's agents in the suit against them which has been dismissed?

A. I have not considered them as agents.

X 34. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were trustees for Bigelow of the stock sought to be recovered in the suit against them which has been dismissed?

A. I have taken the view that whether Lewisohn was considered a trustee of Bigelow or not in his acts, or whether they were simply considered as acting jointly in a transaction each for the other, the conclusion, to my mind, would be the same.

X 35. Is it a principle of New York law that in an action at law against one or some of several joint tort feasors, the controversy may be determined as between the parties before the court,—i. e., the plaintiff and defendant,—and without prejudice to the rights of others; and the judgment will completely determine the controversy between them and will not be res adjudicata between the plaintiff and any of the joint tort feasors who is not a defendant and may be sued later?

A. The question involves various situations. The courts of New York state dispose of all the rights of the parties when they are before them and adjust the equities between them, and a judgment entered thereon may or may not be conclusive as to other parties, depending upon questions of privity and various other considerations that are apt to be raised in questions involving prior adjudication.

X 36. Have you stated all your reasons for the opinions expressed by you, or the statements made by you, in answer to the 6th, 7th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th direct interrogatories?

1028

A. I believe I have stated that I have not undertaken to state all of the considerations that enter into them, as it is hardly practicable within the limits of this examination.

X 37. If not, what are all your reasons for the opinions or statements given by you in answer to each of said interrogatories?

A. I will answer the question in a general way. In addition to what I have already stated, on direct examination, as to the reasons which have led me to the conclusion that the transactions are identical, there can be no liability of one party without the liability of the other, if it be said that the parties are acting, as the complainant alleges, in a conspiracy. There could hardly be a conspiracy without the joint assent of the two parties; and that, if the state of facts which the New York courts have assumed to be true, and have stated did not constitute a cause of action in any aspect of the case, or upon any construction which could be put upon the bill, it must bar that so far as the plaintiff and Lewisohn are concerned. In no court in the country, therefore, could Lewisohn be called to account for the transactions set up in that action. Second and again, as I stated heretofore in this examination, that, in my judgment, there was that privity with Lewisohn and Bigelow, such independent relation and such joint interest, joint duty, if any, towards the complainant, and altogether such a joint relation, as necessarily constituted them privy within the legal definition. That the complainant recognizes this situation by alleging the fact that

the residence of the two parties was in different jurisdictions, as by way of excuse in making each a party to the bill against the other; that the transaction was such that brought it within the rule laid down in Portland Gold Mining Co. v. Stratton's Independence, 158 Fed. Rep. 63, in which this rule is stated:

"Thus it is settled by repeated decisions that the general rule that one may not have the benefit of a judgment as an estoppel unless he would have been bound by it had it been the other way, is subject to recognized exceptions, one of which is that in actions of tort such as trespass, if the defendant's responsibility is necessarily dependent upon the culpability of another who was the immediate actor, and who in an action against him by the same plaintiff for the same tort, has been adjudged not culpable, the defendant may have the benefit of that judgment as an estoppel, even though he would not have been bound by it had it been the other way. And we think it could not well be otherwise, for when the plaintiff has litigated directly with the immediate actor, the claim that he was culpable, and upon the full opportunity thus afforded for its legal investiga-
tion, the claim has been adjudged against the plaintiff, there
1029 is manifest propriety and no injustice in holding that he is thereby concluded from making it the basis of a right of recovery from another who is not otherwise responsible."

In that case the plaintiff and the defendant owned adjoining mines. Defendant leased its properties to one Burbridge. Plaintiff claimed that Burbridge took ores from the property of the plaintiff. In an action brought by the plaintiff against Burbridge and his associates there was a verdict in favor of the defendants and against the plaintiff. A subsequent action was brought against the defendant, Stratton's Independence; and it was claimed that they were the recipients of the ore, and had ratified the acts of Burbridge and his associates. The court there held that the former action was a bar.

And in the Emma Silver Mining Company's case, reported in 7 Fed. Rep. 401, where an agent was sued, after the termination of his agency, and upon the trial of the merits the agency was determined against the plaintiff, the principal, though not a party to the suit, was held to be entitled to avail himself of the judgment as a bar when he was sued by the same plaintiff on the same cause of action."

There are a great many adjudications upon the subject of former adjudications, rights of privies, and other questions that naturally arise, and each case must be judged upon the facts and circumstances surrounding it. In my judgment, as I have stated during the course of this examination, the primal requisite is that the plaintiff shall have one opportunity to be heard in court and fairly test the question as to the liability of the defendant, and that the object of the rule was to prevent successive litigation of the same question, either between the same parties or parties who ought, in all fairness, to be entitled to the benefit of the judgment; that when the plaintiff in this action has had an adjudication that, under no construction which could be put upon his pleading, had he a cause of action, it was an

adjudication upon those facts which bound him and all parties connected therewith, at least such as he himself had alleged in his bill of complaint was necessarily connected therewith. It has seemed to me that in the case in hand the adjudication of the New York court was necessarily an adjudication that there was no cause of action existing in favor of the plaintiff. As the only parties against whom he claimed a cause of action to exist were Bigelow and Lewisohn, and the only cause of action which he claimed against them is the one set forth in each of the bills of complaint, the bills being identical, and in my judgment, under this state of facts, I consider the judgment a bar. These are the principal reasons for my opinion as stated above.

X 38. Have you now stated all your reasons for said answers?

1030 A. I think I have stated substantially, at one time or another during my examination, my reasons for my opinion. I have not cited precedents, as it is not practicable for me to do so on this examination.

X 39. Were you, prior to the taking of your deposition on the foregoing cross-interrogatories, shown them, or any of them, or any copies of any of them, or given any information concerning the substance of them?

A. I have not had any information of the interrogatories until they were read to me during this examination, and I have only known of them as they have been read to me consecutively during the examination.

X 40. Has each of your answers in its final form been given in the language in which it now appears, before you were aware of the substance of any subsequent cross-interrogatory?

A. I have answered each cross-interrogatory before knowing anything about the following ones, and I believe my answers are in the same form except necessary verbal corrections.

X 41. Have you, since September 22, 1908, discussed in any way with any other person who is named as a witness in the caption to these cross-interrogatories, or with any one on behalf of the defendant, any of the subjects dealt with in the foregoing interrogatories or in your answers thereto?

A. I have had no discussion whatever with either of the parties named.

M. L. STOVER.

Before me,

PERCIVAL WILDS,
Notary Public.

[NOTARIAL SEAL.]

Deposition of John B. Stanchfield.

The Deposition of John B. Stanchfield, Taken in Behalf of the Defendant Bigelow and Filed by His Counsel Subject to the Objections and Exceptions of Counsel for the Complainant, The Old Dominion Copper Mining & Smelting Company, to be Found at Pages 945-950.

[Commission and notarial certificate omitted.]

Q. 1. State your name, age, and place of residence.

A. John B. Stanchfield; age, fifty-three; technical residence, Elmira, N. Y., actual residence, the Hoffman House, New York city.

Q. 2. State your occupation and place of business.

1031 A. My profession is that of a lawyer, and I have an office for the transaction of business at Elmira, N. Y., and at No. 5 Nassau street, New York city.

Q. 3. If, in answer to the preceding interrogatory, you have testified that you are an attorney at law, state when you were admitted to the bar, and in what state or states, and how long you have been engaged in the practice of law in said state or states, and with what firms, if any, you have been or are connected?

A. According to my best recollection, I was admitted to the bar of New York in the fall of 1879; I have been actively engaged in the practice of law since that date in the state of New York. From 1877 to 1882 I was in the office, at Elmira, N. Y., of David B. Hill as clerk, and subsequently, during portion of that time, as partner engaged in the practice of the law under the firm name of Hill & Stanchfield; afterwards I became, and am now, at Elmira, N. Y., the head of the firm of Reynolds, Stanchfield & Collin, and am engaged in the practice of the law at New York in my individual name, with no partnership relations.

Q. 4. State what, if any, judicial or other public or official positions you hold or have held.

A. I have never held any judicial place. From about the time of my admission to the bar, and for six years thereafter, I was the prosecuting officer of Chemung county. I have filled different political offices since that time.

Q. 5. State any other matters relating to your experience in your profession, and as to your familiarity with the law and usages governing the practice in the state and federal courts in New York, both in law and in equity, and also as to your familiarity with the laws and usages of the state of New York relating to former adjudication and estoppel by judgment.

A. I have had occasion, during my professional career, to examine the law of New York in regard to the effect of former judgments and the circumstances under which the doctrine of estoppel and res adjudicata can be availed of by litigants.

Q. 6. Assuming that an action in equity is brought in the federal court for the southern district of New York by a corporation against

one of two persons alleged to have been jointly its promoters to recover from him the profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, at a price in excess of the price which they paid for it and of its fair value, and assuming that in this action a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor
1032 of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence of a similar action, substantially identical with the first and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 945-950.]

A. In my opinion it would be held to be a bar on the ground that the controversy raised by the second suit had already been judicially determined in the first suit.

Q. 7. Assuming that two actions in equity are brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters to recover from him profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, and assuming that such property is alleged to have been sold, pursuant to said joint plan and conspiracy, in two separate parcels, in each of which both promoters were jointly interested, and that said two actions were brought to recover the respective profits received from the sale of the two parcels, respectively, and assuming that the bills of complaint in the two actions were substantially identical, except as to the particular relief sought, and assuming that certain profits were alleged to have been made by said promoters on each parcel, and assuming that in one of said actions a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to two similar actions, substantially identical in form with those above described and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted, exception.—See Pages 946-950.]

A. In my opinion the decree would be a bar to the two similar actions, for the same reasons stated in my answer to the 6th interrogatory?

Q. 8. Have you examined a copy of the record in the action of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn in the Circuit Court of the United States for the Southern District of
1033 New York, such as is hereto annexed and marked (1), the respective portions of said record being marked A to K, inclusive?

[Objected to; admitted; exception.—See pages 946-950.]

A. Yes.

Q. 9. Have you examined copies of the proceedings in the above-entitled causes, to wit, the two causes of the Old Dominion Copper Mining & Smelting Co. v. Bigelow in the Supreme Judicial Court in Massachusetts, such as are hereto annexed and marked, respectively, (2) and (3)?

A. Yes.

Q. 10. Assuming that there were now pending in the courts of the state of New York proceedings against Albert S. Bigelow, identical in all respects (except as the practice might require formal changes) with the copies of the proceedings referred to in the 9th interrogatory, and assuming that said courts had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record, copies of which are referred to in the 8th interrogatory, were sufficiently pleaded and proven in defence of said proceedings, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in each of these bills of complaint were, respectively, the same persons, and that the contracts, acts, matters, and transactions mentioned in these bills of complaint were, respectively, the same contracts, acts, matters, and transactions, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, what would be the effect, under the laws and usages of the state of New York, of said decree and record as a defence to said proceedings assumed to be so pending?

[Objected to; admitted; exception.—See pages 946-950.]

A. In my opinion said decree and record would be, under the law and usages of the state of New York, a good and valid defence to said proceedings assumed to be so pending, for the reason that the decree in the action of the Old Dominion Copper Mining & Smelting Company against Lewisohn is a final adjudication of the controversy raised by the pleadings in the two causes of the Old Dominion Copper Mining & Smelting Company against Bigelow.

Q. 11. Assuming the facts stated in the 10th interrogatory, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executor's in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof
1034 through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would those additional facts affect your answer to the preceding interrogatory?

[Objected to; admitted; exception.—See pages 946-950.]

A. In my opinion the additional facts assumed in the 11th interrogatory constitute an element which materially strengthens the validity of the Lewisohn decree as a defence under the authority of Bracken v. Atlantic Trust Co., 36 App. Div. 67, at page 71.

Q. 12. Assuming the facts stated in the 10th interrogatory, and assuming the facts stated in the 11th interrogatory, and assuming that the participation of the defendant, Bigelow, as stated in the 11th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers to the two preceding interrogatories?

[Objected to; admitted; exception.—See pages 947-950.]

A. The additional assumption contained in the 12th interrogatory adds cumulative weight, in my opinion, to the validity of the Lewisohn decree as a defence, although I do not consider that lack of knowledge on the part of the plaintiff of such participation of both parties in the defence of the Lewisohn case would necessitate any change in my answer to the 11th interrogatory.

Q. 13. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8098, referred to in the 9th interrogatory, and assuming that the course of the proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8098, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint
1035 in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8098 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, what under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8098, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

A. In my judgment said decree and record would constitute a

valid defence to the proceeding corresponding to the cause numbered 8098, described in the 9th interrogatory, for the reason that it would constitute a prior adjudication of the same controversy involved in the cause numbered 8098, within the decisions of the courts of this state, on the subject of former adjudications as constituting a bar to future litigation. My reason for such opinion is, briefly, that it clearly appears from the two records that the facts set forth in the two bills of complaint are identical, the transaction involved is the same, the property involved is the same, the relief demanded is the same, and that the situation brings the case squarely within the doctrine that the courts will not permit a second adjudication of the same controversy. I am materially strengthened in this view by the fact that it appears that the transaction upon which both suits are based was in the name of Lewisohn, who was, therefore, in my opinion, under the New York statutes, trustee for Bigelow.

Under the New York Code of Civil Procedure, sec. 449:

"A trustee of an express trust may without joining with him the person for whose benefit the action is prosecuted. A person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust within the meaning of this Section."

It has been uniformly held that the application of this section extends to actions against trustees as well as actions brought by trustees. I am therefore of the opinion that Lewisohn was trustee, that Bigelow was privy to the Lewisohn suit, and that Bigelow's rights were judicially determined in that suit.

Q. 14. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow
1036 identical in all respects with the proceeding numbered 8099, referred to in the 9th interrogatory; and assuming that the course of proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8099, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8099 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and trans-

actions, respectively, and assuming that the bill of complaint in said Circuit Courts and the prayers thereof relate to one part of an entire transaction comprising said contracts, acts, matters, and transactions, and that the bill of complaint corresponding to the one numbered 8099 in Massachusetts and the prayers thereof relate to another part of the same entire transaction, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numberd 8099, dscribd in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

A. Inasmuch as the record described in the 8th interrogatory appears from my examination of it to set forth another transaction relative to the causes of action set forth in the cause numbered 8099, as well as that set forth in the cause numbered 8098, and in view of the additional fact that it clearly appears from the decree and record described in said 8th interrogatory that the United States Supreme Court passed upon the said entire transaction, it is, in my opinion, clear that the decree described in said 8th interrogatory settles the law for both causes 8098 and 8099, and that the bar arising from said decree applies to the cause numbered 8099
1037 as well as that numbered 8098. The reasoning contained in my answer to the 13th interrogatory applies, in my judgment, as well to the 14th interrogatory.

Q. 15. Assuming the facts stated in the 13th and 14th interrogatories, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would these additional facts affect your answers, or either of them, to the 13th and 14th interrogatories?

[Objected to; admitted; exception.—See pages 948-950.]

A. The additional assumption contained in the 15th interrogatory strengthens my opinion that the decree described in the 8th interrogatory is a bar to the causes of action numbered 8098 and 8099.

Q. 16. Assuming the facts stated in the 13th, 14th, and 15th interrogatories, and assuming that the participation of the defendant, Bigelow, as stated in the 15th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers, or either of them, to the 13th, 14th, and 15th interrogatories?

[Objected to; admitted; exception.—See pages 949-950.]

A. The additional assumption contained in the 16th interrogatory adds additional strength, in my view, to the effect of the decree, described in the 8th interrogatory, as a bar.

Q. 17. If you have not already done so, state your reasons for your answers to interrogatories 6th to 16th, inclusive.

[Objected to; admitted; exception.—See page 950.]

A. My reason for the answers given to the interrogatories 6th to 16th, inclusive, is based upon two grounds:

First. It is, in my opinion, not open to question that under section 449 of the New York Code of Civil Procedure, Lewisohn was a trustee on behalf of Bigelow in the transaction on which all of the suits are based, and that, under the same section as construed by the New York courts, an action against Lewisohn judicially determined the rights of Bigelow, so that the final decree in the suit against Lewisohn would be held to be a bar as against Bigelow were Bigelow sued in the New York courts.

1038 Second. While I believe that this first consideration, just stated, is, in itself, conclusive of the question, I am also of the opinion that, even if the transaction had not been in Lewisohn's name alone, still, inasmuch as the bills of complaint in the two New York suits are identical with the two bills of complaint in the Massachusetts suits, with the exception of unimportant differences of names, residences, and formal matters, differing because of the difference in practice, the entire transaction is the same, the property involved is the same, the questions of fact and law involved the same, the relief demanded the same; and that therefore the New York courts would hold that the decree, described in the 8th interrogatory, was a complete and absolute bar to the two causes, numbered 8098 and 8099, in the Massachusetts courts.

Cross-interrogatories:

Without waiving the foregoing objections, but expressly insisting thereon, the plaintiff puts de bene the following cross-interrogatories:

X 1. Is it a principle of the law of the state of New York that the law decided in a case in the court of last resort in overruling a demurrer becomes the law of the case to be applied when the case is heard upon the facts?

A. It is the law of New York that a decision of a court of last resort on a demurrer determines the law upon the facts embodied in the pleadings to which the demurrer was interposed.

X 2. Is it the laws of New York that there is no right of exoneration or contribution between defendants jointly and severally liable ex delicto and not ex contractu?

A. In my judgment, yes.

X 3. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered that Bigelow might—but for said defence, if any—be under a liability to the plaintiff in the suits against Bigelow?

A. As I understand the purport of this question, my answer is, no.

X 4. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability that Bigelow might—but for said defence, if any—be under as a liability jointly with Lewisohn?

A. As I understand the purport of this question, my answer is, no.

X 5. In determining whether or not the decree dismissing the suit

against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability jointly and severally with Lewisohn?

A. As I understand the purport of this question, my answer is, no.

1039 X 6. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability arising ex delicto?

A. As I understand the purport of this question, my answer is, no.

X 7. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability ex delicto jointly and severally with Lewisohn?

A. As I understand the purport of this question, my answer is, no.

X 8. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts, as applied to these facts in said suit, there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. I have not had an opportunity to examine the decision referred to with such detail as to adequately answer the interrogatory.

X 9. On the facts alleged in the present suit against Bigelow, and assuming that, under the law of Massachusetts, as applied to these facts in said suit, there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer, reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability ex delicto with Lewisohn, if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. I have not had an opportunity to examine the decision referred to with such detail as to adequately answer the interrogatory.

X 10. Is it a principle of the law of the state of New York that the liability of joint wrongdoers is joint and several?

A. Yes.

X 11. Is it sometimes a principle of New York law that estoppel by former adjudication must be mutual?

A. It is not necessarily a principle of New York law that estoppel by a former adjudication must be mutual; such may or may not be the rule contingent upon the facts.

X 12. If so, what, if any, are all the occasions of which you have knowledge on which they need not be mutual?

A. I have had no opportunity to examine the case with a view to giving an intelligent answer to this interrogatory.

X 13. Assuming that Bigelow took no part in the Lewisohn suit, in your opinion is the law of New York such that Bigelow
1040 would have been estopped in another suit to deny his liability as a matter of law on the same facts, by a final decree against Lewisohn in the first suit?

A. If final judgment were rendered against Lewisohn in the courts of New York upon the facts appearing in the bills of complaint in these actions, and Bigelow were thereafter sued on the same facts in the courts of New York, he would be estopped from denying liability thereon.

X 14. Assuming that Lewisohn's executors took no part in the suits against Bigelow, in your opinion is the law of New York such that said executors would have been estopped in another suit to deny their liability as a matter of law on the same facts, by a final decree against Bigelow in these suits?

A. In my judgment, yes.

X 15. Assuming that Bigelow took part in the defence of the suits against Lewisohn's executors, and that the plaintiff knew this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation and knowledge, operate as an estoppel in favor of Bigelow?

A. Owing to the shortness of the notice given me, I have no time to furnish the detailed information called for by this interrogatory.

X 16. Assuming that Bigelow took part in the defence of the suit against Lewisohn's executors, and that the plaintiff did not know this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation without plaintiff's knowledge, operate as an estoppel in favor of Bigelow?

A. Owing to the shortness of the notice given me, I have no time to furnish the detailed information called for by this interrogatory.

X 17. Assuming that Bigelow did not take part in the defence of the suit against Lewisohn's executors, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may operate as an estoppel in favor of Bigelow?

A. Owing to the shortness of the notice given me, I have no time to furnish the detailed information called for by this interrogatory.

X 18. Have you considered any decisions or language of the courts in New York which may have any tendency to support the view that there is no estoppel in Bigelow's favor growing out of the decree in favor of Lewisohn's executors?

A. I know, at the present time, of no cases the trend of which would be to support the view that there is no estoppel in Bigelow's favor arising out of the Lewisohn decree.

1041 X 19. If so, what, by name and reference, are all of those which you have considered?

A. My answer to the foregoing cross-interrogatory covers this question.

X 20. Have any arguments been submitted or suggested to you by defendant's counsel, or have you thought of any, in support of the view that there was by the law of New York no estoppel in favor of Bigelow growing out of the decree in favor of Lewisohn's executors?

A. No arguments have been either submitted or suggested to me by counsel for the defence, nor have any presented themselves to me.

X 21. If so, what are all of said arguments?

A. My answer to the foregoing cross-interrogatory covers this question.

X 22. What, in your opinion, constitutes privity under the law of New York to a judgment?

A. A mutual relation to, connection with, and interest in the facts upon which a judgment is rendered is essential to constitute privity.

X 23. In determining whether there was an estoppel in the present case, have you assumed or considered that Bigelow was in privity to the parties of record in the suit against Lewisohn's executors?

A. Yes.

X 24. In considering whether there was any estoppel in this case, have you assumed or considered that Bigelow had any legal interest to defend in the suit against Lewisohn's executors beyond such interest as he might have to secure a favorable precedent?

A. My judgment is that, although not a party to the suit, he nevertheless had a legal interest to defend in the Lewisohn litigation.

X 25. If so, precisely what have you assumed to be said legal interest?

A. The facts charged Bigelow with being practically a partner in the transactions upon which liability against Lewisohn's estate was ought to be predicated; such allegations gave Bigelow a legal interest in the outcome of that controversy.

X 26. Unless Bigelow would have been bound in favor of the plaintiff by estoppel by a decision adverse to Lewisohn's executors even if Bigelow did not participate in the defence of the suit against them, did Bigelow, in your opinion, have a legal interest to defend in that suit?

A. Irrespective of whether or no Bigelow would have been bound by the judgment in favor of the plaintiff, in my opinion, he still had a legal interest that would warrant him in participating in the defence of the Lewisohn suit.

X 27. If so, by precise description, what, in your opinion, was said legal interest?

A. If Bigelow was made aware of the facts alleged in the bill of complaint against Lewisohn in New York, and owing to his connection therewith, as alleged in the complaint, for the purpose of protecting his reputation and property, he invoked the power of the courts of New York to permit him to intervene in that action
1042 and defend the same with like effect as though he had been made a party thereto, such right would have been accorded him.

X 28. In determining whether there was any estoppel in this case, have you assumed that the plaintiff consented to the participation, if any, by Bigelow in the support of the demurrers of Lewisohn's executors?

A. I do not consider the consent of the plaintiff to the participation of Bigelow as of vital consequence in arriving at the opinion I have heretofore expressed; but I have considered it.

X 29. Is it a principle of New York law that if the defendant in one suit sustains merely the character of a co-trespasser with the defendant in another suit by the same plaintiff, the recovery against one defendant is not thereby made competent evidence against the other?

A. I have neither the time nor the opportunity to look up the technical rule as to whether or no a judgment against one defendant is competent evidence against the other; my judgment is that it would not be competent evidence.

X 30. Is it a principle of New York law that the judgment in favor of one of two persons jointly and severally liable for the wrongful conversion of the plaintiff's property is no bar to a subsequent suit against the other because torts are joint and several?

A. The question is not sufficiently clear to enable me to give an intelligent answer to it.

X 31. Is it a principle of New York law that an adjudication acts as an estoppel only between the parties thereto or those in privity with them, or, in other words, the estoppel must be mutual?

A. Ordinarily this would be true, but there are many exceptions to the rule.

X 32. Is it a principle of New York law that a judgment in favor of one co-trespasser may not be used by another co-trespasser not a party to it, by way of estoppel?

A. If the facts alleged against a co-trespasser arose out of the same transaction and are pleaded identically the same, he could avail himself of a judgment in favor of a co-trespasser although he was not a party to the record in that suit.

X 33. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were Bigelow's agents in the suit against them which has been dismissed?

A. No.

X 34. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were trustees for Bigelow of the stock sought to be recovered in the suit against them which has been dismissed?

A. My opinion under the facts set up in the complaint against Lewisohn's executors is that Lewisohn was a trustee for Bigelow.

X 35. Is it a principle of New York law that in an action
1043 at law against one or some of the several joint tort feasors, the controversy may be determined as between the parties before the court,—i. e., the plaintiff and defendant,—and without prejudice to the rights of others; and the judgment will completely determine the controversy between them, and will not be res adjudicata between the plaintiff and any of the joint tort feasors who is not a defendant and may be sued later?

A. If the facts alleged in the complaint as to any of the joint tort feasors not before the court were the same as the facts in the case before the court, then, and in that event, the record before the court would be res adjudicata in the action against the remaining joint tort feasors.

X 36. Have you stated all your reasons for the opinions expressed by you, or the statements made by you, in answer to the 6th, 7th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th direct interrogatories?

A. Yes, according to the best of my recollection.

X 37. If not, what are all your reasons for the opinions or statements given by you in answer to each of said interrogatories?

A. I do not, just at the moment, recall any supplemental reasons to those already expressed.

X 38. Have you now stated all your reasons for said answers?

A. Limited by my answer to the preceding cross-interrogatory, yes.

X 39. Were you, prior to the taking of your deposition on the foregoing cross-interrogatories, shown them, or any of them, or any copies of any of them, or given any information concerning the substance of them?

A. No.

X 40. Has each of your answers, in its final form, been given in the language in which it now appears, before you were aware of the substance of any subsequent cross-interrogatory?

A. Yes.

X 41. Have you, since September 22, 1908, discussed in any way, with any other person who is named as a witness in the caption to these cross-interrogatories, or with any one on behalf of the defendant, any of the subjects dealt with in the foregoing interrogatories or in your answers thereto?

A. No.

JOHN B. STANCHFIELD.

Before me,

PERCIVAL WILDS,
Notary Public.

[SEAL.]

Deposition of William A. Keener.

The Deposition of William A. Keener, Taken in Behalf of the Defendant, Bigelow, and Filed by His Counsel, Subject to the Objections and Exceptions of Counsel for the Complainant, The Old Dominion Copper Mining & Smelting Company, to be Found at Pages 945-950.

[Commission and notarial certificate omitted.]

1041 Q. 1. State your name, age, and place of residence.

A. William A. Keener; age, fifty-two; 2 West 88th street, borough of Manhattan, New York City.

Q. 2. State your occupation and place of business.

A. Lawyer; 115 Broadway, borough of Manhattan, New York City.

Q. 3. If, in answer to the preceding interrogatory, you have testified that you are an attorney at law, state when you were admitted to the bar, and in what state or states, and how long you

have been engaged in the practice of law in said state or states, and with what firms, if any, you have been or are connected.

A. I was admitted to the bar of the state of New York in 1879; I have been actively engaged in the practice of the law since that time except during the periods when I was a professor of law in the Harvard University and subsequently in Columbia University, during which times I acted, from time to time, as counsel. I began the practice of the law as a member of the firm of Ashley & Keener; afterwards I became a member of the firm of Hatch, Keener & Clute; later I became a member of the firm of Keener & Lewis, and am now a member of the firm of Keener, Lewis & Layng.

Q. 4. State what, if any, judicial or other public or official positions you hold or have held.

A. I was at one time a justice of the Supreme Court of the state of New York, by appointment of the governor of the state.

Q. 5. State any other matters relating to your experience in your profession and as to your familiarity with the law and usages governing the practice in the state and federal courts in New York, both in law and in equity, and also as to your familiarity with the laws and usages of the state of New York relating to former adjudication and estoppel by judgment.

A. I was at one time a member of the law faculty of Harvard University, and subsequently a member of the law faculty of Columbia University, and dean of the law school. I have practised in the federal courts of New York state, in the federal courts of Pennsylvania, and have appeared in the United States Circuit Court of Appeals in Massachusetts, and have the information common to lawyers engaged in state and federal practice.

Q. 6. Assuming that an action in equity is brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters, to recover from him the profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, at a price in excess of the price which they paid for it and of its fair value, and assuming that in this action a final decree upon the merits is entered for the defendant upon demurrer, on the ground that
1045 the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to a similar action, substantially identical with the first and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 945-950.]

A. In my opinion it would be a bar to such action.

Q. 7. Assuming that two actions in equity are brought in the

federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters, to recover from him profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, and assuming that such property is alleged to have been sold, pursuant to said joint plan and conspiracy, in two separate parcels, in each of which both promoters were jointly interested, and that said two actions were brought to recover the respective profits received from the sale of the two parcels, respectively, and assuming that the bills of complaint in the two actions were substantially identical, except as to the particular relief sought, and assuming that certain profits were alleged to have been made by said promoters on each parcel, and assuming that in one of said actions a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to two similar actions, substantially identical in form with those above described and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 946-950.]

A. It would, in my opinion, be a bar to such action.

Q. 8. Have you examined a copy of the record in the action of the Old Dominion Copper Mining & Smelting Co. v. Lewis-
1046 ohn in the Circuit Court of the United States for the Southern District of New York, such as is hereto annexed and marked (1), the respective portions of said record being marked A to R, inclusive?

[Objected to; admitted; exception.—See pages 946-950.]

A. Yes.

Q. 9. Have you examined copies of the proceedings in the above-entitled causes, to wit, the two causes of the Old Dominion Copper Mining & Smelting Co. v. Bigelow in the Supreme Judicial Court in Massachusetts, such as are hereto annexed and marked, respectively, (2) and (3)?

A. Yes.

Q. 10. Assuming that there were now pending in the courts of the state of New York proceedings against Albert S. Bigelow, identical in all respects (except as the practice might require formal changes) with the copies of the proceedings referred to in the 9th interrogatory, and assuming that said courts had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record, copies of which are referred to in the 8th interrogatory, were sufficiently pleaded and proven in defence of said proceedings, and assuming that the Leonard Lewisohn and the Albert S. Bigelow

mentioned in each of these bills of complaint were, respectively, the same persons, and that the contracts, acts, matters, and transactions mentioned in each of these bills of complaint were, respectively, the same contracts, acts, matters, and transactions, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, what would be the effect, under the law and usages of the state of New York, of said decree and record as a defence to said proceedings assumed to be so pending?

[Objected to; admitted; exception.—See pages 946-950.]

A. It would, in my opinion, be a bar to such action.

Q. 11. Assuming the facts stated in the 10th interrogatory, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would those additional facts affect your answer to the preceding interrogatory?

[Objected to; admitted; exception.—See pages 946-950.]

A. It would only confirm me in my answer.

1047 Q. 12. Assuming the facts stated in the 10th interrogatory, and assuming the facts stated in the 11th interrogatory, and assuming that the participation of the defendant, Bigelow, as stated in the 11th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers to the two preceding interrogatories?

[Objected to; admitted; exception.—See pages 947-950.]

A. It would not affect my answers at all.

Q. 13. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8098, referred to in the 9th interrogatory, and assuming that the course of the proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8098, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming

that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8098 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8098, described in the 9th interrogatory?

[Objected to: admitted: exception.—See pages 945–950.]

A. It would, in my opinion, be a bar to such action.

Q. 14. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bige-
1048 low, identical in all respects with the proceedings numbered 8099 referred to in the 9th interrogatory, and assuming that the course of proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8099, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8099 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, and assuming that the bill of complaint in said Circuit Court and the prayers thereof relate to one part of an entire transaction comprising said contracts, acts, matters, and transactions, and that the bill of complaint corresponding to the one numbered 8099 in Massachusetts and the prayers thereof relate to another part of the same entire transaction, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8099, described in the 9th interrogatory?

[Objected to: admitted: exception.—See pages 948–950.]

A. It would, in my opinion, be a bar to such action.

Q. 15. Assuming the facts stated in the 13th and 14th interrogatories, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would these additional facts affect your answers, or either of them, to the 13th and 14th interrogatories?

[Objected to; admitted; exception.—See pages 948–950.]

1049 A. They would only confirm me in my opinion.

Q. 16. Assuming the facts stated in the 13th, 14th, and 15th interrogatories, and assuming that the participation of the defendant, Bigelow, as stated in the 15th interrogaory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers, or either of them, to the 13th, 14th and 15th interrogatories?

[Objected to; admitted; exception.—See pages 949, 950.]

A. It would not affect my answers at all.

Q. 17. If you have not already done so, state your reasons for your answers to interrogatories 6th to 16th, inclusive.

[Objected to; admitted; exception.—See page 950.]

A. Albert S. Bigelow and Leonard Lewisohn were associated together in the joint promotion and sale of certain mining properties to the plaintiff. The plaintiff sued the executors of Leonard Lewisohn in the United States Circuit Court for the Southern District of New York, complaining because of the fraud practised by Lewisohn and Bigelow upon the corporation in effecting the sales.

Bigelow was not made a party defendant to this suit, because of his absence from the jurisdiction, he being a resident of Massachusetts. It has been finally determined that Lewisohn did the corporation no injury, and that the plaintiff has no cause of action against him or his representatives, and a final judgment or decree has been entered accordingly. There is now pending in the Supreme Judicial Court of Massachusetts against Albert S. Bigelow two suits based on the identical facts which have been decided by the United States Supreme Court, in affirmance of the court below, to show no cause of action against Lewisohn.

In the action brought against Lewisohn in the federal court for the southern district of New York, the joint participation of Bigelow with Lewisohn in the fraud practised upon the plaintiff was alleged, and in the action brought in the Supreme Judicial Court of Massachusetts, the participation of Lewisohn with Bigelow in the fraud practised upon the plaintiff is alleged. The facts throughout are identical, and the only apparent reason why Bigelow and Lewisohn were not joined in an action as defendants and thereby multiplicity of action saved, is that one resided in Massachusetts and the other in

New York. The facts in each case being identical, if Lewisohn did no wrong, then Bigelow did none.

I am asked for my opinion as to the effect of the decree in favor of Lewisohn were Bigelow sued in New York instead of in
1050 Massachusetts. No citation of authority is needed in support of the proposition that Lewisohn's executors could plead the decree of the federal court in bar of any action that might be brought by the plaintiff against them in the state court of New York. I have answered that in my opinion Bigelow could avail himself of the Lewisohn decree as a bar to any action brought against him in New York. It is true that he was not named as a party defendant in the Lewisohn suit, but his interests were of necessity involved in that action, and after notice from Lewisohn of its pendency, and after opportunity had been given him to join in the defence, he could not, as between Lewisohn and himself, have litigated any questions necessarily decided in that suit had the plaintiff been successful.

The Ocean Steam Navigation Co. v. Campania Transatlantica Espanola, 144 N. Y. 663, 665.
Carleton v. Lombard and others, 149 N. Y. 137–161.

Had the plaintiff been successful in the Lewisohn suit, and subsequently brought an action against Bigelow in New York, Bigelow could not have litigated between himself and the plaintiff the questions finally adjudicated in the Lewisohn suit as between Lewisohn and the plaintiff.

Castle v. Noyes, 14 N. Y. 329.
Matter of the Estate of Straut, 126 N. Y. 201.

As Bigelow, in the event of the plaintiff's success in the Lewisohn suit, would have been precluded both as to Lewisohn and the plaintiff from litigating the questions therein raised, it would be the height of injustice, now that the plaintiff has failed, not to permit Bigelow to plead the Lewisohn decree as a bar to any action by the plaintiff in New York, and such, it is submitted, is not the law.

But, independent of the fact of Bigelow's participation in the defence of the Lewisohn suit, the relation of the parties to the transaction would preclude the plaintiff from suing successfully Bigelow in New York after the Lewisohn decree. The policy of the courts in New York is to give every suitor an opportunity to try a case on its merits, but it is also the policy of the courts not to encourage unnecessary litigation. When, therefore, a failure to establish a right against A necessarily negatives a right against B, because A was either a sole actor, or a joint actor with B, B can plead the judgment obtained by A in bar of any action brought against him by the plaintiff in the action in which A succeeded.

Featherstone v. N. & C. Turnpike Road, 71 Hun, 109.
People v. Stevens, 51 How. Pr. 235, 246.

1051 The New York rule is, in my opinion, well expressed in the language used by Judge Choate, in Emma Silver Mining Co.,

Limited, v. Emma Silver Mining Co. of New York and others, 7 Fed. Rep. 401, at page 407.

"It is contended on the part of the complainant that, whatever may be the effect of the judgment as to Park and Baxter, the defendant corporation cannot avail itself of the judgment as a bar, or as a conclusive determination of the facts, because the defendant corporation was not a party to that suit. The weight of authority, however, is that where an agent in a transaction is sued after the termination of his agency, and upon a trial of the merits the issue is determined against the plaintiff, the principal, though not a party to the suit, can avail himself of the judgment as a bar, when he is sued by the same plaintiff on the same cause of action. While the principal, if he had no notice of the former suit, and no opportunity to defend it, may not be concluded by a judgment against the former agent, or made responsible for the agent's bad pleading or blunders in the trial of the cause, because so to conclude him would be to deprive him of his property without due process of law, yet, as regards the plaintiff who has before sued the agent and been defeated, there is no reason why he should not be concluded upon the principle of public policy which gives every man one opportunity to prove his case, and limits every man to one such opportunity. He has had his day in court, and it is immaterial whether he has chosen to test his right as against the principal or the agent in the transaction, provided the issue to be tried was identical as against both."

To summarize, I regard it as immaterial what nomenclature is used to describe the relation which existed between Bigelow and Lewisohn, whether it be that of trustee and cestui qui trust, joint principals, or principal and agent.

The acts complained of were their joint acts, and the facts as to each are identical, and the proof as to each must be identical. The questions involved have been finally disposed of as to Lewisohn in his favor, and in an action in which Bigelow was active. If Lewisohn did no wrong, Bigelow did none, as it is not claimed that he acted independently of Lewisohn. On these facts the Lewisohn judgment would, in my opinion, be a bar to any action brought in New York by the plaintiff against Bigelow.

1052 Cross-interrogatories:

Without waiving the foregoing objections, but expressly insisting thereon, the plaintiff puts de bene the following cross-interrogatories:

X 1. Is it a principle of the law of the state of New York that the law decided in a case in the court of last resort in overruling a demurrer becomes the law of the case to be applied when the case is heard upon the facts?

A. Yes.

X 2. Is it the law of New York that there is no right of exoneration or contribution between defendants jointly and severally liable ex delicto and not ex contractu?

A. Not absolutely; dependent upon circumstances.

X 3. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you as-

sumed or considered that Bigelow might—but for said defence, if any,—be under a liability to the plaintiff in the suits against Bigelow?

A. Yes.

X 4. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability that Bigelow might—but for said defence, if any—be under as a liability jointly with Lewisohn?

A. Yes.

X 5. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability jointly and severally with Lewisohn?

A. Yes.

X 6. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability arising ex delicto?

A. Yes.

X 7. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability ex delicto jointly and severally with Lewisohn?

A. Yes.

X 8. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts, as applied to these facts in said suit, there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. If it be assumed that the decision referred to represents
1053 the law of New York, the liability would be joint and several.

X 9. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts, as applied to these facts in said suit, there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability ex delicto with Lewisohn, if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. In my opinion, yes, if it is assumed that the decision referred to represents the law of New York.

X 10. Is it a principle of the law of the state of New York that the liability of joint wrongdoers is joint and several?

A. Yes.

X 11. Is it sometimes a principle of New York law that estoppel by former adjudication must be mutual?

A. Yes; subject to exceptions.

X 12. If so, what, if any, are all the occasions of which you have knowledge on which they need not be mutual?

A. It is difficult to formulate a statement covering the law of New York in this regard. There are few cases which are treated somewhat as exceptions to the rule. Speaking generally and broadly, I should say that there is not need of mutuality where it can be said that the party against whom you are pleading a judgment has had an opportunity of establishing his cause of action, and has failed so to do in a case where, because of the relations of the defendant in that case to the defendant in the case in which the judgment is pleaded, it is impossible to say that the plaintiff has a right against the second defendant unless he had a right against the first defendant. Those cases arise where there has been a relation between the defendants against whom the plaintiff is bringing separate actions, and it is necessarily true that the fundamental facts as to a cause of action are identical with reference to the successive defendants and where the principle of law arising from those facts must apply to both defendants.

X 13. Assuming that Bigelow took no part in the Lewisohn suit, in your opinion is the law of New York such that Bigelow would have been estopped in another suit to deny his liability, as a matter of law, on the same facts by a final decree against Lewisohn in the first suit?

A. No; not as between the plaintiff and Bigelow.

X 14. Assuming that Lewisohn's executors took no part in the suits against Bigelow, in your opinion is the law of New York such that said executors would have been estopped in another suit to deny their liability, as a matter of law, on the same facts by a final de-

1054 cree against Bigelow in these suits?

A. No; not as between the plaintiff and Lewisohn.

X 15. Assuming that Bigelow took part in the defence of the suits against Lewisohn's executors, and that the plaintiff knew this, what by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation and knowledge, operate as an estoppel in favor of Bigelow?

A. The cases which I have deemed sufficient to justify the conclusion reached by me are:

Castle v. Noyes, 14 N. Y. 329.
Featherstone v. N. & C. Turnpike Road, 71 Hun, 109.
People v. Stevens, 51 How. Pr. 235.
Matter of the Estate of Strant, 126 N. Y. 201.

I do not think these are all the cases bearing on the question, but they are the only cases I have in mind at present. In my answer to the direct interrogatory I stated that the fact of participation only confirms my opinion, previously expressed to the interrogatory, that the element of participation was eliminated; and, in answer to the direct interrogatory as to the effect of knowledge on the part of the plaintiff, I stated that it did not affect my answer.

X 16. Assuming that Bigelow took part in the defence of the suit against Lewisohn's executors, and that the plaintiff did not know this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation without plaintiff's knowledge, operate as an estoppel in favor of Bigelow?

A. The cases just cited by me are the only cases I have in mind at the moment, though I regard them as representing the general trend of opinion in this state.

X 17. Assuming that Bigelow did not take part in the defence of the suit against Lewisohn's executors, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may operate as an estoppel in favor of Bigelow?

A. The cases I have immediately in mind are:

Featherstone v. N. & C. Turnpike Road (71 Hun, 109);
People v. Stevens (51 How. Pr. 235),—

1055 and the opinion of Judge Choate in Emma Silver Mining Co., Limited, v. Emma Silver Mining Co. of New York and others (7 Fed. Rep. 401, at page 407).

X 18. Have you considered any decisions or language of the courts in New York which may have any tendency to support the view that there is no estoppel in Bigelow's favor growing out of the decree in favor of Lewisohn's executors?

A. No; none that I regard as in conflict with my opinion.

X 19. If so, what, by name and reference, are all of these which you have considered?

A. None that I regard as in conflict with my opinion.

X 20. Have any arguments been submitted or suggested to you by defendant's counsel, or have you thought of any, in support of the view that there was by the law of New York no estoppel in favor of Bigelow growing out of the decree in favor of Lewisohn's executors.

A. No arguments on behalf of the plaintiff have been presented to me by defendant's counsel. The argument which has suggested itself to me on behalf of the plaintiff is that a separate action brought against one alleged wrongdoer cannot be pleaded as a bar by another alleged wrongdoer, for the reason that he was not a party to the action in which the judgment was obtained, and should not therefore, be allowed to avail himself thereof; this argument, I am satisfied, is unsound under the law of the state of New York, in its application to this case.

X 21. If so, what are all of said arguments?

A. I have endeavored to sum them up faithfully in my answer to the preceding interrogatory.

X 22. What, in your opinion, constitutes privity under the law of New York to a judgment?

A. The word "privity" is one I have never been able to define.

X 23. In determining whether there was an estoppel in the present case, have you assumed or considered that Bigelow was in privity to the parties of record in the suit against Lewisohn's executors?

A. In reaching my conclusions I have regarded the transaction as one in which Bigelow and Leonard Lewisohn jointly participated, and as a transaction in which, in any suit brought against Lewisohn,—such as was brought by the plaintiff,—Lewisohn had a perfect right to notify Bigelow of the pendency of the suit, to give him an opportunity to become active in its defence, and that, after such notice and opportunity given, the result would be that as between Lewisohn and Bigelow, Bigelow would be bound as to any of the questions adjudicated in the suit between the plaintiff and Lewisohn. In this sense I have regarded Bigelow as in privity with Lewisohn.

X 24. In considering whether there was any estoppel in this case, have you assumed or considered that Bigelow had any legal interest to defend in the suit against Lewisohn's executors beyond
1056 such interest as he might have to secure a favorable precedent?

A. Yes; as stated in my answer to the last cross-interrogatory.

X 25. If so, precisely what have you assumed to be said legal interest?

A. I have assumed that the joint interest of Lewisohn and Bigelow in the transaction of which the plaintiff complains was of such a character that a decree against Lewisohn would, as between Lewisohn and Bigelow, absolutely bind the latter, should Lewisohn give him notice of the pendency of the action, and an opportunity of appearing to assist in its defence; or should Bigelow, without such request from Lewisohn, appear and take an active part in the defence. Furthermore, I am inclined to the belief that, as to the real estate transferred by Lewisohn to the plaintiff, the relation between Bigelow and Lewisohn might be so clearly one of trustee and cestui que trust that, with or without notice, Bigelow would be bound by the decree; but as to this I express no definite opinion.

X 26. Unless Bigelow would have been bound in favor of the plaintiff by estoppel by a decision adverse to Lewisohn's executors even if Bigelow did not participate in the defence of the suit against them, did Bigelow, in your opinion, have a legal interest to defend in that suit?

A. Yes; if I understand the meaning of the word "legal" in connection with "interest."

X 27. If so, by precise description, what, in your opinion, was said legal interest?

A. It is the interest I have heretofore described in my answers to the 23d and 25th cross-interrogatories.

X 28. In determining whether there was any estoppel in this case, have you assumed that the plaintiff consented to the participation, if any, by Bigelow in the support of the demurrers of Lewisohn's executors?

A. No.

X 29. Is it a principle of New York law that if the defendant in one suit sustains merely the character of a co-trespasser with the defendant in another suit by the same plaintiff, the recovery against one defendant is not thereby made competent evidence against the other?

A. Yes.

X 30. Is it a principle of New York law that the judgment in favor of one of two persons jointly and severally liable for the wrongful conversion of the plaintiff's property is no bar to a subsequent suit against the other because torts are joint and several?

A. A judgment in favor of one of two persons jointly and severally liable for wrongful conversion is no bar to an action against the other unless the relations of the respective defendants to each other are such that the facts and law applying to the one defendant are identical as to the other.

1057 X 31. Is it a principle of New York law that an adjudication acts as an estoppel only between the parties thereto or those in privity with them, or in other words, the estoppel must be mutual?

A. As I have said before, it is a principle of the New York law, subject to exceptions, which exceptions are broad enough, in my opinion, to cover this case.

X 32. Is it a principle of New York law that a judgment in favor of one co-trespasser may not be used by another co-trespasser not a party to it, by way of estoppel?

A. I repeat the answer given to the 30th cross-interrogatory.

X 33. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were Bigelow's agents in the suit against them which has been dismissed?

A. I have not endeavored to work out the relation between the parties in legal nomenclature; whether it was a case of joint trustees ex maleficio, joint equitable tort feasors, joint principals, or principal and agent; I certainly have not looked upon Lewisohn in the New York suit as simply the agent of Bigelow.

X 34. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were trustees for Bigelow of the stock sought to be recovered in the suit against them which has been dismissed?

A. I have not considered a decision of this question necessary in the conclusion reached by me, though, as I have stated before, it seems to me, without reaching a definite conclusion, that at least as to part of the transaction there was a definite relation of trustee and cestui que trust.

X 35. Is it a principle of New York law that in an action at law against one or some of several joint tort feasors, the controversy may be determined as between the parties before the court,—i. e., the plaintiff,—and without prejudice to the rights of others; and the judgment will completely determine the controversy between them, and will not be res adjudicata between the plaintiff and any of the joint tort feasors who is not a defendant and may be sued later?

A. It is a principle of New York law that such a controversy may

be determined with the result indicated in this cross-interrogatory, but that principle is qualified in the manner which I have stated in reply to the 30th cross-interrogatory.

X 36. Have you stated all your reasons for the opinions expressed by you, or the statements made by you, in answer to the 6th, 7th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th direct interrogatories?

A. Yes.

X 37. If not, what are all your reasons for the opinions or statements given by you in answer to each of said interrogatories?

A. I have stated them fully.

X 38. Have you now stated all your reasons for said answers?

A. Yes.

X 39. Were you, prior to the taking of your deposition on the foregoing cross-interrogatories, shown them, or any of them,
1058 or any copies of any of them, or given any information concerning the substance of them?

A. No.

X. 40. Has each of your answers in its final form been given in the language in which it now appears, before you were aware of the substance of any subsequent cross-interrogatory?

A. Yes.

X 41. Have you, since September 22, 1908, discussed in any way with any other person who is named as a witness in the caption to these cross-interrogatories, or with any one on behalf of the defendant, any of the subjects dealt with in the foregoing interrogatories or in your answers thereto?

A. I have had no discussions since September 22 with any one concerning this case, nor have I had any discussion prior thereto with any one. At one time—I do not remember the date—one of counsel for the defendant conferred with me in regard to the case for the purpose of ascertaining my opinion; and, in a light, casual manner, but not for any purpose of discussion, at some time—I cannot give the date—I mentioned to two or three others, who had given an opinion in favor of the defendant, that I had reached a similar conclusion.

WILLIAM A. KEENER.

Witnessed by
WALLACE A. FOSTER.

Deposition of Peter B. Olney.

The Deposition of Peter B. Olney, Taken in Behalf of the Defendant Bigelow, and Filed by His Counsel, Subject to the Objections and Exceptions of Counsel for the Complainant The Old Dominion Copper Mining & Smelting Company, to be Found at Pages 945-950.

[Commission and notarial certificate omitted.]

Q. 1. State your name, age, and place of residence.

A. My name is Peter B. Olney; I am sixty-five years of age, and I reside at Lawrence, Nassau county, Long Island, N. Y.

Q. 2. State your occupation and place of business.

A. I am a lawyer, and my place of business is 68 William street, New York city, borough of Manhattan.

Q. 3. If, in answer to the preceding interrogatory, you have testified that you are an attorney at law, state when you were admitted to the bar, and in what state or states, and how long you have been engaged in the practice of law in said state or states, and with what firms, if any, you have been or are connected.

1059 A. I was admitted to the bar first in the state of Massachusetts in 1866, and afterwards in the state of New York in 1866, and have practiced since then in the state of New York. The first firm with which I was connected was the firm of Barlow, Hyatt & Olney. The next was the firm of Barlow & Olney, and afterwards Olney & Comstock. I have been engaged in the practice of law for forty years and upwards.

Q. 4. State what, if any, judicial or other public or official positions you hold or have held.

A. I was one of the commission of three appointed by an act of the legislature of the state of New York in 1879 to compile public laws affecting the city of New York, and afterwards, under an act of the legislature, a member of the commission to revise said laws. The commission was composed of the late William C. Whitney, then counsel to the corporation, the late George Bliss, and myself. The revision was adopted by the legislature in volume 2 of the laws of 1882, I think. I was appointed district attorney for the county of New York in December, 1883, and acted as such until the 1st of January, 1885. I am now, and have been since 1898, referee in bankruptcy under the present United States bankrupt act.

Q. 5. State any other matters relating to your experience in your profession and as to your familiarity with the law and usages governing the practice in the state and federal courts in New York, both in law and in equity, and also as to your familiarity with the laws and usages of the state of New York relating to former adjudication and estoppel by judgment.

A. I have been in active practice in the courts of the state of New York during the last forty years, and during that period have practised in the state and federal courts, both in law and equity, and in the course of this practice have become fairly familiar with the laws of the state of New York relating to former adjudications and estoppel by judgment. In the case of Thorne v. De Breteuil, reported in 86 App. Div. 405, and 179 N. Y. 64, I had occasion, as counsel in that case, to examine, with a great deal of care, the doctrine of former adjudication and estoppel by judgment as applied by the courts of the state of New York.

Q. 6. Assuming that an action in equity is brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters to recover from him the profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, at a price in excess of the

price which they paid for it and of its fair value, and assuming that in this action a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Su-
1060 preme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to a similar action, substantially identical with the first and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 945-950.]

A. I think it would be a bar to the latter action. In case the further element of notice of the litigation and participation therein were present, I have no manner of doubt that the judgment in the former suit would be a bar.

Q. 7. Assuming that two actions in equity are brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters to recover from him profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, and assuming that such property is alleged to have been sold, pursuant to said joint plan and conspiracy, in two separate parcels, in each of which both promoters were jointly interested, and that said actions were brought to recover the respective profits received from the sale of the two parcels, respectively, and assuming that the bills of complaint in the two actions were substantially identical, except as to the particular relief sought, and assuming that certain profits were alleged to have been made by said promoters on each parcel, and assuming that in one of said actions a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to two similar actions, substantially identical in form with those above described and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 945-950.]

A. My answer to this interrogatory is the same as my answer to the 6th.

Q. 8. Have you examined a copy of the record in the action of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn in

the Circuit Court of the United States for the Southern Dis-
1061 trict of New York, such as is hereto annexed and marked (1), the respective portions of said record being marked A to R, inclusive?

[Objected to; admitted; exception.—See pages 946-950.]

A. I have.

Q. 9. Have you examined copies of the proceedings in the above-entitled causes, to wit, the causes of the Old Dominion Copper Mining & Smelting Co. v. Bigelow in the Supreme Judicial Court in Massachusetts, such as are hereto annexed and marked, respectively, (2) and (3)?

A. I have.

Q. 10. Assuming that there were now pending in the courts of the state of New York proceedings against Albert S. Bigelow, identical in all respects (except as the practice might require formal changes) with the copies of the proceedings referred to in the 9th interrogatory, and assuming that said courts had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record, copies of which are referred to in the 8th interrogatory, were sufficiently pleaded and proven in defence of said proceedings, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in each of these bills of complaint were, respectively the same persons, and that the contracts, acts, matters, and transactions mentioned in each of these bills of complaint were, respectively, the same contracts, acts, matters, and transactions, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, what would be the effect, under the law and usages of the state of New York., of said decree and record as a defence to said proceedings assuming to be so pending?

[Objected to; admitted; exception.—See pages 946-950.]

A. I think the decree and record would be a bar and defence to such suit, and if the further element was added of notice to Bigelow and participation by him in the New York litigation, there would be, in my opinion, no doubt that such decree and record would be a complete bar and defence.

Q. 11. Assuming the facts stated in the 10th interrogatory, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would those additional facts affect
1062 your answer to the preceding interrogatory?

[Objected to; admitted; exception.—See pages 946-950.]

A. As I have already stated in answer to the 10th direct interrogatory, notice to Bigelow, and participation by him in the litigation in New York would, beyond any doubt, in my opinion, render

that judgment a complete bar to the Massachusetts suits if brought in the courts of the state of New York.

Q. 12. Assuming the facts stated in the 10th interrogatory, and assuming the facts stated in the 11th interrogatory, and assuming that the participation of the defendant, Bigelow, as stated in the 11th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answer to the two preceding interrogatories?

[Objected to: admitted: exception.—See pages 947-950.]

A. I cannot say that this additional fact would affect my answer.

Q. 13. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8098, referred to in the 9th interrogatory, and assuming that the course of the proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8098, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8098 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, what, under the laws and usages of the state of New York, would be the effect of said decree and
1063 record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8098, described in the 9th interrogatory?

[Objected to: admitted: exception.—See pages 948-950.]

A. I think that that decree would be res adjudicata, and a bar and defence to the action.

Q. 14. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8099, referred to in the 9th interrogatory, and assuming that the course of proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the sub-

ject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8099, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8099 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, and assuming that the bill of complaint in said Circuit Court and the prayers thereof relate to one part of an entire transaction comprising said contracts, acts, merits, and transactions, and that the bill of complaint corresponding to the one numbered 8099 in Massachusetts and the prayers thereof relate to another part of the same entire transaction, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8099, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

1064 A. I think such decree and record would be a bar and defence to such action.

Q. 15. Assuming the facts stated in the 13th and 14th interrogatories, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would these additional facts affect your answers, or either of them, to the 13th and 14th interrogatories?

[Objected to; admitted; exception.—See pages 948-950.]

A. Adding these assumed facts, I have no manner of doubt but that in the courts of the state of New York the judgment and decree in New York would be an absolute bar to both suits.

Q. 16. Assuming the facts stated in the 13th, 14th, and 15th interrogatories, and assuming that the participation of the defendant, Bigelow, as stated in the 15th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers, or either of them, to the 13th, 14th, and 15th interrogatories?

[Objected to; admitted; exception.—See pages 949, 950.]

A. I cannot say that it would affect my answer.

Q. 17. If you have not already done so, state your reason for your answers to interrogatories 6th to 16th, inclusive.

[Objected to; admitted; exception.—See page 950.]

A. My reasons are the decisions of the courts of the state of New York in applying the doctrine of res adjudicata. Thus our Court of Appeals in Embury v. Connor, 3 N. Y., 522, held that—

"The general rule is, that an allegation on record, upon which issue has been once taken and found, and a judgment has been rendered, is, between the parties taking it and their privies, conclusive, according to the finding thereof, so as to estop the parties respectively from again litigating that fact once so tried and found; whether it is plead in bar, or given in evidence; when it is proper to be given in evidence.

In the subsequent case of Castle v. Noyes, 14 N. Y. 229, the court held that it was "well" settled that such a judgment was con-
1065 clusive in a second suit between the same parties or their privies on the same question, although the subject matter may be different.

Bigelow's relations to the subject matter of the litigation in the New York suit and his identity of interest with Lewisohn were such as to render Bigelow a privy with Lewisohn within the meaning of the rule. In addition, the supplemental answer in the Massachusetts suits alleges that Bigelow had knowledge of the litigation in New York, and fully participated in the defence of that action. The subject matters of the two suits pending in Massachusetts appear to differ in this, that one suit involves transactions with respect to 30,000 shares of stock, and the other the same transactions with respect to 100,000 shares of stock. The question involved is the same in both suits, although the "subject matter" appears to be different.

Under the decisions of our highest court a judgment in a New York court is a bar to both Massachusetts suits if brought in New York. See Doty v. Brown, 4 N. Y. p. 71; Castle v. Noyes, supra.

I think the elements necessary to constitute an estoppel are present here. The decisions of our courts applying these principles are very numerous. I refer to the following decisions, which seem to be especially in point: Woodhouse v. Duncan, 106 N. Y. 537; Pray v. Hegeman, 98 N. Y. 351, opinion, bottom of page 362, at the end; Thorne v. DeBreteuil, 179 N. Y. 64, opinion at page 82; Gleason v. Northwe-tern Mut. Life Ins. Co., 189 N. Y. 100.

Cross-interrogatories.

Without waiving the foregoing objections, but expressly insisting thereon, the plaintiff puts de bene the following cross-interrogatories:—

X 1. Is it a principle of the law of the state of New York that the law decided in a case in the court of last resort in overruling a demurrer becomes the law of the case to be applied when the case is heard upon the facts?

A. I think it is.

X 2. Is it the law of New York that there is no right of exonera-

tion or contribution between defendants jointly and severally liable ex delicto and not ex contractu?

A. I think it is.

X 3. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered that Bigelow might—but for said defence, if any—be under a liability to the plaintiff in the suits against Bigelow?

A. No.

1066 X 4. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability that Bigelow might—but for said defence, if any—be under as a liability jointly with Lewisohn?

A. Yes.

X 5. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability jointly and severally with Lewisohn?

A. Yes.

X 6. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability arising ex delicto?

A. I assume that the plaintiff charged in the New York suit that the promoters, Bigelow and Lewisohn, to use the language of Justice Holmes, "stood in a fiduciary relation to it," i. e., the plaintiff, and were charged with a breach of their duty as regards the plaintiff.

X 7. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability ex delicto jointly and severally with Lewisohn?

A. I have not specially considered that view except as stated in my answer to the 6th cross-interrogatory.

X 8. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts, as applied to these facts in said suit, there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts, in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability with Lewisohn, if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. In the papers annexed to the interrogatories I do not find in the record the opinion of the Massachusetts Supreme Judicial Court, reported at 188 Mass. 315, and I have not examined the report of that case; hence I cannot answer the question.

X 9. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts, as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts, in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the

law of New York, a joint and several liability ex delicto wtih Lewisohn, if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. I make the same answer to this cross-interrogatory as to the 8th cross-interrogatory.

1067 X 10. Is it a principle of the law of the state of New York that the liability of joint wrongdoers is joint and several?

A. It is.

X 11. Is it sometimes a principle of New York law that estoppel by former adjudication must be mutual?

A. I think it is.

X 12. If so, what, if any, are all the occasions of which you have knowledge on which they need not be mutual?

A. The general rule is that the estoppel shall be mutual. I do not at present recall the exceptions, if any there are.

X 13. Assuming that Bigelow took no part in the Lewisohn suit, in your opinion is the law of New York such that Bigelow would have been estopped in another suit to deny his liability as a matter of law on the same facts, by a final decree against Lewisohn in the first suit?

A. It is.

X 14. Assuming that Lewisohn's executors took no part in the suits against Bigelow, in your opinion is the law of New York such that said executors would have been estopped in another suit to deny their liability as a matter of law on the same facts, by a final decree against Bigelow in these suits?

A. If they had due notice of the litigation, yes.

X15. Assuming that Bigelow took part in the defence of the suits against Lewisohn's executors, and that the plaintiff knew this, what, by name and reference, are all the decisions, if any, in New York, which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation and knowledge, operate as an estoppel in favor of Bigelow?

A. Castle v. Noyes, 14 N. Y. 329, opinion of the court at page 335; Bush v. Knox, 2 Hun, 576, opinion of the court at page 578; Gleason v. Northwestern Mutual Life Ins. Co., 189 N. Y. page 100, opinion of the court at the middle of page 102; Woodhouse v. Duncan, 106 N. Y. 527, opinion of the court at page 532; Bracken v. Atlantic Trust Co., 36 App. Div. page 67, opinion of the court at page 71. I think in my examination of the question I came across other cases upon the point, but I do not now recall them.

X 16. Assuming that Bigelow took part in the defence of the suit against Lewisohn's executors, and that the plaintiff did not know this, what, by name and reference, are all the decisions, if any, in New York, which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation without plaintiff's knowledge, operate as an estoppel in favor of Bigelow?

A. In my opinion the plaintiff's knowledge of the participation

is not a material fact. I refer to the cases mentioned in the answer to the 15th cross-interrogatory, in none of which, as I recollect
1068 it, did it appear whether the plaintiff or the other parties to the judgment had or had not knowledge of the notice to, or participation of, the other parties in the litigation.

X 17. Assuming that Bigelow did not take part in the defence of the suit against Lewisohn's executors, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may operate as an estoppel in favor of Bigelow?

A. The decisions in Featherstone v. Turnpike Co., 71 Hun, 109, opinion at page 111; Pray v. Hegeman, 98 N. Y. 351, opinion, bottom of page 362 and at the end; Carter v. Bowe, page 546, opinion at page 548; Matter of Estate of Straut, 126 N. Y. 201, opinion at pages 210, 211. There may be other cases that I examined in looking up the question, but I do not now recall them.

X 18. Have you considered any decisions or language of the courts in New York which may have any tendency to support the view that there is no estoppel in Bigelow's favor growing out of the decree in favor of Lewisohn's executors?

A. I have not found any such cases; hence have not considered them.

X 19. If so, what, by name and reference, are all of these which you have considered?

A. I cannot refer to or give any such cases.

X 20. Have any arguments been submitted or suggested to you by defendant's counsel, or have you thought of any, in support of the view that there was by the law of New York no estoppel in favor of Bigelow growing out of the decree in favor of Lewisohn's executors?

A. The defendant's counsel have not submitted to me any such arguments, but of course I myself have considered the effect of the fact that Bigelow was not a party on record in the New York case. I wish to add that in considering the question I have had in mind the facts set forth in the supplemental answer or answers interposed in the Massachusetts suits and in the records submitted to me, and from time to time various questions have arisen in my mind, but I cannot say that at any time there seemed to be any sound arguments in support of the proposition that the New York judgment would not be a bar in case the Massachusetts action was brought in the courts of the state of New York.

X 21. If so, what are all of said arguments?

A. I think I have answered this question in my answer to the 20th cross-interrogatory.

X 22. What, in your opinion, constitutes privity under the law of New York to a judgment?

A. Privies in estate, the relation of principal and agent, or principal and surety, or master and servant, indentity or substantial of interest in the subject matter of litigation, notice of the litigation, or notice of the former litigation with an opportunity to participate

1069 therein, make the respective parties privies under the laws of the state of New York. I do not claim that this statement comprehends all the cases or privies.

X 23. In determining whether there was an estoppel in the present case, have you assumed or considered that Bigelow was in privity to the parties of record in the suit against Lewisohn's executors?

A. Yes.

X 24. In considering whether there was any estoppel in this case, have you assumed or considered that Bigelow had any legal interest to defend in the suit against Lewisohn's executors beyond such interest as he might have to secure a favorable precedent?

A. Yes.

X 25. If so, precisely what have you assumed to be said legal interest?

A. I think Bigelow was interested to defend that action because his relation to the subject matter and the litigation was such as to render him bound by the judgment therein.

X 26. Unless Bigelow would have been bound in favor of the plaintiff by estoppel by a decision adverse to Lewisohn's executors, even if Bigelow did not participate in the defence of the suit against them, did Bigelow, in your opinion, have a legal interest to defend in that suit?

A. Assuming that Bigelow was not bound by the New York judgment, I think his only interest in defending it would be to obtain, as a precedent, the judgment of a competent court of jurisdiction.

X 27. If so, by precise description, what, in your opinion, was said legal interest?

A. I think I have answered this question in my answer to the 26th cross-interrogatory.

X 28. In determining whether there was any estoppel in this case, have you assumed that the plaintiff consented to the participation, if any, by Bigelow, in the support of the demurrers of Lewisohn's executors?

A. No.

X 29. Is it a principle of New York law that if the defendant in one suit sustains merely the character of a co-trespasser with the defendant in another suit by the same plaintiff, the recovery against one defendant is not thereby made competent evidence against the other?

A. If the trespass or wrong committed by each of the defendants is in all respects the same, my answer to this interrogatory, if I understand it, would be no.

X 30. Is it a principle of New York law that the judgment in favor of one of two persons, jointly and severally liable for the wrongful conversion of the plaintiff's property, is no bar to a subsequent suit against the other because torts are joint and several?

A. No.

X 31. Is it a principle of New York law that an adjudication acts as an estoppel only between the parties thereto or those in privity with them, or, in other words, the estoppel must be mutual?

A. The general rule, as I gather it from the decisions in
1070 New York, is that an estoppel must be mutual, but I am not prepared to say that there are not some exceptions to the rule.

X 32. Is it a principle of New York law that a judgment in favor of one co-trespasser may not be used by another co-trespasser, not a party to it, by way of estoppel?

A. No.

X 33. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were Bigelow's agents in the suit against them which has been dismissed?

A. I think that a quasi relationship of agency existed, and that idea may have been in my mind in considering the question, but I have considered that the facts in the case at bar were more nearly like the facts in the case of Woodhouse v. Duncan, 106 N. Y. 532, opinion.

X 34. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were trustees for Bigelow of the stock sought to be recovered in the suit against them which has been dismissed?

A. I do not think that I have assumed that Lewisohn's executors were trustees for Bigelow of the stock sought to be recovered in the New York suit.

X 35. Is it a principle of New York law that in an action at law against one or some of several joint tort feasors, the controversy may be determined as between the parties before the court,—i. e., the plaintiff and defendant,—and without prejudice to the rights of others; and the judgment will completely determine the controversy between them, and will not be res adjudicata between the plaintiff and any of the joint tort feasors who is not a defendant and may be sued later?

A. If I understand this question, I do not think it can be answered either yes or no, in all cases. If all the joint tort feasors were alleged to be guilty of the same act and those sued succeeded in obtaining a judgment in their favor upon the merits, I think the same plaintiff under the laws of the state of New York would be barred by the judgment in a suit brought by him against the other joint tort feasors.

X 36. Have you stated all your reasons for the opinions expressed by you or the statements made by you in answer to the 6th, 7th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th direct interrogatories?

A. I think I have.

X 37. If not, what are all your reasons for the opinions or statements given by you in answer to each of said interrogatories?

A. I think I have already given them.

X 38. Have you now stated all your reasons for said answers?

A. I think I have.

X 39. Were you, prior to the taking of your deposition on
1071 the foregoing cross-interrogatories, shown them, or any of them, or any copies of any of them, or given any information concerning the substance of them?

A. No.

X 40. Has each of your answers in its final form been given in the language in which it now appears before you were aware of the substance of any subsequent cross-interrogatory?

A. I first answered Cross-Int. 4, understanding that by that question I was asked if I had formed an opinion on the merits of Bigelow's liability, but when my attention, after having heard Cross-Int. 5, was called to the fact that that was not the question asked, I changed my answer as it now appears on the record. I also added another case to my answer to Cross-Int. 15 after having first heard Cross-Ints. 16 and 17. In every other respect I heard none of the subsequent interrogatories before answering.

X 41. Have you, since September 22, 1908, discussed in any way with any other person who is named as a witness in the caption to these cross-interrogatories, or with any one on behalf of the defendant, any of the subjects dealt with in the foregoing interrogatories or in your answers thereto?

A. No, if the question refers to the cross-interrogatories.

I discussed with Mr. Farley, on several occasions when he called at my office, the questions involved.

PETER B. OLNEY.

Before me,

PERCIVAL WILDS,
Notary Public.

Deposition of William H. Wadhams.

The Deposition of William H. Wadhams, Taken in Behalf of the Defendant Bigelow, and Filed by His Counsel, Subject to the Objections and Exceptions of Counsel for the Complainant The Old Dominion Copper Mining & Smelting Company, to be Found at Pages 945-950.

[Commission and notarial certificate omitted.]

Q. 1. State your name, age, and place of residence.

A. My name is William H. Wadhams; age, thirty-four; residence, No. 39 West 11th street, borough of Manhattan, New York city.

Q. 2. State your occupation and place of business.

A. I am a lawyer, with office at No. 1 Nassau street, borough of Manhattan, New York city.

1072 Q. 3. If, in answer to the preceding interrogatory, you have testified that you are an attorney at law, state when you were admitted to the bar, and in what state or states, and how long you have been engaged in the practice of law in said state or states, and with what firms, if any, you have been or are connected.

A. I was admitted to the bar of New York state in 1898; I have been engaged in the practice of law in said state for ten years, and was first connected with Curtis, Mallet-Prevost & Colt, John C. Carlisle, counsel, 20 Broad street, borough of Manhattan, New York city, from October, 1898, to February, 1899; associated with Charles P. Latting, Esq., United States loan commissioner and counsellor at law, 34 Pine street, borough of Manhattan, New York city,

from February, 1899, to October, 1899, when I formed a partnership with Mr. Latting under the firm name and style of Latting & Wadhams, having offices at No. 34 Pine street, borough of Manhattan, New York city; in the fall of 1901 I was appointed law secretary to Mr. Justice John Proctor Clarke, who had been appointed to the supreme bench of New York state by the then Governor Theodore Roosevelt; for three years associated with Charles P. Latting, dissolved the partnership by mutual consent, and was associated with Harris & Towne, 284 Broadway, at the same time continuing the secretaryship with Mr. Justice Clarke; remained with Judge Clarke four years and four months, serving with him while he was a nisi prius justice at trial and equity terms, and also afterwards in the appellate division, first department; in February, 1906, associated in offices with Winthrop & Stimson, 32 Liberty street; January 1, 1908, formed the partnership of Baldwin, Wadhams, Beacon & Fisher, with offices at 31 Nassau street, where I am now engaged in the practice of the law; have not practised outside the state of New York except appearing by courtesy upon arguments in the state of New Jersey.

Q. 4. State what, if any, judicial or other public or official positions you hold or have held.

A. In addition to the secretaryship mentioned in the last answer, I have served as justice of the city court of the city of New York, having been appointed to that office January 14, 1907, by Governor Charles E. Hughes. I served until the expiration of the term on January 1, 1908.

Q. 5. State any other matters relating to your experience in your profession, and as to your familiarity with the law and usages governing the practice in the state and federal courts in New York, both in law and equity, and also as to your familiarity with the laws and usages of the state of New York relating to former adjudication and estoppel by judgment.

A. During my practice at the bar in the state of New York I had devoted myself largely to the litigated side of business; been frequently in the courts, employed as counsel by other at-
1073 torneys, and by reason of my connection with the courts, both as subordinate and as judge, I have had opportunity to work and pass upon proceedings of all kinds, both in law and in equity.

I am also a solicitor in the United States district court and Circuit Court and proctor in admiralty in the United States court, and have appeared in proceedings both in the southern district of New York and in the eastern district of New York. In the course of this practice and on the bench I have had before me for consideration the question of estoppel by judgment and res adjudicata.

Q. 6. Assuming that an action in equity is brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters to recover from him the profits alleged to have been received by him and his associates secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property

to the corporation at the time of its organization, at a price in excess of the price which they paid for it and of its fair value, and assuming that in this action a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to a similar action, substantially identical with the first and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 945-950.]

A. In my opinion it would be a bar which would prevent recovery in the second cause of action.

Q. 7. Assuming that two actions in equity are brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters to recover from him profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, and assuming that such property is alleged to have been sold, pursuant to said joint plan and conspiracy, in two separate parcels, in each of which both promoters were jointly interested, and that said two actions were brought to recover the respective profits received from the sale of the two parcels, respectively, and assuming that the bills of complaint in the two actions were substantially identical, except as to the particular relief sought, and assuming that certain profits were
1074 alleged to have been made by said promoters on each parcel, and assuming that in one of said actions a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to two similar actions, substantially identical in form with those above described and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 946-950.]

A. In my opinion it would be a bar which would prevent recovery in each of the said actions.

Q. 8. Have you examined a copy of the record in the action of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn in the Circuit Court of the United States for the Southern District of

New York, such as is hereto annexed and marked (1), the respective portions of said record being marked A to R, inclusive?

[Objected to; admitted; exception.—See pages 946-950.]

A. I have examined the records to familiarize myself with the proceedings, but have not minutely examined all the details of it. I am familiar with the proceedings and its history.

Q. 9. Have you examined copies of the proceedings in the above-entitled causes, to wit, the two causes of the Old Dominion Copper Mining & Smelting Co. v. Bigelow in the Supreme Judicial Court in Massachusetts, such as are hereto annexed and marked, respectively, (2) and (3)?

A. Yes.

Q. 10. Assuming that there were now pending in the courts of the state of New York proceedings against Albert S. Bigelow, identical in all respects (except as the practice might require formal changes) with the copies of the proceedings referred to in the 9th interrogatory, and assuming that said courts had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record, copies of which are referred to in the 8th interrogatory, were sufficiently pleaded and proven in defence of said proceedings, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in each of these bills of complaint were, respectively, the same persons, and that the contracts,
1075 acts, matters, and transactions mentioned in each of these bills of complaint were, respectively, the same contracts, acts, matters, and transactions, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, what would be the effect, under the law and usages of the state of New York, of said decree and record as a defence to said proceedings assumed to be so pending?

[Objected to; admitted; exception.—See pages 946-950.]

A. In my opinion it would be a bar which would prevent recovery in the said proceedings.

Q. 11. Assuming the facts stated in the 10th interrogatory, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would those additional facts affect your answer to the preceding interrogatory?

[Objected to; admitted; exception.—See pages 946-950.]

A. A. It would not affect my answer. It would merely give me additional reason for making the same answer.

Q. 12. Assuming the facts stated in the 10th interrogatory, and assuming the facts stated in the 11th interrogatory, and assuming that the participation of the defendant, Bigelow, as stated in the 11th interrogatory, was with the knowledge of the plaintiff, how, if

at all, would this additional fact affect your answers to the two preceding interrogatories?

[Objected to; admitted; exception.—See pages 947–950.]

A. It would not affect them, it would be the same answer.

Q. 13. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8098, referred to in the 9th interrogatory, and assuming that the course of the proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the
1076 parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8098, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8098 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8098, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948–950.]

A. In my opinion it would be a bar which would prevent recovery.

Q. 14. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8099, referred to in the 9th interrogatory, and assuming that the course of proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8099, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the

parties and of the subject matter in said action against said Lewisohn's executors in said court and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of
1077 complaint numbered 8099 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, and assuming that the bill of complaint in said Circuit Court and the prayers thereof relate to one part of an entire transaction comprising said contracts, acts, matters, and transactions, and that the bill of complaint corresponding to the one numbered 8099 in Massachusetts and the prayers thereof relate to another part of the same entire transaction, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8099, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948–950.]

A. In my opinion it would be a bar which would prevent recovery.

Q. 15. Assuming the facts stated in the 13th and 14th interrogatories, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would these additional facts affect your answers, or either of them, to the 13th and 14th interrogatories?

[Objected to; admitted; exception.—See pages 948–950.]

A. It would not affect my answer. It would merely give me additional reason for making the same answers.

Q. 16. Assuming the facts stated in the 13th, 14th, and 15th interrogatories, and assuming that the participation of the defendant, Bigelow, as stated in the 15th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers, or either of them, to the 13th, 14th, and 15th interrogatories?

[Objected to; admitted; exception.—See pages 949, 950.]

A. It would not affect it. My answer would be the same.

Q. 17. If you have not already done so, state your reasons for your answers to Ints. 6th to 16th, inclusive.

[Objected to; admitted; exception.—See page 950.]

1078 A. My answers are based upon considerations of both reason and authority. In my opinion the judgment entered

upon the determination of the Supreme Court of the United States in Old Dominion Mining & Smelting Company against Lewisohn is a bar which prevents recovery, because it is in law an estoppel by judgment. It will be observed that Lewisohn and Bigelow acted together. From the facts it appears that throughout they were jointly interested in the several steps taken, and each acted for the other and co-operated with the other in bringing about the results of which the plaintiff complains. It is unnecessary to state whether, within the strict definitions of law, they were partners or were engaged in a joint venture. The result would be the same, for in each case they would stand in a relation to each other of identity of interest. The general rule of law in New York state is that an allegation on record upon which issue has ben once taken and found, and a judgment rendered thereon, is, between the parties taking it and their privies, conclusive according to the finding thereof, so as to estop the parties, respectively, from again litigating that fact once so tried and found, whether it is pleaded in bar or given in evidence. This rule was announced early by the courts in the state of New York, and was formulated, substantially as given by me, in the case of Enbury against Connor, 3 N. Y. 511, and has frequently been reiterated by judges of our courts of highest resort.

Mr. Justice Holmes, writing the opinion of the United States Supreme Court in the case against Lewisohn, states.—

"The ground of the petitioner's case is that Lewisohn the deceased, and one Bigelow, as promoters formed the petitioner, that they might sell certain properties to it at a profit; that they made their sale while they owned all the stock issued, but in contemplation of a large further issue to the public without disclosure for their profit, and that such an issue in fact was made."

From the records annexed to this examination it clearly appears that the actions against Bigelow concerned the same subject matter and were brought for the same purpose, attempting to impose liability upon one who was jointly engaged with Lewisohn in the acts complained of and set forth in the complaint against Lewisohn. Not only does it appear that they were partners or quasi-partners in this joint venture, and that Lewisohn was the agent and representative of Bigelow, but it appears that, as to the property received, Lewisohn was acting by agreement with Bigelow for the benefit of both, and this necessarily constituted Lewisohn a trustee for Bigelow to the extent of his interest in the property. A decree in favor of a trustee under the laws of the state of New York is binding upon and enures to the benefit of the cestui que trust, or beneficiary. It therefore appears in this case that Lewisohn and Bigelow are privies within the definition as defined in the general rule, both by reason of their identity of interest, being partners in the joint venture set forth, and by reason of the trust relations existing between them. The authorities are in conformity with this opinion. In Freeman on Judgments, sec. 173, it is said.—

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"It is not intended that the fact of a legal and equitable title being in different persons shall authorize the same issue to be twice bona fide litigated. A suit by A for the use of B or his, A's trustee is

binding on B. No man can be permitted after adjudicating the matter by his trustees, to disregard that adjudication."

In the matter of Estate of Straut, 126 N. Y. 201, the court said, speaking of trustees:

"In such an action they represent the whole title and interest and their action in the absence of fraud or collusions, is binding upon the beneficiaries. In the action brought by these trustees there is no question between the beneficiaries themselves. The only question to be considered was between the trustees and a stranger to the trust who was alleged to have in his possession, or to be liable to action for certain property belonging to the trust, and in such an action it is well settled now that the beneficiaries are not necessary parties and the authorities are equally clear in the case of agency. Judge Choate, in Emma Silver Mining Company, Limited, v. Emma Silver Mining Company of New York, 7 Fed. Rep. 401, said: 'The weight of authority, however, is that where an agent in a transaction is sued after the termination of his agency and upon a trial of the merits the issue is determined against the plaintiff, the principal, though not a party to the suit, can avail himself of the judgment as a bar when he is sued by the same plaintiff in the same cause of action. While the principal, if he had no notice of the former suit and no opportunity to defend it, might be concluded by a judgment against his former agent, or made responsible for the agent's bad pleading or blunders in the trial of the case, because so to conclude him would be to deprive him of his property without due process of law, yet as regards the plaintiff who has before sued the agent and been defeated there is no reason why he should not be concluded upon that principle of public policy which gives every man one opportunity to prove his case and limits every man to one such opportunity. He has had his day in Court and it is immaterial whether he has testified under this, his right, as 1080 against the principal or the agent in the transaction provided the issue to be tried was identical as against both.'

Castle v. Noyes, 14 N. Y. 329.
Emery v. Fowler, 39 Me. 329.

and cases cited."

Under that rule the judgment rendered on the stated facts in favor of Lewisohn would act, when properly pleaded, as an estoppel, and therefore a bar which would prevent recovery in the actions against Bigelow.

There is another and further reason. In the action in the United States court against Lewisohn the plaintiff charged Bigelow and Lewisohn with the commission of tortious acts, and demanded a rescission of the contract made by them and a return of the purchase price. The success of their cause of action depended upon the establishment of the commission of the court by Bigelow and Lewisohn. The plaintiff chose this form of action, and must be bound by the resulting determination of the courts. The demurrer to the complaint having been sustained, the judgment entered thereon was a determination that the facts alleged in the complaint did not constitute a cause

of action, and therefore necessarily determined that no tort had been committed.

Under the law of the state of New York, where two parties are charged with the commission of a tort there may be but one recovery, although by an anomaly of law a dual pursuit of that recovery is permitted. So where two persons are charged with the commission of a wrong, separate actions may be brought against each, and there may be, by this means, a dual pursuit of the remedy, and separate judgment may be entered against each, but upon the satisfaction of the judgment against either the other is discharged, and that on the theory that there can be but one recovery for a wrong. This was established in the case of Knapp v. Roche, 94 N. Y. 329, in which Chief Justice Ruger, writing for a unanimous court, says:

"Satisfaction by one joint tort feasor has always been held to be available as a bar to an action against another."

So it is held, reciprocally, that where it has once been determined by the court that there is no wrong by reason of the facts alleged by the plaintiff, that must necessarily be an end of the litigation, and the fact that there is no tort and that no wrong has been committed having once been determined in an action against one of the alleged wrongdoers, it follows that in an action against the other the
1081 judgment of the court in which it was determined that there was no wrong operates as a bar or estoppel by judgment. This must be so to sustain continuity of judicial decisions, to put an end to litigation, and to prevent injustice by operation of law. This may be illustrated by the action of People v. Stephens, 51 How. Pr. 235; aff. 71 N. Y. 527. In that case the state brought an action against four defendants claiming damages for a fraudulent combination and conspiracy in obtaining a contract from the state with reference to the performance of public work. It appeared in the trial that previously the state had commenced an action against two of the same defendants upon precisely the same state of facts, which was tried upon a demurrer interposed by the defendants and judgment rendered in their favor. It was held that the judgment was a bar which prevented recovery in the subsequent action, not only against the two defendants previously sued, but also against the other alleged conspirators. The court said, at page 246:

"It is claimed, however, that the former judgment grants no protection to the other defendants because a party may fail to recover against one joint wrongdoer and yet succeed as against the others. That is undoubtedly true when a case turns upon evidence given. The proof may be sufficient to justify a recovery against one, but insufficient as to another. Has it, however, ever been held that upon the same proof against the same parties the Court would be justified in holding one guilty of actionable conduct whilst the other was not? * * * All the facts of the defendants Gale & Stephens set out in the complaint in the former action and which are identical, the same as those contained in the complaint that the parties are here charged with has entered into a confederacy and combination with others, those others being the persons not then sued; and it was of those acts then and now charged this court gravely and solemnly decided

that they were not sufficient to constitute a cause of action. If they were not then are they now? Has the color or complexion changed with the lapse of years or must this Court change its view of the same facts because performed by the parties now for the first time named, though then included as co-conspirators and confederates. When the former judgment requires us to hold that Stephens against Townsend and Burden have done nothing but raise a cause of action to the state we must necessarily be confined to the same rule when we judge their came conduct and acts committed by others in their aid. The former judgment may have been erroneous and might perhaps have been reversed. It stands nevertheless to-day uttering the law which must control our actions in regard to these parties. It is founded upon no technicality, no legal quibble, but rests upon the great con-
1082 servative principle that litigation must cease with an unreversed judgment."

This case was affirmed by the highest court of this state and has never since been questioned, and stands as law of the state of New York to-day.

On the facts presented in this case there is still a further and additional reason, which, however, is not necessary to the opinion I have rendered, but which merely adds another ground for it, namely, it is a rule of law in the state of New York that where one has taken part in litigation and had an opportunity to control and direct it, that he has had his day in court and is bound equally as if he were a party to the litigation. Upon this subject the Court of Appeals, in the case of Carleton v. Lombard, 149 N. Y. 137, states:

"We have seen that the defendant had knowledge of all the correspondence by cable between the plaintiffs and the parties in Calcutta; that it was notified of the commencement of the action and that it participated in the trial. In so far as the issues actually litigated in that case are identical with the issues involved this judgment is binding upon the defendant, in the same way as if it had been a party upon the record."

I have also taken into consideration that the judgment heretofore rendered, and which I have stated in my opinion, if properly pleaded, would be a bar to actions concerning the same subject matter brought against Bigelow, was a judgment upon demurrer under the law of the state of New York. A judgment on demurrer to plaintiff's complaint is conclusive of everything necessarily determined by it, and in this state, where the defendant has failed to take advantage of the opportunity to plead over the judgment which is thereupon entered against him, is under the laws of the state of New York, a final judgment. Among the cases which have so held, are:

Whiteman v. Shankland, 18 How. Pr. 79;
Allen v. Knott, 111 U. S. 472;
Bouchaud v. Dias, 3 Dem. 238,—

in which it was pointed out that it can make no difference whether the facts be proved by deeds and witnesses or be admitted by the parties, whether ore tenus or by pleading. I have therefore concluded, and stated as my opinion, the final judgment on demurrer

by a court of competent jurisdiction upon a question directly at issue between the parties, and which has in this instance been affirmed upon appeal to the court of highest resort, and which forever
1083 closes and estops all parties to the action, and those in privity with them, from questioning its accuracy or justice in another action. As was stated in People v. Stephens, 51 How. Pr., already cited:

"This rule was essential to peace and repose and was preventative of endless and vexatious litigation, and is also so firmly rooted and grounded in every enlightened system of jurisprudence that it is at once conceded and has not now been questioned. That this practice is fully applicable to the judgment rendered upon a demurrer, plaintiffs concede and authorities are abundant to justify such concession."

I may add further that the reason I stated that this judgment would operate as a bar in both actions is that it appeared from the facts clearly that the two actions are a subdivision of one cause of action, the one having to do with the 100,000 shares, and the other with 30,000 shares of the stock of this company, the facts being in all essentials as bearing upon the gravamen of the offence alleged, the same in each case, and the law affecting the transactions and establishing the rights as between the plaintiff and defendants must necessarily be the same, [the] transaction being one, entire, and identical.

There are many other cases to the same effect; authority in support of this opinion is not lacking, and will be found in Hirchbach v. Ketcham, 84 A. D. 258, where the court held that after demurrer had been sustained to the complaint upon the theory that a contract alleged was invalid, and judgment had been entered thereon dismissing the complaint upon the merits, that such an action was a bar which prevented recovery by the same plaintiff in a subsequent action to recover other fees alleged to be due under the same contract; and other cases might be cited.

Cross-interrogatories.

Without waiving the foregoing objections, but expressly insisting thereon, the plaintiff puts de bene the following cross-interrogatories:—

X 1. Is it a principle of the law of the state of New York that the law decided in a case in the court of last resort in overruling a demurrer becomes the law of the case to be applied when the case is heard upon the facts?

A. It certainly is. If when a demurrer is pleaded upon the ground that the facts alleged are not sufficient to constitute a cause of action, and the demurrer is sustained, it is then the law of the case that no cause of action is stated, and in the ordinary course
1084 of action the plaintiff is given an opportunity to plead over, that is, serve an amended complaint within the time specified by the court, generally within twenty days. If he fails to serve such amended complaint and does not plead over the judgment then becomes final, and is given the same force and effect as a final judgment upon the facts. I have given authorities in support of this point

upon my direct examination, and in addition to the New York cases cited, I may refer, also, to the recognition of this principle in the United States court in Yates v. Utica Bank, 206 U. S. 181, and Northern Pacific Ry. Co. v. Slaght, 205 U. S. 132, and Bissell v. Spring Valley Township, 124 U. S. 225, and Bouchaud v. Dias, 3 Den. (N. Y.) 238.

On the other hand, where the demurrer is overruled, it is then the law of the case that the facts alleged do state a cause of action, assuming them all to be true, and the burden rests upon the plaintiff to proceed with the trial and prove such facts.

X 2. Is it the law of New York that there is no right of exoneration or contribution between defendants jointly and severally liable ex delicto and not ex contractu?

A. Yes, it is the law.

X 3. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered that Bigelow might—but for said defence, if any—be under a liability to the plaintiff in the suits against Bigelow?

A. In the first place, the decree was not merely a decree dismissing the complaint against Bigelow, but it was a final judgment upon a demurrer which determined that there was no cause of action in the complaint alleged. I have not undertaken to consider upon the merits the claim made by the plaintiff either against Lewisohn or against Bigelow. I have therefore not considered whether or not Bigelow was liable to the plaintiff upon the merits in the actions brought by the plaintiff against Bigelow, but I have assumed that even if an attempt were made to prove that Bigelow was liable in such actions, that no recovery could be had if the judgment in favor of Lewisohn were properly pleaded, because, regardless of such independent liability, the judgment upon the demurrer in favor of the defendant in the action against Lewisohn would operate as a bar and prevent recovery as against Bigelow.

X 4. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability that Bigelow might—but for said defence, if any—be under as a liability jointly with Lewisohn?

A. Yes.

X 5. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you as-
1085 sumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability jointly and severally with Lewisohn?

A. Yes.

X 6. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability arising ex delicto?

A. Yes.

X 7. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said de-

fence, if any—be under as a liability ex delicto jointly and severally with Lewisohn?

A. Yes.

X 8. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. Yes.

X 9. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability ex delicto with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. Yes.

X 10. Is it a principle of the law of the state of New York that the liability of joint wrongdoers is joint and several?

A. Yes, in most cases.

X 11. Is it sometimes a principle of New York law that estoppel by former adjudication must be mutual?

A. Yes, sometimes.

X 12. If so, what, if any, are all the occasions of which you have knowledge on which they need not be mutual?

A. It is easier to state cases in which they must be mutual than in which they need not be mutual. The general practice, however, is that they need not be mutual in those cases in which the party or his privy against whom the estoppel is raised has been given his day in court, and after that day in court it has been determined upon his own statement of the facts that he has no cause of action. As was stated in Emma Silver Mining Co., Ltd., v. Emma Silver Mining Co. of New York, 7 Fed. Rep. 401, where the agent is sued, the principal is not estopped if he had no notice of the former suit, and no opportunity to defend it, for the reason that he may not

1086 be concluded by a judgment against his former representative and be made responsible for the bad pleading and blunders in the trial of such former representative, as this would be to deprive him of his day in court, and would thus be depriving him of his property without due process of law; but, as regards the plaintiff, he has been defeated in the former suit against the agent, and there is no reason why he should be concluded by the prior adjudication, because the plaintiff has had his day in court and has been given his opportunity and it has been determined that he has no cause of action. In such case, provided the issue is identical, as against both defendants, an estoppel by judgment exists in favor of the party not sued upon the former trial, because of his privity, and yet it is not a case of mutual estoppel.

X 13. Assuming that Bigelow took no part in the Lewisohn suit, in your opinion is the law of New York such that Bigelow would have been estopped in another suit to deny his liability as a matter of law on the same facts, by a final decree against Lewisohn in the first suit?

A. Yes. In this action there was more than the mere relation of agent, but an identity of interest and an identity of subject matter, and upon showing that relationship, or, in other words, proof of the privity, he would be estopped.

X 14. Assuming that Lewisohn's executors took no part in the suits against Bigelow, in your opinion is the law of New York such that said executors would have been estopped in another suit to deny their liability as a matter of law on the same facts by a final decree against Bigelow in these suits?

A. Yes, assuming that the action had been prosecuted and a decree had been entered in the Bigelow actions first.

X 15. Assuming that Bigelow took part in the defence of the suits against Lewisohn's executors, and that the plaintiff knew this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation and knowledge, operate as an estoppel in favor of Bigelow?

A.—

Carleton v. Lombard, 149 N. Y. 137.
Oceanic Steamship Navigation Co. v. Compania Espanola, 144 N. Y. 663.
Village of Port Jarvis v. First National Bank, 96 N. Y. 550.
Woodhouse v. Duncan, 106 N. Y. 527.
Leavitt v. Walcott, 95 N. Y. 212.
Heiser v. Hatch, 86 N. Y. 619.
1087 Demarest v. Darg, 32 N. Y. 281.
Prescott v. Le Conte, 83 A. D. 483.
Kelley v. Forty-second Street Ry. Co., 37 A. D. 509.
Van Koughnet v. Dennis, 68 Hun. 179.
Bush v. Knox, 2 Hun. 576.

X 16. Assuming that Bigelow took part in the defence of the suit against Lewisohn's executors, and that the plaintiff did not know this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation without plaintiff's knowledge, operate as an estoppel in favor of Bigelow?

A. Same as list given in answer to last question.

X 17. Assuming that Bigelow did not take part in the defence of the suit against Lewisohn's executors, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may operate as an estoppel in favor of Bigelow?

A. Upon the question of estoppel generally:—
Enbury v. Connor, 3 N. Y. 511.
Leavitt v. Walcott, 95 N. Y. 212.
Park Hill Co. v. Herriott, 41 A. D. 324.
Western Ry. Co. v. Nathan, 49 N. Y. 513.
Lawrence v. Shaefer, 19 Misc. 239; aff. 20 A. D. 80.
Brewster v. Hatch, 122 N. Y. 349.
Matter of Will of O'Hara, 95 N. Y. 403.
Paulding v. The Chrome Steel Co. et al., 94 N. Y. 329.
Pakas v. Hollingshead, 184 N. Y. 217.
People v. Stephens, 51 How. Pr. 235; aff. 71 N. Y. 527.
Portland Coal Mining Co. v. Stratton's Independence, 158 Fed. Rep. 63.
Emma Silver Mining Co., Ltd., v. Emma Silver Mining Co. of New York, 7 Fed. Rep. 401.
Gleason v. Northwestern Mutual Life Ins. Co., 189 N. Y. 100.
Bates v. Stanton, 1 Duer, 79.
Hirshbach v. Ketchum, 89 A. D. 258.
Freeman on Judgments, secs. 174, 173, 207.
2 Black on Judgments, secs. 789, 781.
1088 Whitman v. Shankland, 18 How. Pr. 79.
Bouchaud v. Dias, 3 Den. 238.
Allen v. Knott, 111 U. S. 472.
Yates v. Utica Bank, 206 U. S. 181.
Northern Pacific Ry. Co. v. Slaght, 205 U. S. 135.
Bissell v. Spring Valley Townships, 124 U. S. 225.
2 Black on Judgments, sec. 709.
Castle v. Noyes, 14 N. Y. 329.
Carter v. Bowe, 41 Hun, 516.
Matter of Estate of Strant, 126 N. Y. 201.
Brackin v. Adirondack Trust Co., 36 A. D. 67.
Rogers v. Rogers, 3 Paige, 379.
Wakeman v. Grover, 4 Paige, 24.
Kerrison v. Stewart, 93 U. S. 155.
King v. Barnes, 109 N. Y. 267.
Wilcox v. Pratt, 125 N. Y. 688.
Lichty v. Lewis, 63 Fed. Rep. 535.
Bush v. Knox, 2 Hun, 576.
1 Greenleaf on Evidence, p. 523.

X 18. Have you considered any decisions, or language of the courts in New York which may have any tendency to support the view that there is no estoppel in Bigelow's favor growing out of the decree in favor of Lewisohn's executors?

A. No.

X 19. If so, what, by name and reference, are all of these which you have considered?

A. None.

X 20. Have any arguments been submitted or suggested to you by defendant's counsel, or have you thought of any, in support of the view that there was by the law of New York no estoppel in favor

of Bigelow growing out of the decree in favor of Lewisohn's executors?

A. No.

X 21. If so, what are all of said arguments?

A. None.

X 22. What, in your opinion, constitutes privity, under the law of New York, to a judgment?

A. I will adopt, as my definition of privity, that stated by Greenleaf in his work on Evidence, vol. 1, sec. 523. This, in my opinion, is the law in the state of New York:

"The term privity denotes mutual or successive relationship to the same rights of property."

1089 And he adds—

"Standing in this relation to the litigating party here bound by the proceedings to which he was a party, is that they are identified with him in interest; and wherever this identity is found to exist all are alike concluded. Hence, all privies, whether in estate, in blood, or in law are estopped from litigating that which is conclusive upon him with whom they are in privity."

X 23. In determining whether there was an estoppel in the present case, have you assumed or considered that Bigelow was in privity to the parties of record in the suit against Lewisohn's executors?

A. Yes.

X 24. In considering whether there was any estoppel in this case, have you assumed or considered that Bigelow had any legal interest to defend in the suit against Lewisohn's executors beyond such interest as he might have to secure a favorable precedent?

A. No, I have not so assumed; I have considered their relative relationship.

X 25. If so, precisely what have you assumed to be said legal interest?

A. In my opinion as to plaintiff, the facts alleged, if true, would constitute them trustees ex male faceo; and, in my opinion, in their relations as to each other they were engaged in a joint adventure as such quasi partners.

X 26. Unless Bigelow would have been bound in favor of the plaintiff by estoppel by a decision adverse to Lewisohn's executors, even if Bigelow did not participate in the defence of the suit against them, did Bigelow, in your opinion, have a legal interest to defend in that suit?

A. Yes.

X 27. If so, by precise description, what, in your opinion, was said legal interest?

A. The joint interest, as stated by me, is that Lewisohn has taken part in the joint venture in which they are alleged to have been engaged, and was therefore part owner in the proceeds of the property; the contract under which the same was obtained the plaintiff was attempting to set aside.

X 28. In determining whether there was any estoppel in this case, have you assumed that the plaintiff consented to the partici-

pation, if any, by Bigelow in the support of the demurrers of Lewisohn's executors?

A. No.

X 29. Is it a principle of New York law that if the defendant in one suit sustains merely the character of a co-trespasser with the defendant in another suit by the same plaintiff the recovery against one defendant is not thereby made competent evidence against the other?

A. Yes, that is so.

1090 X 30. Is it a principle of New York law that the judgment in favor of one of two persons jointly and severally liable for the wrongful conversion of the plaintiff's property is no bar to a subsequent suit against the other because torts are joint and several?

A. Yes, it may be a principle when it is determined that no tort was committed.

X 31. Is it a principle of New York law that an adjudication acts as an estoppel only between the parties thereto, or those in privity with them, or, in other words, the estoppel must be mutual?

A. It is a principle of law that it operates only as to parties and those that are in privity with them,—if you make your definition of privity broad enough; but it does not always follow that an estoppel in a narrow, technical sense must be mutual. I have more fully discussed this in my prior answer. The difficulty of answering questions of this nature is that the terms used may be variously defined.

X 32. Is it a principle of New York law that a judgment in favor of one co-trespasser may not be used by another co-trespasser, not a party to it, by way of estoppel?

A. Yes, it may, where the act complained of is identical, and the subject matter is identical, and it is determined that there was no trespass committed.

X 33. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were Bigelow's agents in the suit against them which has been dismissed?

A. Yes.

X 34. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were trustees for Bigelow of the stock sought to be recovered in the suit against them which has been dismissed?

A. Yes.

X 35. Is it a principle of New York law that in an action at law against one or some of several joint feasors, the controversy may be determined as between the parties before the court,—i.e., the plaintiff and defendant,—and without prejudice to the rights of others; and the judgment will completely determine the controversy between them and will not be res adjudicata between the plaintiff and any of the joint tort feasors who is not a defendant and may be sued later?

A. Yes, this may be so where the determination is to the effect that no tort was committed; as, for instance, it may be held by a jury upon a trial against two joint tort feasors that the evidence —

tablishes the commission of a tort by one but not by the other, or where actions are separately brought, but on different statements of fact, a judgment may be recovered as against one and not as against the other. This rests, however, upon a diversity of act or a diversity of subject matter, and the use of the words "joint tort feasors" should not be permitted to cause confusion. The law
1091 of the state of New York in this respect is clearly defined, there being two rules, the one rule illustrated by the case of the People v. Stephens, in which co-conspirators were charged with the commission of the same offence upon allegations of the same and identical facts, and in which it was held that a judgment upon a demurrer in favor of two of these co-conspirators was a bar which prevented recovery in a subsequent action against four, the two original named in the first case brought, as well as two additional defendants made parties in a second case, and upon the express ground that the former adjudication was to the effect that no offence had been committed against the law, and therefore, upon such state of facts, no recovery could be had. On the other hand, where the term "joint tort feasor" is used in the sense that two or more persons are charged with the damage done, as distinguished from the acts which brought about such damage, and the damage done is brought about by a diversity of acts, some committed by one of the defendants and others by others of the defendants, it may be and has frequently been held that the one set of acts constitute a tort and that the other set do not; and upon a strict analysis it will therefore be found that in fact the defendants are not joint tort feasors, because there is no tort committed by the one, whereas the tort is determined to have been committed by the other. And so an illustration of this class of cases may be found in the action of Bopp against New York Electric Vehicle Company, in which the appellate division, first department, stated:

"It is well settled that the liability of wrong doers is both joint and several and in an action predicated upon negligence where two or more persons are jointly sued and concurrent acts of negligence are established a recovery can be had against both. If the current act resulting in the injury be not established the jury may exonerate one even against the other."

In my opinion the facts under consideration bring this case clearly within the first class and not within the second class of these cases.

X 36. Have you stated all your reasons for the opinions expressed by you, or the statements made by you, in answer to the 6th, 7th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th direct interrogatories?

A. I have.

X 37. If not, what are all your reasons for the opinions or statements given by you in answer to each of said interrogatories?

A. None others.

X 38. Have you now stated all your reasons for said answers?

A. Yes.

X 39. Were you, prior to the taking of your deposition on the

foregoing cross-interrogatories, shown them, or any of them, or any copies of any of them, or given any information concerning the substance of them?

A. No, not the slightest.

1092 X 40. Has such of your answers in its final form been given in the language in which it now appears, before you were aware of the substance of any subsequent cross-interrogatory?

A. Yes.

X 41. Have you, since September 22, 1908, discussed in any way, with any other person who is named as a witness in the caption to these cross-interrogatories, or with any one on behalf of the defendant, any of the subjects dealt with in the foregoing interrogatories or in any answers thereto?

A. I have not discussed with any of the witnesses named, to my knowledge, in any way connected with the defendant, except that I was requested to give an opinion upon the preliminary motion made for leave to file supplemental answer herein. This request came from John Griffin, Esq., acting on behalf of Mr. Tyler, of Tyler & Young. At that time I questioned him concerning the facts of the case, and learned, in outline, the matters more fully presented by the records annexed to these interrogatories.

WM. H. WADHAMS.

Subscribed and sworn to before me this 28th day of September, 1908.

[SEAL.] H. M. HEWSON,
Notary Public, New York County, N. Y.

Deposition of Dennis O'Brien.

The Deposition of Denis O'Brien, Taken in Behalf of the Defendant, Bigelow, and filed by his counsel, subject to the objections and exceptions of counsel for the complainant, The Old Dominion Copper Mining & Smelting Company, to be found at pages 945-950.

[Commission and notarial certificate omitted.]

Q. 1. State your name, age, and place of residence.

A. My name is Denis O'Brien; my age is seventy-one years; and my residence is now at Watertown, N. Y.

Q. 2. State your occupation and place of business.

A. I am a lawyer, a member of the bar of the state of New York, entitled to practice in all the courts of the state and the federal courts. My place of business is at present at Watertown.

Q. 3. If, in answer to the preceding interrogatory, you have testified that you are an attorney at law, state when you were admitted to the bar, and in what state or states, and how long you have been engaged in the practice of law in said state or states, and with what firms, if any, you have been or are connected.

A. I was admitted to the bar in May, 1861, in New York
1093 state. It is a little difficult to tell how long I have been engaged in the practice of law, because nearly twenty-five years of my life I have occupied official positions and the rest engaged in the practice of law.

I am not connected with any firm. Prior to 1884 there was a firm of lawyers, of which I was the principal member, at Watertown—there was O'Brien & Emerson, and there was Reynolds & O'Brien, and Wynne & O'Brien.

Q. 4. State what, if any, judicial or other public or official positions you hold or have held.

A. I was the attorney general of the state of New York from the 1st of January, 1884, to the 1st of January, 1888,—two terms. I have been a member of the Court of Appeals of the state of New York from the 1st day of January, 1890, to the 1st day of January, 1908.

Q. 5. State any other matters relating to your experience in your profession, and as to your familiarity with the law and usages governing the practice in the state and federal courts in New York, both in law and in equity, and also as to your familiarity with the laws and usages of the state of New York relating to former adjudication and estoppel by judgment.

A. I have already stated my experience. I have practised since my admission, when I was not holding the position as judge before the bar, both in the state and federal courts.

I think I am reasonably familiar with that question, having had occasion to pass upon it as a judge, and to examine it as a lawyer.

Q. 6. Assuming that an action in equity is brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters to recover from him the profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, at a price in excess of the price which they paid for it and of its fair value, and assuming that in this action a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to a similar action, substantially identical with the first and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception. —See pages 945-950.]

1094 A. In my opinion it would be a bar.

Q. 7. Assuming that two actions in equity are brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its

promoters to recover from him profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, and assuming that such property is alleged to have been sold, pursuant to said joint plan and conspiracy, in two separate parcels, in each of which both promoters were jointly interested, and that said two actions were brought to recover the respective profits received from the sale of the two parcels, respectively, and assuming that the bills of complaint in the two actions were substantially identical, except as to the particular relief sought, and assuming that certain profits were alleged to have been made by said promoters on each parcel, and assuming that in one of said actions a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to two similar actions, substantially identical in form with those above described and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 946-950.]

A. In my opinion it would constitute a good defence and a bar to the actions against the other promoter.

Q. 8. Have you examined a copy of the record in the action of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn in the Circuit Court of the United States for the Southern District of New York, such as is hereto annexed and marked (1), the respective portions of said record being marked A to R, inclusive?

[Objected to; admitted; exception.—See pages 946-950.]

A. I have.

Q. 9. Have you examined copies of the proceedings in the above-entitled causes, to wit, the two causes of the Old Dominion Copper Mining & Smelting Co. v. Bigelow in the Supreme Judicial
1095 Court in Massachusetts, such as are hereto annexed and marked, respectively, (2) and (3)?

A. I think I have read what purports to be a copy of the pleadings in the Massachusetts case.

Q. 10. Assuming that there were now pending in the courts of the state of New York proceedings against Albert S. Bigelow, identical in all respects (except as the practice might require formal changes) with the copies of the proceedings referred to in the 9th interrogatory, and assuming that said courts had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record, copies of which are referred to in the 8th interrogatory, were sufficiently pleaded and proven in defence of said proceedings, and assuming that the Leonard Lewisohn and the

Albert S. Bigelow mentioned in each of these bills of complaint were, respectively, the same persons, and that the contracts, acts, matters, and transactions mentioned in each of these bills of complaint were, respectively, the same contracts, acts, matters, and transactions, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, what would be the effect, under the law and usages of the state of New York, of said decree and record as a defence to said proceedings assumed to be so pending?

[Objected to; admitted; exception.—See pages 946-950.]

A. In my opinion it would constitute a good defence.

Q. 11. Assuming the facts stated in the 10th interrogatory, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would those additional facts affect your answer to the preceding interrogatory?

[Objected to; admitted; exception.—See pages 946-950.]

A. The fact that Bigelow participated in the defence of the suit in the federal courts—that circumstance would greatly reinforce the opinion that I have already expressed.

Q. 12. Assuming the facts stated in the 10th interrogatory, and assuming the facts stated in the 11th interrogatory, and assuming that the participation of the defendant, Bigelow, as stated in
1096 the 11th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers to the two preceding interrogatories?

[Objected to; admitted; exception.—See pages 947-950.]

A. That would make the case still stronger.

Q. 13. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8098, referred to in the 9th interrogatory, and assuming that the course of the proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8098, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said de-

cree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8098 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8098, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

A. In my opinion it would constitute a bar to the action against Bigelow.

Q. 14. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8099, referred to in the 9th interrogatory, and assuming that the course of proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed
1097 to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8099, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8099 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, and assuming that the bill of complaint in said Circuit Court and the prayers thereof relate to one part of an entire transaction comprising said contracts, acts, matters, and transactions and that the bill of complaint corresponding to the one numbered 8099 in Massachusetts and the prayers thereof relate to another part of the same entire transaction, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding

corresponding to the cause numbered 8099, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

A. Assuming that the two suits were in New York, the judgment in favor of Lewisohn would constitute a bar to the action against Bigelow.

Q. 15. Assuming the facts stated in the 13th and 14th interrogatories, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would these additional facts affect your answers, or either of them, to the 13th and 14th interrogatories?

[Objected to; admitted; exception.—See pages 948-950.]

A. I have assumed all along, and do now, that the partici-
1098 pation of Bigelow in the defence of the case against Lewisohn is an important element, and, under the circumstances stated in this question, the judgment in favor of Lewisohn can be successfully pleaded by Bigelow in bar.

Q. 16. Assuming the facts stated in the 13th, 14th, and 15th interrogatories, and assuming that the participation of the defendant, Bigelow, as stated in the 15th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers, or either of them, to the 13th, 14th, and 15th interrogatories?

[Objected to; admitted; exception.—See pages 949, 950.]

A. The knowledge of the plaintiff to Bigelow's participation in the defence of Lewisohn strengthens and confirms the opinion that I have expressed as to the legal effect of the former judgment; I regard that additional fact as important, though not absolutely essential.

Q. 17. If you have not already done so, state your reasons for your answers to interrogatories 6th to 16th, inclusive.

[Objected to; admitted; exception.—See page 950.]

A. I think I have already sufficiently stated the reasons, but will say that the general principle that an action once tried and decided shall not again be brought in question applies to the case.

Cross-interrogatories:

Without waiving the foregoing objections, but expressly insisting thereon, the plaintiff put de bene the following cross-interrogatories:

X 1. Is it a principle of the law of the state of New York that the law decided in a case in the court of last resort in overruling a demurrer becomes the law of the case, to be applied when the case is heard upon the facts?

A. Yes, it is to be applied when the case is heard upon the facts,

the same facts as are stated in the pleading to which the demurrer was aimed.

X 2. Is it the law of New York that there is no right of exoneration or contribution between defendants jointly and severally liable ex delicto and not ex contractu?

A. I am inclined to think that, under the law of New York that it is no contribution between wrongdoers.

X 3. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have
1099 you assumed or considered that Bigelow might—but for said defence, if any—be under a liability to the plaintiff in the suits against Bigelow?

A. I have assumed that he might, otherwise there would be no reason for this action.

X 4. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability that Bigelow might—but for said defence, if any—be under as a liability jointly with Lewisohn?

A. Yes, that has entered into my mind in answering the question.

X 5. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability jointly and severally with Lewisohn?

A. I have assumed that, but for the judgment in favor of Lewisohn, Bigelow might be liable, on proper facts, to the plaintiff, jointly and severally with Lewisohn.

X 6. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability arising ex delicto?

A. I have assumed that Bigelow might be liable ex delicto.

X 7. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability ex delicto jointly and severally with Lewisohn?

A. Yes, I have considered that.

X 8. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. I don't know that I understand that question, but I should think it would be a joint and several liability.

X 9. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit, there is a liability of the general nature decided

by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability ex delicto with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. I assume that the facts stated in the pleading against
1100 Bigelow are the same as those stated against Lewisohn; I think it would be a joint and several liability in New York, giving effect to the law of Massachusetts.

X 10. Is it a principle of the law of the state of New York that the liability of joint wrongdoers is joint and several?

A. Yes; the parties who commit a wrong are liable to the injured party either jointly or severally.

X 11. Is it sometimes a principle of New York law that estoppel by former adjudication must be mutual?

A. That is the general rule, though I think there are some exceptions.

X 12. If so, what, if any, are all the occasions of which you have knowledge on which they need not be mutual?

A. I would have to look up the law on that question before stating in what particular cases the estoppel need not be mutual.

X 13. Assuming that Bigelow took no part in the Lewisohn suit, in your opinion is the law of New York such that Bigelow would have been estopped in another suit to deny his liability as a matter of law on the same facts, by a final decree against Lewisohn in the first suit?

A. I am not prepared to say that, without Bigelow's participation in the defence of Lewisohn, the judgment in the federal courts would constitute an estoppel, though I am inclined to think it would.

X 14. Assuming that Lewisohn's executors took no part in the suits against Bigelow, in your opinion is the law of New York such that said executors would have been estopped in another suit to deny their liability as a matter of law on the same facts, by a final decree against Bigelow in these suits?

A. I am not prepared to say that under those circumstances they would be estopped; that is, assuming they did not participate in the suit against Bigelow and they were sued.

X 15. Assuming that Bigelow took part in the defence of the suits against Lewisohn's executors, and that the plaintiff knew this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation and knowledge, operate as an estoppel in favor of Bigelow?

A. I have no means now of referring to the authorities on that question.

X 16. Assuming that Bigelow took part in the defence of the suit against Lewisohn's executors, and that the plaintiff did not know this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewis-

ohn's executors may, by reason of such participation without plaintiff's knowledge, operate as an estoppel in favor of Bigelow?

A. It would take a little time to collect the decisions,
1101 and I am testifying to my general knowledge on the question, without citing cases.

X 17. Assuming that Bigelow did not take part in the defence of the suit against Lewisohn's executors, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may operate as an estoppel in favor of Bigelow?

A. I have not considered the question as to the effect of the Lewisohn judgment, in the absence of the participation of Bigelow in that case; and I do not base my answer upon the authority of any particular case, only on my general impressions as to what the law of New York is.

X 18. Have you considered any decisions or language of the courts in New York which may have any tendency to support the view that there is no estoppel in Bigelow's favor growing out of the decree in favor of Lewisohn's executors?

A. I have not.

X 19. If so, what, by name and reference are all of these which you have considered?

A. I have not considered any particular case, and cannot give you any distinct reference.

X 20. Have any arguments been submitted or suggested to you by defendant's counsel or have you thought of any in support of the view that there was by the law of New York no estoppel in favor of Bigelow growing out of the decree in favor of Lewisohn's executors?

A. No such arguments have been submitted, and I have not attempted to find any authority on that question.

X 21. If so, what are all of said arguments?

A. I refer to my previous answer.

X 22. What, in your opinion, constitutes privity under the law of New York to a judgment?

A. I may not be able now to define privity in the language of the books, but in a general way I can say that one who claims some right derived from another is in privity with that other, though of course the particular cases in which one is said to be in privity with another are various, and not capable of being expressed in any general rule.

I think that one who participates in the defence of an action, being interested in the defence, though not a party, and who is liable, if at all, upon the same transaction which is the subject matter of the action, is in privity with the judgment, though of course, there are other cases where privity exists.

X 23. In determining whether there was an estoppel in the present case, have you assumed or considered that Bigelow was in privity to the parties of record in the suit against Lewisohn's executors?

A. Yes, I have so assumed.

X 24. In considering whether there was any estoppel in
1102 this case, have you assumed or considered that Bigelow had any legal interest to defend in the suit against Lewisohn's executors beyond such interest as he might have to secure a favorable precedent?

A. Yes, I think he had a legal interest in the defence of the suit.

X 25. If so, precisely what have you assumed to be said legal interest?

A. He had a legal interest in defeating the action against Lewisohn, since, if there was a recovery against Lewisohn, there ought to be a recovery against him.

X 26. Unless Bigelow would have been bound in favor of the plaintiff by estoppel by a decision adverse to Lewisohn's executors, even if Bigelow did not participate in the defence of the suit against them, did Bigelow, in your opinion, have a legal interest to defend in that suit?

A. I think he had a legal interest.

X 27. If so, by precise description, what, in your opinion, was said legal interest?

A. The legal interest that he had was to protect himself against the consequences of a favorable judgment by the plaintiff against Lewisohn.

X 28. In determining whether there was any estoppel in this case, have you assumed that the plaintiff consented to the participation, if any, by Bigelow in the support of the demurrers of Lewisohn's executors?

A. I have not assumed that he consented to it in express terms, but I have assumed that he was aware of it.

X 29. Is it a principle of New York law that if the defendant in one suit sustains merely the character of a co-trespasser with the defendant in another suit by the same plaintiff, the recovery against one defendant is not thereby made competent evidence against the other?

A. I think it would be competent evidence, for both participated in the conduct of the action or of the defence.

X 30. Is it a principle of New York law that the judgment in favor of one of two persons jointly and severally liable for the wrongful conversion of the plaintiff's property, is no bar to a subsequent suit against the other because torts are joint and several.

A. I think that it would not be a bar in that case, if I understand the question.

X 31.1 Is it a principle of New York law that an adjudication acts as an estoppel only between the parties thereto or those in privity with them, or, in other words, the estoppel must be mutual?

A. I think it is a general principle of New York law that the estoppel applies to the parties to the action, or those in privity with them.

X 32. Is it a principle of New York law that a judgment in favor of one co-trespasser may not be used by another co-trespasser not a party to it, by way of estoppel?

A. I think it is, if I understand the question.

X 33. In considering the question of estoppel, have you as-
1103 sumed or considered that Lewisohn's executors were Bigelow's agents in the suit against them which has been dismissed?

A. No, I have not considered that particular feature of the case.

X 34. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were trustees for Bigelow of the stock sought to be recovered in the suit against them which has been dismissed?

A. Yes, I think I have considered that as one of the elements in the case.

X 35. Is it a principle of New York law that in an action at law against one or some of several joint tort feasors, the controversy may be determined as between the parties before the court,—i. e., the plaintiff and defendant,—and without prejudice to the rights of others; and the judgment will completely determine the controversy between them, and will not be *res adjudicata* between the plaintiff and any of the joint tort feasors who is not a defendant and may be sued later?

A. Well, I think that is so.

X 36. Have you stated all your reasons for the opinions expressed by you, or the statements made by you, in answer to the 6th, 7th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th direct interrogatories?

A. Those interrogatories are quite complicated and perhaps obscure but I think I have stated all the reasons that occur to me now.

X 37. If not, what are all your reasons for the opinions or statements given by you in answer to each of said interrogatories?

A. My reasons for the answers I have given call for what might be said to be an argument, and I think the reasons sufficiently appear in my previous answers to the direct and cross-interrogatories.

X 38. Have you now stated all your reasons for said answers?

A. Yes; I have stated all the reasons that now occur to me.

X 39. Were you, prior to the taking of your deposition on the foregoing cross-interrogatories, shown them, or any of them, or any copies of any of them, or given any information concerning the substance of them?

A. None at all.

X 40. Has each of your answers in its final form been given in the language in which it now appears, before you were aware of the substance of any subsequent cross-interrogatory?

A. Yes.

X 41. Have you, since September 22, 1908, discussed in any way with any other person who is named as a witness in the caption to these cross-interrogatories, or with any one on behalf of the defendant, any of the subjects dealt with in the foregoing interrogatories or in your answers thereto?

A. No, I have not.

DENIS O'BRIEN.

Before me this 28th day of September, A. D. 1908.

H. M. HEWSON,
Notary Public, Westchester County.

Certificate filed in New York county.
[Adjourned to Monday, October 5, 1908, at 2 p. m.]

1104 MONDAY, *October* 5, 1908—2 p. m.

Deposition of John G. Milburn.

Mr. HEMENWAY: Parties agree that the deposition of John G. Milburn came just a few minutes ago. I assume that the way to deal with it should be that they look it over. We will submit it to you; you can make your objections just the same as to the others, first reading it.

HAMMOND, J.: That is the deposition of whom?

Mr. HEMENWAY: Of John G. Milburn. It has not yet been put in evidence.

[Subsequently the same course was taken in reference to the deposition of Mr. Milburn as with regard to others introduced by counsel for the defendant.]

Deposition of John G. Milburn.

The Deposition of John G. Milburn, Taken in Behalf of the Defendant, Bigelow, and Filed by His Counsel, Subject to the Objections and Exceptions of Counsel for the Complainant, The Old Dominion Copper Mining & Smelting Company, to be Found at Pages 945–950.

Q. 1. State your name, age, and place of residence.

A. My name is John G. Milburn; I am fifty-six years of age; I reside at No. 16 West Tenth street, New York city.

Q. 2. State your occupation and place of business.

A. I am a lawyer; my office is at No. 54 Wall street, New York city.

Q. 3. If, in answer to the preceding interrogatory, you have testified that you are an attorney at law, state when you were admitted to the bar, and in what state or states, and how long you have been engaged in the practice of law in said state or states, and with what firms, if any, you have been or are connected.

A. In April, 1874, in the state of New York. I have been continuously engaged in the practice of law in the state of New York since April 1, 1874, until the present time, with the exception of the period from September, 1882, to June, 1883, when I was professionally engaged in Colorado. From September, 1879, to September, 1882, I was a member of the firm of Sprague, Milburn & Sprague, practising in the city of Buffalo, N. Y.; from the middle of June, 1883, to the first day of February, 1904, I was a member of the firm of Rogers, Locke & Milburn, practising law in the city

of Buffalo; from February 1, 1904, until the present time I have been and now am a member of the firm of Carter, Ledyard & Milburn of the city of New York. During the eight or nine
1105 months I was in Colorado I was associated with the late Senator Edward O. Walcott.

Q. 4. State what, if any, judicial or other public or official positions you hold or have held.

A. No judicial position. For the past four years I have been a member of the commission appointed by the governor of the state, under the authority of the legislature, to consolidate the statutory law of the state. The only other positions I have held have been memberships of temporary commissions, unconnected with legal matters.

Q. 5. State any other matters relating to your experience in your profession, and as to your familiarity with the law and usages governing the practice in the state and federal courts in New York, both in law and in equity, and also as to your familiarity with the laws and usages of the state of New York relating to former adjudication and estoppel by judgment.

A. Well, I have been engaged for over thirty years in the trial and argument of cases in the state and federal courts of the state of New York; in the preparation of briefs for the argument of cases, and of opinions desired by clients. I have had frequently, in connection with my practice and cases, to examine the question of former adjudication and estoppel by judgment under the laws of the state of New York.

Q. 6. Assuming that an action in equity is brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters to recover from him the profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, at a price in excess of the price which they paid for it and of its fair value, and assuming that in this action a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to a similar action, substantially identical with the first and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 945–950.]

A. It would be a bar.

Q. 7. Assuming that two actions in equity are brought in
1106 the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters to recover from him profits alleged to have

been received by him and his associates secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, and assuming that such property is alleged to have been sold, pursuant to said joint plan and conspiracy, in two separate parcels, in each of which both promoters were jointly interested, and that said two actions were brought to recover the respective profits received from the sale of the two parcels, respectively, and assuming that the bills of complaint in the two actions were substantially identical, except as to the particular relief sought, and assuming that certain profits were alleged to have been made by said promoters on each parcel, and assuming that in one of said actions a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to two similar actions substantially identical in form with those above described and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 946–950.]

A. It would bar.

Q. 8. Have you examined a copy of the record in the action of the Old Dominion Copper Mining & Smelting Co v. Lewisohn in the Circuit Court of the United States for the Southern District of New York, such as is hereto annexed and marked (1), the respective portions of said record being marked A to R, inclusive?

[Objected to; admitted; exception.—See pages 946–950.]

A. I have.

Q. 9. Have you examined copies of the proceedings in the above-entitled causes, to wit, the two causes of the Old Dominion Copper Mining & Smelting Co. v. Bigelow in the Supreme Judicial Court in Massachusetts, such as are hereto annexed and marked, respectively, (2) and (3)?

A. I have.

Q. 10. Assuming that there were now pending in the courts of the state of New York proceedings against Albert S. Bigelow, identical in all respects (except as the practice might require formal
1107 changes) with the copies of the proceedings referred to in the 9th interrogatory, and assuming that said courts had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record, copies of which are referred to in the 8th interrogatory, were sufficiently pleaded and proven in defence of said proceedings, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in each of these bills of complaint were, respectively, the same persons, and that the contracts, acts, matters, and transactions mentioned in each of these

bills of complaint were, respectively, the same contracts, acts, matters, and transactions, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, what would be the effect, under the law and usages of the state of New York, of said decree and record as a defence to said proceedings assumed to be so pending?

[Objected to; admitted; exception.—See pages 946–950.]

A. It would be a bar.

Q. 11. Assuming the facts stated in the 10th interrogatory, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would those additional facts affect your answer to the preceding interrogatory?

[Objected to; admitted; exception.—See pages 946–950.]

A. It would not affect the answer I have given except to reinforce it.

Q. 12. Assuming the facts stated in the 10th interrogatory, and assuming the facts stated in the 11th interrogatory, and assuming that the participation of the defendant, Bigelow, as stated in the 11th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers to the two preceding interrogatories?

[Objected to; admitted; exception.—See pages 947–950.]

A. I make the same answer to this interrogatory as to the last preceding direct interrogatory.

Q. 13. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8098, referred to in the 9th interrogatory, and assuming that the course of the proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8098, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full

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force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8098 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8098, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

A. It would be a bar.

Q. 14. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8099, referred to in the 9th interrogatory, and assuming that the course of proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York, wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8099, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was
1109 based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8099 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, and assuming that the bill of complaint in said Circuit Court and the prayers thereof relate to one part of an entire transaction comprising said contracts, acts, matters, and transactions, and that the bill of complaint corresponding to the one numbered 8099 in Massachusetts and the prayers thereof relate to another part of the same entire transaction, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8099, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

A. It would be a bar.

Q. 15. Assuming the facts stated in the 13th and 14th interrogatories, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would these additional facts affect your answers, or either of them, to the 13th and 14th interrogatories?

[Objected to; admitted; exception.—See pages 948-950.]

A. It would not affect them, excepting to reinforce them.

Q. 16. Assuming the facts stated in the 13th, 14th and 15th interrogatories, and assuming that the participation of the defendant, Bigelow, as stated in the 15th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers, or either of them, to the 13th, 14th, and 15th interrogatories?

[Objected to; admitted; exception.—See pages 949, 950.]

A. It would not affect them, except to reinforce them.

1110 Q. 17. If you have not already done so, state your reasons for your answers to interrogatories 6th to 16th, inclusive.

[Objected to; admitted; exception.—See page 950.]

A. The following are my reasons: The bills of complaint in all four actions are based upon an alleged scheme of Bigelow and Lewisohn to acquire certain property, to organize a corporation owned and controlled by them, and to transfer the property to that corporation at a gross overvaluation, receiving in payment therefor capital stock of the corporation to a large amount. In the alleged scheme and all the transactions in its execution, Bigelow and Lewisohn were associated together; they acquired the property for their common benefit; its transfer to the corporation was their common act, and they received the capital stock of the corporation issued in pursuance of it for their common benefit. The acquisition of the stock of the old company from the Simpson executors and Keyser and of the mining claims and other property from Keyser were parts of the same transaction; the transfer of the stock and properties to the new corporation was a single transaction, as was the issue and delivery of the stock of the new company in payment thereof to Lewisohn and Bigelow. Thus the alleged scheme was devised by them both; they were co-owners of the property transferred and co-owners of the stock received for it, and all the acts, from the beginning to end, in the concoction and consummation of the scheme were acts common to them.

This being the situation, it is quite clear to me, after a careful re-examination of the authorities in this state, (1) That the relation of Bigelow to Lewisohn and to the transactions was such that a judgment on the merits in any court of competent jurisdiction, in New

York or elsewhere, in favor of Lewisohn in an action brought by the new corporation against Lewisohn to rescind the transaction or to account for the profits on the theory of their being undisclosed and fraudulent, or in breach of the fiduciary relation of Lewisohn and Bigelow to the new corporation, establishing that no cause of action in its favor arose out of the transaction, would enure to the benefit of Bigelow in any similar suit against him in this state, and be a bar to its prosecution, even if Bigelow had not participated in the defence, and contributed to its expenses; (2) That such a decree in such a suit in favor of Lewisohn as to a part of the property involved in the scheme, and covered by the transfer to the new corporation, would be a bar to any similar suit against Lewisohn with respect to the remainder of the property, and would enure to the benefit of Bigelow in any similar suit against him in the state of New York, and constitute a bar to its prosecution; and (3) That the participation
1111 of Bigelow in the defence of the suit against Lewisohn, or his executors, and his contributing to its expenses,—whether known to the plaintiff or not, and more emphatically so if known to the plaintiff,—puts it, in my judgment, beyond all possible doubt that not only would the decree in favor of Lewisohn enure to the benefit of Bigelow, if the suits against him were pending in the state of New York, and be available to him as a bar, but also, if the decree had been in favor of the complainant, it would be binding upon Bigelow, and enforcible against him in a proper suit or proceeding.

Further, the alleged scheme and transactions in all four suits are identical, the same cause of action is pleaded in all four suits, and the realization between Bigelow and Lewisohn was that of co-actors, co-owners, and co-beneficiaries. The plaintiff has had his day in court as to the scheme and all the transactions it involved, and the cause of action alleged by it; and a court of competent jurisdiction has decreed that it has no cause of action. Such a decree, under the authorities in this state, enures to the benefit of Bigelow in the relation that he was, and is, to Lewisohn and the transactions, though not a nominal party to the record, and particularly so if he actively participated in the defence of the case.

I refer to the following cases, among others, which, in my judgment, sustain my conclusions:

Castle v. Noyes, 14 N. Y. 329.
Bush v. Knox, 2 Hun, 576.
Carter v. Bowe, 41 Hun, 516.
Bates v. Stanton, 1 Duer, 79, 87.
People v. Stephens, 51 How. Pr. 235; (s. c.) 71 N. Y. 612.
Emma Silver Mine Case, 7 Fed. Rep. 401.
Portland Gold Mining Co. v. Stratton's Independence, 158 Fed. Rep. 63.
Woodhouse v. Duncan, 106 N. Y. 527.

Cross-interrogatories.

Without waiving the foregoing objections, but expressly insisting thereon, the plaintiff puts de bene the following cross-interrogatories:

X 1. Is it a principle of the law of the state of New York that the law decided in a case in the court of last resort in overruling a demurrer becomes the law of the case to be applied when the case is heard upon the facts?

A. I should say yes, throughout the case, on the same state of facts.

1112 X 2. Is it the law of New York that there is no right of exoneration or contribution between defendants jointly and severally liable ex delicto and not ex contratu?

A. I should say, generally, yes.

X 3. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered that Bigelow might—but for said defence, if any—be under a liability to the plaintiff in the suits against Bigelow?

A. I have considered that, as well as the other phases of the case.

X 4. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability that Bigelow might—but for said defence, if any—be under a liability jointly with Lewisohn?

A. I have considered that also.

X 5. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under a liability jointly and severally with Lewisohn?

A. I have considered that also.

X 6. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability arising ex delicto?

A. I have considered that also.

X 7. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability ex delicto jointly and severally with Lewisohn?

A. I have considered that also.

X 8. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. I do not think I should characterize the liability as joint and several, using those terms technically, though I think that an action

would be maintainable against both or either, assuming the liability to be as stated in the cross-interrogatory.

X 9. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on
1113 demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability ex delicto with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. It would be ex delicto, in the sense of being founded on wrongful conduct; but I do not regard a suit in equity for an accounting as an action ex delicto.

X 10. Is it a principle of the law of the state of New York that the liability of joint wrongdoers is joint and several?

A. I do not think that the terms "joint" and "several" are accurately used in that connection; under the law of the state of New York, they may all be proceeded against in the same action, or an action will lie against each separately.

X 11. Is it sometimes a principle of New York law that estoppel by former adjudication must be mutual?

A. It is, sometimes.

X 12. If so, what, if any, are all the occasions of which you have knowledge on which they need not be mutual?

A. One instance is—if an agent is sued on a transaction and prevails on the merits, the judgment in his favor would be a bar to a subsequent suit brought on the same cause of action against the principal, though a judgment in favor of the plaintiff would not bind the principal if he was ignorant of the action and took no part in it. That same principle would apply to allied relations or relations similar in principle to that of principal and agent.

X 13. Assuming that Bigelow took no part in the Lewisohn suit, in your opinion is the law of New York such that Bigelow would have been estopped in another suit to deny his liability as a matter of law on the same facts, by a final decree against Lewisohn in the first suit?

A. I do not think he would, though it would be practically conclusive on the principle of stare decisis. See O'Beirne v. Bullis, 158 N. Y. 468.

X 14. Assuming that Lewisohn's executors took no part in the suits against Bigelow, in your opinion is the law of New York such that said executors would have been estopped in another suit to deny their liability as a matter of law on the same facts, by a final decree against Bigelow in these suits?

A. My answer to the last cross-interrogatory answers this interrogatory.

X 15. Assuming that Bigelow took part in the defence of the suits against Lewisohn's executors, and that the plaintiff knew this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's

executors may, by reason of such participation and knowledge
1114 operate as an estoppel in favor of Bigelow?

A. I have not the precise citations at hand, and I cannot, therefore, refer to them off-hand.

X 16. Assuming that Bigelow took part in the defence of the suit against Lewisohn's executors, and that the plaintiff did not know this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation without plaintiff's knowledge, operate as an estoppel in favor of Bigelow?

A. I make the same answer as to the last preceding cross-interrogatory. I do not regard the knowledge of the plaintiff as material if Bigelow did actually participate in the defence of the Lewisohn action by contributing to its expenses and rendering such other aid as was in his power.

X 17. Assuming that Bigelow did not take part in the defence of the suit against Lewisohn's executors, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may operate as an estoppel in favor of Bigelow?

A. I have cited some of the cases, and all of which I have a memorandum before me, in my reply to the last direct interrogatory.

X 18. Have you considered any decisions or language of the courts in New York which may have any tendency to support the view that there is no estoppel in Bigelow's favor growing out of the decree in favor of Lewisohn's executors?

A. I have examined, I should say, nearly all the New York cases on this subject, regardless of their tendency to support either side of this controversy.

X 19. If so, what, by name and reference, are all of these which you have considered?

A. I cannot now refer to any other cases than those I have already mentioned.

X 20. Have any arguments been submitted or suggested to you by defendaant's counsel, or have you thought of any, in support of the view that there was, by the law of New York, no estoppel in favor of Bigelow growing out of the decree in favor of Lewisohn's executors?

A. Counsel for the defendant gave me a reference to many New York cases, covering the question when a prior judgment was a bar and when it was not, and I recall none that lent any countenance to the proposition that the decree in favor of Lewisohn's executors did not inure to the benefit of Bigelow. I certainly have endeavored to think of everything that could be urged for and against that proposition.

X 21. If so, what are all of said arguments?

A. First, (1) That Bigelow was not a party to the record in the Lewisohn suits; (2) That a decree in favor of the plain-
1115 tiff against Lewisohn would not bind Bigelow in the absence of participation on his part in the defence of the Lewisohn

suit; (3) The possible argument that the action was based on tortious conduct, and sounded in tort, with varying grounds of liability.

At this moment I do not recall any other claim or argument that I took into consideraion when I examined the matter.

X 22. What, in your opinion, constitutes privity under the law of New York to a judgment?

A. Among other things, a relation between two parties, springing from a community of interest in property or transactions, or the results of transactions, either direct or through representation.

X 23. In determining whether there was an estoppel in the present case, have you assumed or considered that Bigelow was in privity to the parties of record in the suit against Lewisohn's executors?

A. I have so considered, in a broad sense.

X 24. In considering whether there was any estoppel in this case, have you assumed or considered that Bigelow had any legal interest to defend in the suit against Lewisohn's executors beyond such interest as he might have to secure a favorable precedent?

A. I do not know that he had any so-called legal interest, but to participate in the defence would be the course of a prudent man, not only with reference to securing a favorable decision, but because of the possible consequences to him of an unfavorable decision.

X 25. If so, precisely what have you assumed to be said legal interest?

A. My answer to the last cross-interrogatory covers this cross-interrogatory.

X 26. Unless Bigelow would have been bound in favor of the plaintiff by estoppel by a decision adverse to Lewisohn's executors even if Bigelow did not participate in the defence of the suit against them, did Bigelow, in your opinion, have a legal interest to defend in that suit?

A. I think this cross-interrogatory is answered by what I have said about a legal interest in the answer to the 24th cross-interrogatory.

X 27. If so, by precise description, what, in your opinion, was said legal interest?

A. My answer to the last cross-interrogatory and to the 24th cross-interrogatory disposes of this cross-interrogatory.

X 28. In determining whether there was any estoppel in this case, have you assumed that the plaintiff consented to the participation, if any, by Bigelow in the support of the demurrers of Lewisohn's executors?

A. No.

X 29. Is it a principle of New York law that if the defendant in one suit sustains merely the character of a co-trespasser with the defendant in another suit by the same plaintiff, the recovery against one defendant is not thereby made competent evidence against
1116 the other?

A. In some cases it is, in some cases it is not; depending upon the relation between the co-trespassers other than the mere fact of their having been engaged in a common trespass.

X 30. Is it a principle of New York la wthat the judgment in favor of one of two persons jointly and severally liable for the wrongful conversion of the plaintiff's property is no bar to a subsequent suit against the other because torts are joint and several?

A. That entirely depends upon the relations between the parties guilty of the conversion outside of and distinct from their mere participation in the conversion.

X 31. Is it a principle of New York law that an adjudication acts as an estoppel only between the parties thereto or those in privity with them, or, in other words, the estoppel must be mutual?

A. I do not think it is in all cases.

X 32. Is it a principle of New York law that a judgment in favor of one co-trespasser may not be used by another co-trespasser not a party to it, by way of estoppel?

A. I have already answered this cross-interrogatory.

X 33. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were Bigelow's agents in the suit against them which has been dismissed?

A. This question is not clear to me, but I will say that I have laid no stress on the matter of agency, either between Lewisohn and Bigelow in the transactions, or between Lewisohn's executors and Bigelow in the conduct of the defence.

X 34. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were trustees for Bigelow of the stock sought to be recovered in the suit against them which has been dismissed?

A. In my view of the case, I have laid no stress on any such relation of trusteeship.

X 35. Is it a principle of New York law that in an action at law against one or some of several joint tort feasors, the controversy may be determined as between the parties before the court,—i. e., the plaintiff and defendant,—and without prejudice to the rights of others; and the judgment will completely determine the controversy between them, and will not be res adjudicata between the plaintiff and any of the joint tort feasors who is not a defendant and may be sued later?

A. Certainly; all dependent upon the particular circumstances of each case.

X 36. Have you stated all your reasons for the opinions expressed by you, or the statements made by you, in answer to the 6th, 7th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th direct interrogatories?

A. Yes; all that now occur to me.

X 37. If not, what are all your reasons for the opinions or statements given by you in answer to each of said interrogatories?

A. My answer to the last cross-interrogatory covers this cross-interrogatory.

1117 X 38. Have you now stated all your reasons for said answers?

A. I repeat my answer to the last cross-interrogatory.

X 39. Were you, prior to the taking of your deposition on the foregoing cross-interrogatories, shown them, or any of them, or

any copies of any of them, or given any information concerning the substance of them?

A. Absolutely, no.

X 40. Has each of your answers in its final form been given in the language in which it now appears, before you were aware of the substance of any subsequent cross-interrogatory?

A. Yes, excepting the corrections above made in ink and initialed by myself and the commissioner.

X 41. Have you, since September 22, 1908, discussed in any way with any other person who is named as a witness in the caption to these cross-interrogatories, or with any one on behalf of the defendant, any of the subjects dealt with in the foregoing interrogatories or in your answers thereto?

A. No; about the time mentioned, Mr. Farley, at my request, handed to me the printed bills of complaint and records, copies of which are annexed to the deposition, that I might study them, but we had no discussion in respect to the case at all.

JOHN G. MILBURN.

Before me, the 2nd day of October, 1908.

H. M. HEWSON,
Notary Public, Westchester County.

Certificate filed in New York county.

New York Cases Offered in Evidence by the Defendant.

Mr. HEMENWAY: We propose, if your Honor please, to put in certain New York cases. I had supposed we would not stop to read the cases or to bring the volumes from the law library.

HAMMOND, J.: You may hand in a list of them to the other side and let the reporter also have a list for his report.

[Following is the list furnished by Mr. Hemenway.]

Cases to be put in Evidence as to the Law of New York.

People v. Stephens, 51 How. Pr. 235; aff. 71 N. Y. 527.
Bracken v. Atlantic Trust Co., 36 App. Div. 67, 71; aff. 167 N. Y. 510.
Castle v. Noyes, 14 N. Y. 329.
1118 Tying v. Clarke, 9 Hun, 269.
Matter of Estate of Strout, 126 N. Y. 201.
Russell v. Lasher, 4 Bart. 232.
Woodhouse v. Duncan, 160 N. Y. 527.
Hirschbach v. Ketchum, 84 App. Div. 258.
Pakas v. Hollingshead, 184 N. Y. 211.
Jackson v. Griswold, 4 Hill, 522.
Bates v. Stanton, 1 Deur, 79.
Bouchard v. Dias, 3 Denio, 238.
Oceanic S. N. Co. v. Campagnia Espanola, 134 N. Y. 461.
Oceanic S. N. Co. v. Campagnia Espanola, 144 N. Y. 663.
Carleton v. Lombard, Ayres & Co., 149 N. Y. 137.

Park Hill Co. v. Herriot, 41 App., Div. 324.
Gleason v. N. W. Mutual Life Ins. Co., 189 N. Y. 100.
Doty v. Brown, 4 N. Y. 71.
O'Donnell v. McIntyre, 118 N. Y. 156, 162.
Emma Silver Mining Co., Ltd., v. Emma Silver Mining Co. of New York, 7 Fed. Rep. 401.
Old Dominion &c. Co. v. Lewisohn, 210 U. S. 206.

1119 *Correspondence Between Counsel.*

Mr. HEMENWAY: There is correspondence between the office of counsel for the complainant and counsel for the defendant in this case, and also between counsel for the complainant and counsel for the defendant, Mr. Lauterbach or Mr. Treadwell, in New York in the New York cases.

HAMMOND, J.: Is there any objection to the offer of that?

Mr. HEMENWAY: What I was going to propose in regard to it is to let them take the correspondence, and they can see whether it is correct in matter of substance, and if they have objections to it they can make the same objections as they would if it was offered in court.

HAMMOND, J.: Any objection to that course?

Mr. MCCLENNEN: Do you mean the entire correspondence or only selected portions?

Mr. HEMENWAY: Oh, only selected,—that is, as showing the joint action of counsel.

Mr. MCCLENNEN: I should be very glad to go over the files of the letters proposed rather than to go through the form of having them read.

HAMMOND, J.: That may be done.

[Following is the correspondence submitted by counsel for defendant to counsel for complainant:]

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

SEPT. 4, 1902.
C/B.

Re Old Dominion Copper Mining and Smelting Co.

Walter Lewisohn, Esq., Executor of Estate of Leonard Lewisohn, 11 Broadway, New York City.

DEAR SIR: Upon my return from my vacation I find your letter of August 1st.

If you desire that I should confer with your counsel, Mr. Edward Lauterbach, I shall be glad to arrange for an interview with him at an early date.

1120 The tone of your letter leaves me, however, in doubt as to whether you desire that such conference should be had, or prefer that without such conference the Old Dominion Copper

Mining and Smelting Company shall take such action as it may deem best to protect its interests.

Yours very truly,

LOUIS D. BRANDEIS.

SEPTEMBER 10, 1902.

Louis D. Brandeis, Esq., 220 Devonshire Street, Boston, Mass.

DEAR SIR: I have yours of September 4th. Permit me to correct the statement in the first paragraph of your letter. I have not only never refused, but have been more than ready to furnish any facts in my possession bearing upon the organization of the Old Dominion Copper Mining and Smelting Company or its affairs to which, in my judgment, the Stockholders and Directors of the Company are legitimately entitled. A general verbal request of yours to be allowed to have access to all the papers in relation to the original purchase of the property was very properly refused.

In order, however, that there may be no misunderstanding as to my position in the matter and as to just what information I have refused to give you, will you kindly send me a list of the questions which you wish answered and I shall be pleased to promptly reply to them, if they appear to call for information which your clients should legitimately possess.

If, after receipt of my answers you are still of the opinion that you would like to arrange for an interview with my counsel I shall be prepared to take up the matter then.

My only desire is to have specific points upon which we may base a conference, and it seems to me that the method I have suggested is the shortest way of arriving at such a basis. I think the course I have recommended suggests my answer to the question in the last paragraph of your letter.

Very truly,

A. S. BIGELOW.

1121

SEPTEMBER 11, 1902.

Louis D. Brandeis, Esq., 220 Devonshire Street, Boston, Mass.

DEAR SIR: I have yours of even date. As your request takes in all matters relating also to the late Leonard Lewisohn's connection, I have forwarded your letter to the counsel for the Estate, Mr. Edward Lauterbach, with whom I understand you have been in correspondence on the matter, and shall act according to his instructions. I have telephoned his office this afternoon that an important letter is on the way, so that he may get it to morrow and there be no delay.

Yours truly,

——— ———.

Brandeis, Dunbar & Nutter, 220 Devonshire St.

BOSTON, MASS., *Sept.* 12, 1902.

A. S. Bigelow, Esq., Sears Building, Boston.

DEAR SIR: I received your letter of the 11th this morning, and have not heard from you since.

As our clients are desirous that there should be no delay, I enclose herewith a letter addressed to yourself and the Executors of Leonard Lewisohn relating to a part of the claim concerning which we have written you.

I may add that in the event of no adjustment being reached, we are directed to commence proceedings, and in that event we should like to have an attachment bond in the amount of $500. The claim considerably exceeds that amount, but our clients have expressed a willigness to accept a bond for that amount.

Yours very truly, LOUIS D. BRANDEIS.

(Enc.)

Old Dominion Copper Mining & Smelting Co., Office 35 Congress Street, Boston.

A. S. Bigelow, Esq., and the Executors of the Estate of Leonard Lewisohn, Deceased.

DEAR SIRS: Shortly after the organization of the Old Dominion Copper Mining and Smelting Company, Mr. A. S. Bigelow and Mr. Leonard Lewisohn caused 30,000 shares of the stock of that
1122 Company to be issued to themselves, ostensibly as the consideration for a conveyance to the Company of certain mining properties and claims, the title of which we are advised then stood in the name of Mr. Leonard Lewisohn, and which in the record of the meeting of the Company held July 11, 1895, were described as follows:—

"First. The Old Dominion Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land Office at Tucson, Arizona, Entry No. 267, Lot No. 45, situated in Globe Mining District, Gila County, Arizona.

Second. The New York Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land Office at Tucson, Arizona, Entry No. 268, Lot No. 46 in Globe Mining District in Gila County, Arizona.

Third. The Chicago Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land Office at Tucson, Arizona, Entry No. 269, Lot No. 41 in Globe Mining District, Gila County, Arizona.

Fourth. The Keystone Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1885, in the United States Land Office at Tucson, Arizona, Entry No. 384, Lot No. 51 in Globe Mining District, Gila County, Arizona.

Fifth. A lot or parcel of land situated near the Bloody Tanks and deeded by E. A. Saxe to the Old Dominion Copper Mining Company, Deed recorded in Book 1 of Deeds to Real Estate at page 126 and 127 in the office of the Recorder of Gila County, Arizona, and reference is hereby made to said record for a fuller description of said parcel of land."

The Old Dominion Copper Mining and Smelting Company is advised that these shares were issued under circumstances which entitle it to rescind the transaction, and hereby offers to re-convey the

property to you or either of you, or to such person as you or either of you may name, upon the return by you or either of you of the 30,000 shares, or, if and so far as said shares have been disposed of, upon a proper accounting therefor.

Yours truly,

OLD DOMINION COPPER MINING & SMELTING CO.,
By CHARLES S. SMITH, *Pres't.*
CHARLES H. ALTMILLER, *Treas.*

1123 Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

SEPTEMBER 12, 1902.

G/B.

Edward Lauterbach, Esq., 22 William St., New York City.

DEAR SIR: I am in receipt of your letter of the 9th.

I wrote to the executors of the estate of the late Leonard Lewisohn on September 4th in connection with an earlier letter to them of July 24th relating to an important claim of the Old Dominion Copper Mining and Smelting Company against the estate.

In my letter of September 4th to them, I suggested that if they desired, I should be glad to confer with their counsel.

You have no doubt been advised by them, as well as from your correspondence with Mr. Bigelow, of the nature of this claim.

If you deem a conference between us desirable, I shall be glad to do what I can to arrange for such a meeting either here or in New York.

I enclose herewith a letter from the Old Dominion Copper Mining and Smelting Company to Mr. Bigelow and the Executors relating to a part of the transactions on which the claim in question is founded.

Yours very truly, LOUIS D. BRANDEIS.

(Enclosure.)

SEPTEMBER 12, 1902.

Louis D. Brandeis, Esq., 220 Devonshire St., Boston, Mass.

DEAR SIR: Mr. A. S. Bigelow has referred to me your letter to him of the 11th inst. and has, he informs me by mail, communicated to you that, since I represent the Executors of the Lewisohn Estate, and because an interview between us is likely to take place, he refers to the subject of that letter, as well as the matter generally, to me to discuss with you on his behalf as well as on behalf of the Executors.

I shall be glad to hear from you at your convenience so that a meeting may be arranged for.

Very truly yours, EDWARD LAUTERBACH.

1124 Law Offices of Hoadly, Lauterbach & Johnson, 22 William Street, New York City.

Edward Lauterbach, Louis Adler, Ferdinand R. Minrath, Alfred Lauterbach, Henry L. Scheuerman, Eugene Treadwell.

SEPTEMBER 13TH, 1902.

Louis D. Brandeis, Esq., c/o Mess. Brandeis, Dunbar & Nutter, 220 Devonshire St., Boston, Mass.

DEAR SIR: I am in receipt of your letter of the 12th. I think that a conference between us is desirable, and I will be glad to see you at any time, preferring of course to have the meeting take place in New York, if convenient to you, rather than at Boston.

The Republican State Convention takes place on the 23rd, and I shall probably not be in town between Friday of next week and Wednesday thereafter. At any other time that you may indicate I will be at your service.

Very truly yours, EDWARD LAUTERBACH.

SEPTEMBER 13, 1902.

Louis D. Brandeis, Esq., 220 Devonshire Street, Boston, Mass.

DEAR SIR: Further answering your letter of September 12th to Mr. Bigelow, Mr. Edward Lauterbach has called me up today on the telephone and stated that he has received my copy of the Old Dominion Copper Mining and Smelting Company's letter to Mr. Bigelow and the Executors of the Estate of Leonard Lewisohn, and that he has telegraphed you in regard to the matter.

In order to avoid a multiplicity of counsel which would undoubtedly delay matters until they could all be thoroughly informed of the case on the part of their clients, I am authorized to say that Mr. Bigelow is perfectly willing to accept any decision which is arrived at by yourself and Mr. Lauterbach, as representing the Estate
1125 of Leonard Lewisohn, and that any course of procedure agreed upon by yourself and Mr. Lauterbach will be perfectly satisfactory to him and he will consider it binding upon him.

Very truly, G. M. HYAMS.

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

SEPT. 15, 1902.
G/B.

G. M. Hyams, Esq., Sears Building, Boston.

DEAR SIR: I am in receipt of your letters of the 12th and 13th. I am today also in receipt of a letter from Mr. Edward Lauterbach stating that he deems a conference desirable, and I have wired him as follows:—

"Regret cannot be in New York this week. Can see you here Tuesday afternoon, Wednesday forenoon, or Thursday. Imperative matter should be taken up this week."

Very truly yours, LOUIS D. BRANDEIS.

BOSTON, MASS., *Sep.* 15.

Edw. Lauterbach, 22 Wm. St.:

Telegram rec'd very sorry must ask you to come before Friday will arrange for any time Thursday most convenient for you Wednesday morning.

LOUIS D. BRANDEIS.

11 25.

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

SEPTEMBER 18, 1902.
G/B.

Edward Lauterbach, Esq., care A. S. Bigelow, Esq., Sears Building Boston.

DEAR MR. LAUTERBACH: I enclose herewith copies of the two bills in equity Old Dominion Copper Mining and Smelting Company v. Albert S. Bigelow, which you examined this morning, and which we propose filing in case no judgment is reached.

1126 I shall be glad to delay filing the bills until such time as you may have had an opportunity of duly considering the questions involved, upon our understanding that my clients shall be in no way prejudiced by the delay, and that if there should be occasion to bring the suits, you will arrange for such waivers in respect to time of filing service and pleadings so that the postponement of the commencing of the suits will not result in delay in the progress of the cases.

Yours very truly, LOUIS D. BRANDEIS.

2 enclosures.

SEPTEMBER 20, 1902.

Louis D. Brandeis, Esq., 220 Devonshire Street, Boston, Mass.

DEAR MR. BRANDEIS: In order not to cause any unnecessary delay in the matter concerning which I had the pleasure of conferring with you on Thursday, I came to Boston today for further conference with you and also with Mr. Hemenway, who will probably appear in any action you may bring, for Mr. Bigelow.

I timed my visit unfortunately, since I have ascertained that you would not be at your office today. Tomorrow I go to Saratoga, and since I expect to be Chairman of the Committee on Resolutions at the Convention, will not be able to confer with you again until after the close of the session, which will probably take place on Wednesday or Thursday of next week.

In the meantime, on any question of procedure or furnishing of a bond that may appear to you to be pressing, Mr. Hemenway will be glad to confer with you.

With regards, I am

Very truly yours, EDWARD LAUTERBACH.

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

SEPT. 22, 1902.
G. B.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: I have today a letter from Mr. Lauterbach, in which he tells me that you are acting with him in the matter of the Old Dominion Copper Mining and Smelting Company against Mr. Alfred S. Bigelow.

1127 I enclose you a copy of his letter, and also of my reply under date of today.

Am I right in assuming that in case a settlement is not reached, Mr. Bigelow will furnish the attachment bond for which we have asked.

Yours very truly,

LOUIS BRANDEIS.

(2 enclosures.)

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

SEPT. 27, 1902.
G. B.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: Mr. Lauterbach requests me to arrange with you the matter of bond in the suits of the Old Dominion Copper Mining and Smelting Company v. Albert S. Bigelow which we wish now to file, of which you doubtless have received the copies which we handed to Mr. Lauterbach.

We should like to have an attachment bond in the amount of $500,000. A single bond will be provided it is conditioned to the satisfaction of any decree which may be entered in either or both of the suits.

Will you kindly let me hear from you on Monday morning whether a bond in that form will be agreeable to you, and whom Mr. Bigelow proposes as surety?

Yours very truly,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

SEPTEMBER 29, 1902.
G. B.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: The two bills of Old Dominion Copper Mining and Smelting Company differ only in that which follows article Twenty-fourth.

I understand that you have a copy of the bill proceeding upon a rescission, and I enclose herewith pages 19 and 20 of bill "A," including article twenty-fifth and the prayer.

Yours very truly,

LOUIS D. BRANDEIS.

(Enclosure.)

1128 Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

NOVEMBER 8TH, 1902.
G/B.

Alfred Hemenway, Esq., Tremont Building, Boston.

MY DEAR MR. HEMENWAY: I enclose copy of my letter to Mr. Lauterbach of September 18th, 1902, embodying the understanding referred to in our conversation of this morning, in regard to the time of filing the pleadings, which appears not to have come to your attention before.

Yours very truly,

LOUIS D. BRANDEIS.

(Enclosure.)

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

NOVEMBER 18TH, 1902.
C/B.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: As I told my clients that the defendant's pleadings in the suits of the Old Dominion Copper Mining & Smelting Co. v. Bigelow were due, under the agreement made with Mr. Lauterbach, on November 5th, I am having almost daily inquiries as to whether they have been filed.

I told them ten days ago, after talking with you, that you would take the matter up immediately, and I hope you will be able to file them today or tomorrow.

Awaiting your reply,

Yours very truly,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

MARCH 2, 1903.
G/B.

Edward Lauterbach, Esq., 22 William Street, New York City.

MY DEAR MR. LAUTERBACH: Your telegram asking me to extend the time to answer in Lewisohn suit for 20 days was received after I left the office on Saturday.

1129 You will see from the enclosed copy of the answer in the Bigelow suit, No. 8099, that Mr. Hemenway considered the matter very carefully, and I have no doubt that with this at hand you will be able to get your answer into satisfactory shape by next Friday, March 6th.

If the answer is filed, and at any time during the subsequent 20 days you should wish to amend the answer I will very gladly consent to the filing of such amendment.

I have not extended the time for answering further partly because I felt sure that upon receiving a copy of Mr. Hemenway's

answer you would not deem it necessary, and partly because of the following:

My clients know that an answer is due this week, and I did not feel at liberty to grant an extension beyond this week because of the position in which I was left before with reference to them by Mr. Hemenway's failure to abide by the agreement that I had made with you in regard to the time for filing the answer in the Boston suits. You will remember that when I consented to postpone the beginning of the suit in order that you and Mr. Hemenway might have ample time to consider the questions, we agreed that there should be no delay in the ultimate proceedings resulting from any delay in the commencement of the suit. Under the arrangements which I made with you Mr. Hemenway's answer should have been filed on November 5th. Instead of that Mr. Hemenway did not file the answer until December 2nd. My clients knew of our agreement and the time when the answer was due, and I was considerably embarrassed in my relations with them owing to that fact.

In view of this it seemed to me unwise to extend your time for answering beyond Friday, although, as above stated, I will gladly consent to any amendment of the answer which is filed within the extension now granted.

Yours very truly,

LOUIS D. BRANDEIS.

(1 enclosure.)

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

MARCH 17TH, 1903.

G/B.

Edward Lauterbach, Esq., 22 William St., New York, N. Y.

DEAR MR. LAUTERBACH: After your telephone this morning, stating that you found it was impossible for you to come on on Monday, I communicated with Mr. Hemenway and secured his consent to the adjournment, as you requested, to Tuesday next, March 24th, at ten o'clock a. m., and have just wired you as follows:—

11:30 "Hemenway has agreed so we will adjourn taking depositions to Tuesday next as you request. Please mail stipulation, also transcript requested in mine of March seventh."

If the stipulation has not already been mailed to me, will you please sign the enclosed stipulation and return it to me.

If by any chance the transcript from the stock ledger referred to in mine of March 7th has not been completed, will you kindly have it completed at once and mailed to me.

Yours very truly,

LOUIS D. BRANDEIS.

(Enclosure.)

BOSTON, MASS, *Mar.* 17.

Edward Lauterbach, 22 Wm. St.:

Hemenway has agreed so we will adjourn*ing* taking depositions

to Tuesday next as you request. Please mail stipulation, also transcript requested in mine of March seventh.

LOUIS F. BRANDEIS.
12 19 p.

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

MARCH 17, 1903.
G/B.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: Mr. Lauterbach called me up on the telephone yesterday and stated that he had just returned from Kentucky and it would be impossible for him to go on with the taking of the depositions on Wednesday or any later day this week, but that he could go on on Tuesday and other days of next week. I told him I would see whether I could arrange so that I could grant the postponement, and I have, at considerable inconvenience, made such arrangements.

Mr. Lauterbach stated that Mr. Bigelow would not go abroad before May 12th, and also that he had just been in communication,—I was not sure whether with you or Mr. Bigelow or Mr. Hyams—in regard to the matter, and that the adjournment would be agreeable to you and them.

I am willing to grant the adjournment as requested by Mr. Lauterbach if you will agree on his behalf as well as that of the witnesses to proceed on Tuesday March 24th at ten o'clock.

1131 I enclose a draft of agreement for the adjournment, which kindly sign and return to me if the arrangement is satisfactory.

I send you also a copy for your files. I wrote to Mr. Lauterbach yesterday that I would wire him if the adjournment could be arranged. Will you kindly let me hear from you, therefore, as soon as possible?

Yours very truly,

LOUIS D. BRANDEIS.

(2 enclosures.)

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

APRIL 2ND, 1903.
C/G.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR HEMENWAY: I have a telegram from Mr. Lauterbach, asking that the hearing in Old Dominion v. Lewisohn be postponed from Friday, April 3rd, for one week.

I am willing to agree to this adjournment if you will sign the enclosed agreement for postponement to Friday, April 10th, at ten o'clock, on behalf of both Mr. Lewisohn and the witnesses.

Please return the agreement by bearer. I enclose a copy for your files.

Yours very truly,

LOUIS D. BRANDEIS.

(2 enclosures.)

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

MAY 1ST, 1903.
G/B.

Edward Lauterbach, Esq., 22 William St., New York City.

MY DEAR MR. LAUTERBACH: Confirming our telephone communication on the 29th, I have had the examination of Mr. Bigelow and Mr. Hyams adjourned to Tuesday, May 5th, at ten a. m.

I understand that you have only a few questions to put to Mr. Bigelow, and that you will then proceed with Mr. Hyams.

I trust you have entirely recovered from the effects of the operation.

Yours very truly, LOUIS D. BRANDEIS.

1132 Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

MAY 1ST, 1903.
G/B.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

MY DEAR MR. HEMENWAY: I enclose herewith a copy of my letter of today to Mr. Lauterbach.

Yours truly,

LOUIS D. BRANDEIS.

(Enclosure.)

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

MAY 15, 1903.

Edward Lauterbach, Esq., 22 William Street, New York City.

DEAR SIR: I have yours of the 14th.

I will draft the stipulation in regard to taking testimony and send it to you.

I would like to take the testimony of Mr. Meredith and perhaps a few other witnesses, some time next week.

Will you have the kindness to wire me tomorrow morning what days next week will be most convenient for you?

Yours very truly,

LOUIS D. BRANDEIS.
G.

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

MAY 18, 1903.
G. B.

Edward Lauterbach, Esq., 22 William St., New York City.

DEAR MR. LAUTERBACH: I find today your two telegrams of the 16th and 18th, the latter saying that you cannot be here on Thursday, but can go on on Friday, and prefer a day or two next week.

I have just heard from Mr. Hemenway, who says he thinks he

can go on on Friday of this week, but that it is possible that
1133 a case marked for Thursday may prevent; and in the event that he cannot go on on Friday of this week, he can go on on Thursday of next week, May 21st.

I have told him I would see what arrangements I could make for Friday of this week and Thursday of next week, and would then advise him and you.

Yours very truly, LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

MAY 21ST, 1903.
G/B.

Edward Lauterbach, Esq., 22 William St., New York, N. Y.

DEAR MR. LAUTERBACH: I have your telegram of today, notifying me that you will be unable to attend on Thursday of next week. I named that day, understanding it to be the only date that Mr. Hemenway was free. I will see if I can make any other arrangement for next week, and if not, will endeavor to accommodate you by postponing the taking of depositions until the week following.

Yours very truly,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

MAY 21ST, 1903.
G/B.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: In pursuance of our conversation on May 18th, I notified Mr. Lauterbach that we would not take any testimony this week but that he should reserve Thursday of next week, which I understood to be the only day you had open. I have just had a telegram from Mr. Lauterbach saying that he is to be engaged on Thursday but could attend on any other day next week after Monday.

Will you kindly let me know whether there has been any change in your engagements for next week, and if not, whether you will be free the week following.

Yours very truly, LOUIS D. BRANDEIS.

1134 Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

JANUARY 13, 1904.
G.

Re Old Dominion v. Lewisohn.

Edward Lauterbach, Esq., 22 Williams St., New York City.

MY DEAR MR. LAUTERBACH: We should like to take some depositions in this case in Baltimore soon.

Will you have the kindness to let me know what day or days will be most convenient to you?

Awaiting your early reply,

Yours very truly, LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

JANUARY 25, 1904.
C/B.

Re Bigelow-Lewisohn.

Alfred Hemenway, Esq., 334 Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: Mr. Lauterbach asks me to arrange with you for the time for taking depositions in Baltimore and tells me of your immediate engagements.

Will you kindly let me know after what date I may arrange the days?

Yours very truly, LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

Bigelow-Lewisohn.

Edward Lauterbach, Esq., 22 William St., New York City.

DEAR MR. LAUTERBACH: I find that I omitted to acknowledge receipt of your letter of January 23d in regard to the taking of testimony.

1135 Upon communicating with Mr. Hemenway, I found that he was not willing to fix at all a time for the taking of the testimony in Baltimore until he had disposed of the then pressing matters in the Bay State Gas litigation which I understand is coming up for a hearing on the 11th.

Yours very truly, LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.
Removed to top floor.

BOSTON, MASS., *April 6th*, 1904.
C/B.

Re Old Dominion-Lewisohn.

Edward Lauterbach, Esq., 22 William St., New York, N. Y.

MY DEAR MR. LAUTERBACH: I enclose you copy of my letter to Mr. Hemenway of today.

You will recall that when I wrote you on January 13th about taking testimony, you authorized me to fix the earliest time that Mr. Hemenway would give and that he was unable to give me any time then on account of his peremptory assignments in the Gas cases.

Will you kindly let me know whether I am free now to arrange the dates with Mr. Hemenway?

Yours very truly,

LOUIS D. BRANDEIS.

(Enclosure.)

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.
Removed to top floor.

BOSTON, MASS., *April 6th*, 1904.
C/B.

Re Old Dominion-Lewisohn.

Alfred Hemenway, Esq., 334 Tremont Building, Boston, Mass.

MY DEAR MR. HEMENWAY: I understand that the end of the Gas cases is near, and presume that you will again be open to engagements in other matters.

Will you kindly let me know for what time I may endeavor to arrange for taking some testimony in Baltimore, about which you will recall that I last heard from you on January 26th, when you said that you could not take the matter up until the Gas hearing was disposed of.

Yours very truly, LOUIS D. BRANDEIS.

1136 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

APRIL 11, 1904.
G/B.

Old Dominion v. Lewisohn.

Alfred Hemenway, Esq., 334 Tremont Building, Boston.

DEAR MR. HEMENWAY: I have yours of the 9th, and assume that I shall hear from you soon.

I wish that you would let me know at the same time for what week we may set down for argument the demurrer in the Bigelow suit here.

I think that the demurrer should be argued soon.

Yours very truly,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

APRIL 18, 1904.
G/B.

Old Dominion v. Lewisohn.

Edward Lauterbach, Esq., 22 William St., New York City.

DEAR MR. LAUTERBACH: You will recall that when we were taking testimony in New York last year, I suggested that we take the deposition of Mr. Stanton, but that you and Mr. Hemenway preferred at that time that Mr. Stanton's deposition should be taken in the ordinary course on written interrogatories. We thereupon filed interrogatories to Mr. Stanton and took his deposition on written interrogatories. These interrogatories were at the time taken technically in the Massachusetts case, 8099 Equity. I wish the deposition of Mr. Stanton to be on file also in the New York case.

Will it be agreeable to you to stipulate that the deposition taken in the Boston suit may be used also in the Lewisohn suit?

I enclose herewith a copy of the interrogatories and answers.

Yours very truly,

LOUIS D. BRANDEIS.

(2 enclosures.)

1137 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

APRIL 21, 1904.
G/B.

Lewisohn.

Edward Lauterbach, Esq., 22 William St., New York City.

DEAR MR. LAUTERBACH: I have yours of the 20th, in which you ask me to submit to you the form of stipulation which I desire to have entered in relation to Mr. Stanton's deposition, and I now enclose duplicate copies of same, which I have signed.

Will you kindly sign them and return one copy to me?

Yours very truly,

LOUIS D. BRANDEIS.

(2 enclosures.)

APRIL 28TH, 1904.

Louis D. Brandeis, Esq., 161 Devonshire St., Boston, Mass.

DEAR SIR: We beg to enclose herewith the stipulation sent to us in the case of Old Dominion Copper Co. against Frederick Lewisohn, et al. agreeing that a certified copy of the deposition of John Stanton taken in the Bigelow suit may be filed and read in evidence in the Lewisohn suit.

Very truly yours,

HOADLY, LAUTERBACH & JOHNSON.

(Enc.)

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

APRIL 29, 1904.
G/B.

Old Dominion-Lewisohn.

Messrs. Hoadley, Lauterbach and Johnson, 22 William St., New York City.

DEAR SIRS: I thank you for yours of the 28th enclosing stipulation with reference to the deposition of John Stanton. I have not heard from Mr. Hemenway since April 9th in regard to the taking of depositions, and presume that he is in communication with you.

Yours very truly,

LOUIS D. BRANDEIS.

1138 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JUNE 3, 1904.
G/B.

Bigelow-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: I enclose herewith draft of the reservation in Old Dominion Copper Mining and Smelting Company v. Bigelow, 8098 Equity, as prepared by Judge Lathrop.

I am handing a copy of this also to Mr. Cooper for Judge Lathrop's signature.

I have written to Mr. Lauterbach about taking evidence in Boston in the Lewisohn case the latter part of next week or the early part of the week following, and am awaiting a telegram from him letting me know what days, if any, to avoid.

Yours very truly,

LOUIS D. BRANDEIS.

(Enclosure.)

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JUNE 6, 1904.
G/B.

Old Dominion-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: I have heard from Mr. Lauterbach, who asks me not to take any depositions this week, but to arrange with you for the selection of a day next week.

I should like to commence the taking of depositions on Monday next, June 13th, at half past ten.

Will you please let me know at once whether that time will be convenient to you?

I tried to reach you by telephone, but found that you were not in.

Yours very truly,

LOUIS D. BRANDEIS.

1139 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JUNE 7, 1904.
G/B.

Old Dominion v. Lewisohn.

Edward Lauterbach, Esq., 27 William St. New York City.

DEAR MR. LAUTERBACH: I duly received your telegram of the 3d, and have arranged with Mr. Hemenway to take the depositions of some witnesses in Boston at my office on Wednesday next, June 15th, at 10.30 o'clock.

Yours very truly,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JUNE 13TH, 1904.
C/B.

Old Dominion v. Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: I have written Mr. Lauterbach, asking him kindly to have present at the taking of depositions at our office on Wednesday the original subscription or underwriting agreements and other papers put in evidence in connection with the depositions of Messrs. Bigelow and Hyams.

If these papers are in your possession and not in Mr. Lauterbach's, will you please bring them with you?

Yours very truly,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JUNE 21, 1904.
C/B.

Re Old Dominion-Lewisohn.

Edward Lauterbach, Esq., 22 William St., New York, N. Y.

DEAR MR. LAUTERBACH: I presume you have received from Mr. Hemenway copies of the depositions of Mr. Coram and Mr. Stone.

You will note that, in view of your inability to attend at
1140 the taking of the depositions, I agreed that, although the depositions are closed, I would recall Mr. Coram and Mr. Stone in case you wish to cross-examine them.

Will you kindly let me know by return mail whether you do wish to cross-examine them, and if so, what day will be convenient for you for this purpose? I should like to fix some day before June 28th.

I have marked for argument at the October Sitting the demurrer in the suit of Old Dominion Copper Mining and Smelting Company v. Lewisohn.

Yours very truly,

LOUIS D. BRANDEIS.

ARM–V.

JUNE 28TH, 1904.

Louis D. Brandeis, Esq., 161 Devonshire Street, Boston, Mass.

DEAR SIR: Mr. Hemenway has not yet sent us copies of the depositions by Mr. Coram and Mr. Stone. As soon as the same is received Mr. Lauterbach, who has just returned from Chicago, will examine them, and will then reply more definitely to your favor of the 21st inst.

Yours very truly,

HOADLY, LAUTERBACH & JOHNSON.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

SEPT. 9, 1904.
G/B.



Lewisohn.

Edward Lauterbach, Esq., 22 William St., New York City.

DEAR MR. LAUTERBACH: I should like to take, on such day next week as will be most convenient to you, the deposition of Mr. Charles H. Altmiller, and possibly also the deposition of one or more of the other subscribers to the Old Dominion stock.

Will you kindly let me know what day you prefer?

Yours very truly,

LOUIS D. BRANDEIS.

1141 EL/V. SEPTEMBER 10TH, 1904.

Louis D. Brandeis, Esq., 161 Devonshire Street, Boston, Mass.

DEAR MR. BRANDEIS: I have communicated with Mr. Hemenway, who will communicate with you on the subject of the proposed examination of Charles H. Altmiller, and others, subscribers to the Old Dominion stock.

Very truly yours,

EDWARD LAUTERBACH.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

SEPT. 14, 1904.
G/B.

Lewisohn.

Edward Lauterbach, Esq., 22 William St., New York City.

DEAR MR. LAUTERBACH: I have received your letter of the 10th, and since then have heard from Mr. Hemenway that he feels you ought to attend at the taking of the deposition of Mr. Altmiller, and that he has written you to that effect, and that he will le me hear as soon as he hears from you, but that he thought his letter had not been answered because you were not in New York City.

Will you have the kindness to let me know as soon as this reached you when it would be convenient for you to attend at the taking of Mr. Altmiller's deposition.

As I have stated, we shall probably on the same day wish to take the depositions of a few other subscribers to the stock.

Yours very truly,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

SEPT. 20, 1904.
G/B.

Lewisohn.

Edward Lauterbach, Esq., 22 William St., New York City.

DEAR MR. LAUTERBACH: A letter from your office under date of the 15th informed me that my letter to you of the 14th asking you to name a day that would be convenient for you to attend at the taking of the deposition of Mr. Altmiller would be answered upon your return to the office on the 19th.

1142 If you have not already written me, will you kindly wire me on receipt of this on what day you can attend?

Awaiting your reply,

Very truly yours,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

SEPTEMBER 22, 1904.

Re Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston.

MY DEAR HEMENWAY: I received your message last week that Mr. Lauterbach was absent from New York, and that you could not fix a time for taking the depositions here until you should hear from him.

I wrote Mr. Lauterbach accordingly asking him to let me know on what day it would be convenient for him to proceed, and I finally got a telegram yesterday from him saying that he could proceed on any day satisfactory to you.

Before I could communicate with you I have had a telephone from him saying that you say that you cannot go on earlier than the second week of October, but that any day either during the second week of October or before that time on which you can go on will be satisfactory to him.

Is there not some day next week or the week following on which you would be able to attend to the matter, and if not, what day or days during the second week of October will you be able to attend?

Awaiting your reply,

Yours very truly,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

SEPT. 23, 1904.
G/B.

Lewisohn.

Edward Lauterbach, Esq., 22 William St., New York City.

DEAR MR. LAUTERBACH: I have just been talking with Mr. Hemenway, and he has agreed that I might fix Friday, October 7th, for the taking of Mr. Altmiller's deposition.

Will ten o'clock on that day be a convenient time for you to attend at my office?

Yours very truly,

LOUIS D. BRANDEIS.

1143 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

1143

OCTOBER 6, 1904.
G/B.

Old Dominion vs. Bigelow and Lewisohn.

Alfred Hemenway, Esq., 334-338 Tremont Building, Boston, Mass.

MY DEAR HEMENWAY: I have yours of today and am very sorry that you cannot go on with the taking of the depositions to-morrow.

I note that you have already notified Mr. Lauterbach.

As I said yesterday when you mentioned this, I would like to go on on Monday or Tuesday of next week, or if that is not possible, on Wednesday, and I am disappointed at your not letting me know whether you can go on on Monday or Tuesday.

Please let me hear from you.

Very truly yours,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

NOVEMBER 2, 1904.
G/B.

Edward Lauterbach, Esq., 22 William St., New York City.

DEAR MR. LAUTERBACH: 1. I am sorry to report that Judge Townsend's engagements are such that he did not consider it possible to hear our demurrer at his November sitting.

Will you not, nevertheless, complete your brief now so that we may have the case ready for argument as soon as an opportunity arises?

2. I note that you will let me know within a few days whether you wish to cross examine Mr. Altmiller.

Will you also let me have an answer to the matter which we discussed, namely whether you will waive formal proof of those matters testified to by Mr. Altmiller from entries in the various books and papers, and as to some of which he has no personal knowledge.

If you do not wish to consent, I want to call as soon as possible witnesses who can give formal testimony to these matters.

Awaiting your reply,

Yours very truly,

LOUIS D. BRANDEIS.

1144 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

NOVEMBER 3, 1904.
G/B.

Old Dom. v. Bigelow.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: You doubtless know that the demurrer in suit of Old Dominion Copper Mining and Smelting Co. v. Bigelow is on the November list for the Full Bench. Indeed, I understand that you yourself directed the papers to be printed, but in order to avoid the possibility of any misunderstanding, I wrote to say that we shall want to have this demurrer argued when it is reached.

I am led to send this letter because I found that although I had early notified Mr. Lauterbach that we expected to argue the demurrer in the Lewisohn case as soon as reached, and also talked with him about the matter recently in Boston, he seemed entirely surprised to find that it was on the list and he was not prepared to take it up on Tuesday.

Yours very truly,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

NOVEMBER 11, 1904.
G/B.

Re Lewisohn.

Edward Lauterbach, Esq., 22 William Street, New York City, N. Y.

DEAR MR. LAUTERBACH: I have yours of the 9th enclosing check for $35., and have sent you by American Express twelve additional copies of the Demurrer Book.

I am writing to Mr. Hemenway today to ascertain whether he wishes to cross examine Mr. Altmiller &c.

Yours very truly,

LOUIS D. BRANDEIS.

1145 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

NOVEMBER 11, 1904.
G/B.

Re Lewisohn.

Alfred Hemenway, Esq., Tremont Bldg., Boston.

DEAR MR. HEMENWAY: Mr. Lauterbach tells me that he has requested you answer my inquiry whether you wish to have made

any cross examination of Mr. Altmiller, and also whether you will stipulate as to the withdrawal of the objections to the formal parts of Mr. Altmiller's testimony, so as to relieve us from the necessity of making formal proof.

I should be glad if you could let me have a reply by eleven o'clock tomorrow.

Yours very truly,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

DECEMBER 15, 1904.
J–G.

Re Bigelow-Lewisohn.

Edward Lauterbach, Esq., 22 William Street, New York City.

MY DEAR MR. LAUTERBACH: My absence in the South has led to delay in replying to your letter of November 12th.

In pursuance of the suggestion contained in your letter I enclose herewith:

1. Three copies marked "A" of draft of stipulation to be filed in the Lewisohn case # 1 concerning the Altmiller deposition.

It has seemed to me also proper at this time to prepare stipulations covering some other matters in regard to the proof in the Lewisohn cases and also in the Bigelow cases, and I therefore enclose herewith:

2. Drafts marked "B" of stipulations to be filed in both Lewisohn cases covering the filing therein of certified copies of the depositions of the Lewisohns and others which were taken in the Bigelow case, and also concerning the filing of the depositions of Bigelow and others taken in the Lewisohn case, etc.

1146 3. Also for your and Mr. Hemenway's consideration, drafts marked "C" of stipulations to be filed in the two Bigelow cases concerning the filing of the depositions of the Lewisohns and others.

4. Drafts marked "D" of stipulations to be filed in the two Bigelow cases concerning the depositions of Bigelow, Hyams and others which were taken in the Lewisohn suit.

Will you kindly let me know as soon as possible whether these stipulations will be in all respects agreeable to you and Mr. Hemenway, and if you have any suggestions to make, let me have them as promptly as possible.

Yours very truly,

LOUIS D. BRANDEIS.

(Stipulations herewith.)

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JANUARY 10, 1905
G/B.

Re Bigelow-Lewisohn.

Edward Lauterbach, Esq., 22 William Street, New York City.

DEAR MR. LAUTERBACH: I duly received yours of December 29th.

Are you and Mr. Hemenway content with the form of the stipulations submitted, and if so, will you kindly have them returned to me?

Yours very truly, LOUIS D. BRANDEIS.

ARM–m JANUARY 12, 1905.

Louis D. Brandeis, Esq., 161 Devonshire Street, Boston.

DEAR SIR: In reply to your favor of the 10th inst., we beg to state that the stipulations have just been returned by Mr. Hemingway in the Bigelow-Lewisohn matter together with his suggestions for certain changes to be made therein. We will change the stipulations in accordance with his said suggestions, and send it to you within the next day or two.

Very truly yours,

HOADLY, LAUTERBACH & JOHNSON.

1147 ARM—L.

JANUARY 18TH, 1905.

Louis D. Brandeis, Esq., 161 Devonshire St., Boston, Mass.

DEAR SIR: We have this day sent to Mr. Hemenway the stipulations in amended form in the Lewisohn and Bigelow actions, and have requested him to deliver the same to you providing they meet with his approval.

We will be obliged if upon delivery you will sign a set of the said stipulations so that we can have a full copy for our records.

Very truly yours,

——— ———.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JANUARY 26, 1905.
G/B.

Bigelow-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: When I saw you on the 20th, you expected to be able to let me have the stipulations in a few days.

Have you had time to examine them?

Yours very truly,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

FEBRUARY 1, 1905.
G/B.

Bigelow-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: I take the liberty of reminding you that you promised when I saw you on Jan. 20th, to send me the stipulations in the above cases.

Yours very truly, LOUIS D. BRANDEIS.

1148 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

FEBRUARY 13, 1905.
G/B.

Bigelow-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: Will you please let me have the Old Dominion-Bigelow-Lewisohn stipulations today or tomorrow?

Yours very truly,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

FEBRUARY 17, 1905.
G/B.

Old Dominion—Bigelow-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston.

MY DEAR HEMENWAY: I have yours of the 14th inst., enclosing the stipulations in the above cases.

The changes which you and Mr. Lauterbach have made are satisfactory to me.

I think that in the clause "Said waiver being made conditionally upon the production of any and all of the original documents that the respondent shall notify complainant to produce and the complainant hereby stipulates and agrees to produce any and all of the original documents upon receiving notice requiring the production thereof" the word "said" should be substituted for "the" in each instance before the word "original," so that it shall read "all of said original documents," as it might otherwise on its face appear to refer to some other papers.

I have therefore taken the liberty of thus changing the word "the" to the word "said."

We have signed and sent for filing the stipulations in the Bigelow suits and in the Lewisohn suits, and have sent to Mr. Lauterbach a signed copy of all seven stipulations.

Yours very truly,

LOUIS D. BRANDEIS,
D.

1149 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

FEBRUARY 17, 1905.
G/B.

Re Bigelow-Lewisohn.

Edward Lauterbach, Esq., 22 William Street, New York City.

DEAR MR. LAUTERBACH: I have just received from Mr. Hemenway the stipulations with the modifications suggested by you and

him. These are entirely satisfactory to us. I have thought, however, that in the paragraph "Said waiver being made conditionally upon the production of any and all of the original documents that the respondent shall notify complainant to produce, and the complainant hereby stipulates and agrees to produce any and all of the original documents upon receiving notice requiring the production thereof," the word "said" should be substituted for "the" before the word "original," and I have taken the liberty of doing so.

I send you herewith for your files a copy signed by us of all the stipulations filed in the Bigelow and Lewisohn cases.

Yours very truly,

LOUIS D. BRANDEIS.

P. S.—I understand that our demurrer is the third case on the list for argument on Monday next. I am purposing to go over on Sunday afternoon, and spend the night at the City Club, so as to be on hand Monday morning, and I hope to have the pleasure of meeting you then.

(7 enclosures.)

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

FEBRUARY 18, 1905.
G/J.

Old Dominion—Bigelow-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: We have signed and now return to you herewith your copy of the stipulations.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.
G.

(7 enclosures.)

1150 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JUNE 26, 1905.
J/B.

Old Dominion: Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston.

MY DEAR MR. HEMENWAY: I wrote Mr. Lauterbach some days ago that we wished to take the depositions of a number of witnesses who were subscribers for stock, and asked him at what time it would be most convenient for him to come to Boston. He writes me that I should make arrangements with you; that any date that you fix will be agreeable to him, but that he "should prefer to have the depositions taken after the Fourth of July."

Please let me know on what dates it would be convenient for you to attend, and I will endeavor to make my engagements conform, and secure the witnesses for such dates.

Yours very truly,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JULY 11, 1905.
J/B.

Old Dominion—Bigelow-Lewisohn.

Edward Lauterbach, Esq., 22 William Street, New York City.

DEAR MR. LAUTERBACH: Mr. Hemenway has just notified me that he will be at liberty to go any days next week, except Saturday, that will be convenient to you with the taking of the depositons.

Will you kindly let me know what days you can attend next week, and I will endeavor at once to get in touch with the witnesses?

It is growing late in the month, and I fear that some of them may already have left on their vacations.

Awaiting your reply.

Yours very truly,

LOUIS D. BRANDEIS.

1151 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JULY 14, 1905.
J/B.

Old Dominion—Bigelow-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: As arranged with you over the telephone on the 11th, I wrote Mr Lauterbach as to fixing the time for taking the depositions, and he suggests Wednesday, July 19th.

I am therefore endeavoring to get together the witnesses for that date, at our office, at ten o'clock.

Yours very truly, LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JULY 14, 1905.
J/B.

Old Dominion—Bigelow-Lewisohn.

Edward Lauterbach, Esq., 22 William Street, New York City.

DEAR MR. LAUTERBACH: I have your telegram and letter of the 13th, suggesting Wednesday, July 19th, for taking the depositions in the above case.

I am endeavoring to get the witnesses together for that date.

I shall expect you and Mr. Hemenway at our office at ten o'clock.

Yours very truly, LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JULY 17, 1905.
J/McC.

Old Dominion—Bigelow-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: At the taking of the testimony in the above matter Wednesday, I desire to examine Mr. Chrimes and for this purpose should like to have all the correspondence of Mr. 1152 Bigelow in connection with the corporation and syndicate during 1895 up to October 1st, particularly the letters already introduced — evidence, and also all the letter books of the various series for the same period.

I assume that it will not be necessary to issue a formal summons to Mr. Chrimes, or for the production of the books and papers, and shall be obliged if you will confirm this.

Yours very truly, LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

SEPTEMBER 30, 1905.
G/B.

Old Dominion vs. Bigelow.
" " vs. Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: We should like to take some further depositions.

Will it be possible for you to attend on either October 12th or 13th, and if neither of those dates is possible, please let me know the earliest date after that which will be convenient for you.

I am communicating also by this mail with Mr. Lauterbach.

Yours very truly, LOUIS D. BRANDEIS

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

SEPTEMBER 30, 1905.
G/B.

Old Dominion vs. Bigelow.
" " vs. Lewisohn.

Edward Lauterbach, Esq., 22 William Street, New York City, N. Y.

DEAR MR. LAUTERBACH: We should like to take some further depositions.

Will it be possible for you to attend on either October 12th or 13th, and if neither of those dates is possible, please let me know the earliest date after that which will be convenient for you.

I am communicating also by this mail with Mr. Lauterbach.

Yours very truly, LOUIS D. BRANDEIS.

1153 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

OCTOBER 5, 1905.

J/B.

Old Dominion—Bigelow-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: I have yours saying that you know of no objection to taking the depositions on the 13th, and Mr. Lauterbach has also written that that date would suit him if agreeable to you.

We are communicating with Mr. R. Brent Keyser, of Baltimore, with a view to taking his deposition there on that date. Will you please let me know by bearer whether you see anything to prevent your attending at Baltimore on the 13th?

We are communicating with Mr. Keyser this morning.

Yours very truly, LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

OCTOBER 9, 1905.

J/B.

Old Dominion: Bigelow-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: I have your message that you cannot go to Baltimore on the 13th on account of pending cases here, but that you can attend at the taking of testimony in Boston on that date.

Will you therefore kindly have Mr. Chrimes at our office with all of the books and papers produced at his examination on July 20th and also the other books and papers called for in the course of his deposition?

We hope to arrange also for the presence of enough other witnesses to occupy the day.

Yours very truly, LOUIS D. BRANDEIS.

1154 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

OCTOBER 9, 1905.

J/G.

Old Dominion: Bigelow-Lewisohn.

Edward Lauterbach, Esq., 22 William Street, New York City, N. Y.

DEAR MR. LAUTERBACH: Mr. Hemenway has assented to the taking of depositions in Boston on the 13th, and I have just written him as per enclosed copy.

Yours very truly, LOUIS D. BRANDEIS.

(1 enclosure.)

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

OCTOBER 14, 1905.

J/G.

Old Dominion: Bigelow-Lewisohn.

Edward Lauterbach, Esq., 22 William Street, New York City, N. Y.

DEAR MR. LAUTERBACH: I have not heard from you by wire or letter in answer to mine of the 12th.

As we desire to arrange for the attendance of witnesses on the 19th, if that date is possible, will you kindly wire me early Monday whether it will be convenient for you to be here on that date? Mr. Hemenway assents to that day subject to your consent.

Yours very truly, LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

OCTOBER 6, 1905.

G/B.

Old Dominion: Bigelow-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: I have just received a telegram from Mr. Lauterbach reading as follows:—"This week inconvenient. Any day next week after Monday. Arrange with Hemenway."

1155 Will you please let me know on what days next week you can attend for the taking of depositions?

Yours very truly, LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

OCTOBER 21, 1905.

J. B.

Old Dominion: Bigelow-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: We are arranging, in accordance with my conversation with you last evening, to take the depositions on Friday next, October 27th, at ten o'clock.

Will you therefore kindly have Mr. Chrimes at our office with all of the books and papers produced at his examination on July 20th and also the other books and papers called for in the course of his deposition?

When I last heard from you, you promised to let us have your answer in the suit of Old Dominion vs. Bigelow by October 15th. If the answer is ready please send me a copy; if not, I hope you will be able to let me have it within the next few days.

Yours very truly, LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

OCTOBER 21, 1905.

J/B.

Old Dominion: Bigelow-Lewisohn.

Edward Lauterbach, Esq., 22 William Street, New York City, N. Y.

DEAR MR. LAUTERBACH: I saw Mr. Hemenway yesterday, and agreed with him that we should proceed with the taking of depositions on Friday next, October 27th, at ten o'clock. He said that he would notify you, but to avoid the possibility of any misunderstanding, I write to you direct.

Yours very truly,

LOUIS D. BRANDEIS.

1156

OCTOBER 23RD, 1905.

Louis D. Brandeis, Esq., 161 Devonshire Street, Boston, Mass.

DEAR MR. BRANDEIS: Friday next, October 27th will suit my convenience for the taking of the depositions referred to in yours of the 21st.

Yours very truly, EDWARD LAUTERBACH.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass

OCT. 28, 1905.

T/McC.

Re Old Dominion Copper Mining & Smelting Co. vs. Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: In the Old Dominion case, we desire to take the testimony of several witnesses in and about St. Johnsbury, Vt. Will it be possible for you to attend to the matter on November 2d and 3d? It seems possible that it could be so arranged that all the depositions can be taken on the 2d, but in view of the distance, it would perhaps be better to leave another day open so as to avoid the possibility of having to make two trips.

I am writing to Mr. Lauterbach.

I should like to hear from you if possible today or Monday, and am asking Mr. Lauterbach to telegraph his reply.

Yours very truly,

LOUIS D. BRANDEIS.

P. S.—My partner, Mr. McClennen, will attend to the taking of the above depositions.

1157 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

OCT. 28, 1905.
T/McC.

Re Old Dominion Copper Mining & Smelting Co. vs. Lewisohn.

Edward Lauterbach, Esq., 22 William St., New York, N. Y.

DEAR MR. LAUTERBACH: In the Old Dominion case, we desire to take the testimony of several witnesses in and about St. Johnsbury, Vt. Will it be possible for you to attend to the matter on November 2d and 3d? It seems probable that it could be so arranged that all the depositions can be taken on the 2d, but in view of the distance, it would perhaps be better to leave another day open so as to avoid the possibility of having to make two trips.

I am writing Mr. Hemenway at this time, and shall be obliged if you will let me have your reply by telegraph.

Yours very truly,

LOUIS D. BRANDEIS.

P. S.—My Partner, Mr. McClennen, will attend to the taking of the above depositions.

ET–K.

OCTOBER 31ST, 1905.

Louis D. Brandeis, Esq., 161 Devonshire Street, Boston, Mass.

DEAR SIR: Not hearing from you relative to taking testimony at St. Johnsbury in the Old Dominion case we presume that you have concluded not to go there this week.

There are only two trains from New York, one at nine o'clock in the morning, arriving at 7.30 in the evening, the other at 4.30 in the afternoon, arriving at 3.30 the next morning, which is a very unseasonable hour to arrive at any place, being too early to go to work and too late to go to bed. We desire to have sufficient notice to permit us to leave by the 9 A. M. train.

Yours truly,

——— ———.

1158 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

NOVEMBER 2, 1905.
J/G.

Old Dominion: Bigelow-Lewisohn.

Eugene Treadwell, Esq., Hoadly, Lauterbach & Johnson, 22 William Street, New York City.

DEAR SIR-: I have yours of the 31st.

I had supposed that Mr. Hemenway reported to you that he was unable to attend at the taking of testimony at St. Johnsbury this week, and for that reason it was necessary to postpone the taking of the depositions.

I note your wishes in regard to notice so that you can take the morning train.

Very truly yours, LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

Nov. 24, 1905.
T/McC.

Old Dominion—Lewisohn.

Eugene Treadwell, Esq., Hoadley, Lauterbach & Johnson, 22 William St., New York, N. Y.

DEAR SIR: Will it be convenient for you to attend the taking of depositions in Vermont on December 7, 8, or 9, if these dates are convenient for Mr. Hemenway?

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

ET-L.

NOVEMBER 27TH, 1905.

Old Dominion—Lewisohn.

Mess. Brandeis, Dunbar & Nutter, Devonshire St., Boston, Mass.

GENTLEMEN: Yours of November 25th received. December 7th, 8th or 9th will be convenient for me if they are for Mr. Hemenway. Please notify me at least forty-eight hours in advance, as I should have to take the morning train from New York the day previous to the first session.

Yours truly,

——— ———.

1159 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

DEC. 1, 1905.
T/McC.

Old Dominion—Lewisohn.

Eugene Treadwell, Esq., 22 William St., New York, N. Y.

DEAR MR. TREADWELL: Mr. Hemenway is unable to go to Vermont on December 7th, 8th, or 9th. We are writing him relative to the 14th, 15th, or 16th, and shall be glad to know whether these dates would be agreeable to you.

Yours very truly, LOUIS D. BRANDEIS.

ET-M.

DECEMBER 2ND, 1905.

Old Dominion—Lewisohn.

Louis D. Brandeis, Esq., c/o Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

DEAR SIR: Yours December 1st received.

The 14th, 15th and 16th December will be agreeable to me. Kindly notify me as far as possible in advance if selection made final.

Do I understand that you will expect testimony to commence on the 14th, and also if it is liable to continue on the 16th.

Very truly yours,

—— ——.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

DEC. 4, 1905.
T/McC.

Old Dominion—Lewisohn.

Eugene Treadwell, Esq., Messrs. Hoadly, Lauterbach & Johnson, 22 William St., New York, N. Y.

DEAR SIR: Mr. Hemenway informs us that the 14th of December is agreeable to him for taking the depositions at St. Johnsbury. We will accordingly endeavor to perfect arrangements for this date at once.

We believe that all the depositions can be taken in one day.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

1160 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

DEC. 6, 1905.
T/McC.

Old Dominion—Lewisohn.

Eugene Treadwell, Esq., Messrs. Hoadley, Lauterbach & Johnson, 22 William St., New York, N. Y.

DEAR SIR: We enclose you herewith a stipulation, and copy for your files, for the appointment of commissioner to take depositions at St. Johnsbury. Will you kindly sign and return to us the original.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

Enclosure.

ET-L. DECEMBER 7TH, 1905.

Old Dominion vs. Lewisohn.

Mess. Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

DEAR SIRS: Yours of 6th with stipulations enclosed received. We herewith return original signed.

Yours truly,

—— ——.

(Enc.)

DECEMBER 12TH, 1905.

To Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

Old Dominion Lewisohn Will session be held St. Johnsbury and where. Also on which day Answer.

EUGENE TREADWELL.

JANUARY 13TH, 1906.

Messrs. Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

GENTLEMEN: We beg to acknowledge receipt of your favor of the 4th instant, addressed to Mr. Treadwell, and in compliance with the request therein contained beg to hand you herewith check for $6.00 to cover one-half of the expense incurred by the employment of a stenographer to take the depositions at St. Johnsbury in the case Old Dominion Company v. Bigelow.

Yours very truly,

HOADLY, LAUTERBACH & JOHNSON.

Enc.

1161 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JAN. 15, 1906.
T/McC.

Old Dominion—Lewisohn and Bigelow.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR SIR: We have just received from Messrs. Hoadley, Lauterbach & Johnson a check for $6 to cover one-half the expense of stenographer in taking the depositions at St. Johnsbury.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

MARCH 2, 1906.
T/McC.

Old Dominion—Lewisohn and Bigelow.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR SIR: Will it be convenient for you to attend the taking of depositions in Connecticut on March 7, 8, or 9? We can probably arrange so that you can leave Boston in the morning and get back on the evening of the same day.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

MARCH 2, 1906.
T/McC.

Old Dominion—Lewisohn and Bigelow.

Edward Lauterbach, Esq., Hoadley, Lauterbach & Johnson, 22 William St., New York, N. Y.

DEAR SIR: Will it be convenient for you to attend the taking of depositions in Connecticut on March 7, 8, or 9? We can probably

arrange so that you can leave New York in the morning and get back on the evening of the same day.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

1162 ET-M. MARCH 3RD, 1906.

Old Dominion v. Lewisohn & Bigelow.

Messrs. Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

GENTLEMEN: The date of March 9th would be preferable to us, subject of course to the convenience of Mr. Hemenway with whom we presume you have arranged.

Yours truly,

——— ———.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

MAR. 5, 1906.
T/McC.

Messrs. Hoadley, Lauterbach & Johnson, 22 William St., New York, N. Y.

GENTLEMEN: Your letter of March is received.

Mr. Hemenway finds that it will not be possible for him to go on this week, or even to fix a date until the conclusion of the case which he is now trying.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

MARCH 27, 1906.
T/McC.

Old Dominion Copper Mining & Smelting Co.,-Lewisohn.

Messrs. Hoadley, Lauterbach & Johnson, 22 William St., New York, N. Y.

GENTLEMEN: We are just writing Mr. Hemenway with reference to an appointment for the taking of testimony. Will it be agreeable to you to attend within a week or two?

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

1163 E. T.-L.

MARCH 28TH, 1906.

Old Dominion Co. vs. Lewisohn.

Messrs. Brandeis, Dunbar & Nutter, 161 Devonshire St., Boston, Mass.

DEAR SIRS: Yours of 27th received. Excepting April 6th and 7th, together with a case in the United States Supreme Court which the clerk of that Court advises may be reached in the week beginning April 9th, it will be agreeable for us to attend the taking of testimony.

Yours truly, ——— ———.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

APRIL 17, 1906.
T/McC.

Old Dominion—Lewisohn and Bigelow.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: Can you arrange for the taking of any depositions in Boston at the end of this week or during next week? We should like at least one day for this.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.
T.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

APRIL 26, 1906.
T/McC.

Old Dominion—Lewisohn & Bigelow.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: As you will recall, we have agreed upon May 12th for taking testimony in New York. We should like to follow this up with some in Boston. Can you go on May 14th and 15th in Boston? If not, will you please let us have the earliest time thereafter that you can go on.

Yours very truly. EDWARD F. McCLENNEN.

1164 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

MAY 7, 1906.
T/McC.

Messrs. Hoadly, Lauterbach & Johnson, 22 William St., New York, N. Y.

GENTLEMEN: In the taking of testimony on Saturday next before Mr. Webb in New York, we should like to offer in evidence some of

the numerous exhibits which were marked for identification at the time of the earlier taking of testimony in New York, and to close the direct examination of the various witnesses then examined, leaving them for your cross-examination. Will it be agreeable to you to have the witnesses in attendance and the exhibits present without summons? Among other exhibits we shall wish to offer in evidence are some from the Lewisohn letter books:

Letters: To Keyser, June 13.
" Brooker, June 25th.
" Shiff, July 12.
" Brooker, July 24.
" Stern, July 24.
" Hawley, July 25.
" Behrens, Aug. 6.
" Henry, Aug. 6.
" Henry, Aug. 26.
" Mainz, Sep. 12.
" Caspary, Oct. 1.

The portions of the Lewisohn books relating to Old Dominion, or a transcript thereof,—they are now marked Exhibits #231, #232, #233.

You will recall that the New York witnesses who have thus far testified are:

Walter Lewisohn.	Albert Lewisohn.
Frederick L. Raheuser.	F. Raheuser.
Adolf Lewisohn.	Jesse Lewisohn.
Frederick Lewisohn.	E. C. Westervelt.

Will you kindly inform us whether it will be agreeable to you to take testimony in Boston on the 15th, 16th and 17th?

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

1165 E. T.-L.

MAY 8TH, 1906.

Old Dominion Co vs. Lewisohn.

Messrs. Brandeis, Dunbar & Nutter, 161 Devonshire St., Boston, Mass.

GENTLEMEN: Yours of May 7th received. It would be impossible to obtain the attendance of the various witnesses you name on Saturday, that being practically a holiday, and unless you have any further direct-examination of them or any of them, we suggest instead that you on that day close their direct-examination on the record, leaving the question of cross-examination to await subsequent decision. Of course, if we conclude not to cross-examine, we can arrange to have the witnesses present at some convenient time to sign their depositions. If, however, we conclude to cross-examine, we can arrange for a further date. Obviously, we could not conclude

their examination on that date together with the testimony of the other witnesses which you expect to take. We will have the exhibits present to enable you to put them in evidence on that day.

We can attend the taking of testimony in Boston on the 15th, 16th and 17th, if agreeable to Mr. Hemenway.

Kindly advise us as far in advance as possible if you conclude to have the sessions on those dates.

Yours truly,

——— ———.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

MAY 9, 1906.
T/McC.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: Messrs. Hoadly, Lauterbach & Johnson inform us that they can attend to the taking of testimony in Boston on the 15th, 16th and 17th of May, provided you can. Kindly inform us whether it will be convenient for you to give us all or any of these days?

Yours very truly, EDWARD F. McCLENNEN.

1166 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

MAY 14, 1906.
T/McC.

Old Dominion-Bigelow.

Messrs. Hoadly, Lauterbach & Johnson, 22 William St., New York, N. Y.

GENTLEMEN: Mr. Hemenway cannot go on in taking testimony upon Wednesday and Thursday of this week, but can go on on Tuesday and Wednesday, May 22d and 23d. Will you kindly inform us whether it will be agreeable to you to come to Boston on these days.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

MAY 15, 1906.
T/McC.

Old Dominion-Bigelow.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: We beg to confirm our conversation by telephone that May 22nd and 23rd are reserved for taking testimony in Boston, subject to these dates being satisfactory to Messrs. Hoadly, Lauterbach & Johnson, to whom we have written.

Yours very truly, EDWARD F. McCLENNEN.

E. T.-K.

MAY 15TH, 1906.

Old Dominion vs. Bigelow.

Messrs. Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

DEAR SIR: It will be agreeable for us to attend taking of testimony in Boston on May 22d and 23rd, as suggested in yours of the 14th inst.

Yours truly,

—— ——.

1167 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

MAY 16, 1906.
T/McC.

Messrs. Hoadly, Lauterbach & Johnson, 22 William St., New York, N. Y.

GENTLEMEN: Your letter of May 15th is received, and we have accordingly arranged with Mr. Hemenway to go on on May 22d and 23d at our office in Boston.

Will you kindly bring with you the letters received by Mr. Lauterbach or the Lewisohns between June 1st and October 1st, 1902, from the Old Dominion Copper Mining & Smelting Co., Mr. Brandeis, Mr. Smith, Mr. Altmiller, Mr. Hyams, Mr. Bigelow, or Mr. Hemenway.

Yours very truly,

BRANDIES, DUNBAR & NUTTER.

E. T.-M.

MAY 17TH, 1906.

Old Dominion v. Bigelow.

Messrs. Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Massachusetts.

GENTLEMEN: If for any reason the plan of taking testimony in Boston on Tuesday and Wednesday next is changed, kindly telegraph me early Saturday morning that I may alter other arrangements.

Very truly yours,

—— ——.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JULY 6, 1906.
T/McC.

Messrs. Hoadly, Lauterbach & Johnson, 22 William St., New York, N. Y.

DEAR SIRS: We are just writing Mr. Hemenway for a day in which to take testimony in Boston, as soon after July 13 as he can

devote to this matter. Will you kindly inform us whether you can attend to the matter during the last half of July.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

1168 E. T.-L.

JULY 10TH, 1906.

Old Dominion vs. Bigelow et al.

Messrs. Brandeis, Dunbar & Nutter, 161 Devonshire St., Boston, Mass.

DEAR SIRS: Yours of July 6th received. It appears to have been misdirected at first and subsequently sent on a later date. We can attend on either of the following dates:

July 16, 17, 18, 24, 25, 26, 31, August 1 and 2.

Kindly inform us as far as possible in advance of the date selected.

Yours very truly,

—— ——.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JULY 12, 1906.
T/McC.

Old Dominion—Bigelow.

Messrs. Hoadly, Lauterbach & Johnson, 22 William St., New York, N. Y.

GENTLEMEN: Enclosed herewith are copies of the interrogatories which we have just filed in the Supreme Judicial Court for Suffolk County for the deposition of Maxwell Woodhull. We should be greatly obliged if you would file such cross-interrogatories as you intend as soon as may be.

Yours very truly,

BRANDIES, DUNBAR & NUTTER.

Enclosure.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JULY 14, 1906.
T/McC.

Messrs. Hoadly, Lauterbach & Johnson, 22 William St., New York, N. Y.

GENTLEMEN: Mr. Hemenway informs us that he can go on in Old Dominion on July 24th, in Boston. Accordingly, we will arrange for a hearing at our office at 10 o'clock that morning.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

1169 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

FEBRUARY 8, 1907.
T/McC.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR SIR: We beg to confirm our arrangement with Mr. Farley today postponing the hearing in the case of Old Dominion Copper Mining & Smelting Company v. Lewisohn and Bigelow from February 13th at 9 o'clock to February 15th at 9 o'clock.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

FEBRUARY 11, 1907.
T/McC.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR SIR: In accordance with our conversation with you by telephone this morning, we have communicated with Mr. Treadwell, and he is agreeable to having the hearing in the case of Old Dominion Copper Mining & Smelting Company v. Lewisohn and Bigelow at 9 o'clock on Saturday morning, February 16th, and we will understand that it is so set.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

FEBRUARY 12, 1907.
T/McC.

Old Dominion—Bigelow and Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR SIR: No formal agreement has been signed covering the use in the different suits of the later depositions taken in the cases of Old Dominion Copper Mining & Smelting Company v. Bigelow and Lewisohn. I have accordingly drawn one, including in one
1170 agreement the earlier depositions, and also the latter ones. Will you kindly sign this and return it to us.

In addition to the exhibits, will you please have Mr. Hyams bring with him the original letter of C. H. Altmiller to A. S. Bigelow, dated June 24th, 1902.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

Enclosure.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

MARCH 9, 1907.
B/G/Md.

Re Old Dominion—Bigelow-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: Are you not able to let us have a reply to our letter of February 18th?

Yours very truly, LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

BOSTON, MASS., *March* 19, 1907.
T/McC.

Messrs. Hoadly, Lauterbach & Johnson, 22 William Street, New York, N. Y.

GENTLEMEN: We are desirous of bringing the case of Old Dominion Copper Mining & Smelting Co. v. Bigelow on for hearing before the Court in April, as we called to Mr. Hemenway's attention last January. We are just writing Mr. Hemenway with reference to a specific assignment of the case, and shall be obliged if you will let us know concerning your engagements during April.

We are still anxious to get from you the stipulation dispensing with the formalities concerning the depositions.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

1171 Brandeis, Dunbar & Nutter, 161 Devonshire Street,

BOSTON, MASS., *March* 25, 1907.
T/McC.

Messrs. Hoadly, Lauterbach & Johnson, 22 William St., New York, N. Y.

GENTLEMEN: Mr. Hemenway informs us that it will be impossible for him to try the case of Old Dominion Copper Mining & Smelting Co. v. Bigelow in April, but that he has been trying to arrange for a conference with Mr. Treadwell and Mr. Hyams with a view to determining what further evidence should be offered. Under these circumstances we hope that it will be possible to have the case heard in May.

We understand that Mr. Hemenway has no objection to the form of stipulation relative to the testimony. If you are of the same opinion, we shall be greatly obliged if this formal matter can be disposed of at the present time.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

Brandeis, Dunbar & Nutter, 161 Devonshire Street.

BOSTON, MASS., *April* 30, 1907.
T/McC.

Old Dominion v. Lewisohn and Bigelow.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: As considerable time has elapsed since our conference on April 1st relative to the Old Dominion cases, we think that you have doubtless had opportunity to go into the matter of your contemplated defence and may therefore be in a position to let us know whether you will need more than the two days now set, May 27th and May 28th, to introduce your evidence. If so, we should like to arrange with you at the present time for additional dates in June which will meet your convenience.

As your inability to give the matter your attention this spring will probably prevent a hearing before the Court before the summer adjournment, we are very anxious to have the testimony completed this spring so that there will be no difficulty in having the case heard promptly when the Court comes in again.

Yours very truly. LOUIS D. BRANDEIS.

1172 Brandeis, Dunbar & Nutter, 161 Devonshire Street.

BOSTON, MASS., *May* 20, 1907.
T/McC.

Old Dominion—Bigelow and Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMINGWAY: Messrs. Hoadly, Lauterbach & Johnson have written us in response to our letter of May 15th, written on the same subject as our letters to you of April 30th and May 11th, to which we have no answer, and they express some doubt as to going on in the hearing on May 27th and May 28th. As we have written them in reply, it seems to us, in view of the length of time that has elapsed since we first expressed a desire to dispose of the case this spring, and also since our interview of April 1st when the hearings were set for May 27th and May 28th as days convenient to you, that the hearings should certainly go on these days. We also should like to arrange—before your dates are otherwise filled—to have later dates set in June for further hearing, if they are to become necessary.

Will you please let us know what dates you can give us.

Yours very truly. LOUIS D. BRANDEIS.

MAY 24TH, 1907.

Re Old Dominion Co. vs. Bigelow.

Louis D. Brandeis, Esq., 161 Devonshire Street, Boston, Mass.

DEAR MR. BRANDEIS: I find it impossible to do anything about

the Old Dominion matter on Tuesday the 28th inst. As to a further appointment, I must confer with Mr. Lauterbach.

Yours very truly,

——— ———.

1173 Brandeis, Dunbar & Nutter, 161 Devonshire Street.

BOSTON, MASS., *May* 28, 1907.
T/McC.

Messrs. Hoadly, Lauterbach & Johnson, 22 William St., New York, N. Y.

GENTLEMEN: We are just writing Mr. Hemenway that we shall move on next Tuesday morning to have the case of Old Dominion Copper Mining & Smelting Company v. Bigelow, #8098, assigned for hearing on the merits at an early date in the Autumn in view of Mr. Hemenway's inability to try the case before the Court this Spring.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

Brandeis, Dunbar & Nutter.

MAY 28, 1907.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: In view of the difficulty in arranging for any further progress in the case of Old Dominion Copper Mining & Smelting Company v. Bigelow, #8098, we have decided to move next Tuesday morning on the coming in of the Court that the case be set down for hearing on the merits at an early date in the Autumn.

We shall of course prefer to have the case heard during the coming June, but shall not press for an assignment at that time in view of your informing us of your inability to try the case then

Yours very truly,

EDWARD F. McCLENNEN.

ET–L.

MAY 31ST, 1907.

Old Dominion Co.

Messrs. Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.:

GENTLEMEN: We have yours of May 28th, in which you state your intention of having the Bigelow case assigned for hearing at an early date in autumn. It was our understanding had with your Mr. Brandeis, our Mr. Lauterbach and Mr. Hemenway that
1174 these cases should proceed together, and in view of your taking the Lewisohn case to the Supreme Court we feel that it is only proper that the Bigelow case should stand until the Supreme Court has passed upon the question. We did not interfere with your course in taking of testimony in these cases, permitting you to have all the time you desired for your convenience, and you occupied

something over two years in making your case. Under all the circumstances it seems to us that you are unduly pressing the Bigelow case to a hearing in Massachusetts. We think that the Bigelow case should not be set down for hearing in the Fall.

Very truly yours,

——— ———.

JUNE 3D, 1907.

Mr. Louis D. Brandeis, 161 Devonshire Street, Boston, Mass.

DEAR MR. BRANDEIS: In accordance with your request over the telephone, I write to tell you that we understand that you will put over the motion in the Old Dominion Case from Tuesday June 4th, until Friday June 7th, this being done at our request owing to Mr. Treadwell's desire to attend the funeral of Judge Townsend of the United States Circuit Court.

Yours very truly,

——— ———

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JULY 12, 1907.
P/B.

Re Old Dominion—Lewisohn.

Messrs. Hoadly, Lauterbach & Johnson, 22 William Street, New York City.

DEAR SIRS: Mr. McClennen and I are making arrangements for the time for taking our vacations.

Will you kindly let me know when you and Mr. Hemenway wish to take depositions in the above cause?

Yours very truly,

LOUIS D. BRANDEIS.

1175 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JULY 12, 1907.
P/B.

Re Old Dominion — Bigelow.

Alfred Hemenway, Esq., Tremont Bldg., Boston, Mass.

DEAR MR. HEMENWAY: Mr. McClennen and I are making arrangements for the time for taking our vacations.

Will you kindly let me know when you and Mr. Lauterbach wish to take depositions in the above cause?

Yours very truly,

LOUIS D. BRANDEIS.

ET-L.

JULY 16*th*, 1907.

Louis D. Brandeis, Esq., c/o Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

DEAR SIR: We have your letter. We understand that Mr. Hemenway will inquire from you as to what dates yourself and Mr. Mc-

Lennen desire to take your vacations and arrange the dates for taking testimony accordingly. We shall, under the stipulation, avail ourselves of the testimony taken on those dates.

Yours very truly,

——— ———.

1176 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JULY 17, 1907.
B/Md.

Re Old Dominion vs. Lewisohn.

Messrs. Hoadley, Lauterbach & Johnson, 22 William Street, New York City.

DEAR SIRS: We are in receipt of yours of the 16th, and also received under the same date a letter from Mr. Alfred Hemenway in which he says:

"L. D. Brandeis, Esq., c/o Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston.

DEAR MR. BRANDEIS: If you will indicate the time during which you and Mr. McClennen propose to be absent on your respective vacations I can doubtless arrange so that the taking of our testimony in the Old Dominion cases will not interfere therewith.

Yours very truly,

ALFRED HEMENWAY."

I have just written him as follows:

Re Old Domnion vs. Bigelow.

"DEAR MR. HEMENWAY: I have yours of the 16th.

We shall be glad to attend at the taking of testimony in the Old Dominion cases at any time before August 10th, upon receipt of reasonable notice, and if the taking of your testimony has not been completed before then, we shall be glad to resume the taking of testimony after September 3d.

Will you kindly let us know as soon as possible on what days you would like to proceed?"

Yours very truly,

LOUIS D. BRANDEIS.

1177 Brandeis, Dunbar & Nutter, 161 Devonshire Street.

BOSTON, MASS., *Sept.* 4, 1907.
H/McC.

Old Dominion v. Bigelow.

Hoadley, Lauterbach & Johnson, 22 William St., New York City.

GENTLEMEN: Mr. Brandeis and Mr. McClennen have returned from their vacations, and are ready to arrange for an appointment

with you for the taking of testimony, if you intend taking any. It would be particularly convenient for us if such an appointment could be made for an early day and at an early day, as we shall wish to make appointments in other matters so as not to conflict.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

OCT. 31, 1907.
G/B.

Old Dominion — Bigelow.

Eugene Treadwell, Esq., care Alfred Hemenway, Esq., 335 Tremont Building, Boston.

DEAR MR. TREADWELL: At your request, I have taken from my volume of depositions the copies of the following:

Testimony of Walter Lewisohn,
" " Ferdinand L. Rahaeuser,
Adolph Lewisohn,
Frederick Lewisohn,
Albert Lewisohn,
Jesse Lewisohn,
E. C. Westervelt,

being contained in three volumes, and paged 835 to 1007 both inclusive.

I understand that you will return these to me tomorrow, Friday.

Yours very truly,

LOUIS D. BRANDEIS.

(3 volumes of testimony herewith.)

1178 *Oral Testimony.*

MR. HEMENWAY: I will call Mr. Farley.

JOHN WELLS FARLEY, sworn.

(By Mr. HEMENWAY:)

Q. What is your full name?
A. John Wells Farley.
Q. Your place of business?
A. Tremont building, Boston, Mass.
Q. Associated with Alfred Hemenway?
A. Yes.
Q. Counsel in this case; and you were also one of the counsel of record in this case?
A. Yes.
Q. And have taken part in the preparation and trial of the cases since what time?
A. Since the last of November, 1903.

Q. Now, Mr. Farley, you know Mr. Edward Lauterbach?
A. Yes.
Q. And Mr. Eugene Treadwell?
A. Yes.
Q. Will you state what participation you, as associate with me and with counsel in the case, have had in the New York cases, if any?

Mr. McClennen: That I object to.

Hammond, J.: What do you desire to show, Mr. Hemenway?

Mr. Hemenway: What I desire to show is that these cases began with correspondence between Mr. Brandeis and Mr. Bigelow, and also between Mr. Brandeis and the executors of Mr. Lewisohn: that in the first instance—this will appear by the correspondence—Mr. Lauterbach was counsel and acted for both parties,—that is, Mr. Bigelow and the executors of Mr. Lewisohn. The evidence already in shows the participation of Mr. Hyams, who was in the employ of Mr. Bigelow, in reference to the testimony and the taking of evidence in these causes: that the evidence for the four cases was taken in Boston, in New York, and in St. Johnsbury, Vt.; that there are various stipulations that appear already in the evidence as to the use of this testimony in all of the cases. Supplementing that testimony by the evidence of Mr. Farley, I propose to show that he has been, in conjunction with myself, in constant communication with Mr. Lauterbach and Mr. Treadwell: that the demurrer that is reported in the 188th Mass., on the argument of it, Mr. Farley was in court, and that the brief upon which that was argued here in Massachusetts was prepared jointly by Mr. Farley, Mr. Treadwell, and myself; that both Mr. Lauterbach and Mr. Treadwell came to Boston several times in conference about these cases, and that in regard to the case in New York, that was argued on demurrer, the preparation of the brief that was used by Mr. Treadwell in his argument was the joint work of Mr. Treadwell, Mr. Farley, and myself; and that
1179 subsequently, when briefs were prepared for the Court of Appeals and the United States Supreme Court, those briefs were the joint work of the same counsel; and that no step has been taken, either in the Boston cases or in the New York cases, except upon joint consultation or knowledge and approval, and that whenever testimony has been taken in the cause it has been taken with the presence of New York counsel when taken in Boston, and of Boston counsel when taken in New York, and also when taken in Vermont; and that from the beginning to this time there has been joint service in defence of the New York suits. That is what I propose to offer as supplementing the evidence already in the case, and that will be put in through the correspondence which I have submitted to counsel.

Mr. McClennen: It seems to me, your Honor, that if all that is offered were established it would be of no importance whatever in the case. If I followed Mr. Hemenway, he and Mr. Farley were counsel for Mr. Bigelow; Mr. Lauterbach and Mr. Treadwell were counsel for the Lewisohns. Their respective clients had two cases pending, an unfavorable decision in either of which would be an extremely undesirable precedent in its effect upon the other. They

consulted with each other in order to find out how best to preven their becoming an unfavorable precedent for the other, just as if th client of one of them had been named Hayward or Leeson instead o being named Bigelow or Lewisohn, just as they would have done i the precise facts on which the liability arose had been different i each case, but had involved the same principles of law.

HAMMOND, J.: Do you think this evidence has any materia bearing, Mr. Hemenway? Do you think that counsel have pro ceeded in such a way as to make it your duty to put it in?

Mr. HEMENWAY: Well, I do conceive it to be my duty, for thi reason; that in one deposition that has been put in the case there i an opinion expressed from which the inference might be found that but for participation in the defence, it would not be pleadable in bar I do not think, if I were asked my personal opinion, that it make any difference whether there was participation or not; I think it turns upon the right of participation, and not the question of actual participation. But to me, on the opinion of a man in high po sition, I think I ought to offer it, it being, I think, an undisputed fact. Of course, like many facts, it is capable of having the inference drawn from it that we were merely making a precedent, or, in the other case, that our motive was to avoid liability. But that is for the court to determine, not for counsel.

Mr. MCCLENNEN: I should not want to leave uncontradicted the statement that it was an undisputed fact. I do not suppose there would ultimately be any great difference between us as to just what occurred, but I think there may be some difference of opinion
1180 as to whether it constituted a participation in the defence or not.

Mr. HEMENWAY: That is what I meant to say, the inference from the undisputed facts; as to the facts that I have stated, I do not think those would be disputed.

HAMMOND, J.: If I were to [follow my own impression] I should exclude the evidence, because as I have stated to counsel, I believe it to be immaterial. But if counsel think that there is something in this evidence that will help them and be material, I am inclined to let it in subject to the objections that are made by the other side, as I have done in the case of the depositions. I do not intend by this to give anybody rights that he has not or to deprive anybody of any rights that he has. Counsel for the complainant may take such objections to the evidence as they see fit, and those objections will stand against the evidence wherever the case comes up. But under the circumstances, while I think there is a limit beyond which I ought not to go, and while I think this evidence is pretty near the limit, still, on the whole, the evidence may go in and you may have objection to it on the general ground that it is not material, and if there is any particular question that you think there is any other objection to, you may have that; but upon the general ground you object to this evidence as to participation as immaterial, and it goes in subject to your objection and exception; and that will be so whether you make any other objection while it is being put in or not. If there is anything else except that general objection that is in your mind, you may state it.

Mr. McCLENNEN: Then as to this particular question, I object to it on the ground that it calls upon the witness to draw an inference or conclusion not merely relative to the facts, but also relative to the joint understanding of counsel.

[Question read.]

HAMMOND, J.: In answering that question you may state what acts you know of which seemed to you to indicate participation. State them.

The WITNESS: I should like to limit my answer to stating what I have done, in association with Mr. Hemenway, with New York counsel, omitting any interpretation, but merely stating the facts as I recollect them. The first knowledge that I had of this case was, as I have stated, in the fall of 1903. At that time the Massachusetts cases, nominally against Bigelow, were pending, one in the Supreme Court for the county of Suffolk, and the other on a reservation before the full court; and I was asked to assist in the preparation of the brief for the case so reserved. At the same time there was pending before the Circuit Court for the Southern District of New
1181 York a parallel case on a similar demurrer. Practically contemporaneously with the beginning of my preparation I was told—and I state that only to explain my acts—that Hoadly, Lauterbach & Johnson, or their representative, Mr. Treadwell, were also interested in all these cases, which were, as I just said, and are now identical. So I began to communicate with Mr. Treadwell more particularly at that time. I think my first communication with him was at the time of a visit of his here; but at any rate, he made to me numerous suggestions in relation to the brief that Mr. Hemenway was preparing with my assistance. When I say "to me" I mean to me and Mr. Hemenway practically throughout. At the same time I made various suggestions to him as to the brief which he was preparing in the so-called New York case; and our preparation went along practically hand in hand, both conferring with the other, sometimes by letter, sometimes by conference, occasionally by telephone communication between the two cities. As I recollect it, the Massachusetts case was argued first, and subsequent to that, in view of matters which arose in that argument, we made further suggestions to him in relation to the brief in the New York case. After that was decided, briefs so prepared being filed, as I recollect it, after the decision, first of the case in the Circuit Court, and then in the case in Massachusetts, there was a lapse of the taking of the evidence. At any rate, if there was not, I was occupied on something else, so that for a period of, I should say, about a year, as far as I was personally concerned, there was a cessation, though, I think, during that time there was evidence being taken, and I do recollect that at least once, I think more often, Mr. Treadwell came on here and at that time Mr. Hemenway and I conferred with him. And thereafter, until the hearing about a year ago,—a year ago next November,—all action was taken after conference or communication and agreement; so that the defence, either as to the preparation of evidence, the possible cross-examination of witnesses, or the preparation of the law to be expressed in the briefs or otherwise was done under what I will

call, for a short term, jointly; the evidence here was, as I understand, and in fact I know, as I have seen the stipulation, taken under a stipulation whereby it might be used in all four cases; that is, the two in New York and the two here. At such takings, almost every time,—I am inclined to think at every time,—either Mr. Treadwell or Mr. Lauterbach was present. I do not think I was present at the taking of any testimony when Mr. Lauterbach was there, and I state all that I then did as a matter only from seeing the record; but I was present on a number of occasions when Mr. Treadwell, representing Messrs. Hoadly, Lauterbach and Johnson, and, as I understand it, both defendants, was present. While, as far as the Massachusetts cases were concerned, there was only the taking of testimony continuing, there were
1182 arguments and appeals in the New York cases, the New York case being first appealed.

I think I have omitted a step. As I understand it, I think the plaintiff first amended, and we went over this amendment very carefully with Mr. Treadwell to see exactly what we would deduce that they had in their minds; and we made very careful comparisons of the two amendments which they made to them, although I think there was only one which purported to be substantial. Then we conferred with Mr. Treadwell in relation to the argument, so far as there was to be one, before the Circuit Court after amendment; and on the demurrer being sustained, then a more elaborate argument which took place before the Circuit Court of Appeals, and assisted him in the preparation of that brief, at the same time being in communication with him as to the dates when the depositions should be taken; so that we both, as to the evidence and as to the preparation of the law, continued to co-operate and act in conjunction with New York counsel. Then, the demurrer in the New York case being again sustained by the Circuit Court of Appeals, the plaintiff first, I think, sought a stay of execution; and, as I recollect the New York record — I am unable to state whether that was suggested by us or whether Mr. Lauterbach or Mr. Treadwell representing us did it,—but they opposed that stay of execution unless the plaintiff should stipulate, if the petition were refused, they should dismiss the case in Massachusetts. We again conferred as to the writ of certiorari, and, after that was granted, as to the brief before the United States Supreme Court on the final argument. Of course, all through this we were supplied by the New York counsel, perhaps in some instances directly, with the plaintiff's briefs, arguments, and memoranda so far as they could, and we, on the other hand furnished Mr. Treadwell and Mr. Lauterbach with everything that we had. As I have said, Mr. Treadwell was here constantly, and on at least three occasions when I was present Mr. Lauterbach came here and we conferred in Mr. Hemenway's office, consulting as to the whole status of the case, and what, if, anything, it was advisable to do in preparation for the defence. Shortly prior to the hearing, which was in November last year, I was preparing some of the evidence in relation to that, and I consulted over the telephone and by conference with New York counsel. Then at the hearing—Oh, I ought to say that, in addition to this, we were kept informed as to the course of correspondence, so far as it

was in any wise different from that with us, from Mr. Brandeis' office to Mr. Treadwell and to Mr. Lauterbach, and both in Mr. Brandeis' correspondence with us and in his correspondence with them the cases were treated jointly and indiscriminately. At the time of the hearing here Mr. Treadwell came on, I think,
1183 three or four days ahead, and we conferred at great length as to the general course, and I and Mr. Hemenway—or Mr. Hemenway and I—discussed the whole matter with him, and he was of counsel with us throughout that hearing, and signed, or I signed in his behalf, as I did for Mr. Hemenway, the pleadings at that time. When the decrees came down after the final hearing, we communicated with him.

(By HAMMOND, J.:)

Q. You mean, of course, after the hearing on the merits before Mr. Justice Sheldon?

A. Yes, your Honor. And I remember he had printed for us and sent to us copies of those findings of alleged facts. It was after that that the argument before the Supreme Court took place, and we continued to co-operate with him in the preparation of that matter. I think I did forget to state that Mr. Hemenway two or three times—and I think I once or twice—went to New York and conferred with Hoadley, Lauterbach & Johnson. I think that is, in substance, all that I now recall, though I may have omitted certain points.

(By Mr. HEMENWAY:)

Q. You have been in my office since 1903, and are still there?

A. Yes.

Mr. MCCLENNEN: In the answer to the preceding question, we object to the statement that Mr. Farley was informed that Hoadly, Lauterbach & Johnson, or Mr. Treadwell, were interested in all these cases, on the ground that it is immaterial.

Mr. HEMENWAY: That may be stricken out.

HAMMOND, J.: You may strike that out.

The WITNESS: I should like to state by whom I was informed.

Mr. MCCLENNEN: I understand the information is stricken out.

HAMMOND, J.: I don't think it is of any consequence.

Q. By whom were you informed?

Mr. MCCLENNEN: I object to that on the ground that there is no such evidence on the record.

HAMMOND, J.: If the information is not of any consequence, it is of still less importance who told him. He only made that statement to explain why it was that, having certain informtaion, he did a certain thing.

The WITNESS: I don't know whether I am required to answer, but I think my answer would perhaps clarify the situation.

HAMMOND, J. (to Mr. McClennen:) Go on.

Mr. MCCLENNEN: I also object to the answer of the witness where he states that the preparation for cross-examination and argument was, if he might so term it, joint, done jointly, on the ground that

that is an inference rather than a statement of fact. I object to that portion of the witness' answer in which he states that
1184 the testimony was taken under a stipulation for use in all the cases, on the ground that that is a statement of what is contained in a written instrument, the production of which will show that there were four stipulations, and that each one was always confined to a particular case; that is, that the stipulation in the Lewisohn case was not participated in by the counsel for Bigelow, and the stipulation in the Bigelow case was not participated in by counsel for Lewisohn; but each stipulation provided that the testimony taken in the other case might be used in that case.

Mr. HEMENWAY: Those stipulations are in the case, as I understand.

Mr. MCCLENNEN: Some of them are, and I dare say all of them are.

Mr. HEMENWAY: They will speak for themselves.

HAMMOND, J.: I suppose if the stipulations are in the case, they will control.

Mr. MCCLENNEN: But the witness' answer does not indicate necessarily that those in the record are the only ones, although he undoubtedly intended to say that.

I also object to that portion of the answer in which he states that they acted, or continued to act, to co-operate in conjunction with New York counsel, on the ground that that is a statement of conclusion, not of a fact.

I object to that portion of his answer in which he says that he forgets whether they opposed, or whether Mr. Lauterbach and Mr. Treadwell, "as representing us," opposed a stay of execution, particularly to that portion of the answer "as representing us," that being a conclusion, not a statement of fact, and not purporting to be something of which the witness himself would have personal knowledge.

I object to that portion of his answer in which the witness states that the cases were treated jointly and indiscriminately in the correspondence and the conferences, on the ground in part that it purports to be——

The WITNESS: I did not so state.

HAMMOND, J.: I think that was your expression; I thought it was rather strong.

The WITNESS: May it please your Honor, that refers to Mr. Brandeis' correspondence.

Mr. MCCLENNEN: I am not sure what the difference between us is.

The WITNESS: The application of my alleged language.

Mr. MCCLENNEN: Well, whatever the context may be, I object to that portion of his answer in which the witness stated that the cases were treated jointly and indiscriminately in certain particulars which appear in the answer of the witness, the objection being in part that that is a statement of conclusion and not a statement of fact, and in part that it is a statement of written communications.

I object also to the statement of the witness that they con-
1185 tinued to co-operate in the preparation of the argument or for the argument before the Supreme Court, again on the ground that that is a statement of conclusion, not a statement of fact.

The WITNESS: I think some of my statements have been misunderstood, so that, in justice to my evidence, I should have an opportunity to explain, and, as far as possible, eliminate the words that I only used descriptively.

Q. To what words do you refer?

A. I refer to the words "jointly," "in conjunction," "jointly and indiscriminately," and there are further facts in relation to the stipulations on which I based what Mr. McClennen now alleges to be a conclusion; but particularly I intended to use the words "jointly," "in conjunction," "jointly and indiscriminately," and "in co-operation" as a short designation of certain facts. If those be conclusions I should like the opportunity of omitting those words and of stating more clearly the facts.

Q. Well, state more clearly the facts.

A. As to the use of the word "jointly" in the preparation between Mr. Treadwell, Mr. Hemenway, and myself, I mean simply that I co-operated with—I mean simply that I talked and conferred and wrote and telephoned to Mr. Treadwell and to Mr. Lauterbach in the same manner as, for instance, I would have done had Mr. Hemenway been in New York.

HAMMOND, J.: You are getting more indefinite still.

The WITNESS: All my conference with him was as fully relating to all the cases as had Mr. Treadwell been counsel.

(By HAMMOND, J.:)

Q. Well, that does not give us any idea. What did you do?

A. I talked over the briefs, corresponded about the briefs, discussed cases, discussed the allegations of the plaintiff, discussed the draft of the pleadings both for the plaintiff and for the defendant; discussed what we conjectured would be the arguments and the inferences and the efforts of the plaintiff, what facts could be eliminated as irrelevant and what facts would be helpful to us when put in evidence. In regard to the stipulations, I used my description as applying to all the four cases, because, as I remember, the four stipulations, if they were separate, were sent under the same cover, and they were treated as a whole by us and by Mr. Lauterbach's office.

Q. What do you mean by "were treated as a whole"?

A. Well, they were all identical, or, if not, practically identical.

HAMMOND, J.: Aren't they in?

Mr. HEMENWAY: I think they are in, yes.

The WITNESS: Those in relation to the Massachusetts cases here are in. There are others relating to the New York cases, one set of which is, I understand, annexed to the Baltimore answers.

1186 Q. Do you agree with Mr. McClennen that each stipulation had reference to one particular case and no reference to others?

A. I agree the stipulations were so drawn in form, but the discussion between counsel was on the assumption, by us, at least, that they all stood or fell together.

HAMMOND, J.: Well, I do not think that is admissible.

The WITNESS: In relation to the words "jointly and indiscriminately" used as applied to Mr. Brandeis' correspondence: by that I mean, in the first place, that Mr. Brandeis, or Mr. McClennen, or his office, kept us informed in many instances of what he was writing about to Mr. Lauterbach, or to Mr. Treadwell, and that a great many of his letters to us, for instance, would be headed "re Lewisohn" or "re Bigelow and Lewisohn," and that many of his letters to Mr. Lauterbach would be headed "re Bigelow" or "re Bigelow-Lewisohn," and that in the letters, as in the headings, the discussion or reference would be to all, as I understood it, of the cases.

HAMMOND, J.: Are those the letters that you are putting in?

Mr. HEMENWAY: Those are the letters that we submit.

HAMMOND, J.: Then I think a description of the letters is immaterial.

Mr. HEMENWAY: That is all.

Mr. MCCLENNEN: In the last answer we object to the statement that the stipulations were treated as a whole.

HAMMOND, J.: I will exclude that. That is clearly outside the line.

Cross-examination.

(By Mr. MCCLENNEN:)

Q. In the cases, Mr. Farley, to which you referred in which the leters were headed "re Bigelow," or "re Bigelow-Lewisohn," or both, you had before you letters referring to the taking of testimony which, under the stipulations, would be admissible in either case?

A. I don't know that I can generalize.

Q. Well, you appeared to be looking at a specific letter at the time you spoke just then.

A. I do not think I was; I may have so appeared, but it was not in fact true. I was running over the whole lot.

Q. Well, then, perhaps, to put it in a negative form, do you remember any letters in which that heading occurs in which the subject under consideration did not purport to be the taking of testimony which, under all the stipulations, was admissible in either case as far as relevant?

A. I understood you to correct me on what those stipulations were in fact. Outside of that, I should have to look over the letters to see whether that is so.

Q. All I ask you is whether you recall any notice in which that is not the fact?

1187 A. I have no recollection one way or the other, because I did not look at them with that in view. I have no doubt I

can prepare myself to answer that question if you wish me to. Do you want me to look all these over [inspecting the letters referred to]?

Q. Had you nearly completed it?

A. I had completed about one third.

Q. If you will, glance along and find any one where that is not a proper characterization?

A. Here is one, for instance, which seems to me to perhaps be a basis for an answer to your question.

Q. What is the date of that letter?

A. April 30.

Q. Of what year?

A. 1907.

Q. Between whom?

A. Mr. Hemenway and Mr. Brandeis. That is, it referred to the general conduct of the defence and not simply to the depositions. Here is a letter which seems to refer to a hearing rather than to the depositions.

Q. Between what parties, and on what date is that one?

A. The same parties, May 20, 1907. There are many of them headed—to Mr. Hemenway—"Old Dominion Bigelow," which also relate to depositions; also to Mr. Bigelow headed "Lewisohn" without Mr. Bigelow's name, which refer to depositions.

(By HAMMOND, J.:)

Q. You used the language "it might be," that in the letters generally in each case between counsel they were headed, sometimes both names, Bigelow and Lewisohn. Now counsel wants to know whether you want that answer to stand with reference to the correspondence generally, or whether you want to confine it to letters about taking depositions.

A. I don't feel I should answer without going through again this entire file, your Honor. As I looked it over, I did not note any such distinction, if there be such.

Mr. HEMENWAY: Inasmuch as this correspondence is to be submitted to counsel, is it hardly worth while to take the time?

HAMMOND, J.: I don't think so. My own opinion of it is that we have got pretty near the end of that which is of any consequence.

The WITNESS: As a matter of fact, all of this correspondence during these dates was practically about depositions. In fact, I don't know that there was any other.

(By Mr. MCCLENNEN:)

Q. I think perhaps the record will be less imperfect in shape if I ask you this: In characterizing the correspondence as being headed in one way or another, you have reference only to those letters which you have offered in evidence at this time?

A. Yes.

Q. So that an inspection of the letters in that regard would show to just what you refer?

A. Yes.

1188 HAMMOND, J.: I think that is a satisfactory way to leave it.

Q. [Presenting a pamphlet.] Will you glance at what I have heretofore always supposed was Mr. Treadwell's brief in the Supreme Court of the United States, and can you point out any parts of it which were your creation?

A. Why, no more than I could point out in our brief here now which was mine and which Mr. Hemenway's.

Q. Not by comparison; I shall not charge it against you if you cannot point it out; I merely ask if you can?

A. Well, I think that the sixth point, as to multifariousness, is practically the same as ours. The fifth point, "Rescission in part is not permissible:" I remember of talking that over with him, and I think talking over the case of Ready v. Pinkham, 181 Mass., especially, that partial rescission is not tolerated. I think Mr. Hemenway called my attention to Merrill v. Beckwith, to Perley v. Balch, and to Morse v. Brackett. I recollect of speaking about those to Mr. Treadwell. The fourth point—I am looking at this brief backwards—the fourth point, "Albert S. Bigelow is an indispensable party,"—when I say this I mean I think I contributed more to this than to the other parts. I remember about the indispensability of the several parties one way and the other here, and I went into that, I think, very exhaustively with Mr. Treadwell, and he used that to a considerable extent. I think this third point, where he refers to "Rescission, where possible, the sole relief,"—I think that is almost entirely his. We discussed that, but I note here one portion of it which we discussed, and I think this is substantially in accordance with that discussion; that is, the discussion of Parker v. Nickerson in the coal case and the reading of that. There are portions here I can hardly—I would prefer not specifically to—designate, because it might give counsel for the plaintiff a prevision of our brief in the pending case, and I do not think that is, perhaps, proper.

Mr. MCCLENNEN: The accumulations of record have become so great we shall probably not reach that far in it.

The WITNESS: It is a question of ability rather than of will, I suppose. I think this discussion here about Dickerman v. Northern Trust Co. was more or less the result of what we talked over. I do not see it here. There is some discussion here of the Yeiser case, which you alleged in your petition was contrary to the other doctrine that we had; I don't know that that appears. We discussed the part here referring to Blum v. Whitney very thoroughly; also Hutchinson v. Simpson. A portion of the brief, on page 57, I remember, we had a heated discussion over. I remember this grouping—perhaps more accurately, subdivision—of the cases as appearing in the second point. We discussed that at great length, and I think he has made in this case three subdivisions; I think I originally made two.

1189 HAMMOND, J.: Do you care to pursue this any further?

Mr. MCCLENNEN: Just a little bit further, if I may, your Honor.

The WITNESS: My recollection is—of course it is confused by the fact that we did discuss the thing so much—my recollection is on that you will find that the original division—I may be wrong about this—was into two general classes of cases in which we contend and believe that all cases contrary, so called, to the rule we contend for could be divided, and I think that was a discussion which was put into the third division here. Then this "Other cases cited by petitioner,"—here is this Yeiser case,—that contains a discussion of Hayward v. Leeson and the Old Dominion case. I think the part here relating to Hayward v. Leeson—Mr. Hemenway was counsel in that case, and I think that a good deal of it is what I remember of hearing him speak of. I do not wish to be understood that we wrote this, you understand, but we revised and co-operated.

Q. Were there any respects in which there were minor differences of opinion between you and Mr. Treadwell as to the form or substance of the brief?

A. I do not really know what that question calls for: I am not quite clear what you mean.

Q. Were there any paragraphs or sentences in it, or subdivisions in it, or arrangements in it, which you would have prepared some other way rather than as he puts it?

A. Well, I think in all our briefs there has been a substantial difference in arrangement. I do not feel that I can answer that question without going into the present arrangement of our present view, which would be really pointing out the differentiation.

Q. I did not intend to ask you to indicate the parts in which that occurred; but there were occurrences, then, if I understand you, where you and he differed as to just what was best?

A. Oh, yes, in the arrangement: there is some difference in the arrangement, I think; and I am sure I hope everything in that brief is in ours, and, I trust, some more. I know I have been over this very carefully to see if everything we believed to be material in this is in ours, and it is my fault if it is not.

Q. In those instances in your brief you adopted your own view after giving due consideration to his?

A. Well, of course, Mr. McClennen, in the arrangement, yes; I know there are three or four points where, after considerable discussion, we did change in accordance with his view; in one instance, I think, because he—as to the possible effect on them.

Q. And he did the same way; he took his own arrangement after giving due weight to your suggestions?

A. Why, I suppose so, yes. There are one or two instances there. I think, where he finally yielded. It was rather as counsel
1190 with equal standing that we conferred with him in the case, rather than one having the right to overrule the other. If either party had that authority, he never exercised it.

Q. I understood you to refer to the fourth main point in the brief as one that you had to do with to some extent?

A. I think my words were that as to that we had discussed it quite vigorously, were they not?

Q. Well, I cannot carry the precise phraseology of the answer.

A. Let me see.

Q. Now on that, do I understand you that you, while counsel for Mr. Bigelow, were seeking to have Mr. Treadwell, counsel of record for Mr. Lewisohn, contend that suit could not be maintained in New York, or in the Circuit Court in New York, because Mr. Bigelow was not before the court?

A. No.

Q. Were you approving of his course in urging that Mr. Bigelow was an indispensable party, and that, as he did not appear of record, the bill could not prevail?

A. Your question contains an erroneous assumption of fact, Mr. McClennen, and I cannot answer it. You will notice that the point is "Albert S. Bigelow is an indispensable party in whose absence a bill for rescission cannot be maintained." So far as your question relates to rescission, I should answer it yes; as it is framed, I should say no.

Q. That is, one of the contentions which you maintained in the New York suit, was that, in certain respects, at least, a bill could not prevail against Lewisohn, because Mr. Bigelow was not before the court?

A. As to rescission, it was my view of the law then, and is now.

(By HAMMOND, J.:)

Q. That includes your work in so far as——

A. In so far as it entailed any preparation of the law on that point, yes.

(By Mr. MCCLENNEN:)

Q. You did not, at the time you were engaged at that labor, consider Mr. Bigelow a party to the suit in New York?

A. Well, I will have to ask you to define the sense in which you use the word "party" before I can answer that.

Q. I will give you the utmost scope.

A. If you mean party of record, I did not then and do not now; if you mean party in the sense that he was, in my opinion, privy, I do and did.

Q. You observe you have now incorporated in your answer the word "privy" which was not in my question. In what sense did you consider him a party,—not a privy, but a party?

A. Well, I think we can fence on the definition of the word "party."

Q. I have no doubt we can, but I don't want you to; I want you to take the most liberal definition you can put upon the word
1191 "party," regardless of the definition I put upon it, and state how you considered Mr. Bigelow a party, not a privy; I am not talking about privy.

A. I am asking you, in asking your question, to define whether you wish me to exclude anything except a party of record, first.

Q. No, if you know of a party applicable to these facts who is not a party of record and who is not a privy, I wish you would state whether Mr. Bigelow was that and what kind of a party you mean.

A. Well, I will try, but it is going to lead me into a discussion of the law. Of course he is not a party of record; that speaks for itself.

(By HAMMOND, J.:)

Q. Well, in what sense is he a party, Mr. McClennen wants to know, as distinguished from a privy?

A. Why, in so far, your Honor, as he is alleged by the plaintiff to be a necessary party, so that they must excuse his being joined, in so far as I considered that he at any time would have had the right to intervene, is he a necessary party; in so far as, if the decision had been adverse to him and the Lewisohns had neglected to have appealed, it is my opinion he could have entered an appeal; in so far as he, through his counsel, introduced anything which he believed important to the defence of the action; in so far as he, through counsel, co-operated in the defence of the action. If those things that he did do not constitute what comes within the definition of the word "party," he was not a party; if they do, he was. I can only state the facts.

(By Mr. MCCLENNEN:)

Q. At the time that the Supreme Court of Massachusetts had decided that this bill was not demurrable and the federal courts had twice decided that it was demurrable, did you then believe that Mr. Bigelow had a right, against the opposition of the other parties in the Lewisohn suit, to go in and insist upon becoming a party defendant?

A. I am not sure under those circumstances, Mr. McClennen; I should question it after the litigation had gone to that extent.

HAMMOND, J.: There, again, I do not think you were paying attention to the question, which calls for your belief at that time.

The WITNESS: I say I hardly think that is so.

HAMMOND, J.: What you believed then, is the question, not what you believe now.

The WITNESS: Well, I hadn't any definite belief then and haven't now; it would be a question of uncertainty then and now. I should want the authorities to examine and consider them at some length. I will say, then, that I believed then, and do now, that if, unless he intervened, his rights would be prejudiced, he could intervene.

Q. That is, you place his right to intervene as a party upon the existence of a right which might be prejudiced by an adverse decision?

A. As far as I have considered it. This is rather a snap judgment.

1192 Q. So if, apart from intervention, his rights would not be prejudiced by an adverse judgment, you didn't ever discuss or believe that he had a right to intervene?

A. I have stated I believe that was a different thing. Whether or not, in view of other facts if I had considered them more fully, I should have changed, I do not know.

Deposition of Alton B. Parker.

Mr. HEMENWAY: We had hoped to have here the deposition of ex-Judge Parker. But it has not come as yet.

HAMMOND, J.: In answer to the same questions?

Mr. HEMENWAY: Yes.

HAMMOND, J.: Well, when you get that, you can pass it over to the other side.

Mr. MCCLENNEN: Do you know whether it has been taken or not?

Mr. HEMENWAY: I don't know.

HAMMOND, J.: Anything further, Mr. Hemenway?

Mr. HEMENWAY: Of course we reserve the right to put in the deposition of Mr. Millburn. We have examined it and turned it over to them.

HAMMOND, J.: Well, you will do that to-morrow, I suppose?

Mr. HEMENWAY: Yes.

HAMMOND, J.: Anything in reply?

Mr. MCCLENNEN: There is some testimony, your Honor. Before introducing our testimony, part of which is with reference to the law of New York, if Mr. Parker's deposition is to be put in out of order, we should like to have the assurance of counsel that the testimony now put in by us will not be communicated to Mr. Parker.

Mr. HEMENWAY: Certainly we will give you that assurance.

Mr. MCCLENNEN: Or the fact of what we have put in?

Mr. HEMENWAY: Or the fact of what you have put in. We shall not communicate with Mr. Parker at all with reference to the matter.

The deposition of Alton B. Parker, taken on behalf of the defendant, Bigelow, was subsequently received, filed by counsel for the defendant and admitted subject to the objections and exceptions of counsel for the complainant, the Old Dominion Copper Mining & Smelting Company, to be found at pages 945-950.

[Commission and notarial certificate omitted.]

1193 Q. 1. State your name, age, and place of residence.

A. My name is Alton B. Parker. I reside at 574 Madison avenue, New York city, and my age is fifty-six years.

Q. 2. State your occupation and place of business.

A. I am a practising lawyer, with an office at No. 3 South William street, New York city.

Q. 3. If, in answer to the preceding interrogatory, you have testified that you are an attorney at law, state when you were admitted to the bar, and in what state or states, and how long you have been engaged in the practice of law in said state or states, and with what firms, if any, you have been or are connected.

A. I was admitted to the bar in May, 1873, in the city of Albany, state of New York, and have been engaged in the practice of law ever since that time, except such portions of it as I spent as a member of the bench. I was a member of a firm before going upon the

bench. The name of the firm was Parker & Kenyon, and was then engaged in practising law at Kingston, N. Y. I left the bench in August, 1904, and for a short time I practised law in the city of New York alone, and three years ago I became a member of the firm of Parker, Hatch & Sheehan, and am still a member of that firm.

Q. 4. State what, if any, judicial or other public or official positions you hold or have held.

A. In addition to the practice of my profession I was surrogate of the county of Ulster from the 1st day of January, 1878, until November, 1885. In November, 1885, I became a justice of the Supreme Court of the state of New York, and while holding that office I served for a short time as a member of the general term, third department, for nearly four years, and during the life of the second division of the Court of Appeals I was a member of that court by designation of the governor. Upon its dissolution I was made a member of the general term of the Supreme Court of the state of New York, which position I held for nearly three years. Subsequently, Governor Black designated me a member of the appellate division of the first department, located in the city of New York, which position I held until my election as chief judge of the Court of Appeals of the state of New York, which took place in November, 1897, in which position I continued until my resignation on the 5th day of August, 1904.

Q. 5. State any other matters relating to your experience in your profession, and as to your familiarity with the law and usages governing the practice in the state and federal courts in New York, both in law and in equity, and also as to your familiarity with the laws and usages of the state of New York relating to former adjudication and estoppel by judgment.

A. Yes. Nothing need be added as an answer to this question beyond my answer to the two preceding questions.

1194 Q. 6. Assuming that an action in equity is brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters to recover from him the profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, at a price in excess of the price which they paid for it and of its fair value, and assuming that in this action a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to a similar action, substantially identical with the first and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 945-950.]

A. In my opinion the decree would be a bar to the second action, if it were pleaded in defence.

Q. 7. Assuming that two actions in equity are brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters to recover from him profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, and assuming that such property is alleged to have been sold, pursuant to said joint plan and conspiracy, in two separate parcels, in each of which both promoters were jointly interested, and that said two actions were brought to recover the respective profits received from the sale of the two parcels, respectively, and assuming that the bills of complaint in the two actions were substantially identical, except as to the particular relief sought, and assuming that certain profits were alleged to have been made by said promoters on each parcel, and assuming that in one of said actions a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to two similar actions, substantially
1195 identical in form with those above described and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 946-950.]

A. The decree would be a bar.

Q. 8. Have you examined a copy of the record in the action of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn in the Circuit Court of the United States for the Southern District of New York, such as is hereto annexed and marked (1), the respective portions of said record being marked A to R, inclusive?

[Objected to; admitted; exception.—See pages 946-950.]

A. I have.

Q. 9. Have you examined copies of the proceedings in the above-entitled causes, to wit, the two causes of the Old Dominion Copper Mining & Smelting Co. v. Bigelow in the Supreme Judicial Court in Massachusetts, such as are hereto annexed and marked, respectively, (2) and (3)?

A. Yes.

Q. 10. Assuming that there were now pending in the courts of the state of New York proceedings against Albert S. Bigelow, identical in all respects (except as the practice might require formal changes) with the copies of the proceedings referred to in the 9th interroga-

tory, and assuming that said courts had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record, copies of which are referred to in the 8th interrogatory, were sufficiently pleaded and proven in defence of said proceedings, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in each of these bills of complaint were, respectively, the same persons, and that the contracts, acts, matters, and transactions mentioned in each of these bills of complaint were, respectively, the same contracts, acts, matters, and transactions, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, what would be the effect, under the law and usages of the state of New York, of said decree and record as a defence to said proceedings assumed to be so pending?

[Objected to; admitted; exception.—See pages 946-950.]

A. The doctrine of res adjudicata would apply, and the decree would be a bar to the actions assumed to be pending.

1196 Q. 11. Assuming the facts stated in the 10th Interrogatory, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defense of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would those additional facts affect your answer to the preceding interrogatory?

[Objected to; admitted; exception.—See pages 946-950.]

A. The fact that Bigelow participated in the action brought against Lewisohn would not affect my answer to the 10th direct interrogatory. That fact is immaterial so far as the effect of the decree is concerned.

Q. 12. Assuming the facts stated in the 10th interrogatory, and assuming the facts stated in the 11th interrogatory, and assuming that the participation of the defendant, Bigelow, as stated in the 11th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers to the two preceding interrogatories?

[Objected to; admitted; exception.—See pages 947-950.]

A. It would have no effect on my answer.

Q. 13. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8098, referred to in the 9th interrogatory, and assuming that the course of the proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record

in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8098, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the
1197 Southern District of New York and in said bill of complaint numbered 8098 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, what, under the laws and usages of the state of New York, would be the effect of said decree and record, described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8098, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948–950.]

A. My answer is that it would constitute a bar to the proceeding assumed to be pending in New York.

Q. 14. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8099, referred to in the 9th interrogatory, and assuming that the course of proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8099, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8099 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, and assuming that the bill of complaint in said Circuit Court and the prayers thereof relate to one part of an entire transaction, comprising said contracts, acts, matters, and transactions, and that the bill of

complaint corresponding to the one numbered 8099 in Massachusetts and the prayers thereof relate to another part of the same entire transaction, what, under the laws and usages of the state of New York, would be the effect of said decree and record described
1198 in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8099, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948–950.]

A. I answer the same to this as to the 13th direct interrogatory.

Q. 15. Assuming the facts stated in the 13th and 14th interrogatories, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would these addtional facts affect your answers, or either of them, to the 13th and 14th interrogatories?

[Objected to; admitted; exception.—See pages 948–950.]

A. Such facts would not affect my replies to the 13th and 14th direct interrogatories.

Q. 16. Assuming the facts stated in the 13th, 14th, and 15th interrogatories, and assuming that the participation of the defendant, Bigelow, as stated in the 15th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers, or either of them, to the 13th, 14th, and 15th interrogatories?

A. My answer would remain unchanged.

Q. 17. If you have not already done so, state your reasons for your answers to Ints. 6th to 16th, inclusive.

[Objected to; admitted; exception.—See page 950.]

A. It is the law of New York, as I understand it, that the liability of tort feasors both of whose acts contribute to an injury, is joint and several. The plaintiff may, therefore, make one or all of them defendants.

The decree in the United States courts having been adverse to the complainant in the suit against Lewisohn, the issues are res adjudicata as to him; and the allegations of the bill upon which the decree was rendered having identified in interest Bigelow and Lewisohn, and asserted a mutual relationship in the fraud set out, Bigelow, in my opinion, by the bill is classed as a privy with Lewisohn. Therefore, although Bigelow was not a party to the suit in the United States courts, the issues became res adjudicata as to him. That decree offered as a defence in this state to a similar action, upon the same facts and allegations, would be a complete bar.

1199 *Cross-interrogatories.*

Without waiving the foregoing objections, but expressly insisting thereon, the plaintiff puts, de bene, the following cross-interrogatories:—

X 1. Is it a principle of the law of the state of New York that the law decided in a case in the court of last resort in overruling a demurrer becomes the law of the case to be applied when the case is heard upon the facts?

A. Yes, if the facts proved on the trial are the same as those alleged in the complaint demurred to.

X 2. Is it the law of New York that there is no right of exoneration or contribution between defendants jointly and severally liable ex delicto and not ex contractu?

A. It is the law of New York that there is no right of contribution between defendants jointly and severally liable ex delicto.

X 3. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered that Bigelow might—but for said defence, if any—be under a liability to the plaintiff in the suits against Bigelow?

A. I have assumed throughout that the cause of action alleged against Bigelow and the one alleged against Lewisohn constitutes but one cause of action. In other words, the cause of action alleged against Bigelow is the same as that alleged against Lewisohn.

X 4. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability that Bigelow might—but for said defence, if any—be under as a liability jointly with Lewisohn?

A. I have.

X 5. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability jointly and severally with Lewisohn?

A. I have.

X 6. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability arising ex delicto?

A. Yes.

X 7. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability ex delicto jointly and severally with Lewisohn?

A. I have.

1200 X 8. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts

in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. Yes, I think it would.

X 9. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability ex delicto with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. In my opinion it would be a joint and several liability ex delicto.

X 10. Is it a principle of the law of the state of New York that the liability of joint wrongdoers is joint and several?

A. Yes.

X 11. Is it sometimes a principle of New York law that estoppel by former adjudication must be mutual?

A. It is.

X 12. If so, what, if any, are all the occasions of which you have knowledge on which they need not be mutual?

A. I know of none. A judgment binds and estops all parties and their privies. In the case of joint tort feasors, a plaintiff, by suing only one of the tort feasors, elects to take judgment in that action against one only. He could, by bringing in the other parties, make them all bound by the judgment. In any event, he cannot, by his mere election to sue one, circumvent estoppel against himself in an action against another privy when he has been unfortunate in his first suit upon the same facts.

X 13. Assuming that Bigelow took no part in the Lewisohn suit, in your opinion is the law of New York such that Bigelow would have been estopped in another suit to deny his liability as a matter of law on the same facts, by a final decree against Lewisohn in the first suit?

A. Yes, as a matter of law on the same facts.

X 14. Assuming that Lewisohn's executors took no part in the suits against Bigelow, in your opinion is the law of New York such that said executors would have been estopped in another suit to deny their liability as a matter of law on the same facts, by a final decree against Bigelow in these suits?

A. Yes, as a matter of law on the same facts.

X 15. Assuming that Bigelow took part in the defence of the suit against Lewisohn's executors, and that the plaintiff knew this,
1201 what, by name and reference, are all the decisions, if any, in New York, which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation and knowledge, operate as an estoppel in favor of Bigelow?

A. I have not examined authorities because I think the courts of

New York would not take into consideration, as affecting the question, the plaintiff's knowledge of Bigelow's participation in the suit against Lewisohn.

X 16. Assuming that Bigelow took part in the defence of the suit against Lewisohn's executors, and that the plaintiff did not know this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation without plaintiff's knowledge, operate as an estoppel in favor of Bigelow?

A. For the reason given in my last answer, I have not considered it.

X 17. Assuming that Bigelow did not take part in the defence of the suit against Lewisohn's executors, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may operate as an estoppel in favor of Bigelow?

A. I have examined the cases of People v. Stephens, 51 How. Pr. 235; aff. 71 N. Y. 527; Castle v. Noyes, 14 N. Y. 329; Woodhouse v. Duncan, 106 N. Y. 527; Williams v. Barkley, 165 N. Y. 18, and the cases cited in those opinions.

X 18. Have you considered any decisions or language of the courts of New York which may have any tendency to support the view that there is no estoppel in Bigelow's favor growing out of the decree in favor of Lewisohn's executors?

A. I have not considered any.

X 19. If so, what, by name and reference, are all of these which you have considered?

A. This cross-interrogatory is covered by my answer to the 18th cross-interrogatory.

X 20. Have any arguments been submitted or suggested to you by defendant's counsel, or have you thought of any, in support of the view that there was by the law of New York no estoppel in favor of Bigelow growing out of the decree in favor of Lewisohn's executors?

A. No.

X 21. If so, what are all of said arguments?

A. This cross-interrogatory is covered by my last answer.

X 22. What, in your opinion, constitutes privity under the law of New York to a judgment?

A. As I understand it, privity is a relationship which arises from identity of interest of the parties. The interest may be mutual or by representation, it may be successive.

1202 X 23. In determining whether there was an estoppel in the present case, have you assumed or considered that Bigelow was in privity to the parties of record in the suit against Lewisohn's executors?

A. I have.

X 24. In considering whether there was any estoppel in this case, have you assumed or considered that Bigelow had any legal interest

to defend in the suit against Lewisohn's executors beyond such interest as he might have to secure a favorable precedent?

A. I assume that he had no legal interest in that suit.

X 25. If so, precisely what have you assumed to be said legal interest?

A. This cross-interrogatory is covered by my last answer.

X 26. Unless Bigelow would have been bound in favor of the plaintiff by estoppel by a decision adverse to Lewisohn's executors, even if Bigelow did not participate in the defence of the suit against them, did Bigelow, in your opinion, have a legal interest to defend in that suit?

A. No.

X 27. If so, by precise description, what, in your opinion, was said legal interest?

A. This cross-interrogatory is covered by my answer to the last interrogatory.

X 28. In determining whether there was any estoppel in this case, have you assumed that the plaintiff consented to the participation, if any, by Bigelow in the support of the demurrers of Lewisohn's executors?

A. I have not assumed so, though I think it did.

X 29. Is it a principle of New York law that if the defendant in one suit sustains merely the character of a co-trespasser with the defendant in another suit by the same plaintiff, the recovery against one defendant is not thereby made competent evidence against the other?

A. Yes.

X 30. Is it a principle of New York law that the judgment in favor of one of two persons jointly and severally liable for the wrongful conversion of the plaintiff's property is no bar to a subsequent suit against the other because torts are joint and several?

A. Yes, I am of that opinion.

X 31. Is it a principle of New York law that an adjudication acts as an estoppel only between the parties thereto or those in privity with them, or, in other words, the estoppel must be mutual?

A. Yes.

X 32. Is it a principle of New York law that a judgment in favor of one co-trespasser may not be used by another co-trespasser not a party to it, by way of estoppel?

A. No.

X 33. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were Bigelow's agent in the suit against them which has been dismissed?

A. I did not assume the relationship of agency.

1203 X 34. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were trustees for Bigelow of the stock sought to be recovered in the suit against them which has been dismissed?

A. I did not assume they were trustees.

X 35. Is it a principle of New York law that in an action at law against one or some of several joint tort feasors, the controversy may

be determined as between the parties before the court,—i. e., the plaintiff and defendant,—and without prejudice to the rights of others; and the judgment will completely determine the controversy between them, and will not be res adjudicata between the plaintiff and any of the joint tort feasors who is not a defendant and may be sued later?

A. That may be entirely possible; but upon the same facts I think that in a suit against other joint tort feasors, a judgment against plaintiff in the original suit would render the question res adjudicata and the decree would be a bar.

X 36. Have you stated all your reasons for the opinions expressed by you, or the statements made by you, in answer to the 6th, 7th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th direct interrogatories?

A. I think I have.

X 37. If not, what are all your reasons for the opinions or statements given by you in answer to each of said interrogatories?

A. This interrogatory is covered by my last answer.

X 38. Have you now stated all your reasons for said answers?

A. Yes, substantially.

X 39. Were you, prior to the taking of your deposition on the foregoing cross-interrogatories, shown them, or any of them, or any copies of any of them, or given any information concerning the substance of them?

A. Yes; I demanded the right to see the cross-interrogatories.

X 40. Has each of your answers in its final form been given in the language in which it now appears, before you were aware of the substance of any subsequent cross-interrogatory?

A. No.

X 41. Have you, since September 22, 1908, discussed in any way with any other person who is named as a witness in the caption of these cross-interrogatories, or with any one on behalf of the defendant, any of the subjects dealt with in the foregoing interrogatories or in your answers thereto?

A. Yes, I have discussed the matter with my partner, Edward W. Hatch, but I have not discussed it with any of the attorneys for either of the parties to the action.

ALTON B. PARKER.

Before me,
PERCIVAL WILDS,
Notary Public.

1204 *Deposition of William B. Hornblower.*

[Mr. McClennen offered in evidence the deposition of William B. Hornblower, taken on behalf of the plaintiff.]

Mr. HEMENWAY: We would suggest that the same course be taken with that deposition as with the others which have been introduced.

HAMMOND, J.: If there is no objection to that course, you may state what depositions you propose to put in, so that the stenographer can take them down, and let them be handed over to counsel for the defendant for such objection as they want to make.

[Following is the deposition above referred to:]
[Commission and notarial certificate omitted.]

Q. 1. What is your name, age, residence, occupation, and place of business?

A. My name is William B. Hornblower; age, fifty-seven; residence, New York city; occupation, lawyer; place of business, 24 Broad street.

Q. 2. Are you the William B. Hornblower who was named by President Cleveland to be a justice of the Supreme Court of the United States?

A. I am.

Q. 3. What positions have you occupied, and what has been your education, experience, in the study and practice of law in or out of the state of New York, and particularly anything with reference to the law as to former adjudication or estoppel by judgment?

A. The only official positions that I have occupied are—member of the commission appointed by the governor of the state of New York in 1890 under an act of the legislature to propose amendments to the judiciary article of our state constitution; member of a board appointed by act of the legislature in 1904 to consolidate the statutes of the state. I am still acting as a member of this board, known as the board of statutory consolidation, which is to report the result of its work to the legislature at its next session in 1909.

I was educated at Princeton University and Columbia University Law School.

I have had a very varied and general experience in the practice of the law, and in the argument of cases in the state and federal courts, for thirty-three years, including cases in the United States Supreme Court and in the Court of Appeals of New York state, as well as in the subordinate courts—state and federal. I have frequently had occasion to examine the questions involved in the doctrine of res adjudicata in the course of my practice. I argued in the appellate division and in the Court of Appeals the case of Bracken v. Atlantic Trust Co., 36 App. Div. 67; 42 App. Div. 621; 167 N. Y. 510,
1205 That case involved the effect of a former judgment in a suit brought by a trust company at the request of bondholders to foreclose a mortgage as a bar to a subsequent action at law by a bondholder. The question was one rather of merger of a cause of action than of estoppel. In connection with that case, however, I had occasion to examine the general law on the whole subject of res adjudicata.

I have very recently had occasion to re-examine the authorities on the subject of res adjudicata in an action recently brought and now pending in the Supreme Court of this state on behalf of certain stockholders of the New York & Harlem Railroad Company, against certain directors of that company, for an accounting of certain transactions which were involved in a prior litigation between certain other stockholders and the New York & Harlem Railroad Company, in which there was a decision in favor of the defendant, reported

under the title of Continental Insurance Co. v. New York & Harlem R. R. Co., 187 N. Y. 225.

Q. 4. Examine the record in this case, including the record in the case of the same plaintiff against the executors of Leonard Lewisohn, attached to the amendment to the defendant's answer. Assuming (*a*) that the question whether the decree dismissing said suit against Lewisohn's executors is a defence in said suits against Bigelow is to be determined by the law of New York, and (*b*) that the defendant, Bigelow, participated in the actual defence of said action in the Circuit Court, and (*c*) that he assumed with said Lewisohn's executors the joint defence thereof, and (*d*) that the defendant, both through his agents and counsel, has, by large expenditures of time and money, contributed to and joined in and taken part in the defence of said action, and (*e*) that this was with the knowledge of the plaintiff throughout the entire pendency of the aforesaid action,—then in your opinion would or would not said decree of dismissal be a defence to said Bigelow in these suits in Massachusetts?

A. I have examined the copies of records furnished me in the two cases referred to. Making the assumptions set forth in the 4th interrogatory, my opinion is that the decree of dismissal in the suit against Lewisohn's executors would not be a defence to Bigelow in the suits in Massachusetts.

Q. 5. Making assumption (*a*) only, or making assumptions (*a*) (*b*) (*c*) (*d*) only, or making assumptions (*a*) (*b*) (*c*) (*d*) and (*e*), what, in your opinion, is the law of New York relative to the effect of said decree as a defence in the suits against Bigelow, and what are your reasons therefor?

A. Making the assumptions called for by that interrogatory, in my opinion, under the law of New York, said decree would not be a defence to suits against Bigelow. My reasons for this and the answer to the preceding interrogatory are briefly these:

1206 The general principle running through the law of estoppel by a former judgment is that the estoppel must be mutual. This principle is so elementary and so constantly reiterated by the courts that it is unnecessary to cite authorities in support of it.

The rule is thus stated by Black in his work on judgments, 2 Black on Judgments, sec. 548:

"In the application of the rule of res judicata it is essential that its operation be mutual. Therefore a party will not be concluded, against his contention, by a former judgment, unless he could have used it as a protection, or as the foundation of a claim, had the judgment been the other way; and conversely, no person can claim the benefit of a judgment, as an estoppel upon his adversary unless he would have been prejudiced by a contrary decision of the case. Thus, where the plaintiff is not a party to the record offered in evidence, not being concluded by it himself, he cannot rely upon it as a technical estoppel upon a garnishee."

Black cites many New York cases in support of this statement. The only case referred to by him to the contrary is a Louisiana decision; as to which, he says, in a footnote,—

"This decision seems to be clearly wrong, as the estoppel certainly would not be mutual. The case does not explain itself."

Among the many cases in this state in which this principle is announced may be cited Lawrence v. Campbell, 32 N. Y. 455, in which the court says, with reference to the effect of a former judgment, "estoppels to be available must be mutual."

In Nelson v. Brown, 144 N. Y. 390, it is said, per Gray, J., referring to a former judgment,—

"She [appellant] was not bound by it, and, therefore, it could not conclude the respondent; under the settled and familiar rule, that the record of a judgment, in order to conclude either of the party litigants, must be conclusive upon both. The operation of the rule must be mutual."

In this connection it must be borne in mind that there is a distinction between the effect of a prior decision by way of estoppel as a bar and the effect of a former decision by way of an adjudication on the questions of law or fact on the principle of stare decisis. It is undoubtedly true that the Circuit Court of the United States for the Southern District of New York would apply the same rule of law to the claim against Bigelow as it has applied to the claim
1207 against Lewisohn's executors, and that if the suit against Bigelow were pending in that court and the same state of facts was set forth in the bill or shown by the testimony, that court would follow its previous ruling in the Lewisohn suit and would dismiss the bill. It is also true that the decree of the Circuit Court of the United States having been affirmed by the Supreme Court of the United States, the rule of law laid down by that court has become binding upon every federal court of inferior jurisdiction, and a suit brought in any federal court against Bigelow upon the same state of facts as appeared or were alleged in the Lewisohn suit would be dismissed by such federal court. As the questions in this case, however, were not federal questions, arising under the statutes or the Constitution of the United States, the decision of the Supreme Court of the United States is no more binding upon the Supreme Court of Massachusetts than would be a similar decision by the Court of Appeals of the state of New York.

The distinction between the doctrine of res adjudicata and the doctrine of stare decisis is well pointed out by the Court of Appeals in the case of Moore v. City of Albany, 98 N. Y. 396. In that case certain persons had a suit against the city of Albany, and recovered judgment, adjudging an assessment levied by the city to be void in a suit brought on behalf of other property owners. The former judgment was held to be not res adjudicata. The court, said, at page 409,—

"It is a general rule that estoppels by judgment must be mutual, that a party cannot claim the benefit of a judgment favorable to him unless he would be bound by a judgment in the same manner if adverse to him. If the judgment in that action had been adverse to the plaintiffs, then it certainly would not have bound William Moore, and he would still have been at liberty to assail the assessment and try all the questions relating thereto de novo upon their merits.

A judgment as to all matters decided thereby and as to all matters necessarily involved in the litigation leading thereto, binds and estops all the parties thereto, and their privies in all cases where the same matters are again brought in question. Such is the doctrine of res adjudicata.

"There is also the doctrine of stare decisis, which is of a different nature. When a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same, and this it does for the stability and certainty of the law."

A further distinction is to be borne in mind between contract cases and tort cases. As a general rule a suit brought against one
1208 of two joint contractors will bar a suit against the other joint contractor, and a decision in favor of one joint contractor, holding that there was no contract liability, can be availed of by the other joint contractor. This rule grows out of the nature of a joint contract, since plaintiff cannot sever his cause of action and must exhaust his rights and remedies in the first suit.

In tort cases, however, the rule is different; the liability of tort feasors is a several liability. The settled law of New York state is that a judgment in favor of one joint tort feasor is not a bar to a suit against another joint tort feasor.

In the early case of Lansing v. Montgomery, 2 Johns. 382, it was held that a judgment in favor of one co-trespasser was not an estoppel to proceedings and judgment against the other co-trespasser.

In Marsh v. Berry, 7 Cowen, 344, it was held that a recovery in favor of one trespasser is not evidence for his co-trespasser.

In Atlantic Dock Co. v. Mayor, 53 N. Y. 68, it is said,—

"A judgment in favor of one co-trespasser may not be used by another co-trespasser, not a party to it, by way of estoppel."

In the very recent case of Gittleman v. Feltman, 122 App. Div. 387, it is held that a judgment "will not be res adjudicata between the plaintiff and any of the joint tort feasors who is not a defendant and may be sued later—for joint tort feasors may be sued separately or together, and nothing but the satisfaction of a judgment against one or more of them or a release of the cause of action, will bar an action against the others."

The only case in this state that I know of, which is in apparent conflict with this doctrine is the case of People v. Stephens, 51 How. Pr. 235. That was an opinion at nisi prius upon a motion made after trial at circuit for a non-suit. The suit was brought by the People of the State against William C. Stephens, Thomas Gale, and others. Its object was to recover damages sustained by reason of a contract made between the state and the defendant Stephens, which contract, immediately upon its execution, was, with the consent of the state, assigned by the defendant Stephens to the defendant Gale; who, as the complaint averred, represented as well himself as the defendants Belden and Denison, and said Gale and said Belden and
Denison have performed the contract.

1209 It appeared that a prior suit had been brought by the plaintiffs, the People, against two of the present defendants, Wil-

liam C. Stephens, the original contractor, and Thomas Gale, the assignee, the object of the suit being to set aside the agreement, which is the subject of controversy in the second suit, on account of the identical alleged unlawful and illegal acts urged as the grounds of recovery in the second suit, and also to recover the damages which the state had sustained up to the time of bringing the action by reason of such contract and the execution thereof.

To the former complaint a demurrer had been interposed, which demurrer had been sustained and final judgment given for the defendants upon the demurrer. This judgment was pleaded as a bar to the second suit. It appears, however, that the plaintiff tried out the second suit upon the facts and did not rely upon the former judgment. It is true that the court granted the non-suit partially upon the ground of estoppel by judgment, and laid down the doctrine in broad terms to the effect that the judgment of a court of competent jurisdiction upon a question directly at issue between parties unless reversed, forever concludes and estops all parties to the action and those in privity with them from questioning its accuracy or justice in another action. The court further held that the defendants who were parties to the second suit were privies to the parties who were named in the first suit.

It appears, however, that the decision in the first suit might well have been held binding on the principle of stare decisis, as a decision by the same court upon the law of the case to the effect that no cause of action was set forth in the complaint. The court says on this subject,—

"Has it, however, ever been held that upon the same proof against two the same court would be justified in holding the one guilty of actionable conduct whilst the other was not? The tribunal which would administer justice upon such principle would deserve to be stripped of its judicial functions, and be condemned to eternal infamy."

Judge Westbrook, however, does not rely upon the bar of the former judgment, but proceeds to discuss the case upon the second ground for a non-suit, and holds, upon the evidence, that plaintiff was not entitled to recover.

When this case came before the Court of Appeals in 71 N. Y. 527, the court affirmed the judgment of non-suit, but did not discuss the subject of res adjudicata, nor in any way approve of the views of the trial court on this subject. The decision of the Court of Appeals was based on the ground that an act of the legislature passed in 1870 was intended as a final disposition of the whole matter and as a
1210 waiver of any claim for fraud, and operated to validate the transactions and to ratify the contracts subject to the powers therein conferred, to annul the same; and that by omitting so to terminate them and by going on under them, the state officers clearly manifested that they did not deem the contracts injurious, and elected, on behalf of the state, to proceed with and abide by them. The omission of the Court of Appeals to discuss, or in any way refer to, the effect of the former judgment is most significant, and is in

effect a ruling that the court did not regard the decision of the lower court as sustainable upon that theory.

So far as the decision by Judge Westbrook at circuit can be considered to hold that a judgment of a court of one jurisdiction rendered against one of several conspirators or tort feasors, or in favor of one of several joint conspirators or joint tort feasors will be a bar to an action in another jurisdiction against the other conspirators or joint tort feasors, it is, in my opinion, entirely unsupported by any decision of the Court of Appeals of this state which has come to my notice, and is at variance with what I regard as the settled law of this state on the general subject.

It is further to be observed, with regard to the decision of Mr. Justice Westbrook, that he says, at page 247,—

"All the acts of the defendants Gale and Stephens set out in the complaint in the former action, and which are identically the same with those contained in the complaint in the present, are charged as done in confederacy and combination with others, those others being the present defendants, not then sued; and it was of those acts, then and now charged, this court gravely and solemnly decided and adjudged, in the language of the demurrer, that they were not 'sufficient to constitute a cause of action.' If they were not then, are they now? Has their color or complexion changed with the lapse of years, or must this court change its view of the same facts because performed by parties now for the first time named, though then included as co-conspirators and confederates?"

In other words, Judge Westbrook's decision rests upon the ground that the rulings of the court are binding upon the same court in a subsequent suit on the principle of stare decisis. It is also to be noted that the judge calls attention, on page 248, to the fact that as the state had, by its agent duly authorized, "agreed for a consideration, to be bound by a judgment of this Court, the estoppel of the judgment is supplemented by the agreement," referring, in this connection, to the case of People v. Stephens and others, 52 N. Y. 306, 309, 310.

1211 So far as this case of People v. Stephens may be interpreted as holding that one of several co-tort feasors is bound by or can avail himself of a judgment in favor of his co-tort feasor in a suit to which he himself was not a party, it stands alone, so far as I know, in the jurisprudence of this state. It is at variance with the current authority of the state, and I do not regard it as stating correctly the law of this state on the subject.

It is true that a judgment is binding, not only upon upon those who are actually party defendants to the suit, but upon persons who stand in privity to the defendant. I do not understand that a joint tort feasor stands in privity with his co-tort feasors within the meaning of this rule. The rule is applied in favor of and against a party who claims title to certain property under or through the party to the record. It also applies to cases of principal and agent, master and servant, trustee and cestui que trust, and to cases where there is a liability over by way of indemnity. This last class of cases covers suits against sureties and numerous other classes of cases where the

party to the record has a remedy over against a third party. In such cases, however, in order to be bound by the judgment, the third party must ordinarily be notified of the suit and given a right to come in and defend, or he must have actually come in and defended it, in order to be bound by the suit. It is to be noted, in this connection, that under the settled law of this state there is no liability for contribution as between tort feasors, and therefore no remedy over where one tort feasor is sued severally and judgment obtained against him.

This is distinctly held in Gilbert v. Finch, 173 N. Y. 455, and numerous other cases. The cases in this state which hold that a party, not a party to the record, is bound or can avail himself of a judgment as a bar, all come under one or the other foregoing classes enumerated. To go through the cases in detail and analyze them would involve a long and unnecessary discussion. I understand that I am only called upon to express my opinion as a New York lawyer with regard to the result of the cases themselves, without referring to them in detail.

Pray v. Hegeman, 98 N. Y. 351, for instance, is a case where privity of title to property is involved.

Clemens v. Clemens, 37 N. Y. 59, is a similar case where parties claiming title under or through a party to the record are held bound by the judgment.

Castle v. Noyes, 14 N. Y. 329, is a case of master and servant.

Smith v. Smith, 79 N. Y. 634, and numerous other cases, are cases of parties liable over by way of indemnity on the principles applicable to suretyship, warranty, or otherwise.

1212 I know of no case in this state going so far as to hold that participation in the defence of a suit by one not a party nor a privy in the sense above set forth, by way of contributing to the expense of the suit, with or without the knowledge of the plaintiff, binds him by the judgment or entitles him to take the benefit of the judgment as a bar. There are some dicta in the cases intimating such a rule, but there are no decisions to that effect. In my opinion, the law of this state on this subject is in accordance with the rule laid down by the United States Supreme Court in Litchfield v. Goodnow, 123 U. S. 549, and Stryker v. Goodnow, 123 U. S. 527. In the former case the court said,—

"She interested herself in securing a favorable decision of the questions involved as far as they were applicable to her own interests, and paid part of the expenses; but there was nothing to bind her by the decision. If it had been adverse to her interest, no decree could have been entered against her personally either for the land or for the taxes."

In the latter case the court said,—

"We have not overlooked the fact that a brief was filed at the hearing in this court on behalf of the Railroad Company to support the claim of Wolcott that the title of that Company was the best. Such a proceeding did not make the Railroad Company a party to the suit, or bind it by the decree. Being interested in the question to be decided, the company was anxious to secure a judgment that could not be used as a precedent against its own claims in any litigation that might thereafter arise in respect to its own property. It is not an

uncommon thing in this court to allow briefs to be presented by or on behalf of persons who are not parties to the suit, but who are interested in the questions to be decided, and it has never been supposed that the judgment in such a case would estop the intervenor in a suit of his own which presented the same questions. It could be used as a precedent, but not as an estoppel in the second suit."

It seems to me very clear that a judgment in favor of the plaintiff in the suit brought against Lewisohn's executors would not have been res adjudicata as against Bigelow, whether his participation in the suit was or was not with the knowledge of the plaintiff. If a judgment in favor of the plaintiff would not have been binding upon Bigelow, then, on the doctrine that estoppels must be mutual, it follows that it is not a binding adjudication in his favor. I do not understand how the question of plaintiff's knowledge can be important, as plaintiff could not very well have prevented Bige-
1213 low from taking part in the defence and in assisting in compensating counsel. It does not appear and is not claimed, so far as I know, that he ever appeared in his own name in any way, shape, or form, in the suit pending in New York, in which the judgment was obtained, or that counsel appeared in his name. It seems to me that merely aiding pecuniarily in the argument of a question of law arising upon a demurrer, in the decision of which question of law the person so contributing is interested for the reason that the same principle may be applied against him on the ground of stare decisis, does not make him a party to the record so as to be bound by an adverse decree or to avail himself of a favorable decree. I do not understand that there is any decision in this state holding otherwise.

It has been suggested, however, that Lewisohn occupied a representative position in this suit and that he was either a trustee or agent for Bigelow, and that, therefore, a decree against Lewisohn would have bound Bigelow, and a decree in favor of Lewisohn would avail Bigelow. It is true that the property for which the corporation issued its stock was put into the name of Lewisohn with Bigelow's consent. It is also true that the plaintiff prayed for rescission of the transaction by which the property was conveyed to the company and stock issued in lieu thereof. It further appears, however, from the bill that the real object of the bill was to obtain an accounting for the stock of the company alleged to have been wrongfully issued, pursuant to a conspiracy between Lewisohn and Bigelow, in which they were equally tort feasors. It is not claimed that Bigelow's stock was ever held in the name of Lewisohn. The stock was issued to Lewisohn in his own name and to Bigelow in his own name. This suit is brought to recover for the stock issued in exchange for the conveyance. It is the value of this stock for which an accounting is sought.

The liability to account for the stock is a several liability of Lewisohn and Bigelow. On receiving the stock neither one acted as trustee for the other or as agent for the other. The fact that, as part of the transaction leading up to and resulting in the delivery of the stock, the title to certain property stood in the name of Lewisohn does not, in my opinion, make a case in which Bigelow would have

been bound by a judgment against Lewisohn or is entitled to claim the benefit of a judgment in favor of Lewisohn.

The principle under which promoters of a corporation are held liable to account for secret profits obtained is laid down in the case of Getty v. Devlin, 54 N. Y. 403, and in Brewster v. Hatch, 122 N. Y. 348. In the latter case I was counsel for the appellants, and obtained a decision establishing the liability of the promoters to account to stockholders. The principle of those cases, as I un-
1214 derstand it, is that promoters occupy a fiduciary relation to the company and to its original stockholders and owe a duty of full disclosure, and cannot make a secret profit at the expense of the other stockholders who were participants in the formation of the corporation. The court discusses in these cases the rights of the parties inter sese and uses language which indicates that they are partners. I do not understand, however, that it follows from the principle laid down in these cases that one of the promoters is so far the agent or representative of the other promoters as to make a suit for an accounting against one of them without joining the others res adjudicata against the others not sued; to so hold would, it seems to me, be to violate the elementary principles of justice, which require that every man shall have his day in court. If, therefore, a judgment against one of the promoters would not bind the other promoters, it necessarily follows from the principle already announced that a judgment in favor of one promoter would not avail the other promoters. Nor do I regard the use of general phrases such as "identity of interest" or "joint undertaking" as furnishing any definite of accurate test with regard to the effect of a former judgment. It is my opinion that where a former suit is not based upon a contract, as to which technical rules apply with regard to merger of the cause of action, it is necessary to bring the former suit within one of the well-established exceptions, as already indicated, in order to avoid the effect of the general principle that a judgment in order to be available in favor of the party must also be available in favor of the other party as against him on the principle of mutuality.

It is also to be noted that the former suit was not a suit against Lewisohn himself, but against Lewisohn's executors, and the executors were not trustees, and never had been trustees, of any property or stock for Bigelow. In this connection I refer the court to the case of Thomson v. American Surety Co., 170 N. Y. 109. I have not, however, deemed it necessary to discuss this question, as my opinion on the other questions makes it unnecessary to have considered this point.

Nor have I considered the question of whether the judgment against the complainant in the United States court suit is to be regarded as a judgment upon the merits within the meaning of section 1209 of the New York Code of Civil Procedure.

There are a great number of New York decisions which discuss the effect of a prior judgment in a subsequent suit between the same parties where the issues are different, but where the prior suit might have included the same issues, or where the issues raised in the latter

suit were impliedly decided by the former judgment. I have not considered it material to the present inquiry to discuss these cases.

I have confined myself to a consideration of the precise ques-
1215 tion presented to me, namely, the effect of a former adjudication upon one not a party to the record in the former suit, and his right to avail himself of a former adjudication as a bar.

To sum up my reasons for my opinion, as already given, I do not regard Bigelow as being in privity with Lewisohn within the meaning of that phrase as used in the decisions as to res adjudicata, nor do I regard Lewisohn as standing in the position of trustee or agent so as to be the representative of Bigelow in the suit, so that Bigelow would be bound by a judgment against Lewisohn. In my opinion Lewisohn and Bigelow were joint tort feasors. A judgment against one would not bind the other, nor would a judgment in favor of one avail the other in another jurisdiction, nor in the same jurisdiction, except on the principle of stare decisis, or by way of precedent.

New York Cases Introduced by Plaintiff.

Mr. McCLENNEN: I also desire to introduce cases decided by the New York courts and the statutory provisions of law.

HAMMOND, J.: Have you got a list of them there?

Mr. McCLENNEN: I have a list that is not quite complete; I want to add a few more. If I may simply do as Mr. Hemenway has done, I will hand the commissioner a copy.

HAMMOND, J.: Very well. You may hand a copy to Mr. Hemenway, and they may be considered as in. You had better send a copy to the stenographer, also, like that which you send to Mr. Hemenway, so that he can use it.

[Following is the list of cases subsequently submitted:]

Stevens v. Central Nat. Bank, 144 N. Y. 50.
Genet v. Del. & Hudson Co., 170 N. Y. 278.
Same v. Same, 162 N. Y. 172.
Same v. Same, 122 N. Y. 505.
Petrie v. Trustee, 92 Hun., 81.
In re Broderick, 56 N. Y. Supp. —.
Randall v. N. Y. El. Co., 149 N. Y. 211.
Koehler v. Hughes, 148 N. Y. 507.
Clarke v. Lourie, 82 N. Y. 580.
Code of Civil Procedure, sec. 1209.
Genet v. Del. & Hudson Co., 171 N. Y. 278.
1216 Same v. Same, 136 N. Y. 593.
Borden v. Fitch, 15 Johns. 121.
Lansing v. Montgomery, 2 Johns. 382.
Marsh v. Berry, 7 Cowen, 344.
Calkins v. Allerton, 3 Barb. 171.
Tyng v. Clarke, 9 Hun, 269.
Atlantic Dock Co. v. N. Y., 53 N. Y. 64.
Gittleman v. Feltman, 122 App. Div. 385.
Kolb v. National Surety Co., 176 N. Y. 233.

Andrews v. Murray, 23 Barb. 354.
Peck v. Ellis, 2 Johns. Ch. 131.
Miller v. Fenton, 11 Paige, 18.
Barrett v. Third Ave. R. Co., 45 N. Y. 628.
Mitchell v. Allin, 25 Hun, 543.
Bath v. Rowland, 82 N. Y. Supp. 841.
Booth v. Powers, 56 N. Y. 22.
Russell v. McCall, 141 N. Y. 437.
Snyder v. Barber, 18 N. Y. 468.
Robinson v. Smith, 18 Johns. 459.
Moss v. McCullough, 5 Hill, 131.
McMaster v. Vernon, 3 Duer, 249.
Brow v. Birdsall, 29 Barb. 549.
Livingston v. Bishop, 1 Johns. 290.
Parks v. N. Y., 98 N. Y. Supp. 94.
Lawrence v. Campbell, 32 N. Y. 455.
Craig v. Ward, 3 Abb. (N. S.) 235.
Brennan v. Bath, 3 Daly, 489.
Castle v. Noyes, 14 N. Y. 329.
Thomas v. Hubbell, 15 N. Y. 405.
Carleton v. Lombard, Ayres & Co., 149 N. Y. 137.
Ocean Nav. Co. v. Campania Co., 144 N. Y. 663.
Albany Sav. Inst. v. Burdick, 87 N. Y. 40.
Prescott v. La Conte, 178 N. Y. 585.
Heiser v. Hatch, 86 N. Y. 614.
Bush v. Knox, 2 Hun, 576.
Fake v. Smith, 2 Abb. Dec. 76.
1217 Konitzky v. Meyer, 49 N. Y. 571.
Smetzer v. White, 92 U. S. 390, 394.
Alexander v. Taylor, 4 Denio, 302.
Featherstone v. Turnpike Co., 71 Hun, **109.**
Moore v. Albany, 98 N. Y. 396.
Trimmer v. Rochester, 130 N. Y. 401.
Tifft v. Buffalo, 25 App. Div. 376.
Wallace v. New York, 53 App. Div. 187.
Stone v. N. Y., 184 N. Y. 124.
Lawrence v. Hunt, 10 Wend. 80.
Fowler v. Bowery Bank, 47 Hun, 399.
Remington Paper Co. v. O'Doherty, 81 N. Y. 474.
Scott v. Brennan, 9 Daly, 226.
Croft v. Bassett, 24 Barb. 31.
Douglas v. Howland, 24 Wend. 35.
Jackson v. Griswold, 4 Hill, 522.
Miller v. White, 50 N. Y. 137.
McMahon v. Macy, 51 N. Y. 155.
Craft v. Coykendall, 34 Hun, 285.
Goddard v. Benson, 15 Abb. Prac. 191.
Chapman v. Frank, 5 N. Y. Supp. 448.
Campbell v. Hill, 16 N. Y. 575.
People v. Knickerbocker, 106 N. Y. 619.
O'Brien v. Browning, 49 How. Pr. 109.

Smith v. Smith, 79 N. Y. 634.
Dibble v. Dimmock, 143 N. Y. 549.
Morehouse v. Brooklyn Co., 185 N. Y. 520.
MacArdell v. Olcott, 62 N. Y. App. Div. 127.
New York Code, 281.
2 Bliss Am. Code, 20, 21.
Thomson v. American Surety Co., 170 N. Y. 109.
Thorne v. De Breteuil, 86 App. Div. 405; 179 N. Y. 64.
Gleason v. Northwestern, 189 N. Y. 100.
Carter v. Bowe, 41 Hun, 516.
In re Straut, 126 N. Y. 201.
Bracken v. Atl. Trust Co., 30 App. Div. 67.
1218 Getty v. Devlin, 54 N. Y. 403.
King v. Barnes, 109 N. Y. 267.
Brunell v. Dias, 3 Den. 238.
O'Donnel v. McIntyre, 118 N. Y. 156, 162.
Mygatt v. Coe, 124 N. Y. 212.
Emma Mines Case, 7 Fed. Rep. 401; 159 Fed. Rep. 36.
Pray v. Hegeman, 98 N. Y. 351.
Jordan v. Van Epps, 85 N. Y. 427.
Clemens v. Clemens, 37 N. Y. 59.
Doty v. Brown, 4 N. Y. 41
Griffin v. Long Island R. R. Co., 102 N. Y. 449.
C. P. P. & M. Co. v. Walker, 114 N. Y. 7.
Thomson v. Sanders, 118 N. Y. 252.
Reich v. Cochran, 151 N. Y. 122.
Earle v. Earle, 173 N. Y. 480.
Williams v. Barcley, 165 N. Y. 48.
People v. Stephens, 51 How. Pr. 235.
Doremus v. Root, 23 Wash. 710; 54 L. R. A. 649, and note; 4 N. Y. 71.
Portland Gold Mining Co. v. Stratton, 158 Fed. Rep. 68.
Rumford Chem. Co. v. Hygienic Chem. Co., 159 Fed. Rep. 36.
Stamp v. Franklin, 144 N. Y. 607.
Van Koughnet v. Dennis, 68 Hun, 179.
Kelly v. 42d St. R. R. Co., 39 App. Div. 500.
Kerrison v. Stewart, 93 U. S. 155.
Lorilland v. Clyde, 122 N. Y. 41.
Park Hill Co. v. Herriott, 41 App. Div. 34.
In re Will of O'Hara, 95 N. Y. 403.
Brewster v. Hatch, 122 N. Y. 349.
Western R. R. Co. v. Nolan, 48 N. Y. 513.
Lawrence v. Schaffer, 19 Misc. 239; aff. 20 App. Div. 80.
Freeman on Judgments, secs. 173, 174, 287.
Black (2) on Judgments, secs. 709, 781, 789.
Emery v. Fowler, 39 Me. 329.
Knapp v. Roche, 94 N. Y. 329.
Whiteman v. Shankland, 18 How. Pr. 79.
1219 Allen v. Knott, 111 U. S. 472.
Hirshbach v. Ketcham, 84 App. Div. 258.

Yates v. Utica Bank, 205 U. S. 181.
No. Pac. Ry. v. Slaght, 205 U. S. 132.
Bissell v. Spring Valley, 124 U. S. 225.
Port Jarvis v. First Nat. Bank, 96 N. Y. 550.
Demarest v. Darg, 32 N. Y. 281.
Prescott v. Le Conte, 83 App. Div. 482.
Park Hill Co. v. Herriott, 41 App. Div. 324.
Paulding v. Chrome Steel Co., 94 N. Y. 329.
Pakas v. Hollingshead, 184 N. Y. 217.
Bates v. Stanton, 1 Duer, 79.
Wilcox v. Pratt, 125 N. Y. 688.
Lichty v. Lewis, 63 Fed. Rep. 535.
1 Greenleaf on Evidence, sec. 523.
Bopp v. N. Y. Elec. Vehicle Co., 78 App. Div. 337.
Cassidy v. Sauer, 114 App. Div. 673.
Shaw v. Broadbent, 129 N. Y. 114.
Genet v. Delaware & Hudson Co., 2 App. Div. 491.
Same v. Same, 14 App. Div. 177.
Moore v. Tracy, 7 Wend. 229.
Diet v. Hyman, 129 N. Y. 351.
Gerrod v. Stagg, 10 How. Pr. —.
St. John v. Andrew, 192 N. Y. 382.
Mallory v. Horan, 49 N. Y. 111.
Marsh v. Masterton, 101 N. Y. 401.
Stowell v. Chamberlain, 60 N. Y. 272.
Converse v. Sickler, 146 N. Y. 200.
Rudd v. Cornell, 171 N. Y. 114.
Shaw v. Bradstreet, 129 N. Y. 114.
Hoag v. Greenwich, 133 N. Y. 152.
People v. Dalton, 52 App. Div. 371.
Collins v. Hydorn, 135 N. Y. 320.
Getty v. Devlin, 70 N. Y. 504.
Eisenlord v. Clum, 126 N. Y. 552.
House v. Lockwood, 137 N. Y. 259.
1220 Lorillard v. Clyde, 102 N. Y. 59.
Towle v. Forry, 14 N. Y. 423.
Woodhouse v. Duncan, 106 N. Y. 527.

Mr. McClennen: I am sorry to say we shall not be able to get all of our evidence in this afternoon, your Honor.

Hammond, J.: Well, get it in as fast as you can.

Stipulations.

Mr. McClennen: I will offer the stipulation in the case of the Old Dominion Copper Mining & Smelting Co. v. Frederick Lewisohn et al., relating to the taking of depositions in Vermont.

I, perhaps, ought to have said, your Honor, that in offering this testimony we desire to be understood as still insisting on our objection to the materiality of the evidence relative to actual participation in the New York case.

HAMMOND, J.: I understand that to be your position.

Mr. MCCLENNEN: I will also offer two other stipulations relative to the taking of testimony in the New York cases.

Also the general stipulation of May 27, 1903, relative to the taking of testimony in Old Dominion Copper Mining & Smelting Co. v. Frederick Lewisohn et al.

Also the stipulation of April 2, 1903, relative to the taking of the further testimony of Mr. Bigelow and Mr. Hyams.

[Following are the stipulations put in evidence under this offer:]

Circuit Court of the United States for the Southern District of New York.

8332.

OLD DOMINION COPPER MINING & SMELTING COMPANY
v.
FREDERICK LEWISOHN et al.

Stipulation.

In the above-entitled case it is hereby stipulated that depositions may be taken for use therein of witnesses residing in the state of Vermont before G. C. Frye, or any other notary public in said state, with like effect as if a commission were duly issued
1221 to him by this court, and that the taking of said depositions may begin at the office of said notary in St. Johnsbury on December 14, 1905.

BRANDEIS, DUNBAR & NUTTER,
Attorneys for Complainant.
HOADLY, LAUTERBACH & JOHNSON,
Attorneys for Respondents.

A.

Circuit Court of the United States, Southern District of New York.

In Equity.

#8332.

OLD DOMINION COPPER MINING & SMELTING COMPANY
v.
FREDERICK LEWISOHN et al.

Stipulation.

The respondents hereby reserve the right of cross-examination of Charles H. Altmiller, if he be again called to testify, by either party, and waive any further or formal proof of the records of the plaintiff

corporation, of the entries in the books of account and check books of the plaintiff corporation testified to by Mr. Altmiller, and of the letters and other documents produced by Mr. Altmiller, and stipulate and agree that Mr. Altmiller's deposition, and the exhibits thereto annexed setting out the contents of the record book, extracts from the books of account, check book, stock-certificate books, and stock-transfer book, and certain certificates of stock, letters, and other documents produced by him, may be read in evidence and used in like manner and with the same effect in all respects as if full and formal proof of the same had been made, reserving, however, all rights to object to the relevancy, competency, and materiality of the interrogatories and answers and of the matters testified to by said deponent and of the said exhibits.

Said waiver being made conditionally upon the production of any and all of said original documents that the respondents shall notify complainant to produce, and the complainant hereby stipulates and agrees to produce any and all of said original documents upon receiving notice requiring the production thereof.

HOADLY, LAUTERBACH & JOHNSON,
Solicitors for Respondents.

1222 B.

Circuit Court of the United States, Southern District of New York.

In Equity.

#8332.

OLD DOMINION COPPER MINING & SMELTING COMPANY
v.
FREDERICK LEWISOHN et al.

In the above-entitled cause it is stipulated and agreed between the parties:

That copies certified by Willoughby L. Webb, commissioner, of the depositions of Walter Lewisohn, Ferdinand L. Rahaeuser, Adolph Lewisohn, Frederick Lewisohn, Albert Lewisohn, Jesse Lewisohn, and Edward C. Westervelt, taken in the case of Old Dominion Copper Mining & Smelting Co. v. Bigelow, No. 8099 Equity, pending in the Supreme Judicial Court for Suffolk county, Massachusetts, may when completed be filed in the above-entitled cause by the complainant at any time before the taking of testimony therein is closed, and may be read and used in evidence in this cause by either party with the same effect as if the same had been regularly taken in said cause before an examiner.

And it is further stipulated and agreed that the depositions of Albert S. Bigelow, Godfrey M. Hyams, Joseph A. Coram, Galen L. Stone, and Charles H. Altmiller, taken before Howland Twombly, Esq., notary public, for use in the above-entitled cause, may be filed in the above-entitled cause by the complainant at any time before

the taking of the complainant's testimony in chief therein is closed, and may be read and used in evidence in this cause by either party with the same effect as if the same had been regularly taken in said cause before an examiner. Reserving, however, to each party all rights to object to the relevancy, competency, and materiality of any of said depositions or the documents therein referred to, and to any of the interrogatories or answers therein contained, and reserving the right of the respondents to cross-examine Charles H. Altmiller, one of said witnesses, if he be again called to testify by either party.

HOADLY, LAUTERBACH & JOHNSON,
Solicitors for Respondents.

1223 Circuit Court of the United States for the Southern District of New York.

In Equity. No. 1.

#8332.

OLD DOMINION COPPER MINING & SMELTING COMPANY
v.
FREDERICK LEWISOHN et al.

It is hereby agreed that the defendants shall not be called upon to take any testimony until the plaintiffs close their testimony in chief, and that the time for taking the plaintiff's testimony is hereby extended until such time as shall be agreed upon by the parties, or fixed by order of court, and that upon the closing of the plaintiff's testimony in chief, the defendants shall have reasonable time for taking testimony, to be agreed upon by the parties or fixed by the court; and that thereafter the plaintiffs shall have a reasonable time for taking testimony in reply, to be agreed upon by the parties or fixed by the court.

BRANDEIS, DUNBAR & NUTTER,
For Plaintiffs.
HOADLY, LAUTERBACH & JOHNSON,
Attorneys for Defendants.

Boston, May 27, 1903.

Circuit Court of the United States, Southern District of New York.

No. 1. In Equity.

#8332.

OLD DOMINION COPPER MINING & SMELTING COMPANY
v.
FREDERICK LEWISOHN et al.

Agreement.

In the above-entitled cause, the taking of the depositions of Albert S. Bigelow and Godfrey M. Hyams before Howland Twombly,

Esq., having been adjourned to Friday, April 3, 1903, at 10 o'clock a. m., and the defendants having requested that the taking of said depositions be further adjourned to Friday, April 10, 1903;

Now, therefore, it is hereby agreed by the parties to said suit that the taking of said depositions be so adjourned, and by said witnesses respectively, that they will appear at said adjourned
1224 date at the office of Brandeis, Dunbar & Nutter, Room 17, 220 Devonshire street, Boston, Mass., at 10 o'clock in the forenoon.

BRANDEIS, DUNBAR & NUTTER,
Attorneys for Plaintiff.
ALFRED HEMENWAY,
Special Attorney for Defendant.
ALFRED HEMENWAY,
Attorney for A. S. Bigelow and Godfrey M. Hyams.

Boston, April 2, 1903.

Additional Correspondence Between Counsel.

Mr. McCLENNEN: I will put in evidence the letter of Mr. Lauterbach to Mr. Brandeis, dated September 20, 1902.

A letter from Mr. Lauterbach to Mr. Brandeis, dated September 26, 1902.

A letter from Mr. Brandeis to Mr. Hemenway, dated September 27, 1902.

A letter from Mr. Brandeis to Mr. Hemenway, dated March 17, 1903.

Mr. HEMENWAY: All these letters are to be submitted to me in the same way I submitted mine to you, and if I have any objections I can make them then?

Mr. McCLENNEN: Yes.

[Following are the letters referred to in this offer:]

G. M. Hyams,
Sears Building, P. O. Box 5104, Boston.

SEPTEMBER 20, 1902.

Louis D. Brandeis, Esq., 220 Devonshire Street, Boston, Mass.

DEAR MR. BRANDEIS: In order not to cause any unnecessary delay in the matter concerning which I had the pleasure of conferring with you on Thursday I came to Boston today for further conference with you and also with Mr. Hemenway, who will probably appear in any action you may bring, for Mr. Bigelow.

I timed my visit unfortunately, since I have ascertained that you would not be at your office today. Tomorrow I go to Saratoga, and since I expect to be Chairman of the Committee on Reso-
1225 lutions at the Convention, will not be able to confer with you again until after the close of the session, which will probably take place on Wednesday or Thursday of next week.

In the meantime, on any question of procedure or furnishing of a bond that may appear to you to be pressing, Mr. Hemenway will be glad to confer with you.

With kind regards, I am,

Very truly yours, EDWARD LAUTERBACH.

BOSTON, MASS., *September* 26, 1902.

DEAR MR. BRANDEIS: I regret exceedingly that I had not the pleasure of meeting you.

Conferences with my clients, the Lewisohns, after a full investigation of the claim that was made on behalf of the Old Dominion Company, have been had by me.

They believe, and I have so advised them, that there is no claim which is made which they recognize as valid, and they must leave you to take such steps on behalf of the Company as you deem advisable.

As I have already informed you, Mr. Hemenway represents Mr. Bigelow, and I suggest that you confer with him as to any proceedings you desire to initiate, and as to the bond that you require.

With many thanks for your courtesy, and with regret that I cannot have the pleasure of a personal interview with you, I am,

Yours very truly,

EDWARD LAUTERBACH.

(Dictated to A. H. G. at office of Mr. Brandeis.)

SEPT. 27, 1902.
G/B.

Alfred Hemenway, Esq. Tremont Building, Boston.

DEAR MR. HEMENWAY: Mr. Lauterbach requests me to arrange with you the matter of bond in the suits of the Old Dominion Copper Mining and Smelting Company v. Albert S. Bigelow which we wish now to file, of which you doubtless have received the copies which we handed to Mr. Lauterbach.

We should like to have an attachment bond in the amount of $500,000. A single bond will do provided it is conditioned to the satisfaction of any decree which may be entered in either or both of the suits.

1226 Will you kindly let me hear from you on Monday morning whether a bond in that form will be agreeable to you, and whom Mr. Bigelow proposes as surety?

Yours very truly,

LOUIS D. BRANDEIS.

MARCH 17, 1903.
G/B.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: Mr. Lauterbach called me up on the telephone yesterday and stated that he had just returned from Kentucky and it would be impossible for him to go on with the taking of the depositions on Wednesday or any later day this week, but

that he could go on on Tuesday and other days of next week. I told him I would see whether I could arrange so that I could grant the postponement, and I have, at considerable inconvenience, made such arrangements.

Mr. Lauterbach stated that Mr. Bigelow would not go abroad before May 12th, and also that he had just been in communication—I was not sure whether with you or Mr. Bigelow or Mr. Hyams—in regard to the matter, and that the adjournment would be agreeable to you and them.

I am willing to grant the adjournment as requested by Mr. Lauterbach if you will agree on his behalf as well as that of the witnesses to proceed on Tuesday, March 24th, at ten o'clock.

I enclose a draft of agreement for the adjournment, which kindly sign and return to see if the arrangement is satisfactory.

I send you also a copy for your files. I wrote to Mr. Lauterbach yesterday that I would wire him if the adjournment could be arranged. Will you kindly let me hear from you, therefore, as soon as possible?

Yours very truly, LOUIS D. BRANDEIS.

(2 enclosures.)

Extracts from Respondents' Brief in United States Supreme Court Case.

Mr. McCLENNEN: I offer in evidence from the brief of Mr. Treadwell in the Supreme Court of the United States, pp. 84, 85, 86.

Mr. HEMENWAY: That I object to.

HAMMOND, J.: It may go in, subject to Mr. Hemenway's objection and exception.

[Following is a copy of the pages of the brief referred to:]

1227 *Fourth Point.*

Albert S. Bigelow is an indispensable party in whose absence a bill for rescission cannot be maintained.

(1) The bill discloses the joint interest of Albert S. Bigelow and of Leonard Lewisohn, defendants' testator.

This disclosure is distinct, emphatic and repeated.

The rescission sought is of the transfer to the complainant of certain mines and mining claims known as the Old Dominion Mine, the New York Mine, the Keystone Mine, and a certain parcel of land in Arizona, all of which had formerly been owned by the stockholders of Old Baltimore Company, the title being held by one William Keyser (Record, p. 3, fol. 4), and from him acquired by the said Bigelow and the said Lewisohn.

The complainant in folio 5 states that prior to May 24th, 1895, Bigelow and Lewisohn formed the plan of acquiring the said property held by Keyser; that (fol. 9, paragraph seventh) on or about

June 13, 1895, Bigelow, in conjunction with Lewisohn, for the purpose of carrying out their plan made an agreement with Keyser.

"In pursuance of this plan and conspiracy they required said Keyser to undertake to convey said claims and real estate to them without payment of any additional consideration upon said executors assenting thereto."

And (fol. 10, paragraph eighth) that Bigelow and Lewisohn for their common benefit acquired from Keyser the said property theretofore standing in his name.

The complaint further states (fol. 10):

"Said conveyance was made to said Leonard Lewisohn and the title to said property was acquired by him for the common benefit of himself and said Bigelow, as hereinafter set forth, and as a part of the plan and conspiracy hereinbefore set forth."

The complaint further states (fol. 18):

"The stock of said Baltimore Old Dominion Company and said parcels of real estate were acquired in the manner aforesaid with intent on the part of said Leonard Lewisohn and of said Bigelow to sell said property of said Baltimore Old Dominion Company and said parcels of real estate for a much larger price."

1228 The complaint further states (fol. 19):

"By the transactions above set forth said Bigelow and said Leonard Lewisohn carried out their said plan and conspiracy * * * and acquired * * * for themselves as they claimed * * * all the property conveyed by said Leonard Lewisohn to the complainant * * * thereupon did sell * * * and also sold * * * all the property conveyed to said Leonard Lewisohn." * * *

The complaint further states (fol. 28):

"Thereafter, to wit, on or about September 12, 1902, the complainant offered to said Bigelow and to the respondents to rescind the sale and conveyance to it from said Leonard Lewisohn of said parcels of real estate in Arizona, to wit, the parcels known as the Old Dominion Mine, the New York Mine, the Chicago Mine, Keystone Mine, and parcel of real estate," etc.

Not alone from the general tenor of the complaint is the joint interest of Bigelow and Lewisohn apparent. Their joint interest is distinctly pleaded, so that there is no doubt, that the transaction sought to be rescinded was a joint one on the part of Lewisohn and Bigelow.

In fact the complaint offers an excuse for omitting Bigelow as a defendant (fol. 29) based on his non-residence within the district.

The formal offer of the real estate to the complainant company was made in the name of Lewisohn (p. 20), probably because the legal title thereto stood in his name, although the property had been, as the complaint repeatedly states, acquired by both Bigelow and Lewisohn for their common benefit, and that they (Bigelow and Lewisohn) sold the same to the complainant.

It will be noted, however, that the formal offer contained a reference to the interest of Bigelow and a request to pay the consideration, namely, 30,000 shares of stock, to Bigelow as well as Lewisohn.

Extracts from Complainant's Brief Filed in Chancery of New Jersey.

Mr. McCLENNEN: I offer in evidence from the brief of Mr. Spooner, counsel for Mr. Bigelow in the New Jersey case——

Mr. HEMENWAY: That is subject to my objection.

HAMMOND, J.: Certainly, it will have to take the same course. It goes in subject to the exception of Mr. Hemenway.

1229 Mr. McCLENNEN: Page 38, the words on that page.—

"The defendant seeks to escape the force of the estoppel by the statement that Bigelow and Lewisohn were tort-feasors, and that under the familiar rule of law a judgment against one tort-feasor is not an estoppel in favor of the other tort-feasor when sued by the plaintiff for the same alleged tort. But Bigelow and Lewisohn are not sued as tort-feasors."

Also on page 47 of that brief the words,—

"This is not what 'mutuality' of estoppel means, as we understand it. What it means is that there would be no estoppel in favor of Bigelow, unless if the decree in New York had been against Lewisohn, it would have also inured to the benefit of the company on the question of liability as against Bigelow, a proposition which we do not contest."

Mr. HEMENWAY: That is subject to my objection and exception.

HAMMOND, J.: I suppose they are positions taken in that case inconsistent, or claimed by you to be inconsistent, with those taken here?

Mr. McCLENNEN: Yes, your Honor.

HAMMOND, J.: And the objection is on the ground that they were taken in that case? The objection, whatever it is, you may have. The stenographer will minute it.

Mr. HEMENWAY: That is under the New Jersey law; our contention here is that it is under the New York law.

HAMMOND, J.: Very well.

Mr. McCLENNEN: I also offer from the New Jersey bill of complaint the following, from page 22:—

"And your orator further shows to your Honor that in view of the premises the determination of the controversies existing between the defendant Company and your orator and the Lewisohn estate should be and is properly cognizable before this Honorable Court to prevent a multiplicity of suits and to prevent injustice through technical conflicts in different jurisdictions, and to the end that a decision might ultimately be reached binding on all the parties in conformity with the spirit of the laws of the state of New Jersey, under whose laws said corporation was organized and the duties and obligations of the parties were created and exist."

Mr. HEMENWAY: That is subject to my objection.

HAMMOND, J.: The same exception.

1230 *Testimony from Printed Record.*

Mr. McCLENNEN: I also call attention in the old printed record to the matters on pages 313, 586, 603, 754, 757, 502, 517, 518, 555.

Mr. HEMENWAY: I object, on the ground that it is already in evidence and does not need to be repeated. I came to your Honor's theory in regard to pointing out evidence, assuming that the whole evidence was before the court.

Mr. McCLENNEN: That is all, if your Honor please, of my testimony, but one witness whom I cannot locate, but who will be here the first thing to-morrow morning.

HAMMOND, J.: What do you propose to show by him?

Mr. McCLENNEN: I desire to show the New York law.

HAMMOND, J.: An oral witness.

Mr. McCLENNEN: Yes, your Honor.

HAMMOND, J.: How long will it take you to examine him?

Mr. McCLENNEN: I should not suppose the direct examination of him would require more than half an hour; perhaps a little more.

HAMMOND, J.: You must be prepared to go on. That will close your evidence?

Mr. McCLENNEN: Yes, your Honor.

HAMMOND, J.: We will adjourn until to-morrow morning at half past nine.

[Adjourned to Tuesday, October 6, 1908, at 9.30 a. m.]

TUESDAY, *October* 6, 1908.

Letter, Brandeis to Hoadly, Lauterbach & Johnson.

Mr. McCLENNEN: In view of the letters introduced by the other side, which I have now read, I should like to put in a letter dated June 1, 1907, from Mr. Brandeis to Hoadly, Lauterbach & Johnson, as follows:—

"JUNE 1, 1907.
B/Md.

Messrs. Hoadly, Lauterbach & Johnson, 22 William Street, New York City.

DEAR SIRS: I am in receipt of your letter of May 31st in which you say:

" 'It was our understanding had with your Mr. Brandeis, our Mr. Lauterbach and Mr. Hemenway that these cases should proceed together, and in view of your taking the Lewisohn case to the Supreme Court we feel that it is only proper that the Bigelow case should stand until the Supreme Court has passed upon the question.'

1231 I must state most emphatically that it never was my understanding that the Bigelow case and the Lewisohn case 'should proceed together,' and I am at a loss to know how that idea could have arisen in your minds. It was understood at certain times that we should take testimony to be used in both of the cases, but it never

was stated or suggested, so far as I know, by any one, prior to the call that Mr. Hemenway and Mr. Treadwell made on me on April 1st, that the Bigelow and the Lewisohn cases should proceed together. When that suggestion was made by Mr. Hemenway and Mr. Treadwell at the conference on April 1st at my office with Mr. McClennen and me, I stated emphatically that there never was any such understanding. The only understanding that we ever had, which I think you will find specifically mentioned in the correspondence and covered by the stipulation, was that you should have a reasonable time for taking testimony after we closed our testimony.

As to the time occupied by us in taking our testimony, which you say was something over two years, I must remind you that a very large part of that time was consumed in delays occasioned by the fact that either you or Mr. Hemenway was unable to fix earlier dates. It is now many months since we closed our testimony, and it is nearly a year since we stated to you that our testimony was practically closed and that we desired you to prepare to take yours.

You cannot fail to recall that this matter was fully discussed when Mr. Treadwell and Mr. Hemenway were at our office at the taking of testimony on July 24, 1906, when we told you that we had practically closed our testimony and desired you to prepare for taking yours.

Yours very truly, LOUIS D. BRANDEIS.

P. S.—We will make the motion for an assignment in the Bigelow case on Tuesday next."

Oral Testimony.

CHARLES ANDERSON BOSTON, sworn.

(By Mr. MCCLENNEN:)

Q. Your full name, Mr. Boston?
A. Charles Anderson Boston.
Q. Your residence?
A. New York city.
Q. You are a member of the bar of New York?
A. I am.
Q. Will you state briefly your education and experience in the practice of law?

1232 A. I was educated at the Baltimore City College and at the Johns Hopkins University; I graduated in law at the University of Maryland in, I think, 1886; I was admitted to practice at the bar of Baltimore city, and shortly afterward of the Court of Appeals of the state of Maryland. I was admitted to practice in the courts of New York in the year 1889, I think. In the year 1893 I was admitted to practice in the Supreme Court of the United States. I have been admitted to practice in the southern, eastern, and northern districts in the state of New York, in the circuit and district courts of the United States. I have also been admitted to practice in other districts in the Circuit Court of the United States. I have practiced chiefly in the city of New York, in the courts of

New York, but I have practiced also in the city of Baltimore, in the Court of Appeals in Maryland, and in the Supreme Court of the United States. I have been engaged in litigation in the federal courts, in several of the Circuit Courts in various districts, and in the district courts, and in some of the districts, as I now recall, in Iowa, Missouri, Kentucky, Maine, New Jersey, and have also been engaged in the Court of Chancery in New Jersey. I have had a general experience in the practice of law. I was engaged in the law department of the Title Guarantee & Trust Company of the city of New York, for about three years, examining questions particularly relating to real-estate law, including the effect of judgments on titles to real property. I subsequently became a member of the firm of Baldwin & Boston in the city of New York, and was a member of that firm for eight years. I left that association and became associated with the firm of Hornblower, Miller & Potter in New York city in the year 1901, and on the dissolution of that firm, in the year 1906 or the year 1907, on the withdrawal of Mr. Byrne, I became a member of the present firm of Hornblower, Miller & Potter, and am still a member of that firm. That has been my general experience with respect to the practice of law. I don't know that you asked me for any particular experience in respect to——

Q. I was going to ask in respect to your experience with the subject of res adjudicata or estoppel by judgment.

A. I have had occasion to consider that question with some frequency. My present recollection is that the first special examination of the subject that I made was in the litigation which is reported under the name of Baldwin v. State of Maryland, in 89 Md. and 179 U. S. I made an examination at that time of the subject of res adjudicata because there had been previous litigation respecting the same question in the same two courts reported in earlier volumes of Maryland and of the United States. I afterwards had occasion to examine it with particular regard to the law of New York in the case of Hirshbach v. Bock, subsequently reported in the case of Hirshbach v. Fitzgerald, which is reported in, I think, at least three of the reports of the appellate division, and in the
1233 145th and 157th N. Y. The questions, as I remember, which are considered in those reports are not questions of res adjudicata, but I had to consider the subject for two reasons. The action was an action brought in behalf of a creditor of the Madison Square Bank, suing for himself and others similarly situated, and I had to consider the effect of such a judgment upon the rights of other creditors. That was one of the questions involved at the trial, and the complaint was dismissed by Mr. Justice Stover. His dismissal was subsequently reversed by the appellate division, and his dismissal was subsequently affirmed by the appellate division in the case of Hirshbach v. Fitzgerald, 157 N. Y.; but only seventeen out of one hundred and ten defendants in that case had appealed to the Court of Appeals, and the appellate division had granted a new trial, so that when we came back for a new trial, as I remember it, some of the defendants had not appealed to the Court of Appeals and I had to consider particularly the effect of the judgment of the Court

of Appeals affirming the judgment of dismissal; so that I studied the subject of res adjudicata, at that time, with great care.

I was of counsel in the case of Thorne v. De Breteuil, which is reported in 179 N. Y., and then once more I studied the subject because there the questions were questions merely of the identity of the issues; the parties were the same. I have had occasion lately to consider the subject very carefully in respect to three litigations now pending in my office: the case of Johnson v. Victoria Chief Copper Mining & Smelting Co., where I have had occasion to consider the effect of a judgment on demurrer in New Mexico between the same parties in the same cause of action, and in the case of the bankruptcy of the Randolph American Coal Company, now pending in St. Louis, and in the case of the Slater Trust Co. v. Reed and others, growing out of the failure of the Randolph Company, now pending in the United States Circuit Court for the Southern District of New York, in which there has been a decision on demurrer, though I do not think it has yet been reported in the Federal Reporter. I had to consider in that case the effect of a representative action upon my clients who were not represented on the record in that action, the action being brought by one bondholder in behalf of himself and others similarly situated. My bondholders were pursuing their own actions and had not joined in the particular action before the court. So that I have had those occasions to consider the subject of res adjudicata in its application to the particular question and generally. I have also made a very careful examination of the subject, anew, with respect to the record in the present action.

Q. Can you give me some idea of how much time you have expended on this particular examination with a view to testifying?

A. I was engaged in a desultory way for about a week, in connection with my other duties, giving a portion of my time as fre-
1234 quently as I could, to the study of this subject in its general aspects, but on Friday, as I remember, week before last, I abandoned all other work and devoted myself exclusively to the consideration of this subject, and have been engaged on it continuously ever since to the exclusion of practically all other professional work.

Q. Have you examined a copy of the record in the case of the Old Dominion Copper Mining & Smelting Co. v. Leonard Lewisohn brought in the Circuit Court for the Southern District of New York, on this demurrer?

A. You mean against the executors of Leonard Lewisohn?

Q. Yes.

A. I have.

Q. Have you examined a copy of the record in the present case of the Old Dominion Copper Mining & Smelting Co. v. Albert S. Bigelow?

A. I have.

Q. In your opinion, assuming that the question whether the decree dismissing the bill of complaint against the executors of Leonard Lewisohn is a bar to the present action is a question to be determined by the law of the state of New York, under the law of the state of

New York does that decree of dismissal operate as a bar to the actions against Albert S. Bigelow?

A. I answer that question on the assumption that it is governed by the law of the state of New York; I would not wish to be understood as expressing an opinion that it is, but assuming that it is, then the action in the Circuit Court of the United States, in New York, is not a bar to the present action.

Q. Will you state in detail your reasons for that conclusion?

A. There are two reasons that would lead me to that conclusion, before I reach the general subject of the effect of a dismissal of one suit on the merits on another suit brought against another person in a different jurisdiction as a joint or several wrongdoer or as a co-wrongdoer. I will approach that subject last. The preliminary matters are simpler, and therefore, I think, should be spoken of first. I have considered very carefully the judgment of dismissal itself, and I am not satisfied that that judgment was a judgment on the merits. We have in the state of New York, in our code of civil procedure, sec. 1209, which I understand applies not only to judgments in the state courts, but would apply to judgments at law in the federal courts. I would not understand that it applies to judgments in equity in federal courts, but I am asked to assume that this is construed by the law of New York. On that assumption, if section 1209 of our code of civil procedure is available, then it must appear on the judgment roll itself that the dismissal was on the merits. It is not necessary that the words "on the merits" should appear in the judgment of dismissal, but it is necessary that it shall clearly appear from the judgment roll that the dismissal was on the merits, else it will not preclude the beginning of a new suit for the same cause of action. It was
1235 said in one New York case, as I remember, that the reason for the adoption of section 1209 of the code of civil procedure was that the rule which had formerly obtained at law should also obtain in equity, and that equity decrees of dismissal which formerly would have been construed to go to the merits, unless the contrary appeared, were now to be construed as judgments at law, which it seems were formerly construed as not disposing of the merits of the case, unless it clearly appeared from the judgment roll that the merits of the case had been disposed of. In speaking of the judgment roll, I refer particularly to what we consider the judgment roll in New York. It does not include opinions, it does include the pleadings, the order for dismissal, and the decree itself, and in the case of the present decree it would include the mandate of the Supreme Court of the United States and the decree of affirmance. Without looking at the opinions of these courts, but looking only at the judgment roll—and I have authority for doing that under the decisions in the state of New York, particularly, as I remember, in one of the cases of Genet v. Delaware & Hudson Co., 170 N. Y. 278, and 162 N. Y. 172; also in Converse v. Sickler, 146 N. Y. 200—looking only at the judgment roll, and excluding the opinions of the court, I find what, it seems to me, is undoubtedly true, that this decree, considering the decree below, as well as the decree of affirmance, was a dismissal of this case for want of equity. I would not consider that the dismissal of a case for want

of equity was a complete disposition of the issues between the parties. I think it has been practically so said in the case of Rose v. Hawley, 133 N. Y. 315, a case in which it was said that section 1209 does not apply to bills in equity, citing Genet v. Delaware & Hudson Co., 163 N. Y. In Rose v. Hawley, as I remember, it was said that the dismissal of a bill of complaint in equity does not dispose of the issue, that an action might have been brought at law. And it would seem to me that this action might have been brought at law for damages. It would seem to me that in the new matter on which this action was originally retained to this court, had resolved itself into an action for damages, and I do not think that the dismissal of the case for want of equity would preclude the beginning of a new suit for damages at law.

The second of the preliminary matters which I think I ought to get out of the way is the identity of the parties here; I mean the character of the parties. This is not a suit against Leonard Lewisohn, it is a suit against Leonard Lewisohn's executors; and whatever might be the law with respect to the effect of a suit against Leonard Lewisohn I do not understand that his executors stand in the same relation to Mr. Bigelow that Mr. Lewisohn himself would have sustained. I think my view in that particular is borne out in the case of Thomson v. American Surety Co., 170 N. Y. 109, where it is said, in
1236 effect,—I do not attempt to quote the words,—that a surety is not bound by a judgment against the executors of a trustee on whose bond he became liable. If the judgment had been recovered against the trustee himself, the surety of the trustee would have been bound, but the judgment not having been recovered against the trustee himself, but having been recovered against the executors of the trustee, the court said that the executors of the trustee sustained no trust relation, they sustained no relation to the estate of their testator; that they were merely responsible for the funds which came into their hands, and that in that respect they were not trustees, that they could not have administered the trust, that they could not have accounted for the trust estate except to the extent of the assets of the decedent which came into their hands. So therefore, it seems to me that Mr. Lewisohn's executors were in no sense in privity with Mr. Bigelow and in no sense represented Mr. Bigelow; and in no sense was a judgment in favor of Mr. Lewisohn's executors a judgment of which Mr. Bigelow could avail himself independent of the subject of participation. I will come to the subject of participation later.

Now I come to what I consider the main subject here, so far as it calls for an elaborate explanation. In my opinion, the matter is already disposed of by the two points that I have already made. Assuming, however, for the purpose of the subsequent discussion, that the first judgment was on the merits, and that the executors of Mr. Lewisohn sustained the same position to Mr. Bigelow that Mr. Lewisohn himself would have sustained, I come to the question whether, under the law of New York, the dismissal of the bill on the merits against Mr. Lewisohn would have availed Mr. Bigelow, independent of the question of participation. I think that under the law of New

York it would not have availed Mr. Bigelow. There are a number of decisions in New York which, in my opinion, are still authorities, never have been overruled, which expressly determine that question. There are also a number of obiter dicta in recent opinions of the Court of Appeals which, if accepted as the law of New York, would expressly overrule the contention. There are also, in my opinion, a number of other decisions in the Court of Appeals in New York where the question has not been raised or discussed, which are inconsistent with the principle. I will take those cases up in their order.

There are a number of decisions in the state of New York which contain broad expressions in which it is said that a judgment on the same questions precludes all parties, however interested in the controversy, or interested in the subject matter of the controversy. None of those cases decide the precise question now in issue. Each of those cases was on a different subject, where it is apparent from the
1237 context and the character of the controversy to the mind, that when they spoke of interest they did not refer to the interest of the wrongdoer, or the interest of a man who sustained the same relation to Lewisohn that Bigelow did in this case. I will take up those cases as I recall them at a later stage and show how, in my opinion, each of them is distinguishable from the present case. But I want to show, at present, that the general proposition of those cases, that it affects everybody in interest, is not the law of New York, except as it applies to people having interests which were discussed in those cases. There is one decision in New York, a special-term decision, made on a motion to dismiss a complaint at the trial, on which some people based a conclusion that that case established the law of New York. That case is the case of People v. Stephens, reported in 51 Howard's Practice, decided by Judge Westbrook, at circuit, on a motion to dismiss the complaint. He granted the motion, and he stated, as I read the opinion, that he considered the judgment against the co-wrongdoers binding upon men who had not been parties to the former suit; not binding upon them, but that they could have availed themselves of the dismissal of the complaint. His reasons are reasons which indicate that the principle which he applied was the rule of stare decisis. I think he said that the judgment was an estoppel; he at least said that the judgment was a bar; but his reasons were that any court which would give two different decisions against different parties on the same state of facts would merit eternal infamy. Now that is the expression, in very harsh terms, of the rule of stare decisis, as I understand it. But, notwithstanding the fact that he expressed the opinion that the case was one where the rule of estoppel worked, he elaborately discussed the merits of the cause, and showed that on its merits the cause should have been dismissed and the motion granted. The case was appealed to the Court of Appeals.

In another case the Court of Appeals, in discussing the question of res adjudicata,—I think it is the case of Leavitt v. Walker, 95 N. Y. 212,—said that if a case was decided by a former adjudication, it was unnecessary to discuss the merits of the case. If we were to apply that same rule to the appeal in the case of People v. Stephens, we would immediately jump to the conclusion that the former judgment

was not a bar. There were two opinions in the Court of Appeals. The case is reported in [illegible] N. Y., as I remember. One, the principal opinion, was by Judge Rapallo; the other, a concurring opinion, by Judge Allen, as I recall. Judge Rapallo said that numerous points of law had been raised in the argument, but they would decide the case on the point which they deemed to control it; and then, instead of deciding the case on the ground of res adjudicata or on the ground of stare decisis, they went into a discussion of the merits of the case, and decided that, from the facts of the case, the plaintiff, the
1238 state of New York, had, through the action of its legislature or one of its boards, waived its cause of action.

Now the Court of Appeals has said in one case, I think, in the Moore v. City of Albany, [illegible] N. Y. 236, that a special term decision does not establish the law, and that they will not in a subsequent litigation involving the same facts consider themselves bound to follow the decision of a special term, in a matter appealed because it was not appealed; that they will not consider themselves bound to follow the rule of stare decisis. So that, in my opinion, a special term decision which has gone to the Court of Appeals on appeal, and which has been affirmed for a different reason from the reason assigned below, does not establish the reason assigned below as the law of New York. As far as I know—and I have made very diligent search—there is no case in the state of New York, other than the case of People v. Stephens, in the circuit, which was tried at the circuit—the circuit, formerly, in New York was a court which tried jury issues, issuing out of the Supreme Court, and it was a court of coordinate jurisdiction with what I have styled the special term, which was a term held by one judge for the trial of jury causes—the case of People v. Stephens has never been followed in New York on that point, as far as I know. It was quoted once in New York in another case, but not on that point, but on another point altogether, and was not quoted or cited in the Court of Appeals. So that, I do not understand, should establish the law. On the contrary, I consider that the law is firmly established to the contrary.

The question has arisen in several cases. It arose in the case of Moore v. Tracy, 7 Wendell, 236; in the case of Marsh v. Berry, 7 Cowan, 344; in the case of Lansing v. Montgomery, in 2 Johns., 381. In each of those cases the question was, to my mind, in point, and the decisions are express decisions on this subject.

There have been expressions by the appellate division to the Court of Appeals in other cases which, in my opinion, are a direct contradiction of the principle said to have been laid down in People v. Stephens by the circuit decision. Those cases—

Or, there is another case before I go to the Court of Appeals, the case of Calkins v. Albertson, 2 Barbour, [illegible], where the expression appears to be obiter dictum, also in the case of Atlantic Dock Company against the Mayor [illegible] of New York, in [illegible] N. Y., at page [illegible].

There has been [illegible] decision by the appellate division in the second department of New York, the case of Gittleson v. [illegible], 122 App. Div. 385, where it seems that there was a direct expression to the contrary. My recollection is that the case was affirmed

by the Court of Appeals, but that particular part of the ap-
1259 pellate court decision was not cited or quoted. My own opinion is that the expression there was obiter dictum, although there might be a difference of opinion about that; there might be a conclusion that it was directly involved.

Now, in the absence of controlling authority, obiter dicta, particularly in the Court of Appeals, are guide to the arrival at what is the law. But in view of the decisions in the earlier part of the history of New York, which have never been reversed, and which were of higher authority than the Circuit Court decision in People vs. Stephens, and in view of what I deem other than in the Court of Appeals in New York, decisions [illegible] possible to say that the New York law is [illegible] or mind, it is fairly established in support of my view. [illegible] so far as I know, that the cases which I have cited are all of the cases that have an immediate and direct bearing on the proposition. But I have said that there are cases which, in my opinion, are so far inconsistent with it, that is, so far inconsistent with the decision in People v. Stephens that they practically establish that the law of New York is to the contrary of what was decided by the Circuit Court in People v. Stephens. In the last case which has been reported, so far as I can discover, from the Court of Appeals in New York, the case of St. John v. Andrew Institute, 192 N. Y., a volume of reported cases which is not yet bound, the Court of Appeals had occasion to consider the effect of the reversal of a judgment by the Court of Appeals upon the rights of a legatee, under a will, who had appealed from the judgment. He had not appealed. The Court of Appeals reversed the judgment, or reversed it as far as the appellant was concerned. The question of his rights depended upon the construction of the will. The construction of the will was such that if the appellant's rights were what the Court of Appeals had decided then the rights of his co-defendant, who had not appealed, were exactly the same, because they arose on the same state of facts. Their legacies were similar, and they both claimed under the same document—the will; and the court below had adjudged their rights with respect to the construction which it had given to the will; that is, the Court of Appeals distinctly construed the will, and only reversed as to the person who had appealed. A motion was made by the person who had not appealed,—a motion of remittur,—so as to include him in the reversal and give him the benefit of the action of the Court of Appeals on the appeal taken in the same suit. But the Court of Appeals said, "No, he has not appealed, his interests are several." Now there comes in an illustration by the limitation by the Court of Appeals' decision of the effect of the words which it had used in their opinions that any one interested in the subject matter in dispute could take advantage of a judgment. If that is a prin-
ciple of law, then a legatee whose rights have been involved
1260 in a dispute, and have been adjudged by the court below, has such an interest in the subject matter of the suit that he ought to get the benefit of the reversal as well as his co-defendant similarly situated who has appealed. But the Court of Appeals said,

No; their interests are several, although the interest of the man who did not appeal was not represented on appeal by his co-defendant, who was the appellant." They cited with approval, and as the foundation of their decision and as the precedent on which they relied, the case of Gerrod v. Stage in 10 Howard Practice. That case was a case where two wrongdoers, accused, as I remember, of libel in the same suit, had suffered judgment in the court below. One of them appealed, and the Court of Appeals reversed the judgment as to the appellant, but left it standing as to his co-tort feasor. The co-tort feasor never took the court of appeals—it was not the Court of Appeals we have an intermediate court of appeals now—he never took the court of appeals; consequently—so the court of appeals reversed only as to him making it appear in the decision of the court of appeals that they were of the opinion that the appellant had not established a cause of action. And they reversed against the appellant on the ground that it did not appear from the plaintiff's own testimony that he had any cause of action. In that opinion they said:—

"The interests of these co-defendants are several and not joint. We could not have reversed the judgment if it were joint without reversing it as to all parties whether they had appealed or not. Judgments against wrongdoers being several and their liability being several, and there being no contribution between them, there is no reason why we should reverse as to the co-tort feasor who has not appealed."

Now the Court of Appeals in this very latest case that I speak of, in 192 New York, relied upon that case as a precedent, and quoted the language of that case. I am not sure that that does not establish, as the law of New York now, that a judgment of dismissal against one of two wrongdoers sued on the same state of facts does not avail the other wrongdoer. And that is true, even though it be in the same case; but it strikes me that it is much more true if it be in different cases.

Therefore I say that it seems to me that the cases in New York are inconsistent with any such theory, as well as there being cases which have declared the express contrary.

Further than that, perhaps another dictum, but I do not know that it is a dictum, is a definition of privity which is used by the Court of Appeals in the opinion in Atlantic Dock Co. v. Mayor, 53 N. Y., at page 68. In defining privity in that case, the court cites a definition which it says is taken from the case of Sprague v. Watt, in 20 Pickering in this state. But when we examine the case of Sprague v. Watt, we find that the action was an action against a tort feasor engaged in the same tort, and that the court of Massachusetts decided in the case, it was stated in that case that it was admitted that if the defendants were guilty they were equally and jointly guilty. In that case the defendants were not sued jointly, they were sued severally, and the cases came on for trial together on the same state of facts. It was admitted at the trial of the two cases tried together that if the defendants were

guilty they were equally and jointly guilty. One of the questions in that case which was a case for a trespass, quare——

Mr. HEMENWAY: ——clausen fregit.

THE WITNESS: I have not used that phrase for so long I cannot quote it; we do not talk Latin much in the New York courts.

The question at issue in this case was whether the place where the trespass was committed was a public highway. It had previously been decided in the case of one of the tort feasors that the locus in quo was a public highway, therefore he was not guilty, could not be guilty of a trespass against the plaintiff's right. A judgment was introduced against both defendants, or was introduced in the case which were tried together; but your court in the two cases held that the judgment in the circuit against Wait was a bar against the man, with respect to the man, who had been previously tried, but was no bar against the man who was accused of having committed the wrong with him; and so the court on review, as I remember, reversed the judgment as to one of the defendants and affirmed it with respect to the other. Now the question there, is how far, by citing a Massachusetts case as authority or precedent for the definition of privity, the Court of Appeals of New York adopted with it the exception from the definition. My idea is that if a court refers to a case for a definition, and the case defines the word, and then says that the facts before it do not come within the definition, that in adopting that decision as a precedent the Court of Appeals of New York also decided that the case which the court of Massachusetts held did not come within its definition of privity, was not within the definition of privity and that was henceforth to be understood to be in New York.

Not only that, but similar cases arise in New York in the citation by the courts of New York of Litchfield v. Goodnow, 123 U. S. My recollection is that, in the case of Litchfield v. Goodnow, the Supreme Court of the United States decided that participation in an action did not amount to such representation in the action that a party would be bound merely because of his participation. That case has been cited with approval in New York, again, as I remember,
1242 in the case of definition of privity. So that it might well be contended that by adopting the definition of privity as used in Litchfield v. Goodnow, the Court of Appeals of New York had also adopted the exception. The case in which Litchfield v. Goodnow is cited as a precedent for the definition of privity is the case of Williams v. Barclay, 165 N. Y. 48.

So it seems to me that it is clear that the law of New York is not established to the contrary of what I say; it also seems to me that it is established affirmatively as I say, for the reasons which I have mentioned. If my reasons are not good, my opinion is not good.

Now as to what the law of New York is. It is not peculiar, it is to the effect that parties and privies are estopped by a judgment in which the same question was litigated or might have been litigated. Now and again the Court of Appeals has at times used the expression "might have been litigated," and at subsequent times has

spent its time in explaining what it meant by "might have been litigated." The latest case in which it limits the expression "might have been litigated" is the case of Earle v. Earle, 173 N. Y. 480. It was not a tort case; it was tort in one sense, because it was a suit against delinquent trustees for an accounting, and the various beneficiaries of the trust were made parties to the suit. Two of them appeared, asserted their interest in the trust, and asked for an affirmative judgment; the third appeared and defaulted; she asked for no affirmative judgment. Finally judgment was entered in the case, but it did not grant this defendant any relief, the defendant who had defaulted. It did grant the defendants who had claimed affirmative relief a money judgment against the trustees for the amount of their share in the estate. Subsequently the defendant who had suffered a default, but who was a party to the former litigation, brought suit against the trustees for an accounting of her share of the estate. But she was immediately met by the defence: "Why, while your rights were not litigated in the former suit, they could have been litigated; you were made a defendant for the purpose of presenting your rights, and you didn't do it; now you are barred." But the Court of Appeals said, "No, she didn't have to litigate her affirmative rights in that case, that she could suffer a default without barring her rights, and could re-litigate them." That is an extreme illustration. There is another case where a woman was made party to a suit to foreclose a mortgage. She defaulted; the property was sold subject to her dower. The purchaser took a deed of the property subject to her dower. After her husband's death she brought suit to admeasure her dower, and the purchaser defended on the ground she was not entitled to dower. And the court said her dower was not litigated; it might have been litigated, but it was not essential to any of the issues that
1243 were raised by the parties. By the way, I have not given a reference to the latter case, but I will; I will find it and give it later.

So it very clearly appears that the two phrases, "interest in the subject matter" and "might have been litigated," are used with respect to the particular cases before the court, and have not the same meaning as they would have if used popularly, and none of them decide the present situation.

Now it is not all privies who are bound. In Campbell v. Hill, 16 N. Y. 575, there is a discussion of cases in which privies are bound and why they are bound. It is there stated that whether a privy is bound depends in each case upon the character of the privity. It is rather difficult, in the short time at my command, to classify all of the cases in which persons have been held to be privies to a judgment; but, as a general thing, they are people who are represented in the action by a party to the action, or whose interest is represented in the action by a party to the action, or people who are indemnitors of a party to the action, or have undertaken to indemnify against the result of the action; or people who subsequently take the same property which is involved in the action and take it with the rights which have been decided by the action, or people who sustain the

relation to each other of principal and agent, master and servant, principal and surety, indemnitor and indemnitee, and similar relations, where either there is a responsibility over or there is a union of interests in the question decided, and where the persons' rights will be adjudged in the case. But none of the cases which I have considered—and I have not considered a very great many—extend that doctrine to co-wrongdoers; they are all people where the judgment works as an estoppel, I mean as an estoppel between the parties, —they are all people who sustain relations to each other than that of equal wrongdoers. There is a class of cases where people who are responsible for wrongdoing are regarded as estopped or entitled to take advantage of the cases of other wrongdoers, or of the actual wrongdoer, but those are invariably cases where somebody is responsible for the wrongdoing of another and has not himself participated in the wrongful act. Every one of the cases to which I refer will be found to come within that category. A type is the case of Featherstone v. Turnpike Co., in 71 Hun, I think, page 109; but there are several other cases in the state of New York and in the Court of Appeals. The Court of Appeals cases, as I remember, all have to do with municipalities, and the principle was first established with respect to municipalities, that a municipality having a right of action against an actual wrongdoer was in such privity with him that it was affected by the judgment, a judgment that no cause of action existed against the wrongdoer.

1244 There is a class of cases where judgments operate against strangers, but those cases are all cases where the judgment is the ascertainment of a fact, and the fact is not the entire subject of litigation, but is merely part of the subsequent action. They are well illustrated, first, by the cases where the question in a subsequent action is whether a man sustained the relation of principal and agent to another man, or whether two people sustained or now sustain to each other the relation of husband and wife, and the judgment establishing the relation between the two parties is held to be the best evidence that the relation exists; it is not put on the ground of estoppel, it is put on the ground that the judgment is the ascertainment of that particular fact between the two people who were most interested in the fact. There is another class of cases where a man having been defeated in a suit, or having succeeded in a suit, is subsequently himself estopped from offering the effect of that judgment in a suit against entire strangers. The reason for that is that the man has once chosen a position which is inconsistent with the position that he now assumes. Illustrations of that are cases where a man sues for conversion. Under the doctrine of the law, when the judgment is entered, the title to the property passes to the judgment debtor. After that, he is no longer the owner of the property, and he could not recover against a stranger for a trespass on or damage to the property, because he could not prove that he was the owner of the property. He has had the litigation with the man as the result of which the title to the property actually passed; but the judgment is not to operate as an estoppel except it proves the fact that the man no longer has title to the thing with respect to which he sues. So if a

man assumes an absolutely inconsistent position and sues with respect to the state of facts which he alleges to exist, and recovers in such a suit, he cannot afterwards, in respect to a stranger, take a position which is at variance with the position he took in the first place; that is because it is in the nature of a conclusive admission against him that the state of facts which he now alleges does not exist.

There is a class of cases where a man is not bound by a judgment because he has contracted to pay the judgment. In such cases our courts hold that he is bound by the judgment between third parties because he has undertaken to pay that judgment, and in such cases he is not entitled to notice of the action.

Now I come to the subject of the effect of participation. I find no decision and, in my opinion, it is not the law of New York that mere participation in an action binds the party participating. There are numerous cases to the contrary. The strongest case to the contrary is that of People v. Knickerbocker Life Ins. Co. in 106 N. Y., where the receiver of the Knickerbocker Company actually partici-
1245 pated in the Supreme Court of the United States in a suit against the life-insurance company, and asked the Supreme Court of the United States to amend its former determination so as to permit the action to be tried over again, and on his application the United States Supreme Court did it, and the case was subsequently tried, went by default, there being nobody to represent the corporation at the trial. That judgment was pleaded against the receiver. But the Court of Appeals said that participation in that manner by the receiver was not such a participation in the action,—that he was not bound by the result of the action.

(By Mr. HEMENWAY:)

Q. One moment. In regard to participation, was that included in your question?

A. I am asked to examine the record, and the record alleges participation, as I remember. My recollection is that the record in the amended, new supplemental answer here expressly alleges participation.

Mr. HEMENWAY: It does, and I was mistaken in supposing you referred to looking at that record. I thought you meant the record in New York.

The WITNESS: No, the record in this case.

Mr. McCLENNEN: Perhaps that was my fault, but I intended to put it once for all.

The WITNESS: I understood I was to refer to both records in order to discover what the effect of the New York case was on the Massachusetts case, and I could not express an opinion with reference to the effect of the New York case without knowing what the Massachusetts case was too, so I have read both records and am answering with respect to both records.

Every case that I have found where participation played any part in the result is a case where a man had a right, which the law allowed him, to appear and protect his interests. I do not understand

that Mr. Bigelow here had a right to appear for the protection of any interest. My reason for that is that it is the law of New York that there is no contribution between wrongdoers. It is also the law of New York that the satisfaction of a judgment against any wrongdoer is a complete satisfaction of the entire cost of the case, although a mere recovery against one wrongdoer is not a complete satisfaction of the cause of action, but you can have as many recoveries as there are wrongdoers, and not one will bar another. When I speak of recovery, I mean the entry of the judgment as distinguished from its satisfaction. Therefore I consider that Mr. Bigelow had no interest to protect in that suit. And having no interest to protect, the suit was inter alios, and he had no right to interfere; bearing in mind also, that the thing here which was in litigation were the assets of the estate of Leonard Lewisohn. Leonard Lewisohn had no right to contribution from Bigelow. His executors, if they had paid the judgment, would have no right to appeal to Bigelow to con-
1246 tribute. And so Bigelow had no interest in the subject matter of the dispute. He had, perhaps, a praiseworthy desire to get a decision as a precedent in litigation. But I have already referred to the case of Litchfield v. Goodnow, where mere participation in the duties did not amount to participation in the suit. Bigelow was not interested except so far as he wanted to get a precedent in the suit out of the state rather than going into it, because recovery in that suit and payment by the executors of Leonard Lewisohn would have extinguished the cause of action. So that I cannot understand, and I am not of the opinion, that Bigelow had any interest to protect in that suit. Our Court of Appeals has distinguished between an interest in litigation and interest in the event of the litigation. It has done so in this very case of St. John v. Andrew Institute, in 192 N. Y., and it is illustrated by reference to a case where a judge is disqualified from sitting in a case because of his interest. If he merely has an interest in the determination of the question as a question of law, he is not, as a matter of law, disqualified from sitting in a case. Now the law of New York is that all the persons who are bound or affected by a judgment are those who have an interest to protect in the action and the rights secured to them by the law to appear in the action. I think Mr. Bigelow had no right in this case, because he was not liable with respect to any possible recovery in this case, and this judgment would not have affected him in any possible way. I think he had no interest to protect. He had no interest in this case, and he had no right to appear in this case because there was no contribution in this case. He was not in any sense represented in the case, his interests were not involved in the action, and he was not a necessary party in the case.

I have tried to discover, in my own mind, why strangers are not bound by litigation. The rule used to be——

(By Mr. HEMENWAY:)

Q. One moment. Is that in answer to the interrogatory?

A. Yes, I think it is. There are two reasons, and those reasons have been used by the Court of Appeals in New York, and I think they have a direct bearing. I may not have so phrased it that you can see

its bearing, but I think I will come to it in an instant. One reason is that strangers have had no day in court, but that is only one reason. The other reason is that there must be mutuality. Mutuality, as I understand it, is, if the judgment had gone the other way, it would have been operative in favor of the person who in that event would have been a successful party. It has been established many times in New York that in order for a judgment to be an estoppel it must be mutual. The cases are—

Nelson v. Brown, 144 N. Y. 384.
Collins v. Hydon, 135 N. Y. 320.
1247 Masten v. Olcott, 101 N. Y. 152.
Moore v. Albany, 98 N. Y. 396.
Remington Paper Co. v. O'Doherty, 81 N. Y. 474.
Atlantic Dock Co. v. Mayor, 53 N. Y. 64.
Booth v. Powers, 56 N. Y. 22.

And any judgment here, in my opinion, would have lacked the element of mutuality. I do not think a judgment recovered here in favor of the plaintiff would have had any effect whatever upon Mr. Bigelow. Here the element of mutuality was lacking. And all the cases that I have cited decide that mutuality is an effectual factor in estoppel by judgment. Mere inconsistency between the results reached between strangers in respect to the same state of facts does not make it a rule that a judgment must be an estoppel. Where the litigation occurs in the same court, the court will adopt the rule of stare decisis, and will apply the same principles of law to the same state of facts. In passing on the subject of interests in the litigation, as distinguished from interest in the event, as where no property rights are really involved, I cite the cases of—

Collins v. Hydon, 135 N. Y. 329.
Eisenlord v. Clum, 126 N. Y. 552.
Wallace v. Strauss, 113 N. Y. 238.

The case of Collins v. Hydon, 135 N. Y. 320, is an interesting, and I think a pertinent, case here. There, in a former suit, an individual *had* [was] made an assignee for the benefit of creditors. He himself was a judgment creditor. He sought to set aside a previous conveyance of the property as a fraud, and he was defeated on the issue of fraud, and it was decided in the first case that there was no fraud. Of course he could not set aside the deed, for it was not a fraud. In that suit he was assignee for the benefit of creditors, and sued as such. He subsequently brought suit in his own right as judgment creditor to set aside the deed, and he was met with this judgment; and yet the Court of Appeals held that he was not precluded by the former judgment because it distinguished as between his interest as assignee for the benefit of the creditors and his individual interest in the second suit, and he was not precluded on the question of fraud by the prior judgment. Yet it is difficult for us to distinguish actually between a man appearing in court in a representative capacity and appearing in court in an individual capacity where he has an interest in the same question, the

question of fraud. Yet the court held that his participation
1248 as assignee for the benefit of creditors, his actually being the plaintiff for the benefit of creditors, did not bind him on the judgment when he sued subsequently in his own individual capacity. Now the reason for that is, and it is established by a long line of cases, that the issues must be identical.

And now I come to the identity of issues. A vast majority of cases in New York in which the question of identity of interests has arisen, are cases where there was a dispated fact; but in the New York case against Lewisohn's executors there was no disputed fact; the facts were all admitted, so that we must consider what the issue was. The issue, as I understand it, is whether a cause of action had been stated against the executors of Leonard Lewisohn, and it was decided that no cause of action, in equity at least, had been established against the executors of Lewisohn. But I do not understand that is the issue here. I understand that the issue here is whether there is any cause of action against Bigelow; and there being no representation of Bigelow by Lewisohn's executors, the issue is not the same within my understanding of the authorities of New York with respect to the identity of issues. One rule which the New York authorities lay down for the purpose of determining the identity of issue is whether any additional evidence would be necessary to establish a second cause of action. If additional evidence would be necessary to establish a second cause of action, then, as a general rule, the issue is not identical. I understand additional evidence of facts, requiring additional proof, are alleged by the amendment in this action, in the Massachusetts action, to the original bill of complaint, setting up additional facts. If those additional facts are material to the present issues, then the present issues have not been decided in the prior judgment in accordance with the practice and decisions which I understand to be accepted in New York. I do not think that the liability of Mr. Bigelow could have been determined on the pleadings in the New York action. That is an additional reason why, to my mind, the issues in the New York case were not identical with the issues here. Nor do they come within the proposition that they might have been litigated. They might not have been litigated on the record as it was made. It is possible, perhaps, that if Mr. Bigelow had asked to be admitted as a party, he might have been admitted; I cannot tell; I do not know. I do not think it would have been optional with the court to have admitted him, because I do not think he had any interest to protect, and I doubt if he was even a proper party to the New York suit, and I think the court, even if he had sought to have been admitted, would have been justified in refusing to admit him, because there was no issue made with him; there was no pursuit of him, and none of
his property was in litigation in that suit, but all of the
1249 property which would be affected pending the result of the suit was the assets of the estate of Leonard Lewisohn in the hands of his executors.

Now I come to the question of representation. It is a rule in New York that if a person is represented in a suit and his interests are

adjudicated, or the interests of his representative are adjudicated, that the adjudication binds his interest, so far as it is represented. But I do not understand that there was any interest represented here. I have repeatedly said that in my view, sustained, I think, by the decision of the Court of Appeals in Thomson v. American Surety Co., 107 N. Y., in no sense did the executors of Leonard Lewisohn represent any interest of Bigelow's. They were not his trustees; they did not have any of his property in their hands; all the property was the estate of Leonard Lewisohn, and they had no right of contribution against Bigelow. The mere fact that their testator at a previous stage in his existence had been trustee for Bigelow,—if he were trustee for Bigelow,—I am not sure that he was trustee for Bigelow; he may have been trustee; after he acquired the property he may have been trustee, not for Bigelow, but for this plaintiff corporation. If the plaintiff corporation had been formed and had not been constituted of the same individuals, it could have enforced the administration of the trust in its favor without bringing Bigelow into the suit. So I very much doubt whether Leonard Lewisohn was ever trustee for Bigelow, because he had none of Bigelow's property in his hands. The stock was delivered not to Lewisohn, but to Bigelow, so that Lewisohn was never accountable for any property to Bigelow.

I don't doubt—I do doubt, for the reason I have stated, I doubt if Lewisohn, at any time, was trustee of Bigelow. But if we should assume that Lewisohn was at any time trustee for Bigelow, that trust was fully administered, and no longer did any property of Bigelow remain in his hands, and he could not recover of the trust property; he could not reimburse himself out of the trust property, because he did not have any of it in his hands. In order to do so, he would have had to sue somebody else, and then he would have run up against the principle of no contribution against wrongdoers. As bearing on this question I cite the case of Russell v. McCall, 141 N. Y. 455. It is true that our code of civil procedure, section 449, provides that the trustee of an express trust can bring a suit with respect to the trust without suing the beneficiaries of his trust. In the first place, that is an express trust. In the second place, it does not in terms apply to plaintiffs; it may have been judged to apply to the defendants as well. I understand that there is some little contention that it does, but be that as it may, I do not think it can possibly be contended here that any statute of the state of New York has any
1250 effect upon the proper or necessary parties, or with a suit in equity in the federal court in New York. So I dismiss that section 449 of our code without any more talk on that subject, because I think it is plainly inapplicable to a suit in the federal court, and that our courts have distinguished between a suit on contract and a suit against a contract. I made that distinction in the recent case of Cassidy v. Sauer, reported in 114 Appellate Division, and affirmed in the Court of Appeals; I think the affirmation was in 187 N. Y., but perhaps that was at a later stage of the case. The appellate division there made a distinction between suing on a contract and suing in opposition to a contract, suing to set aside the contract.

In that case, the president of a corporation had bought some land in his own name with the funds of the corporation, and admitted that he held it as the property of the corporation. He made a deed under seal in his own name, and subsequently he brought suit to set aside the deed on the ground of fraud. He did not bring suit in his individual capacity, he joined himself as trustee of the corporation for which he was trustee as co-plaintiff, and he was met with the rule that nobody can sue on a contract under seal unless it is the person whose seal is affixed to the document. But the appellate division said, in effect, "That applies, it is true, to suits on contract, but it does not apply to suits against the validity of a contract. Anybody who is defrauded by a contract can bring suit as plaintiff to set aside the contract." So, also, I think, here. The plaintiff was not suing on the contract, but he was suing to recover to get an accounting, to recover damages, for a fraud which was practised in procuring this contract. I think he would have had a right of action at law without reference to equity at all, but if he resorted to equity, then he must offer to restore what he received. In doing so, it would be incidentally part of the action to ask that the contract be rescinded. But it was not necessary to recovery or to the assertion of the rights of the plaintiff that the contract should be rescinded. That is illustrated by the former decision in this case, and the law of New York would not differ, as I understand it, from the law here.

I have said that there is no right to contribution in equity. That is established by the case of Gridley, Rec'r, and Life Ins. Co. v. Finck et al., 173 N. Y. 455.

Mr. HEMENWAY: One moment.

The WITNESS: I see a mistake which I myself have made there, when I say no right of contribution in equity. I mean no right of contribution in equity between wrongdoers, and I had not previously cited authorities for that statement. I have come to it in my notes, and I wish to cite the authorities for that statement.

Mr. HEMENWAY: The part of your answer to which I ob-
1251 ject is that where you said there is no difference between the law of New York and the law of Massachusetts. He is an expert simply on the law of New York.

HAMMOND, J.: Cannot you state what the law of New York is without comparing it with the law of Massachusetts?

The WITNESS: If your Honor please, I have referred not to the law of Massachusetts as that law is generally admitted, but I have referred to the decisions at the earlier stage of this record as shown on the record. That was what I was referring to.

Mr. HEMENWAY: Your Honor will save my objection.

HAMMOND, J.: The question here is what the New York law is, and I doubt if we get along much if you say it is the same there as it is here. You may state what it is there, and we will take care of what it is here.

Mr. HEMENWAY: That is why I asked that that part of his answer be stricken out.

HAMMOND, J.: It does not give us any idea of what you think

the law of New York is by saying you think it is the same as it is here. We don't care to know what your idea of the law here is.

The WITNESS: I do not think it is material to what I have said. I have endeavored to give you my idea of the law of New York without comparing it with the law of Massachusetts. If I inadvertently fell into a comparison, I do not think it is material to my answer.

HAMMOND, J.: Very well. You may consider that your saying that the law of Massachusetts is the same as the law of New York is not to be regarded as giving us any light as to what the law of New York is.

The WITNESS: There was no partnership here between the executors of Lewisohn and Mr. Bigelow; if there had been, I think that question is disposed of by the case of Booth v. Powers, in 56 N. Y., where it was said that a judgment obtained against one of two partners in a previous action with respect to the same state of facts was not binding upon his surviving partner when the surviving partner was sued after his death. Mr. Lewisohn was not sued here as trustee for Mr. Bigelow; he was sued as a wrongdoer. The New York cases, some of which I have cited, distinguish between a man sued in his individual capacity and a man sued in his representative capacity, and they hold that if a man is a party to a suit in a representative capacity, he is not bound in his individual capacity. They distinguish between his individual capacity, although he is interested in the same question, and his representative capacity. Now

1252 Lewisohn's executors here were not sued in any sense in a capacity as representing Mr. Bigelow; they were sued as having part of the assets of the estate of Lewisohn in their hands, and to the extent that Lewisohn's estate was liable either to his legatees or next of kin or creditors; they would have represented those persons or that class of persons, to the extent, however, only of the assets in their hands or of claims against the estate of Lewisohn. But as Lewisohn had no claim against Bigelow for contribution, Bigelow had no claim against Lewisohn for contribution, and Bigelow, therefore, is not a creditor of Lewisohn, and could not be represented by Lewisohn's executors. We did not ask the return of any trust property from Lewisohn. I say "we;" I mean the plaintiffs here. They did not ask the return of any property held by him in trust, but only that he should answer for a wrong.

Now there is another feature of New York law which I do not think I should neglect. It is the law of New York that two estoppels of contrary effect set the matter at large, and that principle is declared in Shaw v. Broadbent, 129 N. Y. 114. I have assumed that in looking at the record of the case I could consider what the Massachusetts court has hitherto done in this case, as shown by the record, and for that reason it seems to me that proposition of New York law is pertinent in this answer. The plaintiff in the former suit did not attack Lewisohn's title to any trust property, nor his beneficiaries' title to the trust property. It is shown affirmatively that the trust relation had ceased before the suit was instituted. And this affords additional reasons, to my mind, for concluding that

Lewisohn's executors did not, in any sense, represent Bigelow in this suit.

Now, reverting to the condition of the record in Massachusetts, I think it is pertinent to say that, under the law of New York, the law of the case as established by the Court of Appeals in the case governs later. If the Court of Appeals in a case has once established the law in the case, and the case is sent back for a new trial, the court below cannot disregard the law as established by the Court of Appeals. That was established in Genet v. Delaware & Hudson Co., 2 Appellate Division, 491, and 14 Appellate Division, 177. In that case the Court of Appeals, on a demurrer, had construed a written contract and had given leave to amend. Subsequently, the pleadings were amended, but the contract was the same. It being contended that the contract should be construed in accordance with the law of Pennsylvania, evidence of distinguished justices of Pennsylvania was taken with respect to the meaning of the contract in Pennsylvania on appeal to the appellate division. The appellate division held it was not proper in the cause at that stage to take evidence as to the meaning of the contract, the Court of Appeals having construed the contract, it being a question of law how the contract should be construed.

1253 That is my answer.

(By Mr. McCLENNEN:)

Q. Have you examined the authorities cited by the various witnesses for the defendant on this subject of New York law?

A. I have examined all of those authorities which were brought to my attention; whether any additional authorities have been cited on this proposition I do not know.

Q. Will you refer to those authorities, and state, in your opinion, under the New York law, their bearing upon the issue?

A. The case of Pray v. Hegeman, 98 N. Y. 351——

Mr. HEMENWAY: One moment. I don't see why his construction of the cases in New York is competent.

Mr. McCLENNEN: It is my supposition, if your Honor please, that the law of New York depending upon the text of adjudicated cases, the opinion of no expert presented to a Massachusetts court accustomed to deal with the interpretation of cases is of the slightest importance. But if it is so important as to call for the introduction of one dozen opinions on the part of the defendant, then I think I must proceed on the theory that some one may consider it important. If the opinion of a New York lawyer is important in determining what those cases amount to, then it is important in determining what the cases cited by the other side amount to.

HAMMOND, J.: I will take the same course here as I have in the taking of the testimony. If you think it is not material, Mr. Hemenway, I will note your objection.

Mr. HEMENWAY: It will do no harm to note my objection and exception.

HAMMOND, J.: The stenographer will note your exception to the testimony of this witness' interpretation of those New York cases

and their bearing upon the question and their bearing upon the issue before us. That is a fair statement to make?

Mr. HEMENWAY: I think so.

HAMMOND, J.: I, myself, am a good deal of the opinion of Mr. McClennen, that it is not of any consequence, but if he thinks it is, you cannot tell how I or anybody else may think at the time of the argument.

The WITNESS: Shall I proceed?

HAMMOND, J.: If I have properly stated your objection and exception.

The WITNESS: The case of Pray v. Hegeman, 98 N. Y., 351, was a case——

(By Mr. HEMENWAY:)

Q. One moment. Is that a case that you say that we have put into the case?

A. Yes; that is one of the first cases cited by Mr. Byrne, Mr. Olney, and several others.

Q. Then they are cases that are referred to in the depositions?

HAMMOND, J. I understood the question to refer to those in the depositions.

1254 A. I have not heard the depositions read, but these are cases which I was told were in the depositions.

[The question put to the witness was read by the stenographer.]

Mr. HEMENWAY: So that he is to interpret the authorities that are cited by the witnesses in support of their opinions?

HAMMOND, J.: Well, that I understand to be the question. If I were sitting here and passing, as ordinarily I am, upon the admission of evidence, I should rule it out, but I let it go in, as I have done several times before. I agree with Mr. McClennen, that I do not think it is of the slightest consequence. Therefore, subject to your exception, he may proceed to answer the question.

Mr. HEMENWAY: One moment.

HAMMOND, J.: Is it your purpose to have the witness go over seriatim these various cases?

Mr. MCCLENNEN: That was my intention, your Honor. That is, it being obviously a question that is dependent upon the decisions in New York, it seemed to me that the value of the depositions presented by our opponent is most clearly shown——

HAMMOND, J.: You are asking this witness to interpret the language of the courts of New York, and that is to be determined by whom? Suppose a dozen of the counsel, skilled in New York law and practice, come in here and put their interpretation upon it, do you think this court will pay any attention to that interpretation of the language?

Mr. MCCLENNEN: As I said before, I should suppose not, but that is all that any of this evidence is. There is no law in New York except the language contained in the decisions.

HAMMOND, J.: There is a great deal more.

Mr. McCLENNEN: The conclusions to be drawn from that language are best to be determined by an inspection of that language.

HAMMOND, J.: Well, he has given his idea of the law of New York. However, as I have said once or twice here, I have not been going on as I should if I were sitting with a jury, and if you desire to put it in, I am going to let it go in subject to Mr. Hemenway's exception that it is immaterial, and of no bearing upon the question.

Mr. McCLENNEN: If I am not imposing too much upon the court.

HAMMOND, J.: If I remember rightly, there is a long list of authorities.

Mr. McCLENNEN: Yes, there is.

HAMMOND, J.: Do you expect this witness to dissect those cases?

1255 Mr. McCLENNEN: I think the length of the list of authorities is much greater than their pertinency to anything that the witness has said, therefore the discussion will be very short in most instances, and I doubt if, after the case of People v. Stephens is disposed of, there is any case in the list that requires any lengthy comment.

HAMMOND, J.: Well, let him be as general as he can and still answer the question, and he may go on.

Mr. HEMENWAY: It is the very generality that is objectionable. The opinions speak for themselves. He is not to give an epitome of what is in the case; that is like putting on a lawyer——

HAMMOND, J.: I agree with you as to that, but the other side want to do it, and I think if counsel stands up in good faith and says that the exigency of the case may, in some aspects, require this testimony, I am inclined to let it in.

Mr. HEMENWAY: Subject to my objection and exception.

(By Mr. McCLENNEN:)

Q. Mr. Boston, I will ask you to bear in mind the suggestion of the court to make your distinguishing remarks as to each case as brief as you possibly can, so that it may be in the nature of a communication to the court on the scope of the case.

A. In the case of Pray v. Hegeman, 98 N. Y., 351, it was determined in that case, first, that Hegeman was sued as executor in his representative character. The presumptive remaindermen were parties. It was held that that judgment was available to those beneficiaries interested in the estate to the extent that those not in esse at the time of the suit were represented by the presumptive remaindermen, and that the creditors of such persons were bound by the estoppel of their debtor with respect to his interest or alleged interest in the estate. That was not an action in tort, but an action to determine the interest of the debtor in the estate.

(By HAMMOND, J.:)

Q. I understand on that ground you throw that case aside?

A. I throw all these cases aside, for the reasons that I shall state as not being pertinent to the present inquiry.

Jordan v. Van Epps, 85 N. Y. 427; that was the construction of

a statute in New York providing for partition of real property. The widow of one of the parties was a party to the action, that is, the widow of the former owner was a party to the action, and could have set up her right.

Mr. HEMENWAY: One moment in regard to this. I understand that these are some cases that you have put in evidence.

Mr. MCCLENNEN: These are cases that your witnesses based their opinions upon in their depositions.

1256 HAMMOND, J.: The question calls simply for cases on which your witnesses based their opinions.

Mr. HEMENWAY: Is not this a case of yours that is referred to in this list?

Mr. MCCLENNEN: I dare say that every case that any witness has referred to is on that list, as well as every case referred to by this witness. I intended to have it so, because I wanted to have in the record all the authorities which any of your witnesses have referred to. This case was in evidence by one of your witnesses before it was put upon my list. If there are any of these cases that you do not rely upon and do not think back up your witnesses' opinions, I do not care to have them distinguished, but I assumed that your witnesses based their opinions upon the cases which they cited, and I think, in order to give value to those opinions, it is proper that I show what they amount to.

Mr. FARLEY: May it please the court, our objection which we wish to have put upon the record is this: that in order in part to limit the scope of the inquiry now and hereafter we put in a strictly limited list of cases. This did not include a vast number of those which the plaintiff has put in. Now, among the cases cited by some of our witnesses, there are cases which we have not put in evidence except in so far as they are referred to by our witnesses, and we understand that does not put them in evidence. Some of them, without committing myself to any expression of opinion, may be merely taken to be arguendo by the witness. But we do object to their putting on their witness to explain away cases we have not put in and that they have. For instance, this case of Pray v. Hegeman, as I understand it, is a case that they have put in evidence. Now they put this man on to distinguish, discuss, or dissect it, and it is on that ground that we wish to have our objection noted.

HAMMOND, J.: I do not think there is any need of any answer. Whether these cases have been cited by anybody or have not been cited by anybody, whether they have been relied on by witnesses called by the plaintiff, I do not think this evidence that is now going in is of any materiality; I do not think it is pertinent to any issue raised by this answer. But counsel for the plaintiff is desirous of taking any advantage which they may be entitled to, and if it does become material he desires to have it go in. It must go in now if it ever goes in. Your objection may be noted, and the evidence will go in. You have limited your objection much more narrowly than Mr. Hemenway did.

Mr. FARLEY: No, sir. I wished to add that specific objection in addition to the objection of a general character. I ought, perhaps, to

state, in further explanation, we do not question their right to put in these cases.

1257 HAMMOND, J.: I think the fact that they have already put them in is entirely immaterial on the question whether they may be put in evidence, provided that they have been put in by you or relied upon by any witness.

Mr. FARLEY: We submit it is simply like a party putting in evidence and then putting on another witness to explain it away; and so it is immaterial.

HAMMOND, J.: I will save your exception. You may go on.

The WITNESS: As I say, the case of Jordan v. Van Epps, 85 N. Y. 427, construed the partition statute of the state of New York as intended to cut off an inchoate right of dower, and therefore the widow, who was a party to the suit, whose dower was not provided for in the suit, was bound by the judgment and could not subsequently set up the right of dower, because she was an actual party to the former suit.

The case of Smith v. Smith, 79 N. Y. 634, is a mere memorandum of opinion, but as far as appears from the opinion the party in the second action had previously been called on to defend the previous action, and did so. He was assignor, and the defendant in the previous action was liable to him.

The case of Clemens v. Clemens, 37 N. Y. 59, was an action to partition lands which had formerly been set off in partition suit to the present owners. The petitioner in the second suit refused to plead for descent in title. The parties interested in the second action except the petitioner were before the court in the former action, except that contingent remaindermen and persons not in esse at the time of the former action were held by the court in the second action to be represented by the persons who were before the court. It was there said that the previous decision was directly in point and was conclusive on the parties, and those claiming under them, with respect to the whole matter, and came within the legal purview of the original action, and that every one in the second action claimed the identical property which was the subject of the first action; and the decision does not extend to persons who are not parties and not privies; and it does decide that the same point must be in issue in the previous action.

Doty v. Brown, 4 N. Y. 41, was an action in replevin, and the right of one of the parties depended on the validity of a bill of sale; the question of fraud in the bill of sale had previously been tried between the same parties. The bill of sale was the same, but the goods in the replevin were not the same as those previously replevined; but the question as to the validity of the bill of sale was the same in the two cases, and the parties to the two actions were identical.

Griffin v. Long Island R. R. Co., 102 N. Y. 449. There the plaintiff had sued previously in two capacities which he had
1258 as receiver of the Long Island Railroad. He subsequently sued in the same capacities the trustees for the same property, and the validity of his appointment was in issue. It had been in

issue from the previous case, and the court held that the parties were bound by the determination in the previous case; it determined that the issues were the same.

In Campbell Printing Press & Manufacturing Co. v. Walker, 114 N. Y. 7, it was said that estoppel extends to every material matter within the issues expressly litigated and determined, and also to matters not expressly determined, which were, in fact, in the thing expressly stated and decided, although not actually litigated or considered. That is a general statement, and is not made with respect to the controversy now before this court on these records.

In Thomson v. Sanders, 118 N. Y. 252, it was held that parties were barred by previous judgments between them, establishing the construction of a bond issued already in a second suit.

I have examined the case of Henry v. Allen, 151 N. Y., at page 1, but I do not find that it appears to be pertinent in any respect, and I do not know whether the citation was a correct one or not.

Earle v. Earle, 173 N. Y., at page 480. I have already referred to that at length. It merely limits the general expression "might have been litigated," as used by previous opinions of the Court of Appeals.

I have previously said that I would later give the citation of the case where a widow sued a second time for her dower, although she was a party to the first suit. That case appears to have been the case of Mallory v. Horan, 49 N. Y. 111.

I have already referred to the case of Featherstone v. The President and Directors of the Turnpike Co., 71 Hun, 109. That was a case where the plaintiff in an action for negligence against the turnpike company was held to be estopped by a judgment in favor of the wrongdoer against the same plaintiff, on the ground of contributory negligence. The former defendant and the present defendant were not joint wrongdoers, and the rule that one wrongdoer could not recover against another or compel constitution [sic] by another did not apply. The court said that the relation was analogous to Pray v. Hegeman. I do not know that the court said that, but I will say that the relation was analogous to Pray v. Hegeman, and to a case of master and servant. The court said that in such a case judgment in favor of one on a ground equally applicable to both is judgment against all; that is, cases of a character where there is no joint wrongdoer.

Castle v. Noyes, 14 N. Y. 329. In that case, the former defendant was the servant of the present plaintiffs, and they appeared to
1259 defend him on their own title. If it had gone the other way they would have been estopped. It is there said that the estoppel includes the parties who had the right to appear, to control the action, and to appeal from the judgment, and that plaintiffs had this right when called in by their servant to defend him; there it was their duty to him on their implied contract to save him harmless. And it is also said that there is no contribution between joint trespassers.

The case of Portland Gold Mining Co. v. Stratton's Independence, 158 Fed. Rep. 68, was not a New York judgment.

The case of Emma Silver Mining Co. v. Emma Silver Mining Co. was a case in 7 Fed. Rep. 408, and was a decision in New York, but not in the state courts. That, too, was the question of Pray v. Hegeman.

The case of Reich v. Cochran, 151 N. Y. 122, was a case where the same question, in substance, had been involved in a previous case of the relation of landlord and tenant after a lease was effected.

I do not know whether the case of Greenwich v. Marvin was cited or not.

I think the case of Gleason v. Northwestern Mutual Life Insurance Co. was mentioned, but I do not know. That was a case where two different people sued on the same policy of life insurance. The administrator in another suit of the former owner and the alleged assignee of the same policy of insurance, and the plaintiff in the second action had had notice of the pendency of the first, that he was interested in the same policy of insurance or claimed under it against the same defendant. That was held a bar under the full faith and credit clause of the Constitution of the United States. The question of privy was not discussed.

The case of Thorne v. De Breteuil, 175 N. Y. 64,—I don't know whether, in my answer to the former question, I stated I was counsel in that case or not, but I was. I investigated in that case the subject of res adjudicata. There the question was merely whether a prior judgment bound the same parties. The people who were parties in the second case were parties to the first case, except that perhaps their children had not been born at the time of the prior suit, but that question is not important, as I remember, now, the case; their children, claiming remainders in property in which the parties were interested during their lifetime, occupied the relation to them of remaindermen with respect to their interests, and in the prior suits everybody in being at the time of the prior suits was before the court.

The case of Heuch v. Powers, 84 Hun, 546, was a case where a party to the second suit had been named as the defendant in the second action. He had not been served, but an answer had been filed in his behalf by an attorney in court. The court held that he was a party to the former suit.

1260 Stearns v. Shepard, 91 App. Div. 49. In the opinion by Judge Ingraham it is true that in his general proposition he says that the term "parties" includes all directly interested in the subject matter who have a right and are given an opportunity to make defence, prepare proceedings, examine and cross-examine witnesses, and appeal. I have, in my previous answer, I think, fully explained how that is limited by other decisions of the court and by the Court of Appeals. That was in the appellate division, you see. In that case the plaintiff was only a nominal plaintiff, and the real party in interest was the one that was held bound.

In Smith v. Smith, 79 N. Y. 634, already referred to, is a memorandum of decision. The participation was by a person who was ultimately liable on the note.

In Bracken v. Atlantic Trust Co., 30 App. Div. 67, it was the bondholder, the privy, who was seeking to enforce his collateral.

In Castle v. Noyes, 14 N. Y. 329, it was said that the term "parties" includes real and substantial parties who, although not on the record, had a right to control proceedings and appeal from judgment; and under that rule the testator and the parties now before the court would have been bound by the record so that his representative might insist that the determination was conclusive upon his adversary. The case, however, was one of master and servant, the master actually bringing suit against his servant, and the question was the question of the plaintiff's title; and it was adjudged against him in his suit against the servant, and it was held it could not be relitigated.

Bush v. Knox, 2 Hun, 576, was a question whether a bill of sale was absolute. The former judgment was in favor of another person, so the present plaintiff had to indemnify; and the defendant directed the other plaintiff to bring the suit, and agreed to indemnify him, and was present at the trial. The court said it was a record inference that he had a right to control the former proceeding. I say the court said so, because I think it did; I am not sure. This is my recollection of the case, and I have not the case before me.

Van Koughnet v. Dennis, 68 Hun, 179, was a case where a wife was estopped by her acts under prior judgment for her husband on the same facts.

National Park Bank v. Whittemore, 7 N. Y. Rep. 456, was a case where a motion was made in the same action; and though the party to the assignment, the party to the record, I think, appeared and moved to vacate the attachment, or his assignor appeared and moved to vacate the attachment—no; he had appeared and moved to vacate the attachment and to file a bond on the appeal. But it was held that he was bound by the decision there on account of his participation. This was a second petition for the same relief.

1261 The case of Kent v. Hudson River R. R. Co., 22 Barb. 278. The former suit was by the assignee, and was said to have been notified by the principal, who was a party to the second suit.

Stedman v. Patchin, 34 Barb. 218, was the case of an owner. The first case was a judgment against the master of a vessel on a bond which he gave to release the vessel on attachment. The subsequent suit was against the owner. The owner had defended the previous action. It was held that his action in that particular showed authority for litigation.

Kolb v. National Surety Co., 176 N. Y. 233, was an action to restrain the enforcement of a judgment against joint tort feasors by the authority of one of them who had paid the judgment and was now attempting to enforce it against the other parties to the judgment. The court in that case says that the general proposition is true that no right of contribution between wrongdoers can be enforced in a court of equity which alone would have jurisdiction to refuse to lend aid, and it did not feel the authority should be subrogated to the plaintiff; that he was the purchaser of the judgment and innocent of wrongdoing; on the other hand, that the plaintiff in this second suit, who was a joint tort feasor, is entitled to no relief in equity.

Tyng v. Clarke, 9 Hun, 269, was a case where a trustee of a corporation was sued for a debt of the corporation. It was held that he could take advantage of a judgment that the corporation was not indebted. The reason there given was there were three decisions, one of them dissenting, two of them giving agreeing opinions, but they did not agree in their reasons. One of them put it on the ground that in that case the trustee had the right of subrogation through the corporation, because it paid its debt; if that right was extinguished by the previous case, his security had been ended.

King v. Barnes, 109 N. Y. 267, was a case for specific performance and for the enforcement of the terms of an agreement. There was no question of fraud between the parties to the agreement. In that case their relation, it is true, was defined as a joint adventure. That was an action for an accounting among persons jointly interested, and their other interests were treated as analogous to those of parties. It did not determine that they would represent each other on any of the questions in the suit, nor what would have been their relation had the corporation sued them for fraud.

The case of Lawrence v. Hunt, 10 Wend. 81, was a suit on the same contract between the same parties and another, and no stranger was involved.

Jackson v. Griswold, 4 Hill, 522, was a suit which held that a mere surety is not bound by a judgment against his principal. It distinguishes a case where the debt is not destroyed by the judg-
1262 ment. It says that the indemnitee is bound to let the indemnitor come in, but that a mere surety is not bound to defend even on notice, but on such notice the surety could come in and defend; consequently the surety who was actually defending was not bound because the principal might have dismissed the bill or declined to appeal; that it would have been different if they had severally come in with the consent of the opposite party.

In Leavitt v. Walcott, 95 N. Y. 212, the parties to the action were the same as the parties to the previous action, and the proposition was that all matters, either of fact or of law, which might have been or actually were litigated were conclusive upon the parties.

The case of Demarest v. Darg, 32 N. Y. 281, was a case between the same parties.

The case of Prescott v. Le Conte, 83 App. Div. 482, was a case where the relation between the parties was that of landlord and tenant, and a party who had not been a party to the previous case had actual notice of the pendency of the action, and the court said he had the right to assume charge, and that the rule of estoppel applied where any privity exists and where the party is liable over. In this case the party in the second action was the party ultimately liable.

Kelly v. 42d St. R. R. Co., 39 App. Div. 500, was a case where the defendant was liable over. It was also said that the binding effect would have extended to all who had the right to appear at the trial and to appeal.

The case of Brewster v. Hatch, 122 N. Y. 349,—well, I have not made enough of a memorandum of that case to now intelligently discuss it.

The case of Getty v. Devlin, 54 N. Y., was an action for an accounting in equity against the executor of the offender. The court did enter judgment against the executor of the principal offender for the whole amount—this was in the court below; it then entered judgment for contribution against the other wrongdoers. But the plaintiff did not appeal from the judgment as failing to give them entire relief against the other wrongdoers, and the other wrongdoers did not appeal from the judgment giving contribution against them. They were parties to the same suit, and it was in the same suit. The court said that these parties were not before it, they had not appealed, and did not discuss their rights; they only discussed the right of the executor who made the appeal, and it held that they were not injured by the judgment against co-wrongdoers for contribution; but it did not establish the law that contribution between wrongdoers is proper. There are may decisions to the contrary which I have already cited.

1263 In the case of Fowler v. Bowery Bank, 47 Hun, there was a question of the operation of the substitution of a sheriff's indemnity. I do not see that it is pertinent to this case.

So far as I know, there are no other cases which have been cited which I have examined.

Cross-examination.

(By Mr. HEMENWAY:)

Q. You are now a partner of Mr. Hornblower's?

A. I am.

Q. And Mr. Hornblower has given a deposition in this case?

A. I believe that he has.

Q. As to the other depositions that have been put into the case by the defendant, I assume that you have read those?

A. I don't know that I have read all. I assume that I have read what were copies of most of them. I recall reading copies of what purported to be the depositions of Mr. Terry, Mr. Wadhams, Mr. Keener, Judge O'Brien, Mr. Byrne,—I think I have read a copy of the deposition of Judge Stover, if such deposition has been submitted. I do not recall at the instant that I have read any other deposition. Perhaps, if the names of other witnesses are mentioned, I can recall them.

Q. You have discussed this case pretty minutely with counsel for the plaintiff in this action?

A. I discussed it pretty minutely yesterday, telling him what I expected to say. I saw him previously; I did not at that time discuss it minutely with him. He left with me copies of the record, he left with me a copy of the memorandum that he either was preparing or had prepared on the subject. I read those memoranda, and I subsequently made an independent investigation, beginning with the digests, and my examination was made independent of the memorandum, the use which I made of the memoranda being merely to see if I was examining the digests for what I deemed the pertinent cases, whether I had included all of the cases in the memorandum. I did not tell counsel for the plaintiff in extenso what I have testified

to here; I told him in substance what, in my opinion, was the law in New York, and in substance my reason for the citing of some cases.

Q. Now I noticed that, in referring to the case of People v. Stephens, you used the expression that some people thought that that case was authority for certain propositions. To whom did you refer as "some people"?

A. I referred only to those witnesses whose deposition, or copies of whose depositions, I had read; I referred to those witnesses who referred to that case as establishing the proposition for which they contended.

1264 Q. Now you recognized that this was a bill in equity filed by the plaintiff against the executors of Mr. Lewisohn?

A. I did; that is to say, that the New York bill was.

Q. That is the case to which I refer. And you recognized that there was a demurrer to that bill?

A. I did; I recognized there were several demurrers in the course of the litigation, and that there were two demurrers to the bill as amended.

Q. And you recognized that the demurrers, both in the United States Circuit Court and in the Circuit Court of Appeals and in the Supreme Court at Washington, were sustained?

A. I recognized that the demurrer to the whole complaint, as amended, was sustained; I do not recall that the demurrer to part of it was sustained. I also recognized that there were two grounds assigned for the demurrer to the whole complaint, and I recognized that the demurrer to the whole complaint was not sustained upon the specific ground that there was a defect of parties defendant.

Q. And you recognized that a mandate came down from the Supreme Court, and that, in pursuance of that mandate, judgment was entered for the defendant in that bill?

A. I did,—the judgment which was entered.

Q. Now that being the case, Mr. Boston, in your opinion, was anything decided in that case?

A. Yes.

Q. What, in your opinion, was decided in that case?

A. In my opinion, it was decided in that case that the plaintiff had no cause of action in equity against the defendants, the executors of Leonard Lewisohn. In my opinion it was declared, in that case, that it was the opinion of the Supreme Court of the United States that on the state of facts set forth in the record as a matter of law the plaintiff had no cause of action. I did not understand, however——

Q. I am asking simply what it did,—what the opinion decided?

A. I have stated what it did decide, but in order to state it carefully——

Q. I do not care for what it did not decide; it would take a great while to say that.

A. No; I have not fully stated what I think it did decide.

Q. Well, then, go on,—as to what it did decide.

A. The case, in my opinion, decided that there was no cause of

action in favor of this plaintiff on the facts stated in that bill against the executors of Leonard Lewisohn.

Q. Now if this bill had been brought in the lifetime of Leonard Lewisohn, and Leonard Lewisohn had been made the defendant, and there had been the same judgment, or a similar judgment to the one entered in this case against his executors, what would the case have decided then?

A. It would, in my opinion, have decided that there was no cause of action on the facts stated, in equity, against Leonard Lewisohn.

1265 Q. If judgment had been entered in such a supposed case in favor of Leonard Lewisohn, and afterwards a similar bill had been brought against Leonard Lewisohn in his lifetime, whether or not to that bill the judgment in the first case could be pleaded in bar,—identically the same bills, only filed at different times?

A. It could be pleaded in bar to the extent of the decision. It would decide that no cause of action in equity existed against Leonard Lewisohn. If the bill was a bill in equity I think it would be a bar.

Q. That was my presumption, another bill precisely in form, only bearing a different date, but subsequent to the first supposed bill.

A. This decision was rendered on the demurrer?

Q. Yes.

A. It was decisive of the point raised by the demurrer. It would not be admissible as a mere bill of complaint; it would have to be properly introduced by the proper pleading.

Q. Properly introduced by proper pleading, have you any doubt that it would have been a bar in New York?

A. To a bill in the same terms?

Q. Exactly the same terms.

A. If the defence pleaded *was* that no cause in equity was shown, it would be a bar.

Q. Could it be pleaded as res adjudicata?

A. Under the same circumstances, yes; under the same circumstances as I supposed in my former answer.

Q. Well, on your theory, do I understand you to say, or to mean, that there is no difference in the matter of pleading? That is to say, on the filing of this second supposed bill, suppose there had been simply a pleading of res adjudicata in bar of that bill, would not that have been sufficient to have met that bill without going through the preliminary form of demurring and carrying it to the United States Supreme Court?

A. It would certainly be a bar to the extent of the decision; it would be a bar to the relief prayed for in the present bill, and it would be a bar as between the same parties, certainly, to the same alleged cause of action similarly stated in equity.

Q. Well, to put your answer a little briefer, isn't it simply this: that if a second bill, identical in its terms except as to its date, had been filed and a plea in bar had been put in in answer to that bill, that it would have been a good plea?

A. It would sustain the defence——

Q. Can't you answer "yes" to that? Wouldn't it be a good plea

in bar? Do you have any doubt as to that? I am sure I have not made my question plain if you have.

A. In that form of action it would be a plea in bar.

Q. Why, I speak of that form of action when I assume that the bills, are identical and that they are both bills in equity; that is part of my assumption.

1266 A. Then my answer is, it would be a plea in bar in the identical suit between the same parties, provided it was properly pleaded.

Q. And a good plea in bar to the suit as res adjudicata?

A. But it would only determine the issues that were raised by the judgment and decided by the judgment, and that issue was that there is no cause of action in equity.

Q. Would it not be ground sufficient for the dismissal of the bill so that the judgment would be identical, or the same as the judgment in the first suit proposed?

A. It undoubtedly would,—a judgment that the cause was dismissed for want of equity.

Q. And that would be the cause for the dismissal, of course, of the second bill?

A. It would.

Q. Well, now, assuming that such a bill had been brought in the lifetime of Mr. Lewisohn, suppose Mr. Lewisohn's death intervening and another bill was brought, against whom would that bill have to be brought in New York?

A. If it was a bill with respect to Lewisohn, it would have to be brought against his executors.

Q. I assume on the allegations of the bill that had been filed in his lifetime, and another suit had been brought for identically the same matters. It would have to be brought against whom?

A. It could certainly be brought against his executors, and, in my opinion, it would have to be brought against his executors; but I can understand a situation in which it might also be brought against his heirs at law; but you have not assumed any additional facts.

Q. No. I merely assume the additional fact that the bill would allege the death of Mr. Lewisohn as a resident, or leaving property in New York of some kind, being sufficient to confer jurisdiction for the appointment of his executors, and the due appointment of his executors is such a case.

A. With those additional facts, his executors would be the proper parties defendant, and with those facts only I think they would be the sole necessary parties defendant.

Q. Well, a bill in equity is in personam, is it not, as opposed to in rem?

A. It is.

Q. Well, the executors in New York are the representatives as to personal transactions and claims of the deceased, are they not?

A. The executors in New York by law take no title to the real property of the decedent. There is devolved upon them, by operation of law,—we consider them executors by operation of law after

their qualification as executors,—the right to the personal property of the decedent within that jurisdiction; and if it was his domicile at the time of his death, it devolves upon them the right of succession to his personal property, wherever located, subject,
1267 however, to the right of local administration with respect to property located outside of the state.

Q. Do not the terms of the will of the testator determine as to what the title to the property of the testator is?

A. I have said that by operation of law the executor takes no title to real property. The testator can devise his real property to the executor, and in that event the executor takes title as his devisee, to do with the title to the property what the testator has directed. It is possible that before the admission of the will to probate, the heirs at law are presumptively the owners of his property, but it is true that that the executors are vested with the legal title to his personal property, certainly within the state, and if he died domiciled in the state, elsewhere, regardless of the terms of the will. A man cannot, by will, prevent his executors from becoming entitled upon their qualification to his personal property, subject to the duty to do first what the law imposes on them, and then what the will imposes on them.

Q. Well, then you considered that this bill, which was filed against the executors of Lewisohn, was in personam?

A. I did.

Q. And that the cause of action survived in New York you assumed, did you not?

A. I assumed that the cause of action survived in New York against the executors; I may add to that, in their representative capacity as executors of Lewisohn.

Q. Well, suppose this bill I have assumed, one identically like the one that I have assumed in New York, had been filed in New York, and the record had all been made up exactly as it is in the pending suit, and the bill was dismissed; that being the case, suppose the present bill had been filed by the plaintiff in this case, could the executors of Mr. Lewisohn, after the death of Mr. Lewisohn, in any way take advantage of a judgment in the suit that had been brought in his lifetime; if so, how?

A. Now I must have misunderstood your question, and I should like to have it read over again.

Q. [Question read.]

A. They could not take advantage of the judgment in the last suit supposed, because they would not be parties to the suit, they would be strangers to the last suit supposed, and they would not be on the record; there would be nothing alleged against them, and they would not be entitled to be heard. They could take advantage of the judgment that had been previously entered against them in any suit where their liability was in dispute and they were parties to the record, but they could not take advantage of the judgment in the previous suit, in a suit in which they were not parties, and in which no claim was alleged to them. You speak of this present bill.
1268 Q. Wait a moment. I am afraid you do not understand my question.

A. That is the reason that I asked that it be read over again.

Q. Let me put another question to make it perfectly clear. I have assumed that a bill identical in terms had been brought against Mr. Lewisohn in his lifetime.

A. Yes.

Q. And that the same steps had been taken that had been taken in the suit in New York, resulting in a judgment for Mr. Lewisohn in his lifetime.

A. You mean a judgment in the same terms?

Q. In the same terms exactly. That then Mr. Lewisohn had died. After his death, that the same plaintiff had brought a bill against his executors in identically the same terms of the first bill, and simply alleging that they were the executors duly appointed and serving, properly appointed; then the executors have before them this bill in this very case; they find that a bill had been filed in Mr. Lewisohn's lifetime and it had been dismissed for want of equity, and the record had been made up as it is made up in this suit; then the executors come to you as counsel and say, "Can we take any advantage, can we use the prior judgment obtained against or obtained by Mr. Lewisohn in his lifetime?"

A. Why, of course they could take advantage of that judgment to the same extent that Mr. Lewisohn could take advantage of it if he had lived, with this exception: that they might not have in their hands all of the assets that Mr. Lewisohn had during his lifetime; but to the extent of the assets in their hands, they, in their representative capacity, would be entitled to take advantage of any decree rendered in favor of Mr. Lewisohn during his lifetime to the extent that the decree was operative on Mr. Lewisohn.

Q. Well, that being the case, whether or not the judgment in the present New York suit is of any force?

A. If you will be kind enough to distinguish which present suit you mean, to prevent me from making the same mistake I did before.

Q. The New York suit.

A. The judgment in the New York suit is of no force for any person other than the party named in the suit or his personal representatives; by that I mean his executors.

Q. It becomes a question of privity?

A. It undoubtedly does,—of either privity or succession. Successors are privies; there are privies who are not successors.

Q. That is true. But the word "privity" in law or "privy" in law, as I understand it, is used in distinction from "party."

A. It does not include all the world besides parties, but it has a meaning different from the meaning of "parties."

Q. The parties in this suit were the executors of Lewisohn?

A. Yes.

Q. Then it becomes a question of law who is in privity
1269 with them,—the executors?

A. It is a question of law upon the facts. The facts, of course, determine what law is applicable.

Q. And in regard to privity, whoever was in privity with Mr. Lewisohn in his lifetime is in privity with his executors?

A. No. The Court of Appeals of the state of New York has decided the contrary in Thomson v. American Surety Co. in 170 N. Y. Whoever claims the property in the hands of the executors is in privity with the executors to the extent that they have assets in their hands for distribution to the claimants; but it is not true, as I understand the law, that whoever was in privity with Mr. Lewisohn is in privity with his executors.

Q. So far as this suit pending in New York is concerned, the executors, you tell us, represent Mr. Leonard Lewisohn?

A. No, I do not tell you that. I tell you they represented the people who claimed Mr. Lewisohn's property either as legatees or as creditors, but the executors do not represent Mr. Leonard Lewisohn. Mr. Leonard Lewisohn is dead. The executors are privies of Lewisohn by devolution of their title to the extent of the things which they took as assets.

Q. Well, I will take your term, then, that the executors are privies and not the representatives of Leonard Lewisohn.

Mr. McCLENNEN: One moment. That is not his term.

A. I did not say they were not the representatives of Leonard Lewisohn. They are styled his personal representatives. There is no privity with the people who were privies to Leonard Lewisohn and are not necessarily in privity with such people; they may be in privity with such people, by reason of some fact arising after Leonard Lewisohn's death, or at the time of his death, or they may be privies to people from whom Leonard Lewisohn claimed estate that devolved upon him.

Q. Well, you would assume that the executors of Leonard Lewisohn, so far as a judgment obtained against him in his lifetime was concerned, were privy to him?

A. Undoubtedly, with the exception that the privity only extends to the property which devolves upon them by reason of their being his personal representatives.

Q. That is their liability, but it is not a personal liability; that is what you mean by that, that it is to be paid out of the estate. Is not the personal liability in New York the cost they may incur in a case prosecuted by or defended by them?

A. It is, with this exception: the power is in the court to charge the cost against the assets in their hands. The court does it in cases where it does not appear affirmatively to the court that the action was prosecuted recklessly or in the executors' wrong.

Q. That is true, but that is another step to the one I intended to ask you. The one I intended to ask you is: If an executor in
1270 New York, representing the deceased, were to bring an action,—on a promissory note, for instance,—and judgment should be for the defendant, would not the executor in the first instance, to the defendant in the suit be liable for the costs?

A. He would; the law says so. He might be entitled to reimbursement in his accounting.

Q. That I understand to be the law.

A. And I think also it is a matter governed by the code of civil procedure, but I do not undertake to carry that in my mind. Al-

though a party there recovering costs might, upon application to the proper court, have execution for costs against the estate of the decedent in the hands of the executor without resorting directly to the executor, but he could not do it without leave of the court.

Q. Then will you tell us, confining yourself simply to a judgment obtained in the lifetime of a party in his favor,—you have already told us that that would inure to the benefit of his executors named in his will——

A. It would, in cases where they were sued.

Q. Wait a moment. I do not want to repeat all that. Now the next question is: Is there any other person under the law of New York to whom the benefit of that judgment would inure; if so, to whom?

A. Yes, it would inure to the benefit—now are you suggesting the benefit of the second judgment recovered by the executors or the benefit of the first judgment recovered against Lewisohn?

Q. I am referring to the first judgment against Lewisohn.

A. It would inure to the benefit of all persons who took property through Lewisohn subsequent to the rendition of the first decree, and possibly to all persons who took part with notice of the pendency of the action after its institution, and those persons would include the executors, upon whom the property of any person devolves at the time of his death, or at the time of his or their qualification, and it might include other people who were in privity with Lewisohn. But I am asked to assume that the bill was the same as the present, and I do not now think of anybody who would be in privity with Lewisohn on the statement of facts in the bill except the people claiming his estate or some interest in it at his death.

Q. You have read the decision of Mr. Justice Holmes in this case?

A. I have.

Q. And although you say that that is not a part of the judgment roll, still, in your capacity as expert you consider it of some weight, do you not?

A. I was not asked to say whether that opinion was right or wrong or whether the law of New York would hold in accordance with that opinion or not. I undoubtedly think that that opinion——

Q. Did you hear my question? [Question read by the stenographer.]

1271 A. Why no. In my capacity as expert on the New York law, which is the only thing I have appeared here to testify to, I considered it of no weight whatever. It might be that judges in New York would give it respect and might declare it to be the law of New York, but it does not determine the law of New York, nor does it determine my view as an expert on the questions that were asked me.

Q. That is to say, if you were asked in regard to a transaction in New York if suits had been tried in the federal court and an opinion had been delivered, in considering the question submitted to you as to what the law of New York was, you would pay no attention to any federal decision?

A. Not unless the federal decision decided the law of New York.

If the federal decision decided the law of New York then I would pay attention to it. If I were asked my opinion as to what the Court of Appeals of New York might subsequently declare, I should pay attention to the opinion, but I would not expect the Court of Appeals of New York to reverse itself by reason of a contrary decision of the Supreme Court of the United States in a matter not involving the law of New York or in a matter not involving the federal law.

Q. Then you do not mean to say that, in considering what the law of New York is, you utterly ignore federal decisions, do you? Do you mean to say that as a lawyer?

A. I have stated the only federal decisions which I have considered in the law of New York on the question which I——

Q. One moment. Just answer my question.

A. You asked me what I meant to say and I am telling you what I mean to say.

Q. Tell it quickly.

A. Decisions I have seen previously?

Q. [Question read by the stenographer.] Now answer my question.

A. In determining the law of New York I first endeavored——

HAMMOND, J.: It does not seem to me that you understand the question. The question may not convey to you the same idea it does to me, but I understand the question, Mr. Boston, to be whether, in considering what the law of New York is, you have considered, as being of any weight whatever in your mind, the opinion given by Mr. Justice Holmes in this case.

The WITNESS: I have read the opinion given by Mr. Justice Holmes in this case. I did not consider it as bearing on any of the questions I have answered in my previous examination because I do not think it refers to them in any respect; therefore I did not consider it as bearing on this decision.

HAMMOND, J.: I understand the question is asked whether, in giving your answers here in this case, you have considered the decision of Mr. Justice Holmes as having any bearing whatever.

1272 The WITNESS: No, I have not considered it as having any bearing whatever on the questions I have been asked.

[Recess until 2 P. M. and resumed.]

(By Mr. HEMENWAY:)

Q. Then, in forming your opinion upon what the New York law is, you would base it upon the statutes, where there are past statutes, or on code or decided cases of the state courts of New York?

A. That is true if all the decided cases of the state courts of New York had considered the question at all. Of course if there were no decided cases I could not consider them, and if the cases had not decided the point I could only use them by way of argument with respect to the point.

Q. Well, with regard to the evidence that you have given as to the application of the New York law to the facts of these bills in

equity, have you rested your opinion upon the decided cases in New York?

A. I have.

Q. Now will you state, in your opinion, which of the cases decided in New York, in any of its state courts, comes nearest to the case in question? By "nearest" I mean nearest as a precedent.

A. Now that you have used the words "as a precedent," I would correct the answer I was about to give. I was going to say that undoubtedly, in its circumstances, the case which comes the nearest is the case which is reported in 51 Howard's Practice, the case of People v. Stephens. I have stated already, in my answer to the principal question, why I do not regard that case as a precedent.

Q. It is unnecessary to repeat what you have already testified to. Now, barring that case, what case comes nearest to the matters alleged in the bill in equity in New York?

A. I think that probably the case of Gerrod v. Stagg, in 10 Howard's Practice, comes nearest to the facts in the present case, although it was not a bill in equity.

Q. Well, what case next to that?

A. In all probability the case next to that which comes nearest on its facts to the present case is the case of Getty v. Devlin, 70 N. Y. 504.

Q. Now you have in your testimony made frequent use of the word "wrongdoers." Do you make any distinction between wrongdoers and joint tort feasors?

A. I make no distinction between the word "wrongdoers" and the word "tort feasors;" I do make a distinction between the words "wrongdoers" and "joint wrongdoers," because I have not described wrongdoers as joint wrongdoers. If I should describe joint wrongdoers, I should consider that "joint wrongdoer" is the exact equivalent of "joint tort feasor."

Q. Then in the case in New York you assume, do you not,
1273 that on the allegations of the bill Lewisohn a[illegible] Bigelow are joint tort feasors?

A. I do consider that they are joint tort feasors, and in speaking of them as joint tort feasors I am describing them merely, and am not saying anything as to the nature of their liability.

Q. But as joint tort feasors?

A. That is a proper description of them.

Q. Then in the consideration of your testimony, have you assumed that the law as laid down in the reports of decisions in the state of New York differs from the law as laid down in the federal courts of New York?

A. Yes. I have considered that the case of Emma Silver Mining Co. v. Emma Silver Mining Co. in 7 Federal Reporter, does not in its language express the law of New York, although I think that the decision, as I remember the case, was properly rendered on its facts, in my opinion.

Q. And of course you assume the law of New York to be different from the law as laid down in the opinion of Mr. Justice Holmes in the New York case?

A. Why, no, I do not. I do not understand that Mr. Justice Holmes was deciding——

Q. I am simply asking you now. I did ask you a question about it, and I understood your answer to be that there was a difference between the law of New York, as laid down in the opinions reported, from the opinions, and the law laid down in the opinions in the New York federal courts?

A. I limited myself to the only opinion of the New York federal courts which, in my opinion, has any bearing on the question of the effect of the New York judgment on the Massachusetts action, and that opinion is the decision in the case of Emma Silver Mining Co. v. Emma Silver Mining Co., reported in the 7th Federal Reporter. I know of no other federal decision with respect to the law of New York on the subject which I am now discussing.

Q. And having read the opinion of Mr. Justice Holmes delivered in this case in New York, you find nothing there about their being,—Bigelow and Lewisohn,—joint tort feasors, do you?

A. I have read the opinion, and I find in the opinion what is in it. I have not read it recently; I don't recall whether the opinion describes them as joint tort feasors or not, but whether it does or not I should so describe them—whether it does or not.

Q. Haven't you become familiar enough with that opinion to know that it describes the allegations of fact in the bill as not constituting any fraud?

A. I undoubtedly have.

Q. And, of course, if there is no fraud, there can be no tort feasor?

A. I undoubtedly have. I was not asked my opinion as to whether this bill described a tort or not.

Q. No; but you have cited cases of joint tort feasors.

A. I have described these men as joint tort feasors.

1274 Q. And joint wrongdoers. Now what I want to get is your authority for so styling them; that is, the source of your information.

A. They are so described in the language of the bill. The language of the bill. The language of the opinion, in my opinion, does not prevent them from being joint tort feasors. The language of the opinion, in my opinion, only decides that there is no cause of action, because in the opinion of the judge writing the opinion there was no tort which the plaintiff could recover for. I understand the opinion did not say that these people were not joint tort feasors; on the contrary, I understand that the opinion did say that it was not passing on their liability to anybody but the plaintiff; but it did not say that they were not joint tort feasors, nor did it say that they had not committed a fraud; but it did say that the plaintiff was not entitled to recover for that fraud, because the plaintiff had not been injured, and the plaintiff had not been injured for the reason that the plaintiff was a mere shell behind which the men who were sued as wrongdoers stood, and that a man could not cheat himself; but it did not say

that a man could not cheat other people, and it describes them as if they were joint tort feasors with respect to other people.

Q. I will confine you, if you please, to this action pending in New York. You do not wish to change your testimony, which was incorporated in a question of mine, perhaps, rather than in your answer, that if there is no fraud there can be no tort feasor?

A. That appears to me so axiomatic that I would, of course, admit what you say; there can be no dispute about it.

Q. Now you have cited the case of Thorne v. DeBreteuil, and have stated that you were counsel in that case. Were not Mr. Olney and Mr. Byrne, who have given depositions in this action now pending here in Boston, also of counsel in that case?

A. They were. They represented, in that case, different interests; I represented the same interest identically that Mr. Byrne did.

Q. I simply asked if they were not of counsel in that case?

A. Well, they were not all counsel for the same clients; that is what I mean.

Q. I understand; but they were all interested in that litigation?

A. As counsel; yes.

Q. And in the questions that were raised by it?

A. They all participated as counsel.

Q. And Mr. Byrne—he represented jointly with you, and in common with you, the same interests, did he not?

A. He did. I, at the time, was associated with Mr. Byrne, and together we did work in that case for the same clients.

Q. Now you have referred in your testimony to section 449 of the code in New York in reference to that part of your testi-
1275 mony that applies to express trustees, stating that the language of the decision applied to express trustees. Has it not been decided in New York that, although the language applies to the plaintiff, yet by construction also it applies to the defendant, and not only to express trustees, but to implied trustees?

A. I am not aware that that is true. Mr. Stanchfield, whose deposition I have read, but did not refer to in my former testimony, as I remember, says it is true. I don't know whether it is true or not.

Q. You are familiar with the allegations of the bill in New York. Did I understand you to state, in your direct examination, that on the allegations of that bill, considering its subject matter and its prayer for rescission, or damages in lieu of rescission, that Mr. Bigelow would not be a necessary party. You so stated, did you not?

A. It is my opinion that he was not a necessary party.

Q. And you further stated that he was not only not a necessary party, but, in your opinion, not a proper party?

A. I stated that, and I stated the reason for it.

Q. You understand that there is a distinction between a necessary party and a proper party in pleading in New York?

A. I undoubtedly do.

Q. And your reasons why a stranger is not bound by the judgment were two: First, that he did not have his day in court, and, secondly, that there was no mutuality. Now in order to constitute a judgment as an estoppel is it necessary that between the parties to the

record in all cases there must be mutuality? Are there no exceptions to that general rule?

A. There are apparent exceptions to that general rule. I have explained the only exceptions that seem to me to be apparent. As I now recall, they are exceptions where the fact in issue between the two parties is an essential fact—by that I mean a disputed question of fact in the cause—an essential fact to be proved by one or the other of the parties in the second action, and it is the fact of the relations between the parties to the other cause,—such, for instance, as whether they sustained the relation to them of principal and agent, master and servant, principal and surety, husband and wife, and possibly similar cases of mutual relationship between the parties. In those cases the judgments are held to be the best evidence of the fact that there was a relation between the two parties, or that there was not a relation between the two parties. That question of the relationship between the parties and the particular relationship between the parties, having once been litigated between the parties, no better evidence of the fact of their relationship can be given, and the judgment is held to be the best evidence of the fact. The only other case that I now recall which is an apparent exception to the rule of mutuality is, as I have stated, where a person has elected his remedy and has chosen a remedy which is absolutely inconsistent with the second position assumed. In that case
1276 evidence of the election is admissible. If the election has gone beyond recall at the time of the institution of the suit, the mere fact of the institution of the suit is sufficient evidence of the election; if the election has not gone beyond recall until the entry of judgment, then you must show the entry of judgment. There are cases—I do not consider them exceptions to the rule with respect to mutuality—where the judgment in the first case is not entirely conclusive of the judgment in the second case. In such cases the judgment is conclusive in the second case with respect to all of the facts which could have been litigated in the first case under the issues made; but where there is an essential fact necessary to be proved in the second case, such as the fact that a man was principal or that he was surety, or facts with respect to the particular defence which he has, he is not bound by the determination against the person with whom he has been in some relation, because that question of his relation has not been litigated in the former suit.

Q. You say that there are exceptions to the rule, do you, of mutuality?

A. I have stated every exception I think of.

Q. The exceptions you have stated are those which you have at present in mind. Would you state that the exceptions you have stated are exhausted, and that there are no others?

A. No, I would not.

Q. They are simply all that you have in mind?

A. No, I would not state that anything is certain in the law. I have stated all that I can now think of.

Q. That is right. Well, now you have alleged or testified that in

several cases to which you have referred there was no contribution between the defendants, and that the courts have so held——

A. No, the courts have not held that there is no contribution between defendants.

Q. Wait a moment.—have so held in actions in delicto. Now is that the universal rule, or are there exceptions to it?

A. I have stated the exceptions to that rule already. I have stated that where the cause of action grows out of neglect and there are two people, one of whom is answerable for the acts of the other by reason of the relation between them, they are not regarded as joint tort feasors if one is mutually responsible for the acts of the other and was not himself an actor in the wrong. In such cases there is not only contribution, there is indemnity, and the person who is not an actor is entitled to indemnity from the person whose wrong resulted in the injury; it is not a question of contribution at all.

Q. Then your answer would be: "Yes, there are exceptions"?

A. No, I have stated that there are what are apparently exceptions, but it is not a question of contribution at all.

Q. Well, then, will you state that there are no exceptions?

1277 It is immaterial to me which way you put it.

A. I will state that I know of no exception. I have characterized the case I suggested in my previous answers as not an exception to the rule, because it does not relate to contribution at all, but relates to indemnity.

Q. You said a great deal in your testimony on direct examination in regard to participation. Did you intend for the court to infer from your testimony that there was participation only in cases where a party had a right to appear?

A. I did not intend to say that there was participation only in those cases; I did intend to say that, in my opinion, based upon the cases which I have examined, the effect of participation is limited to cases where there was not a right to participate unless the party is admitted to the record as a party. In that event, his admission to the record constitutes him a party, and takes him out of the category by which I would describe a participant.

Q. Well, it takes him entirely out of the category——

A. —of mere participants, and makes him a party.

Q. Makes him a party of record?

A. Yes, but so far as the principle——

Q. Oh, I mean in the case of a suit where there is one plaintiff and one defendant only on the record.

A. Yes.

Q. Now does participation in the defence or with the plaintiff consist only in those cases where another party has a right to intervene and become a party to the record?

A. No; it does not extend necessarily only to cases where he has the right to become a party to the record. There are cases where he has no right to become a party to the record, where his relation to the matter is such that he has right to appear in court and be heard. There are cases where, after the institution of an action, an assignee will not be substituted in place of his assignor who was plaintiff at

the inception of the action, and yet he has a right to be heard, although he is not a party to the record. That case is the case of Hirschbach v. Bock, to which I have already referred and in which I was of counsel. In that case the court refused to permit the assignee to be substituted, or the assignee's attorneys to be substituted, as a party; and yet the assignee, in my opinion, had a right to be heard in that action, because he had succeeded to the cause of action pending the litigation, and the Court of Appeals affirmed my view, I think, in the case of Hirshbach v. Fitzgerald, in 157 N. Y. So I would not use, as qualifying words, "the right to become a party on the record." I would limit it to the case of a party who has a legal right to appear and defend.

Q. Even in a case where a party has not the legal right to intervene and defend, does he not become a participant in the case when he does intervene and take part in a trial and endeavor to support either the plaintiff or the defendant? In such a case as that, is he not a participant in law, even although he is not a party
1278 on the record, and although he had no right to intervene?

A. You have used the word "intervene."

Q. I do not mean intervene in law; I do not mean it in that technical sense.

A. I assume that you do not. If he be a participant not intervening in the technical sense, my idea is that his mere participation, independent of the right, does not make him a party bound by the judgment. And I think that view is sustained by a large number of cases.

Q. Do you know of any cases in New York state that take the contrary view and say that a party is bound by the judgment because of the mere fact that he did intervene or did take part in the trial in court?

A. I know of no contrary decisions where the right did not exist.

Q. Well, now, you have stated the fact, the law of New York as a fact, that where there is a decision in the courts and a trial, that that becomes the law of that case?

A. I have so stated.

Q. Well, you do not assume that to be the law of the case, supposing it were pending before a single judge, there was a demurrer, the demurrer was overruled, the trial proceeds, and then it comes to a final decision, and the presiding judge says, "I have so ruled in reference to the demurrer; I think that I was mistaken in the law"?

A. At that stage?

Q. At that stage of the case wouldn't he have the right—isn't it usual and customary in the courts for judges to change their opinions and make a final decision in accordance with what they believe to be the law of the case, irrespective of what they may have ruled earlier in the trial as a question of law?

A. It depends on whether they are passing on the same question or not, properly before them for review.

Q. I assume the same question.

A. I say "properly before them for review." My understanding

of the law of New York is if a presiding justice of the appellate division has determined the law of the case on demurrer and there is no ground at the time for reargument, and the case at a subsequent time comes up on a subsequent appeal and not on appeal from a former decision, that the court is bound by its former decision.

Q. The same judge?

A. The same judge.

Q. And the same court?

A. And the same court at a subsequent stage of the action, provided the point was decided by him properly at the previous stage of the action; I should think without motion for reargument that matter is determined by the court, and that the subsequent appeal will not bring that matter up for review, unless the matter is specified in the notice of appeal as ground for appeal.

1279 But you cannot appeal to a court in New York from its own decision; you must appeal to a higher court, and if you have not appealed to the Court of Appeals from interlocutory judgment to sustain the demurrer or overrule the demurrer, and you subsequently come up from appeal on the final judgment, and you have not specified the appeal to the Court of Appeals, but appeal from interlocutory judgment which has not been previously before the Court of Appeals, you cannot get the Court of Appeals to rule on that question. The Court of Appeals itself regards its decision which it has made at a previous stage in the action as binding on it. I say it so regards it; I do not know whether there is any "unless." I think the case of Getty v. Devlin in 54 N. Y. and the case of Getty v. Devlin in 70 N. Y. determines that fact as the law of New York when it refers to the previous decision in Getty v. Devlin in 54 N. Y. But it is not true, as far as I know, that the same judge passes again, at a later stage of the action, on the same question which he has previously passed upon, unless there is a motion before him, for reargument. It is also the rule in New York that a co-ordinate branch of the court will not review the decision of another branch of our court with equal power. Perhaps I ought to add to my answer that when a case has been appealed to the appellate division and a new trial has been granted on the ground that there was an error of law committed in the first trial, and the same case has gone to the Court of Appeals, and the Court of Appeals has declared the law applicable to the same state of facts, and it comes back to the lower court for a new trial, then the lower court is bound to apply, in my opinion, the law as determined by the Court of Appeals on the facts presented to it in the new trial rather than the law as determined by the appellate division in the same case. That is just what happened in the case of Hirshbach v. Bock, to which I have so frequently referred. When it came up on the new trial, they refused to regard the decision of the Court of Appeals as res adjudicata in the case, because the defendant had not appealed, but he regarded it as the rule of law applicable to the case and dismissed the complaint on the same state of facts. His action in that regard was not reported, so far as I

know, and I am not aware of any similiar question having arisen in New York. But I was counsel in the case, and I know what he did.

Q. The doctrine of estoppel by reason of res adjudicata rests on public policy, and that public policy rests upon two grounds: that the plaintiff or defendant shall have but one day in court; secondly, that there should be an end of litigation: is that not true?

A. No, I do not think it is.

Mr. HEMENWAY: That is all.

The WITNESS: I ask leave of the court to say there were two questions submitted to me. I was asked if the two things were not true, and I answered, I do not think the two things are
1280 true. I should like to say which of the two I do not think is true.

HAMMOND, J.: If you desire to explain your answer, in justice to yourself, you may do so.

The WITNESS: I do: will you read the question, please?

[The question is read by the stenographer.]

The WITNESS: I think the second ground is true; I think the first ground is not true, as stated. I think if it were limited to people who were parties to the first litigation and their privies it would be true.

HAMMOND, J.: Well, gentlemen, are you through with this witness?

Mr. HEMENWAY: That is all.

Mr. MCCLENNEN: That is all, Mr. Boston.

I have already offered, your Honor, a list of cases which I intended to make comprehensive of all that have been cited by any of the witnesses, but to avoid any possible omission I should like to ask that any cases that have been referred to by any of the witnesses or by Mr. Boston be admitted as part of the record.

Mr. HEMENWAY: I think it would be easy to look at the list of cases he has already put in, and, in order that we can have them all together, I think he had better add to it by name and volume because, in some instances, Mr. Boston does not state them in that way.

HAMMOND, J.: If the other side insist on that, I think you ought to do it.

Mr. MCCLENNEN: May I do that after the commissioner has written out the testimony, by putting it in the form of a list?

HAMMOND, J.: What you intend to do is to hand to him a list of the cases which have been alluded to by this witness in testifying?

Mr. MCCLENNEN: Or by the deponents whose depositions have been put in by the defendant.

Mr. HEMENWAY: We have the same privilege, of course.

HAMMOND, J.: Yes, as to each of you, the cases you rely upon, whether they have been stated here or not.

Does that close the evidence, Mr. McClennen?

Mr. McClennen: Yes, your Honor; that is all the evidence for the plaintiff.

Hammond, J.: Anything in reply?

Mr. Hemenway: We expect to have here the deposition of Mr. Parker, and that we want to put in.

Hammond, J.: I would like to dispose of this matter to-
1281 day in some way or other: have you reason to believe that the deposition of Mr. Parker is on the way?

Mr. Farley: I was informed by the commissioner from whom we expected to have it, that he was expected back to New York to-day. I think we can get it.

Hammond, J.: It is manifest that all this examination has gone on upon the depositions already in. I do not know what there will be in the direct of that other deposition to object to; I don't know that there will be anything further if he answers the same questions: I suppose it will be cumulative, will it not?

Mr. Hemenway: We do not expect it will be contradictory of anything we have put in: cannot we use the deposition, when it comes, just as we have the others, submitting it to the other side?

Hammond, J.: That might be, but if there is something in that deposition which would lead the plaintiff to put in additional testimony, that is the trouble about it. I think I will leave this question here; that the deposition can go in—in the first place, it is a question whether you get it or not—after you hear from them whether they want to make any objections or not.

Mr. McClennen: As to the Milburn deposition which has been put in, though not read, I simply would like to make the same objections as in the case of the other depositions.

Mr. Hemenway: I move to strike out the "not read;" it has been constructively read.

Mr. McClennen: Not read by me.

Hammond, J.: You desire to have your objections stand against the Milburn deposition?

Mr. McClennen: Yes, your Honor.

Hammond, J.: Very well, they may stand against it.

Mr. Hemenway: But not on the ground that it has not been read.

Hammond, J.: I think it is generally understood that this case is not to be argued before me. I have assumed that. I understand the expectation of both parties is that the case is not to be argued before me.

Mr. McClennen: I had assumed so, largely from what the court said.

Hammond, J.: I see no additional fact that it is necessary for me to find.

Mr. McClennen: I should suppose not.

Hammond, J.: Well, then, I suppose the proper disposition of this case will be, first, a reservation of the facts found upon the pleadings, the facts found by Judge Sheldon, and the evidence. You
1282 have reserved, I suppose, in every case—do you think it is open to you—that the evidence does not warrant the finding?

Mr. HEMENWAY: Certainly.

HAMMOND, J.: Very well, on the evidence and the findings of Judge Sheldon. The findings will stand, because under the rules applicable to the evidence in the case the court sees no reason to contradict them.

Mr. HEMENWAY: And to have no further force by reason of this reservation than when the case went up before?

HAMMOND, J.: It stands as it did before.

Mr. MCCLENNEN: That is, the reservation, in substance, is the same as if there were final decrees and appeals taken therefrom subject to such modification as the full court deems proper by reason of this new matter.

HAMMOND, J.: Well, I do not think you need to make it a matter of form. If you can agree about form, I will sign the reservation; if you cannot agree upon it, I will hear you as to form and then sign it. When can you do that?

Mr. MCCLENNEN: Well, I can submit to Mr. Hemenway a form this afternoon.

HAMMOND, J.: I think you ought to get it out at once in regular form.

Mr. HEMENWAY: Well, there are certain matters that have arisen, and upon which Mr. Justice Braley passed, as, for instance, that we ought to be enjoined from prosecuting a suit anywhere else, and that came up on a petition for such injunction. The injunction was entered and the defendant duly appealed. Now we want to make that a part of the record, so that the whole case may go before the court.

HAMMOND, J.: I suppose there is no objection to that.

Mr. MCCLENNEN: I assume that is all part of the record.

HAMMOND, J.: Well, that disposes of this case, then.

GEORGE C. BURPEE.
Commissioner.

Copy.

Attest:

—— ——, *Clerk.*

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1 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *December* 17, 1909.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Old Dominion Copper Mining & Smelting Co. vs. Albert S. Bigelow decided on the 14th day of September, 1909.

HENRY WALTON SWIFT,
Reporter of Decisions.

1½ RUGG, *J.*:

These are suits in equity, by which the plaintiff seeks to recover secret profits made by the defendnt as one of its organizers, in selling to it while under the absolute control and management of himself and his associate, one Lewisohn, certain mining properties belonging to him and Lewisohn. The allegations of the bills are set out at length in 188 Mass. 315, where one of the cases was considered upon demurrer. After the overruling of the demurrer the defendant answered, and the cases were heard before a single justice, who entered decrees in favor of the plaintiff in both cases and filed a report of the facts found by him. Except as to matters immaterial so far as the questions of law are involved, he found that the allegations were sustained. Briefly recapitulated, the facts appearing in the report upon which the plaintiff rests its claim are that in April, 1895, the defendant and Lewisohn formed a device to secure the control of the stock (the par value of which was $500,000) of the Old Dominion Copper Company of Baltimore City, called the Baltimore Company, and the title to certain other neighboring mining properties, called the outside properties, and to cause these properties and the real estate of the Baltimore Company to be transferrd to a new corporation (which they should procure to be organized with a much larger capital), for an increased price. Options were secured upon these properties, and the price agreed to be paid by the defendant and Lewisohn to the owners was $1,000,000, divided in the proportion of 547/1000 by the defendant, and 453/1000 by Lewisohn. The outside properties were regarded by all parties as of little or no value and were thrown in as a makeweight in the purchase of the stock of the Baltimore Company. The single justice, while finding that they could not be said to be of no value, was satisfied that their value did not exceed $50,000. No examination to ascertain their value was made by the defendant or Lewisohn, or by any one in behalf of the plaintiff. For the purpose of providing himself with funds to meet in part his financial obligations for the purchase of
2 the properties, the defendant, before taking up the options, organized an underwriting syndicate and another syndicate called the Old Dominion Syndicate. It is not necessary to state the details of these arrangements, further than to say that it is found as a fact that the defendant did not deal fairly with the members of the syndicate in the division of his profits, and did not disclose to the great majority of them the fact of the secret profit. The obliga-

tion of purchase was assumed wholly by the defendant and Lewisohn and the device for the organization of the new corporation was entirely theirs. Although, as first conceived, it was the avowed intention of the defendant and Lewisohn (which the defendant expressed to various members of the syndicate) to form a new corporation with a capital stock of $2,500,000 which should take the property of the Baltimore Company and the outside properties for $2,000,000 of its capital stock and procure a working capital of $500,000 by the sale of the rest of the capital stock to the public for cash at par, they proceeded to organize the plaintiff corporation under the laws of New Jersey, with a capital stock of $3,750,000, divided into one hundred and fifty thousand shares of the par value of $25 each. But it was the intention of the defendant and Lewisohn (as found by the single justice) that "twenty thousand shares of the capital stock of the plaintiff should be issued to new subscribers at par; and this was done in the summer and fall of 1895." This organization was conducted and controlled wholly by the defendant and Lewisohn through themselves and their agents and representatives. Without providing the plaintiff with an independent board of officers or representatives they, as the responsible and only managers of the plaintiff, acting in its name, contracted with themselves as mine owners to sell to it the real estate of the Baltimore Company for $2,500,000 of the capital stock of the plaintiff and the outside properties, of trifling value at best, for $750,000 of such capital stock, and to sell to the general public for working capital the remaining $500,000 of capital stock of the plaintiff at par, without disclosing that they had sold property costing them only $1,000,000 for three and a quarter times its cost.

The first meeting of the stockholders was held on July 7, 1895, at which $1,000,—the lowest amount of capital with which a
3 corporation organized under the laws of New Jersey could begin business,—was paid in by Lewisohn. This money, although deposited to the credit of the plaintiff company upon its organization, was afterwards returned by it to Lewisohn in an accounting with him. A meeting of the directors was held in New York on July 11, 1895, at which the defendant became a director and the president of the plaintiff and Lewisohn a director. Votes were passed to increase the capital stock and two separate votes for the purchase of the mining properties for the prices in stock before indicated. The stock, the market value of which was fully as great as its par value, was issued to the defendant and Lewisohn and one Dumaresq, their nominee, by votes of September 18, 1895, on that or the following day. At the same time a certificate for the remaining twenty thousand shares of stock of the par value of $500,000 was made out in the name of "Thomas Nelson, treasurer," but this stock is found to have belonged to the corporation, and Nelson had no right to act respecting it, as it was taken up by direct subscriptions of the public. The conveyances of the mines by the Baltimore Company and of the outside properties by Lewisohn were not made until December, 1895, or January, 1896. The intrinsic value of the property conveyed by the Baltimore Company is found to have been

not more than $1,000,000, although its market value, largely due to the skillful manipulation of the defendant and Lewisohn, and "the ingenious manner in which they created a desire on the part of men interested in mines, as investors or speculators, to be allowed to join in the transaction they were carrying out," was something less than $2,000,000. The report proceeds: "But, taking the most favorable view of the situation possible for the defendants, he and Lewisohn did, by reason of their failure to disclose the real facts as aforesaid, make out of their sale to the plaintiff company a secret profit of fifty thousand shares of its capital stock, of which the defendant's portion was twenty-seven thousand three hundred and fifty shares, and Lewisohn's portion was twenty-two thousand six hundred and fifty shares. If he had fully disclosed the facts to the plaintiff company and secured for it independent advice, it would not have given to him this secret profit; * * * Lewisohn and he were acting in the formation and execution of the scheme together and in concert. Each of them was doing his part to carry out a joint scheme, which was intended to inure to the advantage of both. The control exercised by them over the plaintiff company was a joint control, and was exercised by them for the benefit of both. A proper disclosure of the real facts by either would have frustrated the schemes of both; they both acted together in pursuance of a common design, and for the profit of both." "During all these transactions the full control of the plaintiff company was in the hands of and was exercised by the defendant and Lewisohn, who were its promoters and who themselves determined upon and dictated, under the advice of their counsel, everything that was done by the plaintiff company or in its behalf; it had no directors, representatives, or advisers other than themselves or their agents; and they did not disclose to it any of the facts which have been stated. This continued to be the case until April, 1902. * * *

"The result of his and Lewisohn's transactions with the plaintiff company was that for the $1,000,000 of their own and their associates' money which they invested, they received, subject to the payment of legitimate expenses of not over $20,000, stock to the par value of $3,250,000, and of the actual value of at least that amount: that is, at the rate of more than three dollars for one. He gave to the members of his syndicate two dollars for one, either wholly in stock or half in cash and half in stock, as they elected. With a few individual exceptions he did not disclose the facts to them. The very great majority of the members of his syndicate did not become aware of the details of what he and Lewisohn had done." The capital stock issued to defendant and Lewisohn was stamped "Issued for property purchased." The law of New Jersey required that such stock be issued only "to the amount of the value" of the property so purchased. Pub. Laws of New Jersey, 1889, p. 414, § 4; 1893, p. 444, §2. The vote of July 11, 1895, to purchase the mining properties was in fact passed by a majority only of the board of directors, for three do not appear to have been present at that time. At the directors' meeting of September 18, 1895, when the votes to issue thirty thousand full paid shares to the defendant and Lewisohn

and one hundred thousand like shares to their nominee Dumare
were passed, seven directors were present, the five aside fro
Bigelow and Lewisohn being their tools, and at the end of t
record of that meeting all the directors signed an assent to t
acts done, and Bigelow and Lewisohn, signing for thirty thousa
shares of capital stock, Dumaresq signing for one hundred thousa
shares of the capital stock, and "Thomas Nelson, Treasurer," signi
for twenty thousand shares of capital stock, being the whole numb
of shares, signified a written approval of the acts of that meetin
The single justice found that the twenty thousand shares were th
property of the plaintiff, and that Nelson had no right to attem
to act as their holder.

1. The defendant strenuously contends that certain facts foun
by the single justice are not supported by the evidence. He firs
attacks the finding, vital to the plaintiff's case, that the scheme o
the defendant and Lewisohn, as framed and executed, contemplate
that twenty housand shares of stock in the plaintiff corporation
should be issued to new subscribers at par, and that the defendan
and Lewisohn did not agree to take all the stock in the plaintiff cor-
poration in return for the mining properties conveyed to it and
$500,000 in cash for a working capital. He argues that the evidence
required a finding that Bigelow and Lewisohn agreed as a part of
their scheme to take all the capital stock in return for the mines
and $500,000 in cash. He also assails the findings, that the property
conveyed to the plaintiff by the defendant and Lewisohn for one
hundred and thirty thousand of its shares of a par value of
$3,250,000 was worth intrinsically not more than $1,000,000, and
that its market value, due to the skilful manipulation of the defend-
ant and Lewisohn and their ingenious baiting of the stock market,
was less than $2,000,000; and he contends that the evidence demon-
strates the truth to be that the plaintiff paid no more than it was
worth.

The evidence was oral, documentary and in depositions. The
rule of practice respecting such a contention as this has been often
declared. In an appeal in equity from a final decree, where all the
testimony is reported, it is the duty of the appellate court to examine
the evidence and decide the case on its merits, both as to the facts and
the law; but where the evidence upon disputed issues is partly oral,
the findings of fact of a single justice will not be disturbed unless
plainly wrong. Jennings v. Vahey, 183 Mass. 47. Lindsey
v. Bird, 193 Mass. 200. It becomes necessary, therefore, to
examine the evidence upon this point somewhat in detail.

The offers of the Baltimore Company for the sale of its property
to the plaintiff, and of Lewisohn for the sale of the outside prop-
erties, were in writing, and the votes of the plaintiff accepting them
were spread upon the records of the directors' meeting of July 11,
1895. These provided distinctly for the issue of one hundred and
thirty thousand shares of the plaintiff's capital stock in payment for
these conveyances. The records of the plaintiff show no vote touch-
ing the issue of the remaining twenty thousand shares. If, as
claimed by the defendant, it was then contemplated that these

shares should be issued to him and Lewisohn at par for cash, it seems probable that a vote to this effect would then have been passed. The only vote respecting the issue of these remaining shares was that of the directors on September 18, 1895, when, after a vote authorizing the issue of a certificate for one hundred thousand shares to Dumaresq (who was the nominee of Bigelow and Lewisohn) and another for thirty thousand shares to Bigelow and Lewisohn, it was voted that the treasurer of the company be "instructed to issue twenty thousand shares * * * to such parties as have subscribed for the same." If it was then understood that Bigelow and Lewisohn had agreed to take all the shares, including the twenty thousand for cash at par and were the subscribers therefor, no sufficient reason appears for not saying so in the vote, instead of adopting a phrase suited to express an intent to issue the shares to the general public. Moreover, at this time, as shown by the only subscription list of the plaintiff, the general public had subscribed generously for stock. The language of the vote aptly refers to such subscribers. The only paper, which appears by the evidence to have been signed by subscribers for stock, was dated July 18, 1895, two months before the vote to issue the twenty thousand shares was passed. The certificate for the twenty thousand shares was issued in the name of "Thomas Nelson, Treasurer," he being the treasurer of the plaintiff. It is ingeniously argued that in this matter Nelson was acting as the treasurer of those who had become subscribers to stock and not as treasurer of the plaintiff. But he treated their payments as if made to the treasurer of the plaintiff. If this certificate had been in truth issued to the nominee of Bigelow and Lewisohn in return for their obligation to pay cash for its face value, naturally it would have been issued without any official title attached, as was that to their nominee, Dumaresq. It is a significant coincidence that the form of certificate selected was the same which, in other companies controlled by the defendant, was used when stock was in fact treasury stock. This certificate was subdivided in the autumn of 1895, and nineteen thousand six hundred and fifty shares were issued to various subscribers, who paid for them directly to the plaintiff, and not to Bigelow or Lewisohn. The remaining three hundred and fifty shares, although subscribed for, were not taken by subscribers. They were not taken or paid for by Bigelow or Lewisohn, but about two years later were sold by direction of Nelson, who was still the treasurer of the plaintiff, through brokers, and their face value credited on the plaintiff's books to treasury stock and the excess above par, for which they were sold, to the interest account. This sum does not appear to have been the equivalent of interest due from the defendant and which should have been paid, if he originally subscribed for the shares, and his name does not appear in connection with them on the plaintiff's books. The transaction respecting the subdivision of this certificate was conducted in substance on the footing of original subscribers, and not of purchasers from Bigelow. The names of those, to whom the shares were issued, appear upon the "Corrected List" of the plaintiff, which was its only record of subscription, and in which the shares taken by

each are described as "allotments." If they were subscribers to the defendant and Lewisohn merely for stock held by them, there was no reason why their names should appear on the plaintiff's subscription list. Notices were sent to these subscribers by the treasurer of the plaintiff, and not by Bigelow, and checks were returned payable to the order of the treasurer, and were deposited directly to the credit of the plaintiff, although notices and subscriptions to the syndicate formed by Bigelow to aid him in furnishing the purchase price were sent by and returned to Bigelow. Various written statements of Bigelow, as for instance that they proposed "to open the bag just a little to the public" and that the public were
8 "starving" for the shares, appear inconsistent with the theory that he and Lewisohn were the subscribers for the entire capital stock. These and other circumstances are sufficient to warrant the finding of the single justice. Apparently he credited contemporaneous acts, entries and other writings with their natural inferences rather than the direct oral and other testimony to the contrary given at the trial. It cannot be said that in this he was plainly wrong.

The finding as to the value of the property conveyed by the defendant and Lewisohn to the plaintiff is also supported by testimony and cannot be disturbed. The evidence touching this matter came from various sources. The former owners had operated the mine with some degree of success on a capitalization of $500,000. They had greater experience and a more intimate knowledge respecting it than any one else, and they seem to have been men accustomed to large business operations and not unfamiliar with mining. They do not appear to have been under any compulsion to sell. The price for which such owners in fact sold their property might well have been regarded as the best test of its value. But the finding was approximately double this sum. Although other circumstances perhaps might have supported a higher valuation, there is no ground for holding this plainly, or even probably, wrong.

These are the main facts relied upon by the plaintiff. Other findings are controverted by the defendant. Without discussing them in detail it is enough to say that a careful examination of the voluminous record discloses no reason for doubting their correctness.

2. At the threshold lies the question as to what law determines the character of these transactions and the liability of the defendant therefor. The votes to purchase the real estate of the Baltimore Company and the outside properties were passed at a meeting of the plaintiff's board of directors held in New York, but they were not New York contracts in the sense that they are to be governed necessarily by the law of New York. As found by the single justice, "It was the intention of the parties that these agreements should be carried out and consummated by the delivery of the deeds and the issue of certificates of stock in Massachusetts, where it was intended that the offices of the company should be, and where they
9 were established, in Boston, and where, in fact, they were so carried out. It was intended that the business of the company, outside the actual mining and smelting operations, which

were to be conducted in Arizona, should be carried on in Massachusetts; and this was done." Where a contract is made with a purpose by the parties to it that it shall be performed in a particular place, its validity and interpretation are to be determined by the law of the place where it is to be performed. It is made with a view to that law. Pritchard v. Norton, 106 U. S. 124. Hall v. Cordell, 142 U. S. 116. Andrews v. Pond, 13 Pet. 65. Hamlyn v. Talisker Distillery, [1894] A. C. 202. American Malting Co. v. Souther Brewing Co. 194 Mass. 89. The ruling of the single justice that the transaction is to be determined according to the law of this Commonwealth appears to have been right.

But, however that may be, the single justice has found as a fact that the law of New York applicable to the case is the same as that of Massachusetts. The only evidence as to the New York law before the single justice was the following cases decided by the courts of that State: Blum v. Whitney, 185 N. Y. 232; Seymour v. Spring Forest Cemetery Association, 144 N. Y. 333; Barr v. New York, Lake Erie & Western Railroad, 125 N. Y. 263; Brewster v. Hatch, 122 N. Y. 349; Getty v. Devlin, 54 N. Y. 403; Campbell v. Cypress Hills Cemetery, 41 N. Y. 34; Colton Improvement Co. v. Richter, 55 N. Y. Supp. 486; and there were also admitted de bene Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 148 Fed. Rep. 1020; S. C. 136 Fed. Rep. 915; and McCracken v. Robison, 57 Fed. Rep. 375, decided in the United States Circuit Court for the district of New York.

The defendant's attack upon this finding stands upon a somewhat different basis from that upon the other findings of fact, because this rests wholly upon documentary evidence, and the appellate court stands precisely as did the justice, who heard the case, in respect of opportunities to weigh evidence and draw inferences from it. The trial court has not here the advantage of seeing the witnesses and judging of their credibility by personal observation. Hence no special presumption exists in favor of his finding. Harvey-Watts Co. v. Worcester Umbrella Co. 193 Mass. 138. But
10 the decision must be made upon the evidence which was before the single justice. The cases in the federal courts are not evidence as to the law of New York, for the reason that, this being a question of general law, the federal courts declare the law upon their own views and are not bound by decisions of State courts. Olcott v. Supervisors, 16 Wall. 678, 689. Burgess v. Seligman, 107 U. S. 20, 33, 34. Pleasant Township v. Ætna Ins. Co. 138 U. S. 67, 73. Moreover, the federal cases cited do not purport to declare what is the law of New York. While none of the decisions of the New York courts is based upon facts precisely like those in the case at bar, Brewster v. Hatch, 122 N. Y. 349, and Campbell v. Cypress Hills Cemetery, 41 N. Y. 34, are so nearly akin in essential features, and the statement of legal principles in each is such as to lead to the conclusion that the finding of the single justice was correct.

Blum v. Whitney, 185 N. Y. 232, is relied upon by the defendant as announcing a different doctrine; but it does not so appear to us. Several corporations and their officers there joined in a written con-

tract for the formation of a new corporation with a fixed capitalization and for the transfer of their several properties to it for a definite amount of its stock. The maximum amount that might be paid for the capital stock of a certain other corporation was fixed by implication in the agreement. All the persons contemplated, and none others, became members of the new corporation. These were treated by the court as together constituting the organizers of the corporation. The fact that the maximum price permitted by the agreement was in fact paid for the capital stock of the other corporation and that a great profit was obtained by some of the organizers was regarded not as a fraud upon the corporation but upon the associates in the organization. It was held not to be a case for the application of the law governing promoters. This case cannot be considered as stating a rule in conflict with the finding of the single justice.

In its practical results it is not of much consequence whether the law of the situs, either of Massachusetts or New York, or of the forum, governs, for upon this record and the findings before us, the law of this Commonwealth controls the rights and obligations of the parties.

3. The next inquiry is as to the liability of the defendant. The plaintiff seeks to establish this on the ground that the defendant and Lewisohn framed a scheme, which was an entirety and which as a whole comprised the organization and continued management of the plaintiff by themselves, their agents and representatives, until the completion of the project; this scheme was the capitalization of the plaintiff for $3,750,000; the sale to it of their property, costing and intrinsically worth $1,000,000, but having in the market a value not over $2,000,000, for $3,250,000; the sale to the general public at par for cash of the remaining $500,000 of stock; and all this without providing the plaintiff with any independent board of officers or advisers to pass upon the wisdom of the purchase and without disclosing the substance of the transaction and their extraordinary profit to the purchasers of its stock for cash at par. This scheme was an entity, one part of it was just as essential as any other part, and one part was the procurement of $500,000 in cash from the unenlightened public as a working capital for the new company. 11

It has been decided, apparently by a unanimous court, that such a transaction creates a liability on the part of the defendant to account for his profits to the plaintiff in this proceeding. Hayward v. Leeson, 176 Mass. 310. One of the present suits was before the court as reported in 188 Mass. 315, and after an elaborate review of the authorities and examination of the grounds for judgment, it was held that the defendant was liable, notwithstanding the opposing decision on the precise point by the United States Circuit Court in Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 136 Fed. Rep. 915. Since the decision reported in 188 Mass. 315, the above entitled case against Lewisohn has been considered by the United States Circuit Court of Appeals (148 Fed. Rep. 1020) and by the Supreme Court of the United States (210 U. S. 206) and without dissent a conclusion has been reached contrary to that of

this court. The deference due to a decision by the highest court in the land and the intrinsic importance of the question at issue require a reconsideration of our own cases, a re-examination of the authorities and a careful consideration of the principles involved.

The plaintiff seeks to recover a secret profit made by the
12 promoters in the sale of their own property to the corporation, basing its claim on the general and well recognized proposition that a promoter cannot take lawfully a secret profit and will be held to account for it if he does.* Fundamently the action is to recover profits obtained by a breach of trust. There is a distinct finding by the single justice that the defendant and Lewisohn were the promoters of the plaintiff. This finding is amply justified by the evidence. In their brains it was conceived, by their direction the formalities of its incorporation were carried out, their resources provided its mines, their influence and reputation with those desiring to invest in mines procured its working cash capital. The word "promoter" has no precise and inflexible meaning in this country. In England it is defined by statute. St. 7 & 8 Vict. c. 110, § 3. See also St. 30 & 31 Vict. c. 131, § 38. But even there the duties of promoters as fiduciaries to the company are matters of common law cognizance. Erlanger v. New Sombrero Phosphate Co. 3 App. Cas. 1218, 1269. In a comprehensive sense "promoter" includes those who undertake to form a corporation and to procure for it the rights, instrumentalities and capital by which it is to carry out the purposes set forth in its charter, and to establish it as fully able to do its business. Their work may begin long before the organization of the corporation, in seeking the opening for a venture and projecting a plan for its development, and may continue after the incorporation by attracting the investment of capital in its securities and providing it with the commercial breath of life. It is now established without exception that a promoter stands in a fiduciary relation to the corporation in which he is interested, and that he is charged with all the duties of good faith which attach to other trusts.

In this respect he is held to the high standards which bind
13 directors and other persons occupying fiduciary relations.†

That the promoters stands in the relation of a fiduciary to the corporation which he organizes seems to be conceded in Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 210 U. S. 206,

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* Parker v. Nickerson, 112 Mass. 195, 196. Parker v. Nickerson, 137 Mass. 487, 497. Bagnall v. Carlton, 6 Ch. D. 371. Emma Silver Mining Co. v. Grant, 11 Ch. D. 918, 936. Nant-y-Glo & Blaina Ironworks Co. v. Grave, 12 Ch. D. 738. Lyndney & Wigpool Iron Co. v. Bird, 33 Ch. D. 85. Whitley Bridge Calico Printing Co. v. Green, 5 Q. B. D. 109. Chandler v. Bacon, 30 Fed. Rep. 538. Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 119, 120. Hinkley v. Sac Oil & Pipe Line Co. 132 Iowa, 396, 402, 403. Fred Macey Co. v. Macey, 143 Mich. 138, 152. Zinc Carbonate Co. v. First National Bank of Shullsburg, 103 Wis. 125. Pietsch v. Milbrath, 123 Wis. 647. Cox v. Coal & Oil Investment Co. 61 W. Va. 291, 305.

† Dickerman v. Northern Trust Co. 176 U. S. 181, 202. Yetser v. United States Board & Paper Co. 107 Fed. Rep. 340. Chaffe v. Berkley, 141 Iowa, 344. Getty v. Devlin, 54 N. Y. 403; S. C. 70 N. Y. 504. Laudenslager v. Woodbury Heights Land Co. 73 Fed. 556, 560. Exter v. Sawyer, 146 Mo. 302, 322. Johnson v. Sheridan Lumber Co. 51 Ore. 35. Camden Land Co. v. Lewis, 101 Maine, 78. Cox v. Coal & Oil Investment Co. 61 W. Va. 291, 305. The Telegraph v. Loetscher, 127 Iowa, 383. Hayward v. Leeson, 176 Mass. 310, and cases cited at p. 318.

The questions to be answered are, whether this rule is applicable, and if it is, whether the plaintiff is in a position to assert its claim.

Notwithstanding this fiduciary relation the promoter may sell property to the company which he is promoting. But in order that the contract may be absolutely binding he must pursue one of four course: (*a*) He may provide an independent board of officers in no respect directly or indirectly under his control, and make full disclosure to the corporation through them; (*b*) He may make a full disclosure of all material facts to each original subscriber of shares in the corporation; (*c*) He may procure a ratification of the contract after disclosing its circumstances by vote of the stockholders of the completely established corporation; (*d*) He may be himself the real subscriber of all the shares of the capital stock contemplated as a part of the promotion scheme. The defendant does not contend upon this report that either of the first two courses was followed. He does rest his claim chiefly upon the third and fourth courses. As applied to the facts of this case these two come to the same thing, for the reason that on the findings of the single justice the defendant and his associate were subscribers for only one hundred and thirty thousand shares out of a total — one hundred and fifty thousand and in the light most favorable to them they held all the shares which had been issued at the time of the ratification, but not all which it was proposed to issue as a part of the scheme of promotion. The point to be determined, therefore, is whether the promoter is immune from liability if he and his associates are owners of all
14 the issued stock at the time of the act complained of, although intending as a part of their plan the immediate issue of further stock to the public without disclosure, and whether, while a substantial portion of the stock intended to be issued to the public remains unissued, a vote of ratification of the breach of trust will protect him.

A review of the authorities seems to demonstrate that there is a liability of the promoter to the corporation when further original subscribers to capital stock contemplated as an essential part of the scheme of promoters came in after the transaction complained of, even though that transaction is known to all the then stockholders, that is to say, to the promoters and their representatives.

Erlanger v. New Sombrero Phosphate Co. 3 App. Cas. 1218, is one of the most important and thoroughly considered cases, and, as it has been said to be a case often misunderstood (Lord Davey in Salomon v. Salomon, [1897] A. C. 22, 57), it is well to consider it at length. It was first heard by Vice-Chancellor Malins under the name of New Sombrero Phosphate Co. v. Erlanger (5 Ch. D. 73), then by the justices of appeal (5 Ch. D. 102), and finally by the House of Lords, where it was twice argued. The facts were these: Erlanger and his associates, hereafter spoken of as the syndicate, bought of the official liquidator of a broken down company the lease of a phosphate island, for £55,000. The agreement for purchase was signed on September 11, and was subject to the approval of the judge, which was given on September 15, 1871. By its terms the contract was to be completed on November 15, 1871. The syndicate

then organized the New Sombrero Phosphate Company under St. 25 & 26 Vict. c. 89 (3 App. Cas. 1264). The articles of association of the new corporation were signed on September 20, 1871, and the company registered on September 20 or 21 (5 Ch. D. 76). On registration the corporation was created under 25 & 26 Vict. c. 89, § 18 of which provided that upon registration "the subscribers * * * shall thereupon be a body corporate * * * capable forthwith of exercising all the functions of an incorporated company." The signers of the articles of association were tools of the syndicate. The members of the first board of directors were named in the articles
15 of association. Two were out of the country and would not attend meetings; others were an employee of Erlanger, a retired admiral of the English navy, whose shares necessary to qualify him as a director were paid for by Erlanger (5 Ch. D. 107, 108), and the mayor of London; three directors made a quorum, and the last three named attended the meetings. The syndicate anticipated its payments required by its contract and acquired the lease of the island on September 21, 1871. The first meeting of the directors was held on September 29, 1871, at which was produced and approved by resolution an agreement between one Evans (in whose name in behalf of the syndicate the contract for the purchase of the lease from the official liquidator was made), and one Pavy (acting for the new company), dated September 20, whereby Evans sold and Pavy for the company bought the lease of the island for £80,000 in cash and £30,000 in paid up stock. In the discussion of this case in 210 U. S. at p. 216 this contract is stated to have been "provisional on the shares being taken and the company formed," but we do not so understand it as set forth in 5 Ch. D. 75, 76 and 95. It was subject to the new company being registered (which was done on September 20 or 21), and to the contract with the official liquidator being approved by the judge (which was done on September 15) and duly performed (which was done on September 21) and to the confirmation by the company (which was given by vote of the directors on September 29, who were in this regard clothed by the articles of association with all the authority of the corporation itself, 3 App. Cas. 1273, 1274), but it contained no other provisional features. The directors adopted the contract between Evans and Pavy without investigation into its merits, and in ignorance of the profit made by the syndicate except as Evans had such knowledge. After this the public oversubscribed. The stock was issued, £30,000 to the syndicate and £100,000 to the public; and on November 2 £80,000 was paid to the syndicate by the company. 5 Ch. D. 96. Respecting this agreement for sale by the syndicate it is further said in 210 U. S. at p. 217, that "the contract seems to have reached forward to the moment when they [the public] subscribed. As it is put in 2 [I is meant] Morawetz, Corp. (2d ed.) § 292, there was really no company till the shares were issued," and on this ground it is
16 stated by the court at p. 216 that the English case "seems to us far from establishing a different doctrine for that jurisdiction." We cannot accede to this interpretation. The company was fully formed the moment it was registered. The subscription for the

shares required as a prerequisite to registration under the English statute established the company as fully as the forty shares subscribed and the $1,000 for capital stock, paid into the plaintiff's treasury on or before July 11, 1895, established it. It was enabled to make any contract within the scope of its powers. That is settled by the plain language of 25 & 26 Vict. c. 89, § 18, quoted above. But it also has been expressly so decided. It was said in Salomon v. Salomon, [1897] A. C. 22, at p. 51: "When the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate 'capable forthwith,' to use the words of the enactment, 'of exercising all the functions of an incorporated company.' Those are strong words. The company attains maturity on its birth. There is no period of minority—no interval of incapacity." This apparently demonstrates the error of the further statement in 1 Morawetz, Corp. (2d ed.) 279, that "Before any shares were issued the existence of the corporation was a fiction." The remark of Lord Cairns (3 App. Cas. at p. 1239) to the effect that the contract for the sale of the island was "provisional on the shares being taken and the company completely formed" was made in connection with the defense of laches and not in the discussion as to the liability of the defendants (which he had concluded on an earlier page), and refers only to the fact that the scheme of the defendants to get £80,000 in cash out of the new company under their contract with it was dependent as a practical matter on the shares being taken by the public, and does not and cannot apply to the phraseology of the contract itself, for respecting that it is not correct. The only conditions named in the contract were that the company should be registered and confirm the contract and the contract of the syndicate with the official liquidator be performed. (See 5 Ch. D. 75, 76 and 95.) The distinction which appears to be established between the Erlanger case and the present one, by the decision of the United States Supreme Court, 210 U. S. 206, is that if promoters organize a company with a capital of $3,750,000
17 and sell to it through their dummy directors property bought by them for this purpose, for $3,250,000, in paid up shares, and then get by public subscription $500,000 for working capital, the transaction is valid. But if promoters, having bought property for £55,000, organize a company with a capital of £130,000, and while they are the only bona fide stockholders by vote of their directors sell to it their property for £110,000, to be paid £80,000 in cash and £30,000 in paid up shares, £100,000 being subscribed in cash by the public, the transaction is void. The only difference between the two cases is that in the Erlanger case the promoters were paid a part of the purchase price in money, the proceeds of public subscription, and received paid up shares, which they took in payment of the balance of the purchase price when the stock was issued to subscribers, while in the present case the whole purchase price was paid in stock, which was issued before any stock was issued to the public although after a substantial public subscription. In other words, the order in which the transaction is carried out, and not its substantial nature, makes the difference between liability and im-

munity of the promoter. It is true that in the Erlanger case, until after ratification by the company of the contract previously made in its behalf for the purchase of the lease of the island, the mayor of London by acting as a director was liable to take shares of stock and intended to, and did subsequently, take and pay for fifty shares. He and possibly one other (3 App. Cas. 1228) appear to have been the only persons up to that time connected with the company, who subsequently became stockholders, who were not agents of the promoters. But it is also the fact (as stated by Jessel, M. R., in 5 Ch. D. at p. 112) that "Up to this time there was not really a single bona fida shareholder distinct from the promoters," and of course all these assented to the transaction. If this is a vital circumstance, that case is distinguishable in principle from the one at bar and from the case decided by the United States Supreme Court. This appears to us to be a difference upon an immaterial matter. It is of no consequence whether in fact the dummy directors know of the terms of sale and the breach of trust of the promoters. It does not appear in the present case that the nominees of Bigelow and Lewisohn knew any more about the profit the latter were making than did the directors of the New Sombrero
18 Company of the profits of the syndicate. The point is that in both cases the directors were selected with the purpose that they should be the mere instruments of the promoters, and they carried out the will of their masters. Under the English statute the instruments of the promoters in the New Sombrero Company, while its directors, were as fully clothed with all the powers of the corporation and as much the holders of all its stock as were the seven directors of the plaintiff holding in all forty shares of the plaintiff at the time the contract of sale in the present case was made. If the assent of all the stockholders is good in the one case, by the same token it should be equally good in the other; and the breach of trust in the one is equally a breach of trust in the other. This case seems to us an authority in favor of the plaintiff.

In New Sombrero Phosphate Co. v. Erlanger, 5 Ch. D. 73, 123, it was said by Baggallay, L. J.: "The syndicate were, in substance, not only the vendors of the property, but also the promoters of the company, and in such a case the syndicate, as promoters, being in a fiduciary relation to the company, it was essential that the public, who were invited to become, and who were expected to become, the shareholders of the company, and to constitute the company, should have the fullest information as to all the surrounding circumstances." See also Jessel, M. R., S. C. at p. 113. In re British Seamless Paper Box Co. 17 Ch. D. 467, at p. 471, it was said by Jessel, M. R.: "If promoters make an arrangement to get a profit for themselves out of what is apparently paid to the vendors, it is immaterial whether the contract with the vendors is approved of by the directors of the company, who are the promoters, just before the allotment or just after: in both cases it is intended to cheat the future shareholders; and of course it makes no difference whatever that the persons who, at the time the allotment was made, were in fact the

promoters or their nominees, knew of the fraud. You can defraud future allottees as well as present allottees." In the same case on appeal Cotton, L. J., said (17 Ch. D. at p. 479): "The directors stand in a fiduciary relation to the whole company, that is, not only to the existing members but to all whom they intend to bring in." In Broderip v. Salomon, (1895) 2 Ch. 323, at p. 329, it was said
19 by Vaughan Williams, J. (whose conclusion was approved in S. C. sub nomine Salomon v. Salomon, [1897] A. C. 22): "Of course, purchasing at an exorbitant price may be a fraud, even if all the shareholders know of it, if there is an intention to allot further shares at a later period to future allottees." This point was apparently left open in the House of Lords, [1897] A. C. at p. 37. In In re Leeds & Hanley Theatres of Varieties, [1902] 2 Ch. 809, at p. 823, occurs this language: "At first there were only four directors * * * and the seven necessary signatories of the memorandum of the association. When it is said that the promoters stood in a fiduciary position towards the company, that does not mean that they stood in such a relation to these directors and these seven signatories. It means that they stood in a fiduciary relation to the future allottees of shares—to the persons who were invited to come and take up the shares of the company." In Gluckstein v. Barnes, [1900] A. C. 240, 257, Lord Robertson says: "The people for whom these gentlemen [the promoters] were bound to act were their coming constituents, the persons out of whose money they proposed to make their gain." In Densmore Oil Co. v. Densmore, 64 Penn. St. 43, at p. 50, it is said: "Where persons form such an association, or begin or start the project of one, from that time they do stand in a confidential relation to each other, and to all others who may subsequently become members or subscribers, and it is not competent for any of them to purchase property for the purposes of such a company, and then sell it at an advance without a full disclosure of the facts." This language is quoted with approval and applied in Burbank v. Dennis, 101 Cal. 90, 98, and in South Joplin Land Co. v. Case, 104 Mo. 572, 580. To the same point, Pittsburg Mining Co. v. Spooner, 74 Wis. 307, 321-323. In Pietsch v. Milbrath, 123 Wis., 647, at p. 656, it is held that "Persons who act as promoters of a corporation do not necessarily cease to be such when the corporation is organized to do business. * * * So long as there are prospective original subscribers for stock and the promoters and those concerting with them remain in control of the corporation, it is in a position to be deceived. * * * It is deceived in a legal sense when it is rendered helpless by its managers as to protecting those invited to subscribe for its stock, and is then used to aid in defrauding them."

This is supported by Fred Macey Co. v. Macey, 143 Mich.
20 138, 152, a case singularly like the one at bar in its essential features, where relief was granted to the corporation against the promoters although they subscribed for all the capital stock. Other cases which in principle reach the same result are Yeiser v. United States Board & Paper Co. 107 Fed. Rep. 340, 348; London Trust Co. v. Mackenzie, 62 L. J. Ch. (N. S.) 870; Hinkley v. Sac Oil & Pipe Line Co. 132 Iowa, 396. It was said in Groel v. United

Electric Co. 4 Robbins, 616, 622: "There can be no question that promoters are liable to the corporation for profits secretly made by them in its promotion, and that such liability arises in cases where future allottees of stock are concerned. Knoop v. Bohmrich, 4 Dick. 82. Plaquemines Tropical Fruit Co. v. Buck, 7 Dick. 219. Loudenslager v. Woodbury Heights Land Co. 13 Dick. 556, affirming the principle established in the court of chancery in Woodbury Heights Land Co. v. Loudenslager, 10 Dick. 78." In Central Trust Co. v. East Tennessee Land Co. 116 Fed. Rep. 743, and Camden Land Co. v. Lewis, 101 Maine, 78, 95, Hayward v. Leeson, 176 Mass. 310, to this point is cited with approval. St. Louis, Fort Scott & Wichita Railroad v. Tiernan, 37 Kans. 606, and Stewart v. St. Louis, Fort Scott & Wichita Railroad, 41 Fed. Rep. 736, were both decided on the assumption that the promoters took all the stock, although it appears that later some stock was issued to municipalities through which the tracks of the promoters' railroad corporation ran, but whether as a part of the original plan of promotion does not appear, and no weight is attached to this circumstance in the opinions. Numerous other cases which have been cited do not bear upon this point for the reason that in each of them the owners of the property conveyed have owned either the entire capital stock of the corporation or all that it was contemplated to issue. See Foster v. Seymour, 23 Fed. Rep. 65; McCracken v. Robison, 57 Fed. Rep. 375; Barr v. New York, Lake Erie & Western Railroad, 125 N. Y. 263; Blum v. Whitney, 185 N. Y. 232. In re Ambrose Lake Tin & Copper Mining Co. 14 Ch. D. 390; Salomon v. Salomon, [1897] A. C. 22; In re British Seamless Paper Box Co. 17 Ch. D. 467; Seymour v. Spring Forest Cemetery Association, 144 N. Y. 333; Hutchinson v. Simpson, 92 App. Div. (N. Y.) 382; Tompkins v. Sperry, 96 Md. 560; Langdon v. Fogg, 18 Fed. Rep. 5; Flagler Engraving Machine Co. v. Flagler, 19 Fed. Rep. 468; Insurance Press v. Montauk
21 Fire Detecting Wire Co. 103 App. Div. (N. Y.) 472; Higgins v. Lansingh, 154 Ill. 301; In re Baglan Hall Colliery Co. L. R. 5 Ch. 346. In all these cases it was also true that no shares were ever issued (so far as appears) other than those to the promoters, except that in In re British Seamless Paper Box Co. 17 Ch. D. 467, at a time considerably subsequent to the organization of the corporation, a change in the scheme was made in good faith by which others were brought in as subscribers.

In this respect the question is one of intention of the promoters. If they actually intend at the time the company is brought out to remain its sole owners and that it shall not receive the money of innocent shareholders in the future, then although thereafter the exigencies of the company may be such as to require the issue of additional stock, they may not be responsible. In re British Seamless Paper Box Co. 17 Ch. D. 467, is an illustration of this principle. There it was found that the promoters were and intended to remain the sole proprietors of the property of the company and the sole members of the company. Cotton, L. J., at p. 479, said: "Here it is an established fact that when the company was formed it was intended to be a private company, that is, it was intended to carry it

on without calling in the public, or issuing any shares except to the then existing shareholders. Therefore the doctrine that directors may not take a profit for themselves is inapplicable, because all the members knew that they intended to make a profit. It is true that some new members were subsequently taken in. If shortly after this transaction a prospectus had been issued and the public had been invited to come in and take shares, no court would have listened to directors who said that it was not intended to take in fresh members. But this was commenced and carried on entirely as a private company, and a considerable time elapsed before they asked any one to join them."

In Wills v. Nehalem Coal Co. 52 Ore. 70, a corporation was organized by promoters with a capital of $150,000. More than half was issued to promoters and their tools in return for property of one of them conveyed at an overvaluation. Afterwards shares were sold to the public without disclosure of the great profit made by promoters. Relief was granted. The contention that the corporation had assented with full knowledge of the facts by all who were the stockholders at the time of the sale was disposed of on the ground that in substance a wrong was done the corporation in diminishing the common fund held for the benefit of all the stockholders by issuing a part of its capital stock for property worth less than its face value. In Richlands Oil Co. v. Morriss, 108 Va. 228, the facts as stated in the opinion were that the promoters, having acquired the control of certain oil leases for an insignificant price, "proceeded to transfer these leases to a company which they organized upon a capitalization of 1,000,000 shares (the par value of each share being $1), and distributed 600,000 of those shares to themselves; and having perfected the organization of the company by making themselves the president, secretary, treasurer, and directors undertook to market the residue of the shares of stock, amounting to 400,000, without informing the public as to the true condition of affairs." The suit of the corporation was upheld. Upon the point we are now discussing these two cases are indistinguishable in principle from the cases at bar.

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This review of decisions seems to establish abundantly the proposition that promoters stand in a fiduciary position toward the corporation, as well when as a part of the scheme of promotion uninformed stockholders are expected to come in after the wrong has been perpetrated, as when at that time there are shareholders to whom no disclosure is made. We find no authority opposed except the Lewisohn cases in the federal courts (210 U. S. 206).

If the question is examined on principle apart from authority, the same result appears clear. The starting point is that a promoter is a fiduciary to the corporation. To use the words of Lord Cairns in Erlanger v. New Sombrero Phosphate Co. 3 App. Cas. 1218, at p. 1236: Promoters "have in their hands the creation and moulding of the company; they have power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and begin business." The corporation is in the hands of the promoter like clay in the hands of the potter. It is to this

person, absolutely helpless and incapable of independent
23 initiative or uncontrolled action, that the promoter stands as trustee. It is not necessary to inquire how far he may be trustee also for shareholders or associates. In the present case the inquiry relates wholly to his obligation to the corporation. The fiduciary relation must in reason continue until the promoter has completely established according to his plan the being which he has undertaken to create. His liability must be commensurate with the scheme of promotion on which he has embarked. If the plan contemplates merely the organization of the corporation his duties may end there. But if the scheme is more ambitious and includes beside the incorporation, not only the conveyance to it of property but the procurement of a working capital in cash from the public, then the obligation of faithfulness stretches to the length of the plan. It would be a vain thing for the law to say that the promoter is a trustee subject to all the stringent liabilities which inhere in that character and at the same time say that, at any period during his trusteeship and long before an essential part of it was executed or his general duty as such ended, he could, by changing for a moment the cloak of the promoter for that of director or stockholder, by his own act alone, absolve himself from all past, present or future liability in his capacity as promoter. The plaintiff was fully organized and authorized to do business on July 8 and 11, 1895, when only $1,000 in capital stock had been paid in. It would be an idle ceremony indeed to establish for promoters the obligations of trustees, and at the same time hold that by their tools and with only $1,000 paid in, and that as a mere form (for it was soon after repaid to one of them) they could vote to themselves a wholly unwarranted profit of $1,250,000, kept secret from other initial shareholders, because at that moment they were the only stockholders. By such a course the law would be holding out apples of Sodom to the wronged corporation. Corporations can be formed through irresponsible agents with ease. If these agents can vote away a substantial part of the capital stock for property of comparatively small value, and still with immunity to themselves and their principles receive from the uninformed public cash subscriptions for the rest of the capital stock, the organization and management of corporations might readily become a "system of frauds." Peabody v. Flint, 6 Allen, 52, 55. It is answered that the plaintiff
24 has assented to the transaction with full knowledge of the facts. But it has not assented when it stood where it could act independently. The assent to the wrongful act of the promoters was given at the behest and by vote of the promoters themselves, while still occupying the position of protectors to their own creature, while it was bound hand and foot by them and prevented from taking any action except through them as a step in its further exploitation, and while their trust was uncompleted. The corporation although by law fully organized was still in its swaddling clothes, so far as the plans of the promoters were concerned. The value of their stock taken in return for their mining property was dependent in a substantial degree upon the corporation having $500,000 in

cash for a working capital. They could not perfect their plans nor reap their contemplated profit, except by retaining their hold upon the corporation until the public had made this contribution. In one sense it is true that the plaintiff was completely organized on July 11 and on September 20, 1895. It was fully competent to be bound by its contracts and ratification of contracts with those dealing with it at arm's length. But it was not free from its wardship to its promoters, whose scheme from the first looked forward to a corporation with treasury filled by subscriptions from the unenlightened public. The corporation was not dealing with these fiduciaries upon an independent ground. The plaintiff, although a legal corporation from July 8, leaned wholly upon its promoters, because they made it so to lean, until long after the events here in controversy. An assent under these conditions can be of no greater effect than the assent of a minor under guardianship to the breaches of trust of his guardian.

The situation is akin to the conveyance of property by a man solvent but in contemplation of insolvency. Such conveyance is not wrong until the contemplated indebtedness is incurred which makes him an insolvent. Then the executed evil intent stretches back and invalidates the original conveyance. Here the conveyance to the corporation with the secret profit, when there are no uninformed subscribers to stock, if nothing more is ever done, is not an actionable tort. But the vicious intent looks forward to the procurement of money from the ignorant public by means of original subscriptions and the execution of this evil intent extends backward to contaminate the sale and its profit.

Stress has sometimes been laid upon the fact that the promoters were paid a part of their purchase price out of the public subscriptions. But there is no difference in principle between such a case and the present, where a substantial part of the value of the stock taken by the defendant and Lewisohn depended upon the cash subscriptions to be made by the public for the remaining shares not issued to the promoters.

But it is further argued that, the entire capital stock outstanding at the time being in the hands of the promoters, the sale of the property to the corporation was merely changing the form of title of the promoters from owners of real estate to that of shares of stock, and that, there being then no other shareholders, no wrong was done. It has been decided that where persons own the entire authorized capital stock of the company and take it in payment for the conveyance of their property at a grossly exaggerated price, nobody can be heard to complain. The leading English cases upon this point are In re Gold Co. 11 Ch. D. 701, In re Ambrose Lake Tin & Copper Mining Co. 14 Ch. D. 390, In re British Seamless Paper Box Co. 17 Ch. D. 467, and Salomon v. Salomon, [1897] A. C. 22. But these and many other like cases cited on pages 185 and 186 ante are where the promoters owned all the outstanding capital stock and intended to remain the sole proprietors and did not purpose that there should be, as a part of the promotion plan, a substantial issue of stock for cash to the public. This is pointed out in London Trust

Co. v. Mackenzie, 62 L. J. Ch. (N. S.) 870, 875. The distinction is clear between cases of that class and those like the present, where the promoters took for themselves a large number of shares of stock without adequate consideration and without disclosure to the detriment of the corporation and all its future shareholders, at the same time planning that there should be immediate public subscriptions. It is one thing to take all the shares of a corporation in payment for physical property conveyed. It does not much matter to the stockholders in such a case whether the total is one hundred and thirty thousand shares or one hundred and fifty thousand shares. But it is a very different thing to take $\frac{130,000}{150,000}$ of capital stock of a
26 corporation whose assets consist of the same physical property, and in addition $500,000 in money subscribed by others. The latter course affects the other stockholders and the corporation itself, and it gives the promoters something appreciably more valuable than what they contribute. It is true that in Salomon v. Salomon and in some other cases there was a part of the authorized capital stock which was not issued, but it was not proposed to be issued as a part of the scheme of promotion and the original shareholders intended to remain the only shareholders. It was to be issued or not in the remote future, as the exigencies of the corporation in the actual conduct of its business might require, but, in any event, it was not to be issued for the purpose of starting the corporation on its course. This circumstance materially affects the question here to be considered. Most, if not all, corporation laws provide in some form for an increase of capital stock. It is of no consequence upon such a point as this, whether the capital stock originally authorized is large but not all issued or whether it is at first small and subsequently an increase is authorized. This seems to be the view taken by the English courts, for it is said by James, L. J., in In re British Seamless Paper Box Co. 17 Ch. D. 467, "If they [the promoters] were intending, although then constituting the whole company, that other people should come in afterwards to whom what had been done would be injurious, the court would feel no difficulty in saying as Lord Langdale did in Society of Practical Knowledge v. Abbott, 2 Beav. 559, that they intended to commit a fraud."

The fundamental reasoning upon which these cases can rest is not that no wrong has been committed, but there is no one to enforce the remedy. All courts recognize the soundness of the doctrine that no man can be on both sides of the same bargain with justice to all interests. The principle that one cannot rightfully sell property, belonging to him in his private right, to himself in a trust capacity is universal.

If this aspect alone is looked at and the corporation is regarded as a distinct person, it cannot be said that the corporation is not wronged by such a breach of duty by promoters. It is only when the corporate personality is disregarded and its component elements as stockholders alone are considered that it can be said
27 that no harm is done on the ground (as was said in Salomon v. Salomon, [1897] A. C. at p. 57) that "the company is bound in a matter intra vires by the unanimous agreement of its

members." But looking through the form of the corporation to the stockholders and treating them as the corporation is an exception to the otherwise firmly established universal rule that the corporation is a separate legal entity for all purposes, even though all its stock be held by a single interest and it be to all practical intents merely the instrument of the stockholder. Conley v. Mathieson Alkali Works, 190 U. S. 406. Peterson v. Chicago, Rock Island & Pacific Railway, 205 U. S. 364, 390. We perceive no reason for extending this exception to a case like the present.

The real ground of the decision of which Salomon v. Salomon is a type is that the corporation is estopped by the circumstance that all persons with financial concern in the matter have assented with knowledge, and thus the lips of everybody are sealed. It is not that no wrong has been done, but that whatever wrong has been done has been condoned. The maxim "Volenti non fit injuria" is invoked. This, however, is setting up confession and avoidance and not a bar to the main cause of action.

The theory upon which corporations are founded is that they are artificial persons, distinct and separate from officers and stockholders. Corporate liabilities do not attach to the latter. The wrong which the defendant and his associate did in this case was in selling property worth intrinsically $1,000,000 and in the market at most $2,000,000 for $3,250,000 without revealing that they were making a secret profit. The wrong was done to the corporation. It affected all its shareholders, present and future alike. It is generally admitted that if there are existing stockholders ignorant of the wrong, redress may be had. But it is had through the corporation or for the benefit of the corporation and not by the stockholder in his own right. The wrong is not done to the shareholders as individuals, nor to the shareholders collectively, it is done to the corporation as an independent being, and thus indirectly the rights of those who are or who may become stockholders are affected. In buying the promoters' mine, the directors of the corporation acted for the corporation,
28 as such, without regard to who were the then stockholders, or even if there were no stockholders. Whoever becomes an originally contemplated shareholder coming in afterwards has as much right to say that the rights of the corporation were not protected and to insist that it should assert its remedy for the wrong done it, as one in at first but not informed. Subsequent subscriptions to original stock as a part of the scheme of promotion do not change the identity of the corporation, but remove an impediment to the enforcement of a remedy for a wrong previously done the corporation. The wrong is not done when the innocent public subscribes, but when the sale was made to the corporation at a grossly exaggerated price with secret profit. The occasion for complaining of this wrong comes when the promoters issue to the public the balance of the stock in order to provide the money necessary to set the corporation on its feet and to give thereby the contemplated value to the stock taken by themselves in payment for their mines. The exemption of the promoter from liability to the corporation for a sale without disclosure when he takes the entire issue of capital stock is an exception to the general rule

imposing upon him the liabilities of a trustee. If this exception is to be extended to a case like the present, it leaves nothing of substantial value in the original rule. It might still reach small and grosser forms of want of fidelity to corporations, but would leave unharmed the vastly greater and more refined variety illustrated by the present case. It would point the way to general immunity for the wary.

It is also urged that the maintenance of this suit works an injustice to the defendant in requiring a repayment to the corporation, which will result in a benefit to the thirteen fifteenths of the capital stock taken by the defendant and Lewisohn (who condoned the wrong) as well as to the two fifteenths subscribed for by the innocent public. The size of the repayment which may be required of the defendant is due to the enormous profit taken at the outset. Apart from the unjust profit taken by the promoters, their interest in the plaintiff was only eight seventeenths, or, tested by the cost and intrinsic value of the property conveyed, four seventeenths. The true answer, however, is given by Jessel, M. R., in New Sombrero Phosphate Co. v. Erlanger, 5 Ch. D. 73, at p. 114. "It is said that is not doing
29 justice, and that the suit cannot be maintained in this form, because it will not do justice. But that argument goes too far, because it would apply to a case of the grossest fraud in every instance in which one or more of the actual shareholders of a company took part in that fraud. If the argument were once allowed to prevail, it would only be necessary to corrupt one single shareholder in order to prevent a company from ever setting the contract aside. It may be said you give to the shareholder, who was a party to the fraud, a profit, because he will take it in respect of his shares, and since as between co-conspirators there is no contribution, therefore his brother conspirators, who are made liable for the fraud, cannot make him repay his proportion. But the doctrine of this court has never been to hold its hand and avoid doing justice in favor of the innocent, because it cannot apportion the punishment fully amongst the guilty. A dozen parties to a fraud may be defendants, and one decree or judgment go against all, and if it is a fraud of such a character that none of them can bring an action for contribution, the plaintiff may at his will and pleasure enforce that judgment against any one of them, and perhaps pass over the most guilty of them: still there is no remedy as between those who commit the fraud. It is one of the punishments of fraud that there is no such remedy, and that a guilty party, though not the most guilty, may suffer the greatest amount of punishment. It is one of the deterrents to men to prevent their committing fraud." See also Stockton v. Anderson, 13 Stew. (N. J.) 486.

It is said further that the result reached is harsh from the business man's point of view. A discussion of this aspect of the case involves ethical consideration. Courts are constantly dealing with the various relations of the business world. Legal principles are applied to these transactions, but such principles "have almost always been the fundamental ethical rules of right and wrong." Robinson v. Mollett, L. R. 7 H. L. 802, 817. Upon its distinctly moral side, there is little to the credit of the defendant and his associate. The offering by the

defendant as promoter for public subscription for cash at par a substantial part of the capital stock of a corporation, the rest of whose capital stock had been issued for property conveyed to it under a law which permitted such stock to be issued only for the real value
30 of property, was equivalent to a representation that no fictitious value had been placed upon the property so acquired. But the distinct finding of the single justice is that the real value was less than one third the price for which the defendant and Lewisohn sold it. Nothing can be said in support of a business enterprise carried on by promoters, which involves the purchase by them of mines, vesting and intrinsically worth $1,000,000, with money in substantial part solicited from associates on representations that a corporation is to be formed with a capitalization of $2,500,000, of whose stock $2,000,000 is to be issued for the conveyance to it by them of the mines, and the rest for cash; the actual organization of the corporation under the laws of a State which permitted the issuance of capital stock for property conveyed only to the real value of the property, with a capital stock of $3,750,000, of which $3,250,000 is issued as fully paid for the conveyance of the mines; the settlement with a very great majority of the associates on the basis of a sale for $2,000,000 of stock as at first represented, the promoters retaining $1,250,000 of shares as a secret profit, intending also to procure from the public subscriptions for $500,000 of stock in cash at par and actually carrying out this purpose, the promoters themselves during all these manipulations having entire control of all executive offices of the corporation. In the absence of compelling authority, we cannot set the seal of judicial approval upon such business policies. See Bigelow v. Old Dominion Copper Mining & Smelting Co. 4 Buch. (N. J.), 71 Atl. Rep. at pp. 176 and 177.

Both on authority outside of our own cases and on principle, it appears to us that the defendant should be held liable. But in this jurisdiction the matter does not stand quite on the basis of an original proposition. In two thoroughly considered opinions in recent years, Hayward v. Leeson, 175 Mass. 310, and Old Dominion Copper Mining & Smelting Co. v. Bigelow, 188 Mass. 315, this court has held that liability existed in a case like this. It is not necessary to repeat the arguments of these decisions. There is thus added to considerations which otherwise exist, the force of the doctrine of stare decisis. One or both of these cases have frequently been cited by courts of other jurisdictions and always with approval until Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 148
31 Fed. Rep. 1020; S. C. 210 U. S. 206. No arguments have been adduced not considered in those cases, and no points now brought forward were not there discussed. While the rule of stare decisis does not prevent the overruling of those cases, they should not be disturbed unless they now appear to be so clearly wrong as to have no sound support. Mabardy v. McHugh, 202 Mass. 148. It must appear that the law was "misunderstood or misapplied." 1 Kent Com. 475. There was no misconception of the points involved when these cases were decided, nor any lack of discernment in their application to the affairs of corporations. It

does not appear that they have become archaic or inapplicable by reason of business evolution since they were announced. On the contrary, the tendency of custom since the first case was decided has been rather in the direction of more strict accountability of those owing duties to corporations and their stockholders. At all events, we perceive no occasion to relax these principles of accountability for breaches of trust. The mere fact that the Supreme Court of the United States has since decided the question differently is not alone a sufficient consideration for reversing our decisions. It is only when the reasoning of its decision is of convincing power and compels the conclusion that our cases were wrongly decided that it must command our support in other branches of the law than those where it is supreme under the Federal Constitution. With great respect to the decision in 210 U. S. 206, we are constrained to adhere to the law as laid down in the earlier cases in this Commonwealth.

We have discussed the question as if the same legal principles are involved now as were presented upon the demurrer. There are, however, certain aspects of the evidence which seem to us to make it essentially different and materially stronger for the plaintiff. When the votes to purchase the mines of the promoters were passed on July 11, only forty shares of stock had been subscribed for or issued. The votes were passed by the directors alone and there was no vote by the stockholders at this time. It is true that the directors comprised all the stockholders, but on that date they were acting wholly in their capacity as directors, that is, as trustees. They did not attempt, so far as any records show, to shift their character
32 as trustees for that of individual stockholders. They did not pursue the careful course of separation of these dual capacities by calling a stockholders' meeting, which was followed in North-West Transportation Co. v. Beatty, 12 App. Cas. 589, nor did they assent in writing as stockholders. So far as the records show up to this point, there was only a directors' vote for the purchase. Moreover, the records of the plaintiff show that at the opening of this meeting only six of the seven directors were present. Four of these six directors resigned as did also the absent seventh director, their resignations were accepted and their successors were chosen. But of the five newly chosen directors, only two were present and took their seats. Thus there were four directors, a bare quorum and majority, present when the offers for the sale of the mines were presented and the votes for their purchase were passed. These votes to purchase were not consummated until December, 1895, and January, 1896, when the deeds were delivered to the plaintiff. The vote to issue the certificates of stock in payment for the conveyances of mines was passed on September 18, 1895. Under date of July 18, 1895, the only subscription list of the plaintiff was signed. Upon this list appear the names of those outside persons who subscribed for the $500,000 of working capital for the plaintiff. The money was paid by some of the outside stockholders before September 18, and at least as early as September 10, 1895. Stock certificates were made out for the number of shares allotted to each under date of

September 18. The rights of all these persons as subscribers had become fixed at least as early as September 10, 1895, before which date the subscriptions were all received, and when notices of their acceptance and demands for payment were sent out. These circumstances amply support the finding of the single justice that issuance of the twenty thousand shares to the public was in the summer or fall of 1895. These stockholders were entitled to have a disclosure made to the corporation through independent officers. There is no pretense that any disclosure was made to these subscribers. On September 18, 1895, the directors of the plaintiff voted to issue the stock as before stated—thirty thousand shares to Bigelow and Lewisohn, one hundred thousand to their nominee Dumaresq, and there was made out the certificate for the remaining twenty thousand
33 shares to "Thomas Nelson, Treasurer," and these four, professing to represent all the stock of the plaintiff, signed the written approval of all previous acts of the directors. This is the first attempt of the stockholders to act respecting this subject. As before pointed out, the certificate to Nelson was wrongfully issued; except as it belonged to outside subscribers, it was treasury stock. There were then other stockholders of the plaintiff who had paid for their stock, although they had not received their certificates, but the plaintiff had their money and they were entitled to be treated as stockholders. Chester Glass Co. v. Dewey, 16 Mass. 94. Chaffin v. Cummings, 37 Maine, 76. Hawes v. Anglo-Saxon Petroleum Co. 101 Mass. 385, 395. Their certificates were dated September 18, 1895, and issued directly. These circumstances show that at the first and only time when there was an effort on the part of the promoters to secure a ratification of their wrongful acts, there were certain shareholders who were not represented and who did not themselves sign in assent and who were in fact ignorant of the wrong done the corporation. Further, they do not show that at any time from the organization of the corporation onward was there a moment when all the stockholders or directors knew of the material facts as to the defendant's relation to the corporation. In this view of the facts, which is supported fully by the evidence, there appears to be no assent by the corporation with knowledge of the facts by all those who at any time constituted all the stockholders, except by assuming the knowledge of Bigelow and Lewisohn on July 11, 1895, when there were only forty shares of stock for which the latter had paid, to be the knowledge of all the stockholders, although there were then seven shareholders as to whose actual knowledge of the scheme there is no evidence, although all were the tools of the defendant and Lewisohn. It is only by treating these subscriptions as a sham that knowledge even of the owners of the forty shares can be found. But these subscriptions were necessary to the organization under the New Jersey law. Hence the rule of Salomon v. Salomon, [1897] A. C. 22, and like cases has no application to these facts, nor does the difficulty meet "the petitioner at the outset that it has assented to the transaction with the full knowledge of the facts," (210 U. S. 211, 212,) unless it is said that in fact knowledge by
34 the plaintiff's dominant stockholders is knowledge by the corporation. But the defendant was committing a breach of

trust on his principal, the plaintiff, and where one is committing a wrong in his own interest his knowledge does not bind the corporation, which might in an innocent transaction be affected by his knowledge. Indian Head National Bank v. Clark, 166 Mass. 27, Produce Exchange Trust Co. v. Bieberbach, 176 Mass. 577, 588. These considerations mark the case as different in material respects from that which was stated in Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 210 U. S. 206, and bring it clearly within the well recognized rule of promoters' liability, laid down in the numerous and undisputed cases, before cited. The Supreme Court of the United States has never passed upon these facts nor upon such a case as is thus presented. We know of no authority which countenances a different decision upon them than that here reached. The conflict between the federal courts and this court in this respect appears to be not upon the merits of the case as disclosed upon the present record. See Bigelow v. Old Dominion Copper Mining & Smelting Co. 4 Buch. (N. J.), 71 Atl. Rep. 153, 155.

But there is still another aspect in which the case differs from that presented in the federal court and in our previous decision. The defendant held out to subscribers of his syndicate, before the incorporation of the plaintiff, that its capital stock was to be $2,500,000 and that they would get for one share in the Baltimore Company two in the new company and that the rest would be sold to furnish the working capital. The right of these parties to become stockholders in the plaintiff company was fixed before its first meeting of stockholders was held, because they had signed the syndicate agreement and had made two payments on account of their subscriptions. They were sharers thus in the profit of $1,000,000 above the costs of mines. But they were also entitled to disclosure of the secret profit of $1,250,000 more taken by the defendant and Lewisohn and it is found that most of them were ignorant of it. Respecting any sale to the plaintiff in which they had agreed to become shareowners on any other basis than that of two for one, they were entitled to disclosure. This is quite aside from any rights they may have had against Bigelow for not treating them fairly on the division of profits. It stands on different ground. In that relation they were sharers in promoters' profits and they received what they expected. But they had also agreed to be subscribers to stock of the plaintiff. In that character they were not promoters, but stockholders and entitled to all their rights. That they knew there was to be a sale for $2,000,000 and a profit of two for one was no reasonable ground for expectation that the defendant would take a large additional secret profit. As to this secret profit, the members of the syndicate had the same rights as the outside public, that is, they were entitled to a disclosure to an independent and impartial board of officers who should be in a position to act for the interests of the corporation as opposed to those of the promoters. In this regard the case is like Arnold v. Searing, 3 Buch. (N. J.) 262, where the defendants were held liable.

4. It is argued that, even though the ratification in writing be disregarded, still the acts of the stockholders of the plaintiff after

some of them knew of the fact that there was some profit to Bigelow and Lewisohn beyond that accruing to all the other members of the syndicate has amounted to a ratification. The complete answer to this argument is that the single justice has found that until shortly before the bringing of these suits neither the stockholders nor the company had gained any knowledge as to the facts upon which the claim is now based, that the very great majority of the stockholders never knew or assented to the operations by which the secret profit was obtained and did not have knowledge of or access to the books or records of the corporation. The votes of ratification of 1899 and 1901 being passed under these conditions do not bind the plaintiff.

5. Several other objections are made to the granting of relief to the plaintiff. It is urged that the plaintiff ought not to recover because, a large majority of its stock being held by a Maine corporation, an agreement has been entered into by that corporation and certain trustees by which it was attempted to provide for the conduct of these suits and sequestrate the proceeds to holders of negotiable certificates. But this agreement is one to which the plaintiff is not a party, and it was made long after these suits were instituted. If it is illegal, it may be set aside in appropriate proceedings,
36 but the rights of the plaintiff for the benefit of all its stockholders cannot be refused enforcement on such ground.

6. The defence of laches cannot prevail. It is found as a fact that as soon as the defendant and his associates released their absolute control of the plaintiff, the action was seasonably begun. The plaintiff is held to the exercise of diligence after the discovery of the facts, but there can be no laches so long as there is no knowledge of the wrong complained of and no failure to avail one's self of reasonable opportunities to ascertain the facts. So long as the plaintiff was wholly in the power of the defendant, it could not be charged with knowledge. Mere lapse of time is no bar to relief under these circumstances. Lydney & Wigpool Iron Ore Co. v. Bird, 33 Ch. D. 85. Lagunas Nitrate Co. v. Lagunas Syndicate, [1899] 2 Ch. D. 392, 433. Twin-Lick Oil Co. v. Marbury, 91 U. S. 587.

7. Nor is the statute of limitations a bar. The time limited by the statute does not begin to run against a breach of trust, where there is a fiduciary duty to disclose the facts on which the cause of action rests, until the facts have or ought to have been discovered. Atlantic National Bank v. Harris, 118 Mass. 147. R. L. c. 202, § 11. The ground of the defendant's liability is his breach of trust as a promoter.

8. It follows from what has been said as to the nature of the wrong done by the defendant that he is liable in solido. The act of the defendant and Lewisohn was a joint act for the benefit of both. Their subdivision of the profits made cannot affect the right of the plaintiff. The breach of trust, which they as promoters committed, was in the nature of a tort. This renders them liable severally as well as jointly and for the whole damage. Hayward v. Leeson, 176 Mass. 10, 324, and cases cited. 188 Mass. at p. 329. Feneff v. Boston & Maine Railroad, 196 Mass. 575, 581. Gluckstin v. Barnes,

[1900] A. C. 240. Bigelow v. Old Dominion Copper Mining & Smelting Co. 4 Buch. (N. J.), 71 Atl. Rep. 153, 176.

9. As to the character of relief which can be afforded, it is said first that rescission is the only remedy open to the petitioner. The single justice has found that the situation of the parties and the properties is not such as to make it just at this time to order
37 a rescission. The evidence justifies this finding. It was decided in this case at its earlier stage, 188 Mass. 315, 329, that rescission is not the only remedy. Hayward v. Leeson, 176 Mass. 310, 321. Parker v. Nickerson, 137 Mass. 487. We are not disposed to question the correctness of the decision upon this point. When one has committed a breach of trust, there is no occasion to be over-solicitous to see that the faithless fiduciary should not make reparation for the wrong done. In re Olympia, [1898] 2 Ch. 153, 169. Lyndney & Wigpool Iron Ore Co. v. Bird, 33 Ch. D. 85, 94. The essence of the suit is that a secret profit was taken by the promoters. The obvious remedy is a return of the secret profit. The difficulty of ascertaining the amount of that profit, which troubled the court in In re Cape Breton Co. 29 Ch. D. 795 does not exist here. See Bentinck v. Fenn, 12 App. Cas. 652; Gluckstein v. Barnes, [1900] A. C. 240; In re Leeds & Hanley Theatres of Varieties, [1902] 2 Ch. 809; Yale Gas Stove Co. v. Wilcox, 64 Conn. 101.

10. The plaintiff has also appealed from the decrees in its favor. It presses its appeals on the ground that it is entitled to recover the difference between the market value of the shares received by the defendant and Lewisohn and the cost to them of the property conveyed to it. This is the measure of recovery where there is a fiduciary relation at the time of the purchase. But there is no finding here that such relation existed at the time the defendant and Lewisohn purchased the property. There is no evidence which requires such a finding. The corporation was not organized until a considerable period after the options had been secured. The defendant and Lewisohn were, during all this time, free to do as they chose with their purchase so far as the plaintiff was concerned. This has been before decided, 188 Mass. 321. The plaintiff contends in the alternative that its measure of damage is the difference between the intrinsic value of the property conveyed and the value of the stock issued therefor. Market value is the standard commonly applied where property has such value. It is only in cases where the value of property cannot be fairly ascertained by the application of this test that resort is had to any other. The single justice appears to have experienced no difficulty in determining that value of
38 these mines. There are no exceptional circumstances which call for the application of any other than the ordinary rule.

11. Since the decision of this case on demurrer, reported in 188 Mass. 315, and the entry of the decrees by the single justice after a full hearing upon the facts, the defendant has been permitted to file a supplementary answer. Old Dominion Copper Mining & Smelting Co. v. Bigelow, 199 Mass. 488. He there sets up, as a bar to the plaintiff's claim, a judgment of the Circuit Court of the United States for the Southern District of New York, entered on

July 23, 1908, in favor of the defendants in a suit like one of the present suits in all particulars, except that it was prosecuted against the executors of the will of Lewisohn, the defendants' demurrer to the plaintiff's bill being sustained and the final decree being entered, whereby the claim against Lewisohn was held to be without foundation, and he contends that the matter is thereby res judicata as to himself. The supplemental answer further avers that the issues were the same as those here involved, and that the present defendant was a privy to the judgment in that case, and participated in the defense, and acted with Lewisohn's executors throughout the entire pendency of the suit. The Lewisohn suit was heard in the Circuit Court of the United States and on appeal in the United States Circuit Court of Appeals, and afterwards upon certiorari in the Supreme Court of the United States. 210 U. S. 206. On these supplemental answers a hearing was had before a single justice, who reserved questions arising thereon for the consideration of this court upon the pleadings and all the evidence.

One of the two suits before us seeks to set aside the conveyance of the outside properties and secure the return of the thirty thousand shares of capital stock issued therefor, and the other to recover damages resulting from the conveyance to the plaintiff of the mines and other real estate of the Baltimore Company for the excessive valuation of one hundred thousand such shares. In other respects the two bills are alike. Two suits (the bills in which have the same allegations as these, mutatis mutandis), were brought against the executors of Lewisohn in the United States Circuit Court for the Southern District of New York. The one relating to the
39 outside properties and the issue of the thirty thousand shares was decided ultimately by the United States Supreme Court, and a final decree was entered dismissing the suit. In the other suit respecting the issue of one hundred thousand shares for the mines and other real estate of the Baltimore Company, no decree has been entered, and it appears to be still pending. Separate offers of sale were presented and separate votes were passed by the directors of the plaintiff for the purchase of the outside properties for thirty thousand shares of its full paid non-assessable capital stock and for the purchase of the property of the Baltimore Company for one hundred thousand like shares. Separate votes were also passed to issue the thirty thousand shares to the defendant and Lewisohn and to issue the one hundred thousand shares to Dumaresq. Probably the defense of res judicata cannot apply to the suit respecting one hundred thousand shares, for the suit touching those shares against Lewisohn's executors has never gone to judgment and is still pending. The res at issue in that suit, which appears to be somewhat different from that involved in the other, has therefore never become judicata. This circumstance is noted in passing. In some aspects of the case it may be important and perhaps decisive. In view of the ground, upon which this opinion is based, however, it makes no difference in the result and we do not further advert to it.

It appears that the fundamental questions in the suit in the fed-

eral court were precisely the same as those raised in the present suit relating to the thirty thousand shares and passed upon in 188 Mass. 315. The present defendant was not a party to the suit in the federal court, but there is evidence that he participated in the defense of it.

The plaintiff objects that the order of the single justice allowing the defendant to file the supplemental answers was erroneous. This order was made in the exercise of judicial discretion, and unless such discretion was wrongly exercised it must stand. The facts averred in these answers could not have been pleaded when the original answers were filed, for the events they set up have occurred since. It is urged that the decree in favor of the executors of Lewisohn was entered in the United States Circuit Court before the
40 trial upon the merits in this court, and might have been pleaded in bar notwithstanding the proceedings in the Supreme Court of the United States upon a writ of certiorari. But even if this be the law, the single justice cannot be said to have erred in permitting the defendant to set up a decree, which rests upon a decision of the court of last resort made after the close of the hearing upon the merits in the present suits. The decree in the federal court, although founded upon a demurrer, may under proper circumstances be a bar to another suit, as well as one founded upon a hearing of evidence. Yates v. Utica Bank, 206 U. S. 181, 183. Northern Pacific Railway v. Slaght, 205 U. S. 122, and cases cited at 130. In the view that we take of the case, it is not necessary to discuss other objections urged by the plaintiff to the force of this decree or the similarity of the issues in the two sets of suits.

12. The most important and difficult question is whether the contention of the defendant is sound that the decree of the federal court is a complete bar to the present suits. His argument is that under the law of New York the decree of the Circuit Court of the United States is a bar to the maintenance of another suit for the same cause of action by the same plaintiff against him, and that, under art. 4, §1, of the Constitution of the United States, the effect given by the law of New York to the decree must be given by this court, in order that it receive the constitutionally required full faith and credit. The constitutional provision is as applicable to a decree of the Circuit Court in the Southern District of New York as to a decree in the State courts. Deposit Bank v. Frankfort, 191 U. S. 499, 515. Central National Bank v. Stevens, 169 U. S. 432, 460. The general effect of the decree (except as to matters of law or practice arising under the statutes of the United States, which have no bearing in the present case) is governed by the law of the State of New York where the federal court was sitting. Hancock National Bank v. Farnum, 176 U. S. 640, 645, citing Crescent City Live Stock Co. v. Butchers' Union, 120 U. S. 141, 147; Metcalf v. Watertown, 153 U. S. 671, 676; Pittsburgh, Cincinnati, Chicago & St. Louis Railroad v. Long Island Loan & Trust Co. 172 U. S. 493.

But before we reach the consideration of the effect of the decree and the interpretation that should be given to it under the
41 laws of New York, there is a preliminary and fundamental question as to the precise meaning of the full faith and credit

clause of the Federal Constitution as applied to the circumstances of this case.

An analysis of the defendant's contention shows that his defense of estoppel by res judicata rests upon the ground that he was either a party or privy to the New York judgment. It is not and cannot be urged that the New York suit was a proceeding in rem as to the plaintiff's cause of action. It was a personal suit. Except in proceedings in rem, there is no such thing known to the law as an adjudication of a cause of action, which can be availed of as res adjudicata by any others than by parties and their privies. The doctrine of stare decisis stands on a wholly different ground. The contention is that, even though the court was convinced that its former decision upon the merits was erroneous and desired to correct the mistake by deciding the later case differently, the decision against the plaintiff would prevent such correction of error. The fact that a party has fully litigated his cause of action in one suit and has been defeated is of no avail in another suit, to which a stranger to the first suit is a party, involving precisely the same issues. This principle is illustrated by many cases. Keokuk & Western Railroad v. Missouri, 152 U. S. 301. Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co. 120 U. S. 141, 155. Moore v. Albany, 98 N. Y. 396. Trimmer v. Rochester, 130 N. Y. 401. Stone v. New York, 138 N. Y. 124. Wallace v. Straus, 113 N. Y. 238. Collins v. Hydorn, 135 N. Y. 320. Groth v. Washburn, 39 Hun 324. Furlong v. Banta, 80 Hun, 248.

The defendant can prevail on his supplementary answers only upon the ground that he was either a party or privy to the judgment rendered in the United States Circuit Court. The defendant Bigelow was not a party to that suit, and he does not assert that he was. The extent of his contention is that he was in privity with the executors of Lewisohn, and therefore entitled to the benefit of the judgment in their favor.

The first matter for determination is this: Does the full faith and credit clause require the courts of all other States to give effect to the law of any particular State, where a judgment may be entered, as to who are privies to such judgment, or does it permit or require the courts of the State where a third person sets up the de-
42 fense that he is privy to a judgment entered in the courts of another State to decide that question according to its own law? Hence it becomes necessary to inquire what has been decided by the Supreme Court of the United States, whose decisions upon this as a federal question are binding upon all State courts.

It was said in Smithsonian Institution v. St. John, 214 U. S. 19, at pp. 28 and 29: "Without doubt the constitutional requirement, art. IV. §1, that 'full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State,' implies that the public acts of every State shall be given the same effect by the courts of another State that they have by law and usage at home. This is clearly the logical result of the principles announced as early as 1813 in Mills v. Duryee, 7 Cranch, 481, and steadily adhered to ever since. Hancock National Bank v. Farnum,

176 U. S. 640, 642." But the broad language of this decision, as well as the comprehensive phrase of the Constitution itself and of the act of Congress in pursuance thereof are to be read and interpreted in the light of the thing intended to be accomplished, and "of some established principles, which they were not intended to overthrow." Huntington v. Attrill, 146 U. S. 657, 685. Many cases have arisen in which this phase of the subject has been discussed. It has been generally held that, no matter how clear may be the language of the statute, nor how decisive the decisions of the courts, of the sister State, as to the scope and effect of judgments upon residents of other States, yet in certain aspects such judgments may and ought to be narrowly scrutinized and the constitutional injunction given a reasonable interpretation. It was said in Public Works v. Columbia College, 17 Wall. 521 at p. 528: "The clause of the Federal Constitution which requires full faith and credit to be given in each State to the records and judicial proceedings of every other State, applies to the records and proceedings of courts only so far as they have jurisdiction. Whenever they want jurisdiction the records are not entitled to credit." This was a case where three of five partners appeared in an action against the copartnership, the other two members being non-residents not served with process and not appearing, and under the law of New York a judgment could be rendered under these circumstances against the copartnership. But it was held that the absent partners were not bound by a judgment so entered. In D'Arcy v. Ketchum, 11 How. 165, a judgment was entered against a non-resident defendant, who had not appeared or been served with process, in accordance with a statute of New York, permitting such course where joint debtors were sued and one only appeared. This statute had been adjudged valid by the courts of New York. It was admitted that the defendant was a joint debtor with the person served in New York, yet it was held that the Constitution and acts of Congress did not purport to give effect to State judgments as binding upon non-resident defendants not served with process and not appearing. See Goldey v. Morning News, 156 U. S. 518, 521.

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It was said, in the recent case of Brown v. Fletcher, 210 U. S. 82, 88, that "the constitutional question does not preclude the courts of a State in which the judgment of a sister State is presented from inquiry as to the jurisdiction of the court by which the judgment is rendered. See the elaborate opinion by Mr. Justice Bradley, speaking for the court, in Thompson v. Whitman, 18 Wall. 457. That opinion has been followed in many cases. * * * Even record recitals of jurisdictional facts do not preclude oral testimony as to the existence of those facts." Old Wayne Life Association v. McDonough, 204 U. S. 8, 15. These principles are illustrated in application to a variety of facts: for example, as to whether attachment of property gives power to enter a judgment of effect beyond the property attached, Pennoyer v. Neff, 95 U. S. 714, 730; as to the limits of jurisdiction of parish courts in the settlement of estates, Simmons v. Saul, 138 U. S. 439, 448; as to whether the return of service is sufficient to confer jurisdiction, Knowles v. Gaslight &

Coke Co. 19 Wall. 58; as to whether the judgment is responsive to the issues tendered, Reynolds v. Stockton, 140 U. S. 254, 265; as to whether an attorney had authority to appear, Cooper v. Newell, 173 U. S. 555, 566, Hall v. Lanning, 91 U. S. 160; as to whether the cause of action was such as to give the State court jurisdiction to render a judgment entitled, according to settled principles of public and international law, to enforcement by other courts, Wisconsin v. Pelican Ins. Co. 127 U. S. 265; as to whether judgment rendered upon appearance by prothonotary, authorized by statute of
44 the State where judgment was rendered, was within the terms of a power of attorney, Grover & Baker Sewing Machine Co. v. Radcliffe, 137 U. S. 287, 295; as to validity of decree of foreign court respecting devolution of real estate within another State, Clarke v. Clarke, 178 U. S. 186, 195; as to effect of decree for future payment of alimony, Lynde v. Lynde, 181 U. S. 183; as to whether divorce obtained by the court having jurisdiction of persons of both parties must be recognized in their domiciliary state, Andrews v. Andrews, 188 U. S. 14, German Savings & Loan Society v. Dormitzer, 192 U. S. 125, 128; as to effect of foreign divorces obtained ex parte, Bell v. Bell, 181 U. S. 175, Streitwolf v. Streitwolf, 181 U. S. 179, Atherton v. Atherton, 181 U. S. 155, Haddock v. Haddock, 201 U. S. 562; as to whether one was "holder" of note within the meaning of a warrant of attorney authorizing confession of judgment, National Exchange Bank v. Wiley, 195 U. S. 257, 269; as to whether determination of domicil of deceased person by appointment of personal representatives foreclosed similar inquiry in other States, Thormann v. Frame, 176 U. S. 350; as to whether service on public officer impliedly authorized to receive service for a foreign corporation, in respect of business transacted by it in one State, was also impliedly authorized to the same extent as to business not there transacted, Old Wayne Life Association v. McDonough, 204 U. S. 8, 22; as to whether a corporation is really doing business in the State in which service is made, within the rule that it is essential to jurisdiction over a foreign corporation having neither property nor agent in the State that it be doing business there, Commercial Mutual Accident Co. v. Davis, 213 U. S. 245 and cases cited at 255, Caledonian Coal Co. v. Baker, 196 U. S. 432; as to whether administration could be granted upon the estate of a living person, Scott v. McNeal, 154 U. S. 34; as to the sufficiency of service by publication, Smith v. Woolfolk, 115 U. S. 143 and cases cited, Clark v. Wells, 203 U. S. 164, 171; as to whether in fact hearing had been granted to one alleged to be an alien enemy, Windsor v. McVeigh, 93 U. S. 274; as to judgment of foreclosure against alien enemy, Lasere v. Rochereau, 17 Wall. 437; as to sufficiency of scire facias to keep alive a judgment, Owens v. Henry, 161 U. S. 642; as to legality of constructive service, Brooklyn v. Insurance Co. 99 U. S. 362,
45 Freeman v. Alderson, 119 U. S. 185, Empire v. Darlington, 101 U. S. 87, Pana v. Bowler, 107 U. S. 529; as to validity of statute imposing personal liability for local assessment upon non-resident landowner, Dewey v. Des Moines, 173 U. S. 193; as to sufficiency of any steps necessary to confer jurisdiction, Howard v. De

Cordova, 177 U. S. 609; as to validity of statute authorizing collection of execution for unpaid balance due on stock subscriptions from foreign stockholders in a corporation, Wilson v. Seligman, 144 U. S. 41; as to whether recital of settlement of cause in a judgment rested on an unfulfilled promissory agreement, Jacobs v. Marks, 182 U. S. 583; as to whether the State court having once rendered final judgment could without notice reopen case and enter a different judgment, Wetmore v. Karrick, 205 U. S. 141, 149. In all these cases it was held that judgments of the courts of sister States, valid there, might be refused recognition elsewhere without doing violence to the federal Constitution. This review of some of the decisions of the Supreme Court of the United States shows how full and complete is the inquiry permitted into the circumstances by which it is contended that the judgment of the court of the sister State binds the person as to whom it is invoked. Such judgments do not stand upon the same footing as domestic judgments. They may be attacked collaterally. Huntington v. Attrill, 146 U. S. 657, 685. There is nothing in the Federal Constitution or laws to prevent the most searching investigation, "into the jurisdiction of the court in which the judgment is rendered, over the subject matter, or the parties affected by it, or into the facts necessary to give such jurisdiction." Fuller, C. J., in Thormann v. Frame, 176 U. S. 350.

The present contention is that the judgment in favor of the executors of Lewisohn avails the defendant because they were privies respecting the subject matter of the suit. We do not find it to be the law of New York that in a suit in New York the defendant would be entitled to prevail on any other ground. The underlying question is one of jurisdiction. The defendant was not a party to the suit against Lewisohn. He was not served with process. No attempt was made by himself or by the plaintiff to join him as a party. Indeed,
the bill in the Lewisohn suit alleges that Bigelow cannot be
46 made a party by reason of residence outside the jurisdiction,
and this fact is not controverted. It follows that the United States Circuit Court for the District of New York acquired no jurisdiction to render a judgment binding upon or in favor of Bigelow, unless he was a privy with Lewisohn.

It has been several times said that a judgment concludes, and may be invoked by, one who is a privy. Minneapolis Association v. Canfield, 121 U. S. 295, 308. Mitchell v. First National Bank of Chicago, 180 U. S. 471, 480, and cases cited. These are general statements, however, and we do not find that the precise point has ever been decided as to the effect which must be given to the judgment in the courts of one State touching privies, non-resident in the first State, and domiciled in the one where the question arises. Strong arguments can be conceived to support the proposition that except as to property rights arising by succession only those can be bound as privies, who are domiciled within the State where the judgment is rendered. But we do not pursue this inquiry. For the purposes of this discussion we assume without deciding that such a judgment binds privies of this description. Whether or not he was a privy is fundamental to the jurisdiction of the United States Circuit Court

to enter a judgment, which as to Bigelow was capable of becoming res adjudicata.

At the outset it is to be observed that the domicil of the defendant is in this Commonwealth, and that domicil generally determines the particular territorial jurisprudence to which every individual is subjected. Grover & Baker Sewing Machine Co. v. Radcliffe, 137 U. S. 287, 298.

The foundation of the doctrine of res adjudicata is that there has been a judicial inquiry into the subject matter, in which the person to be affected by the judgment has had an opportunity by representative to be heard fully. The inquiry as to jurisdiction is in its last analysis, whether one was in such relation to the action in the sister State as to be bound by its judgment. Ordinarily, the question of jurisdiction is whether one was in law a party to the judgment. Whether a court has jurisdiction of a person depends upon whether he was really a party to it. The cases we have reviewed show that this is to be determined by the courts of the government
47 where it arises according to its jurisprudence, subject to the duty imposed by the Constitution of the United States. The law of the State whose courts entered the judgment does not control. Where it is not contended that one was a party, it is equally an inquiry as to jurisdiction to determine whether he was a privy to one who was a party. By parity of reasoning, whether one is a privy to a judgment rendered in a sister or foreign State must also be determined by the law of the sovereignty where the question arises.

Privity was not a matter in issue in the suit, judgment in which is pleaded, nor can it be determined by an inspection of the judgment roll. It must be decided by evidence outside the record. It is not to be settled according to the law of the State where the judgment is rendered. This plainly appears from D'Arcy v. Ketchum, 11 How. 165. The substance of the New York statute, there decided not to be entitled to full faith and credit when followed by the courts in entering judgment, was that, in cases of joint debtors, all non-residents should be privies with any domestic fellow or joint debtor duly served with process and bound by the judgment. See to substantially the same effect Harris v. Hardeman, 14 How. 334; Ewer v. Coffin, 1 Cush. 23; Stone v. Wainwright, 147 Mass. 201; Phelps v. Brewer, 9 Cush. 390. The same principle is illustrated in Hall v. Lanning, 91 U. S. 160, and Public Works v. Columbia College, 17 Wall. 521, where, by statute or usage, all partners were treated as so much in privity that appearance and defense by one bound all his copartners. Yet such a statute or usage was held not entitled to full faith and credit in the sister State.

We understand these federal cases in principle to cover the question before us, and to decide in substance that legislation or judicial determination of one State, that its domestic judgments shall bind non-residents decided by it to be privies, have no extraterritorial force, and are not entitled to recognition under the full faith and credit clause of the Federal Constitution. The same conclusion follows from the cases above cited, which permit inquiry into the extent of the powers

of an agent to subject his principal to the jurisdiction of a foreign court.

But whether or not we interpret these decisions aright, as being decisive against this contention of the defendant, it seems to us that on reason it must be the law that the ascertainment of those
48 non-residents not served with process nor appearing, who are bound by the judgment of a sister State as privies, must be by the courts of the jurisdiction where the question arises, and not by those of the State in which the judgment is rendered. This rests primarily upon the considerations touching the constitutional provision and the reason for its enactment. Its purpose was not to enlarge or change the jurisdiction of the courts of the several States. It was a recognized principle of international law, at the time the Constitution was adopted, that where parties had once fairly litigated a dispute in the courts of any civilized government, the same question ought not to be tried anew. But such judgments were commonly regarded as prima facie evidence of the matter decided and might be re-examined under some circumstances, the whole subject resting in comity and not in obligation. Bissell v. Briggs, 9 Mass. 462. Hilton v. Guyot, 159 U. S. 113, 181. In this regard the several colonies before the Declaration of Independence were as to each other foreign nations. Differences of practice grew up, as to the way in which judgments of foreign courts should be proved, and the precise weight to be attached to them. It was in this state of the law that the Constitution was adopted. Diversity of practice was turned into uniformity by the Constitution, which prescribed the effect to be given to judgments of courts, and empowered Congress to legislate further as to forms of proof. But it was not intended to enlarge the jurisdiction of the courts of the several States, or confer any new power upon them. It has simply made certain and of universal application between the several States that which before rested only in comity, and does still as to judgments of courts of foreign nations. It was intended merely to be regulative. It "establishes a rule of evidence rather than of jurisdiction." Anglo-American Provision Co. v. Davis Provision Co. (No. 1) 191 U. S. 373. Cole v. Cunningham, 133 U. S. 107, 112. Bissell v. Briggs, 9 Mass. 462, 467. "Judgments recovered in one State of the Union, when proved in the courts of another government, whether State or national, within the United States, differ from judgments recovered in a foreign country in no other respect than in not being re-examinable on their merits, nor impeachable for fraud in obtaining
49 them, if rendered by a court having jurisdiction of the cause and of the parties" Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 292. Hanley v. Donoghue, 116 U. S. 1, 4. Hilton v. Guyot, 159 U. S. 113, 185. Union & Planters' Bank v. Memphis, 49 C. C. A. 455, 465, and cases cited. This is further illustrated by what was said by Mr. Justice Gray, in Lynde v. Lynde, 181 U. S. 183, at pp. 186, 187: "By the Constitution and the act of Congress, requiring the faith and credit to be given to a judgment of the court of another State that it has in the State where it was rendered, it was long ago declared by this court: 'The judgment is made a debt of

record, not examinable upon its merits; but it does not carry with it, into another State, the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another State, it must be made a judgment there; and can only be executed in the latter as its laws may permit.'"

In other words, the question whether the plaintiff can try its case here against Bigelow after failing against the estate of Lewisohn arises after full faith and credit have been given to the New York decree, and is not included in giving it full faith and credit. The decree does not have the effect contended for by the defendant proprio vigore. Whether it should bar the plaintiff from another suit is a question of public policy. Such a question must be decided according to the law of the State where it arises.

This conclusion is strongly supported by the argument of convenience. It is a principle of the common law that a judgment binds the parties and their privies. But there is no generally prevailing definition of privity which can be automatically applied to all cases. Who are privies requires careful examination into the circumstances of each case as it arises. Its determination is often difficult for a court possessed of plenary jurisdiction. But if the question who are privies is to be decided as a fact under the law of a foreign jurisdiction upon such evidence as the parties may be able to produce complication is multiplied. The present case furnishes a capital illustration of the evil workings of such a rule. The courts of authority in New York seem not to have decided the precise question we now have to pass upon. Eminent lawyers have been called by both parties to testify as experts. But no two of them agree in their definition of privies, although several think that the executors of Lewisohn and the defendant were privies. There is great diversity in the details of the views expressed by those called by the defendant as to the exact grounds upon which they say the plaintiff would be barred in the courts of New York in a suit against Bigelow. We cannot conceive that it was the intent of the framers of the Constitution to put parties to the expense, inconvenience and unsatisfactory method of resorting to this class of testimony in order to establish their rights, when courts exist in every State, which could with much less difficulty determine the question according to the law of the forum. There is nothing inconsistent with this result in Whitman v. Oxford National Bank, 176 U. S. 559, and Hancock National Bank v. Farnum, 176 U. S. 640. These cases decided that the liability imposed upon stockholders in Kansas corporations, by the Constitution and laws of that State, were contractual in their nature, and were enforceable in the courts of other jurisdictions. These decisions in effect hold that the laws of a sovereign power, as to the rights and liabilities arising out of the relations between a domestic corporation and its stockholders, are binding upon the latter as contracts, because they assented to be so bound by voluntarily becoming such stockholders. Bernheimer v. Converse, 206 U. S. 516, 529. Tilt v. Kelsey, 207 U. S. 43, 47, simply decided in substance that a judgment in rem by a court having jurisdiction thereof binds everybody interested in it. Laing v. Rigney, 160 U. S. 531, held that on the facts shown the State court had juri-

diction of all persons sought to be charged. None of these decisions are apposite to the point now under discussion.

We are, therefore, of opinion that whether Bigelow was in such privity with the executors of Lewisohn, respecting the litigation in New York, as to be able to invoke, in his own defense, the judgment there rendered, is a jurisdictional question to be determined by the law of this Commonwealth, subject to the Federal Constitution.

It remains to inquire whether, according to the law of this Commonwealth, the Circuit Court for the District of New York had such jurisdiction of the defendant as to enable him to invoke its judgment as a bar in the present suit, on the ground of res judicata. This in turn depends upon the question whether the defendant was
51 a privy with the defendants in the Lewisohn suit, or in such relation to it that he can plead the judgment in favor of the Lewisohn estate, as an estoppel against the plaintiff. The evidence shows that he knew of the suit, and through his counsel gave such assistance in the preparation of the briefs for the arguments of that suit as might have been expected. But, as he was not a party, this fact is not of much importance. It is treated by most of the expert witnesses called by the defendant as to the New York law as of no consequence. Privity depends upon the relation of the parties to the subject matter, rather than their activity in a suit relating to it after the event. Participation in the defense because of general or personal interest in the result of the litigation does not make one privy to the judgment. Stryker v. Goodnow, 123 U. S. 527, 540. People v. Knickerbocker Ins. Co. 106 N. Y. 619.

The liability of the defendant, as has been pointed out, according to the law of this Commonwealth, is one arising ex delicto. The wrong committed was a tort, in which the defendant and Lewisohn acted in concert. The finding of the single justice, supported by the evidence is, in substance, that they were joint tortfeasors. The inquiry then is, whether one of several joint tortfeasors can plead a judgment in favor of his joint tortfeasor against a plaintiff claiming to have been injured by their joint act as an estoppel in a suit by the same plaintiff against himself.

This can hardly be regarded as an open question in this Commonwealth. In Sprague v. Oakes, 19 Pick. 455, which was an action for trespass quare clausum fregit, it was said, respecting such a defense, "The defendant was neither a party nor privy to that judgment, was not bound by it, nor could he take advantage of it." This case has never been overruled or questioned and must be regarded as stating the law of this Commonwealth. There are other authorities to the same point. Lansing v. Montgomery, 2 Johns. 382. Marsh v. Berry, 7 Cowen, 344. Moore v. Tracy, 7 Wend. 229. Gittleman v. Feltman, 122 App. Div. (N. Y.) 385. Atlantic Dock Co. v. Mayor & Aldermen of New York, 53 N. Y. 64. Tyng v. Clarke, 9 Hun. 269. Calkins v. Allerton, 3 Barb. 171, 174. Goble v. Lillon, 86
52 Ind. 327. Thompson v. Chicago, St. Paul & Kansas City Railroad, 74 Minn. 89. Three States Lumber Co. v. Blanks, 118 Tenn. 627.

The reason upon which these decisions rest is that there can be

no estoppel arising out of a judgment, unless the same parties have had their day in court touching the matter litigated, and unless the judgment is equally available to both parties. It requires no discussion to demonstrate that a judgment in the Lewisohn suit against the defendants would not have fixed liability upon the present defendant. Hence there can be no estoppel under our law or under the general principles of jurisprudence, because it is not mutual. Brigham v. Fayerweather, 140 Mass. 411, 415. Dallinger v. Richardson, 176 Mass. 77, 83. Worcester v. Green, 2 Pick. 425, 429. Biddle & Smart Co. v. Burnham, 91 Maine, 578. Moore v. Albany, 98 N. Y. 396. "Estoppels to be good must be mutual." Litchfield v. Goodnow, 123 U. S. 549, 552. Nelson v. Brown, 144 N. Y. 384, 390. Bigelow could not have appeared as of right and made a defense to that suit. No judgment can be regarded as res judicata as to any matter where the rights in the subject matter arise out of mutuality, and not by succession, unless the party could, as matter of right, appear and defend, even though he may have had knowledge of the suit. Otherwise, he might be bound by a judgment as to which he had never had the opportunity to be heard, which is opposed to the first principles of justice. Brabrook v. Boston Five Cents Savings Bank, 104 Mass. 228, 233. There is no privity between joint wrongdoers, because all are jointly and severally liable. Corey v. Havener, 182 Mass. 250. Feneff v. Boston & Maine Railroad, 196 Mass. 575, 581. Pinkerton v. Randolph, 200 Mass. 24, 28. There is no right of contribution between joint wrongdoers, where they are in pari delicto with each other. Churchill v. Holt, 127 Mass. 165. They are equally culpable, and the wrong complained of results from their joint effort. The right of recovery over by a municipality against a person, whose wrong created a defect in the highway (Holyoke v. Hadley Co. 174 Mass. 424) is no exception to this rule, because the tort committed by each of the wrongdoers is diverse in character, and rests upon a different basis of liability, and there is a right of indemnity in favor of the municipality. Lowell v. Glidden, 159 Mass. 317, 319. We are aware of no instance of joint participation in a common tortious en-
53 terprise where there is any right of contribution. One comprehensive definition of privies is such persons as are "privies in estate—as donor and donee, lessor and lessee and joint tenants; or privies in blood—as heir and ancestor; or privies in representation—as executor and testator or administrator and intestate; or privies in law—where the law without privity in blood or estate casts land upon another, as by escheat." Buckingham v. Ludlum, 10 Stew. 137, 141. Douglass v. Howland, 24 Wend. 35, 53. Joint tortfeasors come within none of the classes thus described. The definition in 1 Greenl. Ev. § 535, adopted by the Supreme Court of the United States, in Litchfield v. Goodnow, 123 U. S. 549, 551, namely, "Mutual or successive relationship to the same rights of property" equally fails to include joint tortfeasors. If we turn to the law of privity as illustrated in actions against partnership and joint debtors, the soundness of this conclusion is confirmed. It has been repeatedly decided that an administrator of a decedent in one

jurisdiction is not in privity with an administrator of the same estate appointed in another jurisdiction, and that a judgment against one such administrator is not res judicata to the other. Ingersoll v. Coram, 211 U. S. 335, and cases cited. Johnson v. Powers, 139 U. S. 156. In Chase v. Henry, 166 Mass. 577, it was held that discharge in insolvency in this Commonwealth did not bar the debt of a copartnership, one member of which was a non-resident, although two were residents and the copartnership had a regular place of business here. It has been several times held that judgment against one surviving partner upon a claim against the partnership was not admissible in evidence against the executors of a deceased partner, although the existence of the partnership was not disputed. Buckingham v. Ludlum, 10 Stew. 137. Moores' Appeals, 34 Penn. St. 411. Sturges v. Beach, 1 Conn. 507. Larison v. Hager, 44 Fed. Rep. 49. The converse, which is exactly parallel to the present case, namely, that a judgment in favor of one partner or joint and several debtor will not avail his associate in liability, has often been decided. Townsend v. Riddle, 2 N. H. 448. McLelland v. Ridgeway, 12 Ala. 482. State Bank v. Robinson, 13 Ark. 214, 221. Detroit v. Houghton, 42 Mich. 459, 460. It is difficult to conceive of persons more closely identified with their common
54 business than joint debtors and partners, and if judgments against one do not bind his associate, we do not see how persons occupying the less intimate relation to each other, which Bigelow and Lewisohn did, can be bound as privies. See also Williams v. Bankhead, 19 Wall. 563, 570.

Apart from authority and on principle the same result seems necessary. Joint tortfeasors act in unison respecting a common wrongful enterprise. It is one of the penalties, which the common law (differing in this respect from the civil law) inflicts upon those who jointly engage in intentional violation of the rights of others, that each shall be left to bear the natural results of his conduct. Courts will not lend their aid in adjusting the conflicting claims of wrongdoers touching their own turpitude.

An injured party is given the right to pursue his remedy, either singly or together, against those who thus cause injury, and may proceed to judgment against all in separate actions. He is barred only by a satisfaction. An inevitable corollary of these generally undisputed propositions and one consonant with a fundamental sense of justice is that a party has a right to try his case against everybody who has done him a wrong by immediate and direct culpable action. He is not precluded by a failure against one alleged joint wrongdoer from attempting to pursue another. He is entitled to his day in court against a particular adversary. We believe there are no exceptions to this rule stated in this form. The cases where judgment in favor of an active agent or servant avails a passive principal or master (Portland Gold Mining Co. v. Stratton's Independence, 158 Fed. Rep. 63 and cases cited), or where the relation of indemnitor and indemnitee exists (Port Jervis v. First National Bank of Port Jervis, 90 N. Y. 550) do not constitute exceptions to this rule, but stand on a different ground.

For another reason the New York judgment in favor of Lewisohn seems not to be a bar. The joint actor with the defendant was not the defendant in the New York suit, but it was prosecuted against his executors. If it be assumed that there was a kind of privity between the two who acted in concert, that privity was broken by the death of one. There is no privity between Lewisohn's exec-
55 utors and Bigelow. Ela v. Edwards, 13 Allen, 48. Merrill v. New England Ins. Co. 103 Mass. 245, 249. Thomson v. American Surety Co. 170 N. Y. 109. It cannot be said that the plaintiff has elected to pursue his remedy against the estate of Lewisohn to the exclusion of his rights against Bigelow. As between joint tortfeasors the doctrine of election has no application, and moreover the plaintiff sought the New York forum voluntarily only in the sense of being compelled to go there that a court might acquire jurisdiction of those defendants.

The determination that the relation between Lewisohn and Bigelow was that of joint tortfeasors respecting a cause of action arising ex delicto disposes also of the argument pressed by the defendant, that Lewisohn was trustee, agent or representative of Bigelow to such an extent that he was in privity with him. See Bigelow v. Old Dominion Copper Mining & Smelting Co. 4 Buch. (N. J.), 71 Atl. Rep. 153, 176.

The conclusion is, therefore, that the matters set up in the supplemental answers do not preclude the plaintiff from continuing the prosecution of the present suits.

Both parties have introduced a large amount of evidence as to the law of New York touching the effect which would by its courts be accorded to the judgment against the plaintiff in the Lewisohn litigation in a suit like the present pending in its courts against the defendant. In the view which we take of this case that question has become wholly immaterial, and we do not pass upon it.

13. The defendant has briefly argued that a decision for the plaintiff in these suits involves a denial to him of due process of law, the equal protection of the laws, and an impairment of the obligation of contracts. It does not seem necessary to discuss these arguments further than to say that they do not appear to us to have any application to the issues here pending.

14. The present cases were upon the calendar of the full court for argument at its January sitting, 1908. Upon motion of the defendant based upon representations as to the need of delay to enable him to prepare a brief, they were assigned as the first cases for argument at the March sitting of this court, 1908. A few days before the coming in of the court at that sitting, the present defend-
56 ant applied to the Court of Chancery in the State of New Jersey, where the plaintiff is domiciled, and secured a temporary injunction against its prosecution of these suits. The suit in New Jersey was decided adversely to the plaintiff by the chancellor, in whose elaborate opinion one of the vice-chancellors concurred, on August 8, 1908. Bigelow v. Old Dominion Copper Mining & Smelting Co. 4 Buch. (N. J.), 71 Atl. Rep. 153. This decision was not by the court of last resort, and the present defendant, the plaintiff

there, asserted that he intended to prosecute an appeal to the highest court in the State of New Jersey. Thereupon, on motion, an interlocutory decree was entered by a single justice of this court, restraining the defendant, "his attorneys, agents and servants from further prosecuting the action commenced by said Bigelow against the plaintiff in the Court of Chancery in the State of New Jersey * * *; and from commencing or prosecuting any other suit or proceeding either in law or in equity, except in this court, against the plaintiff to prevent it from obtaining the final decision and decree of this court or in any manner to delay or impede the presentation of said case." These suits were then pending before the full court under R. L. c. 159, § 19. This statute, however, does not prevent the entering by a single justice of decrees respecting interlocutory matters which may call for a speedy hearing and decision, but in no wise affecting the questions covered by the final decree. R. L. c. 159, §§ 17, 21, 22. Parker v. Nickerson, 137 Mass. 487, 491. The defendant appealed from this interlocutory decree and from a refusal of the single justice to modify or vacate it.

It is a general principle of chancery jurisprudence that, as between courts of co-ordinate and concurrent jurisdiction, the court which first obtains possession of a transaction shall dispose of it without interference from other courts. Riggs v. Johnson Co. 6 Wall. 166, 196. Home Ins. Co. v. Howell, 9 C. E. Green, 238. The jurisdiction of courts of equity to restrain a citizen suitor from prosecuting litigation in another State is well settled. Cunningham v. Butler, 142 Mass. 47; S. C. sub nomine Cole v. Cunningham, 133 U. S. 107. The present suits were begun October 7, 1902. This court plainly had jurisdiction of the subject matter and the parties. The defendant made no contest in these respects, but proceeded to hearing upon the merits and accepted the jurisdiction of the
57 court up to the point of argument before the full bench. It was manifestly proper that at this stage of the proceedings, in view of his conduct of the suits theretofore, he shoul dbe restrained from attempting to interfere in courts of other jurisdiction with the conclusion of this litigation. It is hardly necessary to say that the interlocutory decree does not purport to restrain him from enforcing whatever rights he may have to a writ of error from the Supreme Court of the United States to the final judgments which may be entered in this court. His ful rights under the Federal Constitution are preserved. The decrees are to be so modified as to include the costs of these appeals, and as modified are affirmed.

So ordered.*

KNOWLTON, *C. J.*:

This is an important case. The decrees from which the appeal was taken to this court call for the payment of considerably more than two million dollars. The questions of law involved are far-reaching. As I do not agree to the opinion of the majority of the court, I deem it my duty to state the reasons for my dissent.

* The case was taken to the Supreme Court of the United States by writ of error.

The fundamental question is, what right and power has a corporation to bind itself, acting through its stockholders in confirmation of the doings of its directors, in the transaction of business, after it has been completely organized under the law of the State of New Jersey, and after the amount of the capital required to authorize it to do business under the statute has been paid in, but before the whole of its capital stock has been issued or subscribed for. The plaintiff corporation was established under the laws of the State of New Jersey. Its rights and powers, and the rights of its stockholders, depend upon the law of that State. Unless it has suffered a wrong as a corporation of that State it has no standing here.

To organize a corporation under the laws of New Jersey, articles of association in writing must be signed by not less than three persons, stating the name of the company, the place or places where its business is to be conducted, the object for which it is to be formed, "the total amount of the capital stock of such company, which shall not be less than two thousand dollars, the amount with which they will commence business, which shall not be less
58 than one thousand dollars, and the number of shares into which the same is divided, and the par value of each share." It must also contain a statement of the names and residences of the stockholders and the number of shares held by each, with the "period at which such company shall commence and terminate, not exceeding fifty years." Gen. Sts. of New Jersey, 912-946, §§ 10-189. The certificate must be proved and acknowledged, and then recorded as deeds of real estate are required to be recorded. It must also be filed in the office of the secretary of state. When this has been done, the company is a corporation from the time of the commencement of the period fixed in the certificate.

The report of the single justice, with the evidence, shows that the plaintiff corporation was organized in all respects in compliance with the statute, that the requisite amount of capital to qualify it to commence business was paid in in cash, and that the corporation was legally authorized to do any business within the purposes of its organization. Although but a small part of its authorized capital had been paid in or subscribed for, it was permitted by law to exercise all the powers of a corporation and to perform all its contemplated functions for fifty years, if it could obtain money or credit sufficient for the purpose. It then made contracts with the defendant Bigelow and his associate Lewisohn, who were the promoters of it, and who therefore stood in fiduciary relations to it, which contracts would be voidable as fraudulent for that reason, unless there was a full and fair disclosure of the facts to the corporation, as represented either by an independent board of directors who were in a position properly to protect its rights, or by its existing stockholders who were the owners of it. The directors were selected by the defendant and Lewisohn, and they were not impartial and independent officers, qualified properly to represent the corporation in matters where its interests might be adverse to those of the pro-

moters. Indeed, as stockholders, they were then the representatives of the promoters. The capital which they paid in under their subscriptions was paid with money furnished by the promoters, and the beneficial interest in all the stock of the company, as it was then organized, was in the defendant and Lewisohn, who were the real owners of the entire corporation. Under these con-
59 tracts, and in payment for property conveyed to the corporation, thirty thousand shares of stock were issued to the defendant and Lewisohn and taken in their names, and one hundred thousand shares were issued to Philip E. Dumaresq, "who took them as the nominee and for the benefit and subject to the orders of the defendant and Lewisohn." These shares "were held for and controlled by the defendant and Lewisohn." Twenty thousand shares more, which made up the total authorized capital of the company, were found by the judge to have been still the property of the corporation itself, and they were intended to be issued to independent subscribers for a working capital. They then stood in the name of Thomas Nelson, treasurer. More than two months after the original contracts were made, and while the ownership of the stock was as above stated, all the directors of the corporation signed, in the record book, a statement approving of the previous action of the board in making these contracts, and a similar statement was signed by the defendant and Lewisohn and Dumaresq as stockholders, and by Nelson as a stock-holding treasurer.

Upon these findings the defendant and Lewisohn were the owners of all the authorized capital stock of the corporation, except the twenty thousand shares in the treasury, which belonged to the corporation, and through the corporation they owned that also. As stockholders, they knew all the facts affecting the validity or propriety of the contracts which they had made with the company. At that time they had no interest adverse to that of the corporation, for they were the sole owners of the corporation. One question is whether this ratification with full knowledge, by all the stockholders, was binding upon the corporation. Another question is whether the contracts were valid when originally made, having been agreed to with full knowledge by the only persons beneficially interested in the corporation. More specifically, the broad question is whether a corporation, which has full power to make every other kind of a contract within the purposes of its organization, is powerless to make a contract, or through its stockholders to ratify a contract, with one standing in a fiduciary relation to it.

There is no question of fraud upon the corporation; for all of the owners of it were fully informed in regard to the transactions, and approved of them. Under such circumstances there can
60 be no fraud. After a corporation is fully organized, the stockholders for the time being own and control it. In a broad sense, they are the corporation, although the corporation as a separate entity may exercise its powers as an individual, under their direction and for their benefit. The power of a corporation through its stockholders, choosing proper agents, to deal formally with those in a fiduciary relation to it is established beyond the possibility of ques-

tion. It matters not that the fiduciaries are themselves stockholders, if the other stockholders are not misled. And it matters not whether they constitute all of the stockholders, or only a part of them, if all the stockholders know all the facts and consent to the transaction.

The only question that seems to me debatable, on this branch of the case, is whether the power of the corporation, or of its stockholders, to act in matters of this kind is taken away by the fact that its stock is not all issued, and that a part of it is retained to be issued to obtain working capital, or for other purposes. On principle, it is difficult to see how this can affect its right under the law to do business of this kind, as it may do business of every other kind.

It is suggested that to make contracts with one in a fiduciary relation may be detrimental to the interests of the corporation, and constitute a fraud upon persons subsequently subscribing for stock not then issued, even if the existing stockholders know all the facts and are content. But it is to be noticed that, under the law of New Jersey, the organization of a corporation does not necessarily give any indication or suggestion as to the value of its stock. It does not indicate that more than $1,000 of capital has been actually paid in, if that sum is fixed in the articles of association as the amount necessary to qualify it to do business. As to the balance of the shares, it does not show whether much, or little, or nothing at all has been paid upon them. It does not indicate that contracts have or have not been made with the corporation, and if they have been made, whether they are advantageous or disadvantageous to it. Under this system, everybody is bound to know that, apart from the general facts of organization which appear of record, one buying stock or subscribing for it must ascertain by inquiry if he would know whether it is of large value or of no value. Evidently the statute was intended
61 to give very broad latitude to organizers of corporations, and to give corporations full powers to contract, while only a small amount of stock has been issued, which may be owned by a very few persons.

Promoters, as well as directors, stand in a fiduciary relation to a corporation. They do not stand in such a relation directly to particular stockholders, or to a particular class of stockholders. Their relation to stockholders is only as the stockholders claim through the corporation by virtue of their ownership of it. Through the corporation, promoters and directors stand in this relation to those who own stock while their fiduciary relation to the corporation continues. They are never in such a relation to those who become stockholders after their relation to the corporation has ended. Their fiduciary relation to the corporation extends through it to all the owners of it. The stockholders for the time being are all the owners of it. These stockholders can sell its property, or wind it up, or control it as they please. No one else has any interest in it, and the directors or promoters have no relations, as such, to any one else. If additional stock is issued after their relations to the corporation are terminated, they are not and they never were in fiduciary relations to the takers of this new stock. In this respect there is no difference between directors and promoters. All this is said in refer-

ence to corporations which are regularly and completely organized, and are authorized to do business and fully to exercise their powers and franchises under the law, notwithstanding that a part of their authorized capital has not been taken. Of course, if a corporation is merely in an inchoate condition, and has not acquired the power to exercise its franchises, a different rule would apply.

So too, promoters may enter into arrangements with underwriters or syndicates or single persons who expect to take stock, and may thus assume obligations. In the present cases I do not intimate that the defendant might not be held liable to some of the persons who arranged with him to take a part in the enterprise.

But whatever may be thought of the conduct of promoters who make contracts with a corporation while they are the sole owners of it, and whether it be held that their fiduciary relations
62 extend to future stockholders or only to those who are the owners while this relation exists, the question before us is whether, under the law of New Jersey, a corporation is powerless to bind itself as to such contracts, when they are entered into with the assent of the existing stockholders, all of whom have full knowledge of the facts. On principle, I think that a corporation organized in that State is not so crippled. Let us consider the authorities.

In re Ambrose Lake Tin & Copper Mining Co. 14 Ch. D. 390, was a case in which a sale of property was made to a corporation by the promoters of it, which would have been voidable for fraud if the promoters had not been the owners of its stock. It was held that, inasmuch as the vendors were themselves the stockholders of the company and knew all the facts, there was no fraud upon the corporation. In this case the judges thought that one of the purposes of these promoters was to obtain profit from future purchasers of the stock who were ignorant of the transaction; but under the circumstances the corporation could not avoid the contract. In North-West Transportation Co. v. Beatty, 12 App. Cas. 589, a contract or purchase of property by a corporation was entered into by directors with one of their number. It was held that the vendor was entitled to exercise his voting power as a stockholder to ratify the contract. He controlled a majority of the votes through ownership of his stock, acquired in a manner authorized by the constitution of the company. It was held that his exercise of his power could not be deemed oppressive for this reason. Sir Richard Baggallay, in delivering the unanimous opinion of the privy Council, said, "Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, and consequently upon the company, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject matter opposed to, or different from, the general or particular interests of the company." Referring to dealings with a director acting in a fiduciary capacity, he said: "Any such dealing or en-
63 gagement may, however, be affirmed or adopted by the company, provided such affirmance or adoption is not brough'

about by unfair or improper means, and is not illegal or fraudulent or oppressive towards those shareholders who oppose it." In this case ratification was by only a small majority of the stockholders.

Salomon v. Salomon, [1897] A. C. 22, was a case in which the proprietor of a business organized a corporation with a capital stock of forty thousand shares, of the par value of one pound each. He, his wife, his daughter and his four sons took one share each. With only seven shares taken, he sold out his business to the corporation for a price which might be found to be much more than it was worth. He then took twenty thousand shares more of the stock; the remaining nineteen thousand nine hundred and ninety-three shares never were issued. The company soon became insolvent, and a receiver, in the interest of creditors, sought to hold this organizer and promoter for fraud upon the corporation. It was held upon these facts that there was no fraud and no liability. Lord Chancellor Halsbury quoted from the headnote in Erlanger v. New Sombrero Phosphate Co. 3 App. Cas. 1218, and then said, "But if every member of the company—every shareholder—knows exactly what is the true state of the facts (which for this purpose must be assumed to be the case here) Vaughan Williams, J.'s conclusion seems to me to be inevitable, for no case of fraud upon the company could here be established." He said this in which only seven shares of stock out of an authorized capital of forty thousand shares had been issued when the contract with the promoter was made. This case seems to me fully to cover the case at bar, in which the only fraud proved was the constructive fraud of a sale to a corporation from one in a fiduciary relation to it.

Other cases establish the proposition that it makes no difference that not all the stock of the company has been issued, if the holders of all outstanding stock agree. In St. Louis, Fort Scott & Wichita Railroad v. Tiernan, 37 Kans. 606, and Stewart v. St. Louis, Fort Scott & Wichita Railroad, 41 Fed. Rep. 736, a part of the stock, although not a large amount, was issued to municipalities after the transaction to which the stockholders agreed. In Hutchinson v. Simpson, 92 App. Div. (N. Y.) 382, a large amount of stock
64 was held in the treasury for other corporate uses. The same was true in Blum v. Whitney, 185 N. Y. 232, which in its reasoning and the authorities cited is a very strong case for the defendant. Only a part of the authorized stock had been issued when the contract was made in In re British Seamless Box Co. 17 Ch. D. 467, and more was issued about a year and a quarter afterwards. Tompkins v. Sperry, 96 Md. 560, is an important case supporting the proposition that stockholders may bind the corporation in transactions of this kind which are voidable for constructive fraud. Except as I shall state hereafter, I know of no case which holds that it makes any difference that not all the stock has been issued, if the corporation is completely organized and authorized to go on with its ordinary business. There are dicta of some English judges, indicating that such a transaction, when it is expected that a prospectus will be issued under the English practice inviting subscriptions for stock from the public, would be fraudulent as against future stock-

holders. These are in opinions in which the judges hold that there is no fraud upon the corporation as there was knowledge and consent of the stockholders, and they seem to assume that the corporation is not fully organized and qualified to do business. But they are without discussion or seeming consideration of the question when a corporation and its stockholders become competent to make binding contracts as to such matters. Other cases which support the defendant's position are Foster v. Seymour, 23 Fed. Rep. 65, McCracken v. Robison, 57 Fed. Rep. 375, and Barr v. New York, Lake Erie & Western Railroad, 125 N. Y. 263.

This court, in Hayward v. Leeson, 176 Mass. 310, in dealing with a corporation established under the laws of Tennessee, held that the receivers of the company might maintain a suit for fraud against promoters, notwithstanding that the stockholders, at the time of the transaction, knew all the facts and agreed to the contract. The particulars of the statute of Tennessee, as to the organization of corporations, do not appear in the report of the case. When the present suits came before the court upon a demurrer, Hayward v. Leeson was followed and held to govern them. 188 Mass. 315. The precise questions which were then before us have been considered by the Circuit Court of the United States and the United States Cir-
65 cuit Court of Appeals in the second circuit, in a suit brought by this plaintiff against Lewisohn's heirs and upon a demurrer to averments of fact against Lewisohn substantially identical with those against the defendant in the present suits, there was a decision for the defendants. Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 136 Fed. Rep. 915; S. C. 148 Fed. Rep. 1020. As appears by the record before us, five judges of the federal courts in that circuit, at different stages of the proceeding, agreed in their view of the law of the case. The suit was then carried to the Supreme Court of the United States, and the justices of that court were unanimous in sustaining the defendant's demurrer. Upon the averments of the bill, they treated Bigelow and Lewisohn as the real owners of the corporation when the contracts were made, through their appointees, who took the stock which they paid for. The judge who wrote the opinion sat as Chief Justice with those other members of this court who took part in the decision of Hayward v. Leeson. The view expressed in the opinion of the Supreme Court of the United States is at variance with a part of the reasoning and with the decision in Hayward v. Leeson. This latest decision must be treated as establishing the law for the federal courts. The cases cited show that the law is settled in the same way in some of the State courts.

In addition to the deference that a unanimous opinion of the justices of the Supreme Court of the United States should receive in any other court, it is for me a very important consideration that, upon questions which will often be litigated in the federal tribunals by reason of the diverse citizenship of the parties the law ought to be the same in the State courts as in the federal courts. It would be unfortunate if, in this large class of cases, the rights of a suitor should depend upon whether he is finally held subject to the jurisdiction of a federal court or to that of a State court.

It seems to me that the great weight of authority, upon the turning point of this case, is in favor of the defendant. I do not regard the case of Erlanger v. New Sombrero Phosphate Co. 3 App. Cas. 1218 (5 Ch. D. 73), relied on by the plaintiff, as having any bearing upon the question on which the present case turns, namely, when is a corporation so far organized that its stockholders, acting with full knowledge, can bind it? No such question arose in that
66 case, and there was no occasion to consider such a question. So far as appears, the question was never thought of. The court was dealing with a fraud upon a corporation whose stockholders were ignorant of the facts that constituted the fraud, and took no action in regard to the matter. It seems to me that the dicta of certain English judges relied on by the majority of the court overlook the fact that the fiduciary relation of promoters of a corporation is of no practical consequence if the promoters are the sole owners of the corporation, and if, at the time of the transaction in question, the corporation is legally organized and qualified to do every kind of business, although this fact is generally recognized by the English courts. I also think that the judges uttering the dicta were influenced by the statutory provision in the English law for the issuing of a prospectus to the public, inviting subscriptions to the stock, after the corporation is organized in other particulars. There is no such provision in the statute of New Jersey.

It is also to be remembered that the dicta were uttered in connection with decisions that the corporation was bound by the knowledge and action of all its existing stockholders, notwithstanding that only a part of the authorized stock had been taken. One or two of the dicta are in other cases in which no question in regard to action by all the stockholders with knowledge arose. In Pietsch v. Milbrath, 123 Wis. 647, 651, it appears that the plaintiffs took their stock upon grossly false representations as to the organization of the corporation, and they were allowed a remedy. Yeiser v. United States Board & Paper Co. 107 Fed. Rep. 340, 348, was a case of gross, active fraud, and some stockholders who were ignorant of the facts were brought in before the transaction in question was consummated. Of course, this decision is of no effect as against the later adjudication in 210 U. S. 206, covering the precise question before us. Neither of these two cases seems to me important in reference to the question on which the present decision depends. I think the corporation in the present case is bound by the knowledge and consent of its stockholders.

The defendant relies upon the independent defense that the decision against the plaintiff, upon the same averments of fact in
67 the suit against the other of the two joint actors, is a bar to the present claim, as res judicata. Evidence was introduced to prove the law of New York, where the decree was entered. The defendant called thirteen witnesses of the greatest eminence and distinction, who testified as experts in law that, in their opinion, under the law of New York, the decree would be a bar to these suits if they were brought against this defendant in the courts of that State. Many of these witnesses had had a long judicial experience. Three of

them had sat in the Court of Appeals, two of them for long terms, and one as a Chief Judge. Several others had served a long time in the Supreme Court of New York, sitting in the general term and the appellate division. Others had held other high positions in their profession, and all of them were lawyers whose opinions are entitled to great weight. The plaintiff called two eminent lawyers who expressed a contrary opinion. Many decisions of the courts of New York were also put in evidence. The defendant contended that, if the decree is a bar under the law of New York, it is equally so when pleaded in Massachusetts.

If it were necessary to consider this branch of the defense, it perhaps would be a grave question whether the defense was or was not made out. But as to that I express no opinion, preferring to rest this opinion on the other ground.

I am authorized to say that Mr. Justice Morton concurs in this opinion.

HAMMOND, J.: Upon the questions (1) whether the facts found by the single justice are supported by the evidence and should stand, (2) whether "the transaction is to be determined by the law of Massachusetts," (3) whether the plaintiff has been guilty of laches, (4) what shall be the nature of the relief (if there is any relief), (5) what effect shall be given to the judgment rendered in the Lewisohn case by the Circuit Court of the United States for the Southern District of New York, (6) whether a decision for the plaintiff in these suits involves a denial to the defendant of due process of law, or the equal protection of the laws, and (7) whether the interlocutory order entered by a single justice enjoining the defendant from further prosecuting his suit against the plaintiff elsewhere except in this court should stand, I agree with the majority of the court.

But upon the question on the merits, namely, whether upon the facts found the defendant is answerable to the plaintiff, I agree with the dissenting opinion filed by the Chief Justice; and for the reasons stated therein I think that the bills should be dismissed.

68 COMMONWEALTH OF MASSACHUSETTS.
Suffolk, ss:

Supreme Judicial Court.

In Equity. No. 8098.

OLD DOMINION COPPER MINING & SMELTING COMPANY
v.
ALBERT S. BIGELOW.

Application for Writ of Error.

To the Honorable Marcus P. Knowlton, Chief Justice of the Supreme Judicial Court:—

And now comes the defendant in the above entitled cause and respectfully represents that on the twenty-sixth day of October,

1427

1909, this Court upon and in accordance with a rescript from the Supreme Judicial Court for the Commonwealth, the highest Court in the State, entered a final decree in said cause in favor of the plaintiff and against the defendant, in which decree, and in the proceedings had prior thereto in this Court, certain errors appear, to the prejudice of the defendant, as recited in the annexed assignment of errors.

Wherefore, the defendant prays that a writ of error to this Court from the Supreme Court of the United States may issue in his behalf for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

By His Attorneys, ALFRED HEMENWAY.
C. H. TYLER.
O. D. YOUNG.
B. E. EAMES.

69 UNITED STATES OF AMERICA:

Supreme Court of the United States.

ALBERT S. BIGELOW, Plaintiff in Error.
v.
OLD DOMINION COPPER MINING AND SMELTING COMPANY, Defendant in Error.

Assignment of Errors by Plaintiff in Error.

And now comes Albert S. Bigelow, plaintiff in error in the above entitled cause, and, in connection with his application for a writ of error, makes this his assignment of errors.

(1) The Court erred in deciding that the final judgment or decree dated July 23, 1908, in the Circuit Court of the United States for the Southern District of New York in the suit brought by the Old Dominion Copper Mining & Smelting Company, complainant, against Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, as Executors of the last will and testament of Leonard Lewisohn, deceased, defendants, set forth in the supplemental answer herein and duly proven upon the trial, was not a bar to the prosecution of this action against the plaintiff in error in the Supreme Judicial Court of Massachusetts, and that said decree did not estop the plaintiff (defendant in error) from prosecuting its said cause in the Supreme Judicial Court of Massachusetts and did not render the matters in issue in said suit in said Circuit Court res adjudicata in said cause in the Supreme Judicial Court in Massachusetts, and thereby denied to said decree full faith and credit in violation of Article IV, Section 1, of the Constitution of the United States and of the Acts of Congress
70 enacted pursuant thereto.

(2) The Court erred in not giving full faith and credit

to the decree of the Circuit Court of the United States for the Southern District of New York, made in the suit duly brought and pending in the said Court by the Old Dominion Copper Mining & Smelting Company, complainant, against Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, as Executors of the last will and testament of Leonard Lewisohn, deceased, defendants, as set forth in the supplemental answer herein and duly proven upon the trial of this cause, in violation and disregard of Section 1, Article IV, of the Constitution of the United States.

(3) The Court erred in not granting a decree herein in favor of the plaintiff in error dismissing the complaint for the reason that the decree entered in the Circuit Court of the United States for the Southern District of New York in the suit brought by the Old Dominion Copper Mining & Smelting Company, complainant, against Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, as Executors of the last will and testament of Leonard Lewisohn, deceased, defendants, as set forth in the supplemental answer herein and duly proven upon the trial, conclusively adjudged and determined in favor of the plaintiff in error that no cause of action existed in favor of the defendant in error against the plaintiff in error by reason of the matters set forth in the bill of complaint herein, and in refusing to so adjudge, the Court denied to the plaintiff in error the right claimed by him under the Constitution of the United States, to wit,—that full faith and credit be given in the Commonwealth of Massachusetts to the judicial proceedings of the Circuit Court of the United States for the Southern District of New York.

71 (4) The Court erred in not granting a decree herein in favor of the plaintiff in error dismissing the complaint, inasmuch as the defendant in error was estopped from maintaining in the Supreme Judicial Court for the Commonwealth of Massachusetts the bill of complaint in this action against the plaintiff in error by reason of the decree entered in the Circuit Court of the United States for the Southern District of New York in the suit brought therein by the Old Dominion Copper Mining & Smelting Company, complainant, against Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, as Executors of the last will and testament of Leonard Lewisohn, deceased, defendants, since the decree in favor of the defendants in said action was also in favor of the plaintiff in error as a privy or representative of the defendants therein and of the decedent, Leonard Lewisohn, and in refusing so to adjudge, the Court denied to the plaintiff in error the full faith and credit of the judicial proceedings in the Circuit Court of the United States for the Southern District of New York, above referred to, contrary to Section 1, Article IV of the Constitution of the United States.

(5) The Court erred in not granting a decree in favor of the plaintiff in error dismissing the complaint, inasmuch as the decree entered in the Circuit Court of the United States for the Southern District of New York, in the suit duly brought and pending therein by the Old Dominion Copper Mining & Smelting Company, com-

plainant, against Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn, and Philip S. Henry, as Executors of the last will and testament of Leonard Lewisohn, deceased, defendants, as set forth in the supplemental answer herein and proven upon the trial, conclusively adjudged and determined in favor of the plaintiff
72 in error that the defendant in error was not entitled to recover against the plaintiff in error by reason of the matters alleged in the bill of complaint herein; and inasmuch as the plaintiff in error was a party by representation to the said action in the Circuit Court of the United States for the Southern District of New York, and inasmuch also as he participated in the said action in connection with the defendants therein and became and was entitled to the benefit of the said decree in all respects to the same extent as though he had been an actual party defendant therein; that, therefore, the Court denied to him in this action the full faith and credit of the decree therein in violation of Section 1, Article IV of the Constitution of the United States.

(6) The Court erred in not granting a decree herein in favor of the plaintiff in error dismissing the complaint upon the ground that the decree entered in the Circuit Court of the United States for the Southern District of New York, in the suit brought therein by the Old Dominion Copper Mining & Smelting Company, complainant, against Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, as Executors of the last will and testament of Leonard Lewisohn, deceased, defendants, set forth in the supplemental answer herein and proven upon the trial under the laws of the State of New York inured to the benefit of the plaintiff in error as fully and completely as though he had been a party defendant in said action; and that in refusing to give such effect to the said decree, the Supreme Judicial Court of Massachusetts denied to the plaintiff in error the right claimed by him under the Constitution of the United States, to wit,—that full faith and credit be given in the Commonwealth of Massachusetts to the judicial proceedings
73 of the Circuit Court of the United States for the Southern District of New York, aforesaid, in violation of Section 1 of Article IV, of the Constitution of the United States.

(7) The Court erred in deciding that the final judgment or decree dated July 23, 1908, in the Circuit Court of the United States for the Southern District of New York in the suit brought by the Old Dominion Copper Mining & Smelting Company, complainant, against Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, as Executors of the last will and testament of Leonard Lewisohn, deceased, defendants, set forth in the supplemental answer herein and duly proven upon the trial, was not a decree in rem or the equivalent thereof, establishing that as between the defendant in error, on the one side, and the plaintiff in error and Leonard Lewisohn, on the other side, the title to the outside properties, so called, was in the defendant in error and the title to the stock issued in exchange therefor was in the plaintiff in error and the said Lewisohn, and that said decree was not a bar to the prosecution of this action against the plaintiff in error in the Supreme Judicial Court of Mas-

sachusetts, and did not render the matters in issue in said suit in said Circuit Court res adjudicata in said cause in the Supreme Judicial Court of Massachusetts and thereby denied to said decree full faith and credit in violation of Article IV, Section 1, of the Constitution of the United States and of the Acts of Congress enacted pursuant thereto.

(8) The Court erred in deciding that the validity of the contracts and transactions in issue was not governed by the laws of the State of New York and that by said laws as existing at the time said contracts and transactions were entered into the same were
74 not valid and binding, and thereby impaired the obligation of such contracts and transactions in violation of Article 1, Section 10, of the Constitution of the United States and denied to the plaintiff in error due process of law and the equal protection of the laws with respect to such contracts and transactions in violation of Section 1 of the 14th amendment to the Constitution of the United States, and denied full faith and credit to the laws of the State of New York in violation of Article IV, Section 1, of the Constitution of the United States and of the Acts of Congress enacted pursuant thereto.

(9) The Court erred in deciding that the corporate action necessary to be taken by the defendant in error in order to authorize its irrevocable assent to the contracts and transactions in issue and to become bound by the same, was not governed by the law of the State of New Jersey, and that by such law as existing at the time said contracts and transactions were entered into, the necessary corporate action was not taken by the defendant in error to constitute its assent to the contracts and transactions in issue and to bind the corporation irrevocably thereby, and thereby impaired the obligation of such contracts and transactions in violation of Article 1, Section 10, of the Constitution of the United States and denied to the plaintiff in error due process of law and the equal protection of the law with respect to such contracts and transactions in violation of Section 1 of the 14th amendment to the Constitution of the United States and denied full faith and credit to the laws of the State of New Jersey, in violation of Article IV, Section 1, of the Constitution of the United States and of the Acts of Congress enacted pursuant thereto.

75 (10) The Court erred in deciding that the contract entered into between the defendant in error on the one side and the plaintiff in error and Leonard Lewisohn, late of the City of New York, deceased, on the other side, duly authorized by the defendant in error and assented to with full knowledge by all existing shareholders and directors of the defendant in error, was not valid and binding and in holding that the same was voidable and rescindable by the defendant in error or that the defendant in error had any right of action arising out of the matters included in said contract, and thereby impaired the obligation of such contract in violation of Article 1, Section 10, of the Constitution of the United States and denied to the plaintiff in error due process of law in violation of Section 1 of the 14th amendment to the Constitution of the United States.

(11) The Court erred in deciding that the validity of the contracts and transactions in issue was not conclusively established by the final judgment or decree entered on July 23, 1908, in the Circuit Court of the United States for the Southern District of New York, upon a mandate from the Supreme Court of the United States, in the suit brought by the Old Dominion Copper Mining & Smelting Company, complainant, against Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, as Executors of the last will and testament of Leonard Lewisohn, deceased, defendants, set forth in the supplemental answer herein and duly proven upon the trial, and thereby denied full faith and credit to the decision of said Circuit Court and of the Supreme Court of the United States in violation of Article IV, Section 1, of the Constitution of the United States, and of the Acts of Congress enacted pursuant thereto,
and impaired the obligation of said contracts and transactions
76 in violation of Article 1, Section 10, of the Constitution of the United States, and denied to the plaintiff in error due process of law and the equal protection of the law with respect to such transactions in violation of Section 1, of the 14th amendment to the Constitution of the United States.

(12) The Court erred in deciding that where the defendant in error entered into a contract with the plaintiff in error and Leonard Lewisohn, which contract was duly authorized by the defendant in error and assented to with full knowledge of all the facts by thirteen fifteenths (13/15) of the entire authorized capital stock of the defendant in error, (being all the then existing shareholders) a recovery could be had in the name of the defendant in error from the plaintiff in error charging the latter with the whole results of said transaction so that the proceeds of such recovery inured to the benefit of holders of said 13/15 of the stock which so assented to the transaction with full knowledge, and thereby impaired the obligation of said contract and transaction in violation of Article 1, Section 10, of the Constitution of the United States and denied to the plaintiff in error the due process of law in violation of Section 1 of the 14th amendment to the Constitution of the United States.

(13) The Court erred in that its decision permitting avoidance or rescission by the defendant in error of a contract entered into between the defendant in error on the one side and the plaintiff in error and Leonard Lewisohn on the other side, duly assented to by the defendant in error and by all its existing shareholders with full knowledge of all the facts and in the absence of any breach of duty
or wrong whatsoever as to the subsequent purchasers of the
77 remaining authorized capital stock is an attempted creation of a fictitious right in the name of the artificial entity called a corporation in the absence of any injury direct or indirect to the rights or interests of any shareholder and is a denial to the plaintiff in error of the due process of law in violation of Section 1 of the 14th amendment to the Constitution of the United States.

(14) The Court erred in deciding that the Estate of Leonard Lewisohn having been discharged from liability in connection with the matters and transactions in issue by final decree of the Circuit Court of the United States for the Southern District of New York

in an action there brought and prosecuted by the defendant in error, which decree was set forth in the supplemental answer herein and duly proven upon the trial, the plaintiff in error, a joint actor with said Lewisohn in said transactions, could be held liable to the defendant in error in solido, not only for alleged profits made by him but also for alleged profits made by said Lewisohn in connection with said matters and transactions, and thereby denied to the plaintiff in error due process of law and the equal protection of the law in violation of Section 1, of the 14th amendment to the Constitution of the United States.

(15) The Court erred in deciding that, the plaintiff in error and Leonard Lewisohn having jointly contracted with the defendant in error and an action to rescind or avoid the contract having been brought by the defendant in error against the Estate of said Lewisohn (the plaintiff in error being out of the jurisdiction) and such rescission or avoidance having been denied on the merits, a similar action could be maintained against the plaintiff in
78 error in the Supreme Judicial Court of Massachusetts, and thereby impaired the obligation of such contract in violation of Article 1, Section 10, of the Constitution of the United States and denied to the plaintiff in error due process of law and the equal protection of the laws in violation of Section 1 of the 14th amendment to the Constitution of the United States.

(16) The Court erred in deciding that, the contract between the defendant in error on the one side and the plaintiff in error and Leonard Lewisohn on the other side being valid where made, could, nevertheless, be avoided and rescinded and that such decision could be reached under the guise of judicial interpretation and was not in fact and law judicial legislation, and thereby impaired the obligation of such contract in violation of Article 1, Section 10, of the Constitution of the United States, and denied to the plaintiff in error due process of law in violation of Section 1 of the 14th amendment to the Constitution of the United States.

(17) The Court erred in that its decision that the contract between the defendant in error on the one side and the plaintiff in error and Leonard Lewisohn on the other side, being valid where made, could, nevertheless, be avoided and rescinded was in effect and substance an act of judicial legislation retroactive in character, purporting to create a breach of duty on the part of the plaintiff in error to the defendant in error as of the time when said contract was made by reason of matters taking place subsequently at the time the additional stock of the defendant in error was issued to the public, and purporting to create a right of action in the corporation nunc pro tunc, and was in violation of the provisions of the
79 Constitution of the United States and the amendments thereof requiring a separation between legislative and judicial powers and was an abridgment of the privileges and immunities of the plaintiff in error as a citizen of the United States and a denial to him of due process of law in violation of Section 1 of the 14th amendment to the Constitution of the United States.

(18) The Court erred in deciding that, where the defendant in error, by its own act and during the pendency of this action in causing substantially all its capital stock to be impounded in the treasury of a Maine corporation had deprived the plaintiff in error of the power of obtaining and returning an amount of such stock equal to the amount issued by it to the plaintiff in error and said Lewisohn, the defendant in error was entitled to any remedy other than rescission and in deciding that, even if the plaintiff in error was unable to return such stock he was not entitled to account for its value and receive a reconveyance of the property and was liable to respond in damages as in an action at law, and the Court thereby denied to the plaintiff in error due process of law in violation of Section 1 of the 14th amendment to the Constitution of the United States.

(19) The Court erred in deciding that the defendant in error could recover from the plaintiff in error money damages in two separate actions based upon parts of one and the same transaction offering rescission as to one part and not as to the other, and the Court thereby impaired the obligation of said contract and transaction in violation of Article 1, Section 10, of the Constitution of the United States and denied to the plaintiff in error due
80 process of law and the equal protection of the laws with respect thereto in violation of Section 1 of the 14th amendment to the Constitution of the United States.

(20) The Court erred in deciding that it could lawfully enjoin the plaintiff in error from prosecuting his appeal from the judgment or decree obtained against him by the defendant in error in the Courts of the State of New Jersey or from taking action elsewhere than in Massachusetts, even in the Federal Courts, and thereby abridged the privileges and immunities of the plaintiff in error as a citizen of the United States and denied to the plaintiff in error due process of law and the equal protection of the laws, all in violation of Section 1 of the 14th amendment to the Constitution of the United States.

(21) The Court erred in deciding that the defendant in error was entitled to recover from the plaintiff in error on account of the matters and things in issue in this cause and thereby denied and violated the rights of the plaintiff in error under the provisions of Article 1, Section 10, and Article IV, Sections 1 and 2, of the Constitution of the United States, and Section 1 of the 14th amendment to the Constitution of the United States and the Acts of Congress enacted pursuant to the foregoing provisions.

ALFRED HEMENWAY,
C. H. TYLER,
O. D. YOUNG,
B. E. EAMES,
Attorneys for Plaintiff in Error.

81 Supreme Court of the United States.

ALBERT S. BIGELOW, Plaintiff in Error,
v.
OLD DOMINION COPPER MINING & SMELTING COMPANY, Defendant in Error.

Prayer for Reversal.

To the Honorable the Supreme Court of the United States:

And now comes the above named Plaintiff in Error, and, in connection with his writ of error issued by this Court to the Supreme Judicial Court of Massachusetts, he prays for a reversal of the judgment or decree against him entered by the Supreme Judicial Court of Massachusetts in an action brought by the Defendant in Error against the Plaintiff in Error in said Supreme Judicial Court, sitting in Suffolk County, and numbered there in Equity, No. 8098.

ALFRED HEMENWAY,
C. H. TYLER,
O. D. YOUNG,
B. E. EAMES,
Solicitors of Albert S. Bigelow, Plaintiff in Error.

82 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Old Dominion Copper Mining & Smelting Company, a New Jersey corporation, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in the city of Washington, in the District of Columbia, on the* twenty-seventh day of January, next, pursuant to a Writ of Error filed in the Clerk's Office of the† Supreme Judicial Court of the Commonwealth of Massachusetts, wherein Albert S. Bigelow, of Cohasset, in the Commonwealth of Massachusetts, is and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Marcus P. Knowlton, Chief Justice of the Supreme Judicial Court of Massachusetts, this twenty-ninth day of December, in the year of our Lord one thousand nine hundred nine.

[SEAL.] MARCUS P. KNOWLTON,
Chief Justice of Supreme Judicial Court.

*Not exceeding 30 days from the day of signing.
†Name of Court to which Writ of Error is directed.

83 BOSTON, MASS., *December* 30, 1909.

Due and sufficient service of the within citation is hereby acknowledged this day on behalf of the defendant in error within named, Old Dominion Copper Mining & Smelting Company, reserving all rights including the right to move to dismiss.

BRANDEIS, DUNBAR & NUTTER,
Attorneys for Defendant in Error,
Old Dominion Copper Mining & Smelting Company.

[Endorsed:] 8098. Eq. Old Dominion Copper Mining & Smelting Co. vs. Alert S. Bigelow. Citation.

84 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

I, Walter F. Frederick, Clerk of the Supreme Judicial Court within and for the County of Suffolk and Commonwealth of Massachusetts, hereby certify that the papers hereunto annexed are an exemplification of the Record in the case of Old Dominion Copper Mining & Smelting Company, Plaintiff, against Albert S. Bigelow, Defendant, in said Supreme Judicial Court determined, and attached thereto and transmitted with said Record, are true copies of the Commissioner's Reports of the Evidence; copies of the opinion of the Supreme Judicial Court for the Commonwealth, attested by the Reporter of Decisions; a copy of the application for writ of error; a copy of the assignment of errors; and the original citation with acceptance of service endorsed thereon.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Boston, this fourth day of January in the year of our Lord one thousand nine hundred and ten.

[SEAL.] WALTER F. FREDERICK, *Clerk.*

85 8098.

[*Bond on Writ of Error.*]

Know all Men by these Presents, That we, Albert S. Bigelow, of Cohasset, in the Commonwealth of Massachusetts, as Principal, and American Bonding Company of Baltimore, a Maryland corporation, as surety, are held and firmly bound unto Old Dominion Copper Mining & Smelting Company, a New Jersey corporation, in the full and just sum of Five Hundred Dollars ($500.00) to be paid to the said Old Dominion Copper Mining & Smelting Company, its successors or Assigns; to which payment well and truly to be made we bind ourselves, our Heirs, Executors, and Administrators, and successors, jointly and severally, by these Presents.

Sealed with our seals, and dated the twenty-second day of November, in the year of our Lord one thousand nine hundred and nine.

Whereas lately at a sitting of the Supreme Judicial Court of Massachusetts, at Boston, within and for the County of Suffolk, in a suit depending in said Court between said Old Dominion Copper Mining & Smelting Company, plaintiff, and said Albert S. Bigelow, defendant, a decree was entered against the said defendant, Albert S. Bigelow, and the said Defendant, Albert S. Bigelow, having procured a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Old Dominion Copper Mining & Smelting Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now the condition of the above obligation is such, that if the said Albert S. Bigelow, plaintiff in error, shall prosecute his said writ of error to effect, and answer all costs, if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

ALBERT S. BIGELOW. [L. S.]
AMERICAN BONDING COMPANY OF BALTIMORE. [L. S.]
By BERTRAM G. WATERS, *Vice Pres't.*

Attest:

A. A. DORITY, *Ass't Sec'y.*

Signed, sealed and delivered in presence of
W. A. S. CHRIMES.

Approved:
But not to operate as supersedeas.

MARCUS P. KNOWLTON, *C. J. S. J. C.*

A true copy of the bond taken by the Chief Justice at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the Supreme Judicial Court for the County of Suffolk and Commonwealth of Massachusetts.

Attest:

WALTER F. FREDERICK,
Clerk Supreme Judicial Court

86 [Endorsed:] 8098. Eq. Old Dominion Copper Mining & Smelting Co'y vs. Albert S. Bigelow. Copy of Bond in Proceedings in error to United States Supreme Court. Original bond filed & lodged in Clerk's office Dec. 31, 1909.

Endorsed on cover: File No. 21,981. Massachusetts Supreme Judicial Court. Term No. 191. Albert S. Bigelow, plaintiff in error, vs. Old Dominion Copper Mining & Smelting Company. Filed January 26th, 1910. File No. 21,981.

TRANSCRIPT OF RECORD

71895

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 192.

ALBERT S. BIGELOW, PLAINTIFF IN ERROR,

vs.

OLD DOMINION MINING & SMELTING COMPANY.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

FILED JANUARY 26, 1910.

(21,982.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 192.

ALBERT S. BIGELOW, PLAINTIFF IN ERROR,

vs.

OLD DOMINION MINING & SMELTING COMPANY.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

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a UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the Honorable the Justices of the Supreme Judicial Court of the Commonwealth of Massachusetts, holden at Boston, within and for the County of Suffolk, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between Old Dominion Copper Mining & Smelting Company, a New Jersey corporation, Plaintiff and Albert S. Bigelow, of Cohasset, in the Commonwealth of Massachusetts, Defendant, in a suit in equity, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of or commission held under, the United States, and the decision was against the title right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendant, Albert S. Bigelow, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the twenty-ninth day of December, in the year of our Lord one thousand nine hundred and nine.

CHARLES K. DARLING,
Clerk of the Circuit Court of the United States, District of Massachusetts.

Allowed by
MARCUS P. KNOWLTON,
Chief Justice of Supreme Judicial Court.

But writ not to operate as supersedeas.

b COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

And now, here, the Judges of the Supreme Judicial Court make return of this writ by annexing hereto and sending herewith, under the seal of the said Supreme Judicial Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, Walter F. Frederick, Clerk of said Supreme Judicial Court, have hereto set my hand and the seal of said Court this fourth day of January A. D. 1910.

[SEAL.] WALTER F. FREDERICK, *Clerk.*

[Endorsed:] 8098. Eq. Old Dominion Copper Mining & Smelting Co'y vs. Albert S. Bigelow. Writ of Error. Suffolk, ss: Supreme Judicial Court. Received Dec. 31, 1909. Attest: Walter F. Frederick, Clerk.

1 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To all persons to whom these presents shall come, Greeting:

Know ye, that among the Records of our Supreme Judicial Court, sitting at Boston in said County of Suffolk, for the hearing of all causes in equity between the first day of January in the year one thousand nine hundred and nine, and the thirty first day of December in the same year, both inclusive, it is thus contained, the following being the entire record in the case:

Old Dominion Copper Mining and Smelting Company, a corporation duly organized under the laws of the State of New Jersey, and having a usual place of business at Boston in our County of Suffolk brings its Bill of Complaint against Albert S. Bigelow, of Cohasset in the County of Norfolk, having his usual place of business in said Boston.

Said Bill of Complaint being in the words following, to wit:

Bill of Complaint.

First. The plaintiff, the Old Dominion Copper Mining and Smelting Company, is a corporation duly organized under the laws of the State of New Jersey and having a usual place of business in Boston in said County of Suffolk. Said corporation is the owner of
2 copper mining and smelting works in the Territory of Arizona, and is carrying on the business of mining, smelting, and selling copper.

Second. On and prior to March 24, 1895, there existed a certain corporation called the Old Dominion Copper Company of Baltimore City (hereinafter called the Baltimore Old Dominion Company) organized under the laws of the State of Maryland and having a usual place of business in said Baltimore. Said Baltimore Old Do-

minion Company was then the owner of mines and mining claims in Arizona. It had a capital stock of five hundred thousand (500,000) dollars divided into twenty-five thousand (25,000) shares of the par value of twenty (20) dollars each. Of said shares there were then owned by the executors of the will of Michael H. Simpson, late of said Boston, deceased, about seventeen thousand eight hundred and fifty-seven (17857) shares and the balance of said shares were then owned by one William Keyser of Baltimore in the state of Maryland and others. Said Keyser also then held the title in his own name to certain mines and mining claims known as the Old Dominion Mine, the New York Mine, the Chicago Mine, the Keystone Mine, and a certain parcel of land near the Bloody Tanks, so-called all in said Arizona, but whether said Keyser held said property solely in his own right or in trust, wholly or in part for others or for said corporation the plaintiff is ignorant.

Third. At some time prior to March 24, 1895, the defendant and one Leonard Lewisohn, late of New York City, deceased, formed the plan of acquiring all the stock of said Baltimore Old Dominion Company and all said real estate, title to which then
3 stood in the name of said Keyser, as aforesaid, and of organizing a new corporation to acquire and of selling to such new corporation at a large advance in price, all the property of said Baltimore Old Dominion Company and all the real estate held by said Keyser, as aforesaid, and putting upon the market and selling to such of the public as might be induced to buy the same a large number of the shares of such new corporation in order to provide the same with a working capital, and make necessary improvements in the plant, and acquire additional mining claims, and of thereby securing for themselves and such persons as they might associate with them a large profit from the purchase and resale to said new corporation to be organized by them of said property; and said defendant and said Lewisohn thereupon conspired together to carry out said plan and thereby to injure the future stockholders in said new corporation, and to secure for themselves as the promoters and organizers thereof a large secret profit.

Fourth. Pursuant to said plan and conspiracy said defendant alone or in conjunction with said Lewisohn at some time prior to March 24, 1895, procured a number of persons, whose names are to the plaintiff unknown, to subscribe to the Old Dominion Syndicate so-called; said syndicate was formed for the purpose of raising about one million (1,000,000) dollars or so much thereof as was necessary to carry out said plan and conspiracy of the defendant and said Lewisohn above described for the benefit of the members of said syndicate. The terms of said subscription were that the subscribers should pay in fourteen (14) per cent. of the amount of their respective subscriptions on March 24, 1895, twenty-eight and two-thirds (28 2/3) per cent. on July 24, 1895, twenty-eight and two-thirds (28 2/3) per cent. on August 25, 1895, and twenty-eight and two-thirds (28 2/3) per cent. on
4 September 21, 1895, and with each of said last three instalments five (5) per cent. interest thereon from

March 24, 1895; and that the amount so subscribed and paid in should be used so far as required for the purpose of acquiring the property or all the capital stock of said Baltimore Old Dominion Company, and that the subscribers to said syndicate should receive in cash or in stock of the new corporation to be formed to purchase said property from said syndicate two million (2,000,000) dollars to be distributed pro rata according to their several subscriptions. The precise terms of said syndicate agreement are to the plaintiff unknown and the plaintiff has no copy thereof which it can attach hereto, but said defendant well knows the terms of said agreement and has a copy or the original thereof in his possession or control.

Fifth. Thereafter, to wit, on or about March 24, 1895, said defendant, alone or in conjunction with said Lewisohn received the first instalment payable by the subscribers to said syndicate amounting to about one hundred and forty thousand (140,000) dollars. Thereafter, to wit, on or about May 2, 1895, said Bigelow, alone or in conjunction with others, for the purpose of carrying out said plan and conspiracy and the purposes of said syndicate, made an agreement with the executors of the will of said Michael H. Simpson for the purchase from said executors of seventeen thousand eight hundred and fifty-seven (17857) shares of the capital stock of said Baltimore Old Dominion Company, being five-sevenths (5/7) of the total capital stock of said corporation, at a price not exceeding six hundred and thirteen thousand one hundred and thirty-seven dollars and thirty-nine cents ($613,137.39); the plaintiff is ignorant of the precise terms of said agreement, but is informed and believes, and therefore charges that said agreement was in the form of an option for which a sum not exceeding one hundred thousand (100,000) dollars was paid, under which option said defendant and his said associates were entitled to acquire said stock at the price aforesaid by making further payments at a further time or times.

Sixth. At some time prior to July 1, 1895, said defendant, alone or in conjunction with others, for the purpose of carrying out said plan and conspiracy and for the purposes of said syndicate, made an agreement with said William Keyser and with other persons to the plaintiff unknown by which the defendant and his associates acquired the remaining two-sevenths (2/7) of all the capital stock of said Baltimore Old Dominion Company, to wit, seven thousand one hundred and forty-three (7143) shares at a price not exceeding one hundred and seventy-five thousand one hundred and eighty-two dollars and eleven cents ($175,182.11). The plaintiff is unable to state more particularly the terms of said purchase, but the terms thereof are well known to the defendant.

Seventh. At about the time of the purchase from said Keyser and others of said seven thousand one hundred and forty-three (7143) shares of stock in said Baltimore Old Dominion Company said defendant or said Lewisohn, or the two in conjunction, for their common benefit acquired from said Keyser for the same consideration paid for said seven thousand one hundred and forty-three

(7143) shares, but, as they claimed, for their own benefit and not for the benefit of said Old Dominion Syndicate, the parcels of real estate in Arizona, title to which then stood in the name of said Keyser, as above set forth, to wit, the four mining claims known as said Old Dominion Mine, said New York Mine, said Keystone Mine, and said Chicago Mine, and said parcel of land near the Bloody Tanks. All said real estate was acquired in the name of and
6 was conveyed by said Keyser to said Lewisohn, but for the common benefit of said Lewisohn and said Bigelow, as hereafter set forth, and pursuant to and as a part of the plan and conspiracy and for the purposes hereinbefore set forth.

Eighth. On or about July 8, 1895, said defendant in conjunction with said Lewisohn, in pursuance of said plan and conspiracy and for the purpose of carrying out the same for the benefit of themselves and of the subscribers to said Old Dominion Syndicate so-called, caused the Old Dominion Copper Mining and Smelting Company, the plaintiff herein, to be organized under the general corporation laws of the State of New Jersey. Said corporation was formed by seven persons selected and employed for the purpose by said defendant and said Lewisohn, to wit, Jesse Lewisohn, Allen W. Evarts, Edgar Buffam, Charles W. Welch, Sidney Riddlestorffer, William V. Rowe, and William R. Montgomery. None of said seven persons, except said Jesse Lewisohn, who was a brother of said Leonard Lewisohn, had any actual interest in said corporation or acted in the formation thereof otherwise than as the representative and agent of said defendant and said Leonard Lewisohn. Each of said individuals nominally subscribed and paid for four (4) shares of the capital stock of said corporation except said Jesse Lewisohn who subscribed and paid for sixteen (16) shares; but in fact all said subscriptions were made for the benefit and at the request of the defendant and said Leonard Lewisohn, and each subscription was paid for by said defendant and said Leonard Lewisohn or one of them.

7 Ninth. On July 9, 1895, the first meeting of said corporation, organized as aforesaid, was held in Jersey City and all of said incorporators were then present. By-laws were adopted and upon an election of directors by ballot said seven incorporators above named were duly chosen directors, and it was further voted to increase the capital stock to three million seven hundred and fifty thousand (3,750,000) dollars, divided into one hundred and fifty thousand (150,000) shares of twenty-five (25) dollars each. A recess was taken by said meeting, and thereupon said seven directors met and organized and elected officers, to wit, said Allen W. Evarts, president, said Sidney Riddlestorffer, vice-president, said Jesse Lewisohn, treasurer, and said Edgar Buffam, secretary. Said meeting of directors confirmed the action of the prior meeting of incorporators increasing the capital stock, as above set forth. The organization of said corporation and the proceedings of said meetings of incorporators and directors were duly had according to the laws of the State of New Jersey, and the by-laws adopted, as aforesaid, and thereby the plaintiff became duly organized as

a corporation and the individuals above named became the lawful officers of the corporation holding respectively the offices above named.

Tenth. A meeting of the directors, of said plaintiff corporation, organized as aforesaid, was duly held on July 11, 1895, at the office in New York City of the firm of Lewisohn Brothers, of which firm said Leonard Lewisohn was a member; all of the directors except said Montgomery were present. Pursuant to instructions from the defendant the resignation of said Montgomery as a director was presented and duly accepted, and the defendant was
8 thereupon chosen a director in his place. Thereupon, pursuant to instructions from the defendant, the successive resignations of said Rowe as a director, of said Welch as a director, of said Jesse Lewisohn as treasurer and as director, of said Evarts as president, and of said Riddlestorffer as vice-president and as director were presented and duly accepted, and said Leonard Lewisohn, one Henry M. Whitney, one Thomas Nelson, and one Joseph G. Ray were successively duly chosen directors, and said Thomas Nelson was duly chosen treasurer, and said defendant was duly chosen president of said corporation. Said defendant and said Leonard Lewisohn were present at said meeting, and upon their respective elections as directors took their places in said meeting. All said resignations were duly received and acted on and said elections to fill the vacancies caused by said resignations were duly had pursuant to the laws of the State of New Jersey and the by-laws of said corporation.

Eleventh. At some time prior to July 11, 1895, to wit, on or about July 8, 1895, said defendant in pursuance of said plan and conspiracy, either alone or in conjunction with said Leonard Lewisohn, completed the purchase of all said shares of stock in said Baltimore Old Dominion Company upon the terms of the agreement with the executors of the will of Michael H. Simpson and with William Keyser and others hereinbefore referred to, and all said stock was delivered and transferred to the defendant or to persons designated by him, and the directors and officers of said Baltimore Old Dominion Company resigned and new directors nominated by said defendant were duly chosen and said defendant was duly
9 chosen president and said Allen W. Evarts secretary of said corporation. At the same time, to wit, on or about July 8, 1895, and prior to July 11, 1895, said Keyser conveyed to said Leonard Lewisohn said real estate in Arizona above referred to, pursuant to said agreement, and the legal title to said real estate became vested in said Leonard Lewisohn.

Twelfth. At said meeting of the directors of the plaintiff corporation on July 11, 1895, above referred to, after the several changes of directors and other officers by resignation above set forth, and after said defendant had been elected president of said corporation there remained present four directors, to wit, said defendant, said Leonard Lewisohn, said Evarts, and said Buffam. Said Evarts was the attorney employed by said defendant and said Leonard Lewisohn to attend to the incorporation of the plaintiff corporation and to carry

out their said plan and conspiracy; said Buffam was a person selected by them and employed by them to act as director and assist them in carrying out said plan and conspiracy. The remaining directors were said Thomas Nelson, Henry M. Whitney, and Joseph G. Ray, no one of whom was present and each of whom was a subscriber to said Old Dominion Syndicate and interested to assist said defendant and said Leonard Lewisohn in their plan to sell said property to the plaintiff and in the success of said plan and conspiracy.

Thirteenth. At said meeting of the directors of the plaintiff company on July 11, 1895, after the change of directors and officers above set forth and after said defendant had been chosen
10 president as aforesaid, said defendant through said Evarts presented to said board of directors of the plaintiff an offer to the plaintiff to sell and convey substantially all the property of said Baltimore Old Dominion Company to the plaintiff, except the cash assets, for one hundred thousand (100,000) shares of the capital stock of the plaintiff corporation to be issued to said Baltimore Old Dominion Company or its nominees. Said offer was signed by the defendant as president of and by said Evarts as secretary of said Baltimore Old Dominion Company. A copy of said offer and of the schedule therein referred to is hereto annexed and marked "A" and made a part of this bill. Upon presentation of said offer, on motion of said Leonard Lewisohn, seconded by said Evarts, it was unanimously voted to accept said offer and to issue one hundred thousand (100,000) shares of the capital stock in payment for said property, and the defendant and said Nelson were appointed a committee to supervise and carry out the details.

Fourteenth. Immediately after the passage of the vote last above referred to at said meeting of directors of the plaintiff on July 11, 1895, said Leonard Lewisohn presented to said board of directors of the plaintiff a proposition to the plaintiff to sell and convey to the plaintiff said real estate in Arizona acquired by said Leonard Lewisohn from said Keyser as above set forth for thirty thousand (30,000) shares of the capital stock of the plaintiff to be issued to said Lewisohn or his nominees, accompanied with a request to issue said shares to the defendant and said Lewisohn. A copy of said proposition is hereto annexed and marked "B" and made a part of this bill of complaint. Upon presentation of said proposition the defendant and said Leonard Lewisohn caused
11 the directors to unanimously vote to accept said proposition and to issue thirty thousand ($30,000) shares of the capital stock in payment for said property, and the defendant and said Nelson were appointed a committee to supervise and carry out the details.

Fifteenth. Thereafter the defendant and said Lewisohn, pursuant to the original plan and conspiracy, and for the purpose of furnishing the plaintiff corporation, promoted by them as aforesaid, with working capital and with funds required to develop its plants and other properties, caused to be offered twenty thousand (20,000) shares of the capital stock of the plaintiff corporation, not theretofore disposed of, for public subscription and sale at the price of

twenty-five (25) dollars per share; and all of said shares were so subscribed for and sold and the price therefor paid by said subscribers to the plaintiff. Said subscribers and purchasers of said shares were ignorant at the time said shares were offered for subscription and at the time they severally subscribed and paid therefor and received their shares, as hereinafter set forth, of the facts hereinbefore set forth as to the promotion and organization of the plaintiff corporation by the defendant and said Lewisohn, and the large profit to be made by said defendant and said Lewisohn and by the other members of said Old Dominion Syndicate therefrom.

Sixteenth. Thereafter the sale and conveyance of the property of said Baltimore Old Dominion Company, included in the offer marked Exhibit "A" and the schedule thereto annexed,
12 was consummated by the transfer of said property to this corporation, and the sale and conveyance of the property included in the proposition of said Leonard Lewisohn marked Exhibit "B" was consummated by the transfer of said property to this corporation. Thereafter, to wit, on or about September 18, 1895, the board of directors of the plaintiff corporation at a meeting duly called voted at the request of said Baltimore Old Dominion Mining Company to issue one hundred thousand (100,000) shares of the capital stock of this corporation to one Philip K. Dumaresq as representing said corporation as and for the price of said property so transferred and conveyed, and said shares were duly issued pursuant to said vote. And said board of directors of this corporation at said meeting further voted to issue thirty thousand (30,000) shares of the capital stock of this corporation to the defendant and said Leonard Lewisohn as and for the price of said property transferred and conveyed by the latter to this corporation, as above set forth, and said shares were thereupon duly issued pursuant to said vote. And said board of directors of this corporation at the same meeting voted to issue twenty thousand (20,000) shares of the capital stock thereof to persons who had subscribed therefor, as above set forth, upon receiving payment of twenty-five (25) dollars per share therefor.

Seventeenth. Said parcels of real estate sold and conveyed by said Lewisohn to the plaintiff as aforesaid, to wit, said several mining claims known as Old Dominion Mine, New York Mine, Chicago Mine, and Keystone Mine respectively and said parcel of land near the Bloody Tanks, so-called, were in fact of substantially no value, to wit, of a value not exceeding five thousand (5,000) dollars, and were known by said Lewisohn and by the defendant when said Lewisohn acquired the same, as aforesaid, and when he offered to sell and convey the same to the plaintiff, as aforesaid, to be
13 of substantially no value. And said parcels were acquired by said Lewisohn in the manner aforesaid with intent on the part of himself and of said defendant to sell the same for a large price. No disclosure was at any time made to the plaintiff corporation of the fact that said real estate was of substantially no value, and by reason of the control by said defendant and said Lewisohn of the plaintiff corporation and its board of directors, as above set forth, said purchase was made without any disclosure to or

inquiry by the plaintiff corporation as to the reasonable value of said property; and no disclosure was ever made to any of the persons who subscribed for or afterwards purchased shares of stock in the defendant corporation, or to any other persons of the facts as to the purchase of said property or as to the reasonable value thereof, and said facts were not known to any of said persons or to any of the members of said Old Dominion Syndicate, except said defendant and said Leonard Lewisohn.

Eighteenth. By the transactions above set forth, said defendant and said Lewisohn carried out their said plan and conspiracy, and having, for the purpose of promoting a corporation and selling to such corporation at a price much in excess of the cost thereof the property of said Baltimore Old Dominion Company and the property so conveyed to said Lewisohn, acquired all the capital stock of said Baltimore Old Dominion Company for the sum of less than eight hundred thousand (800,000) dollars, and acquired without making any further payment, but for themselves as they claim, all the property conveyed by said Lewisohn to the plaintiff, and promoted the plaintiff corporation and caused the same to be organized, and
14 thereupon did sell to it the property of said Baltimore Old Dominion Company for one hundred thousand (100,000) shares of the capital stock of this corporation of the par value of twenty-five (25) dollars each, to wit, the aggregate par value of two million five hundred thousand (2,500,000) dollars, and also sold to it all the property conveyed to said Lewisohn for thirty thousand (30,000) shares of said stock of the aggregate par value of seven hundred and fifty thousand (750,000) dollars.

And for the purpose of providing the corporation so promoted and formed by them pursuant to and in execution of said plan and conspiracy, to wit, the plaintiff corporation, with working and other capital, said defendant and said Lewisohn, in further execution and performance of said plan and conspiracy, sold to the public twenty thousand (20,000) shares of the capital stock of said corporation so formed as aforesaid, to wit, this corporation. The shares of this corporation so issued in payment for the property sold to it as aforesaid were at the time of the fair market value of twenty-five (25) dollars each, and continued for a long time thereafter to be of such or greater value, and said defendant and said Lewisohn thus made for themselves and their associates in said syndicate from the sale of the property conveyed by the Baltimore Old Dominion Company a profit of more than one million five hundred thousand (1,500,000) dollars, and in addition thereto made for themselves alone on the property conveyed by said Lewisohn to the plaintiff a profit of over seven hundred and fifty thousand (750,000) dollars.

Nineteenth. The subscribers to said Old Dominion Syndicate so-called were entitled by the terms of the agreement forming said syndicate to receive each his proportionate share of two million
15 (2,000,000) dollars in repayment of his original advance and as his share of profits. To effect this division each member of said syndicate was permitted to apply for shares of this corporation at par to the amount so payable to him, and said shares were thereupon issued to such applicant in lieu of his proportionate share of said

sum. All or substantially all the subscribers to said Syndicate availed themselves of this privilege, and so far as such privilege was not availed of, the money required was advanced by the defendant or others interested, and the corresponding number of shares was issued to the person so advancing the money. Of the one hundred thousand (100,000) shares of the capital stock of this corporation issued to Philip K. Dumaresq, as above set forth, upon and as consideration for the conveyance of all the property of said Baltimore Old Dominion Company, as aforesaid eighty thousand (80,000) shares were thus distributed to and among the members of said Old Dominion Syndicate, so-called, or persons exercising the privilege of such members in the manner above set forth. And of this amount more than one-half was a profit made in the manner above described, and said Syndicate thereby made a profit of not less than one million (1,000,000) dollars. Of the eighty thousand (80,000) shares thus divided, the defendant received as his proportion four thousand (4000) shares, not less than one-half of which represented and was a profit to him as a member of said syndicate from the purchase of the stock of said Baltimore Old Dominion Company and the sale of its property as aforesaid, to this corporation, pur-
16 suant to the plan and conspiracy formed by said defendant and said Lewisohn, as hereinbefore set forth.

Twentieth. The defendant and said Leonard Lewisohn by agreement between themselves, and as the plaintiff is informed and believes, without the knowledge or assent of the other members of said Old Dominion Syndicate, took from the one hundred thousand (100,000) shares issued to Philip K. Dumaresq, as above set forth, ostensibly in payment of expenses and their own services in connection with the matter, the twenty thousand (20,000) shares remaining after dividing eighty thousand (80,000) shares among the members of said Syndicate, as above set forth. The expenses actually incurred by them did not exceed six thousand (6000) dollars. These twenty thousand (20,000) shares were divided between the defendant and said Lewisohn, said defendant receiving ten thousand nine hundred and forty (10,940) shares as his proportion thereof, and said Lewisohn nine thousand and sixty (9060) as his proportion thereof, and said thirty thousand (30,000) shares issued to said defendant and said Lewisohn for said conveyance of real estate by said Lewisohn were also divided between the defendant and said Lewisohn, said defendant receiving sixteen thousand four hundred and ten (16,410) shares thereof and said Lewisohn thirteen thousand five hundred and ninety (13,590) shares.

Twenty-first. Prior to the formation of said Old Dominion Syndicate, so-called, and prior to making the several agreements hereinbefore referred to for the acquisition of the stock of said Baltimore Old Dominion Company and for the acquisition by said Lewisohn of said several parcels of real estate in Arizona conveyed to him by said Keyser, as aforesaid, said defendant and said Lewisohn had formed the plan and intention of organizing a corporation to acquire the property of said Baltimore Old Dominion Company and to
17 acquire said several parcels of real estate; and had formed the plan and intention of selling said property and said real

estate to such new corporation at a large advance in price and of thereby securing and obtaining for themselves and such persons as they might associate with them a large profit from such sale to said corporation so to be formed, and of selling to the public a sufficient number of shares in the corporation so formed to provide said corporation with a working capital. And said defendant and said Lewisohn formed said Old Dominion Syndicate, so-called, and purchased said stock of said Baltimore Old Dominion Company and said real estate conveyed to said Lewisohn, as aforesaid, for the purpose and with the intent of carrying out the prior plan and intention so formed by them as aforesaid, and of selling the property of said Baltimore Old Dominion Company and the property so conveyed to said Lewisohn, to the plaintiff corporation when the same should be formed, at a large advance in price; and said defendant and said Lewisohn caused the plaintiff corporation to be organized and to acquire the property of said Baltimore Old Dominion Company and to acquire the real estate conveyed by said Keyser to said Lewisohn, and caused said corporation to offer for sale and to sell to the public sufficient shares, to wit, twenty thousand (20,000) shares to provide it with working and other capital, in the manner aforesaid in further execution and performance of said plan and intention. When said offer was made by said Baltimore Old Dominion Company to the plaintiff corporation and when said proposition was made by said Lewisohn to the plaintiff corporation, and when said offer and proposition were accepted, said defendant and said Lewisohn were in absolute control of the plaintiff corporation through the ownership by them and their associates of all stock in said
18 plaintiff corporation then outstanding and through the selection of a board of directors and other officers chosen by them and selected for the purpose of enabling them to carry out said plan, and consisting of themselves, their employees, and associates, all of whom were expressly chosen for the purpose of carrying out said plan and intention and had expressly undertaken to do so; and said offer of said Baltimore Old Dominion Company and said proposition of said Lewisohn were accepted by the plaintiff corporation through its board of directors, as above set forth, by the direction of said defendant and said Lewisohn, and the other directors in acting thereon acted solely at the direction of and pursuant to previous agreement with said defendant and said Lewisohn, and for the express purpose of carrying out the said plan and intention of said defendant and said Lewisohn, and all of said action was taken and was intended by the individuals who took part therein to carry out said plan and intention and to enable said defendant and said Lewisohn and such persons as they had associated with them, to make a large profit by the sale of said property of the Baltimore Old Dominion Company and of said real estate to the plaintiff corporation at a price greatly in excess of the cost to said defendant and said Lewisohn and their associates of all the stock of said Baltimore Old Dominion Company and of said real estate. And when said twenty thousand (20,000) shares of stock were offered to and were sold to the public, as above set forth, said defendant and said Lewisohn were in absolute control of the plaintiff corporation, as aforesaid and

said shares were so offered for sale and sold to carry out said plan and conspiracy of said defendant and said Lewisohn aforesaid.

19 Twenty-second. From July 11, 1895, when said purchase in behalf of the plaintiff corporation of the property of said Baltimore Old Dominion Company and of said real estate from said Lewisohn was consummated, as above set forth, until April 4, 1902, the defendant was continuously the president and chief executive officer of the plaintiff corporation; throughout said period the board of directors of the plaintiff corporation was continuously composed of persons selected by the defendant and said Leonard Lewisohn, and at all times until April 4, 1902, a large majority of the persons so acting as directors were personal friends of the defendant and had been interested with the defendant in the transactions above set forth, and had received some share in the profits thereof, and the remaining directors took no active part in the management of the plaintiff corporation, and were ignorant of the facts hereinbefore set forth. No disclosure was at any time made to any of the subscribers for or to any purchasers of the capital stock of the plaintiff corporation not disposed of to the defendant and his associates, or to any purchasers thereof from them or any of them of the profit made by the defendant as above set forth as promoter of the plaintiff corporation or of any part thereof, and no disclosure was made to those persons other than the defendant and said Lewisohn who shared in the distribution of the eighty thousand (80,000) shares of stock distributed to the members of said Old Dominion Syndicate of the profit made by said defendant and said Lewisohn in the division between them of said additional twenty thousand (20,000) shares derived from the sale of the property formerly held by the Baltimore Old Dominion Company or of the thirty thousand (30,000) shares derived from the sale of the property conveyed by said Lewi-

20 sohn, as above set forth, in the proportion of twenty-seven thousand three hundred and fifty (27,350) to the defendant and twenty-two thousand six hundred and fifty (22,650) to said Lewisohn, and this plaintiff had not until after April 4, 1902, any knowledge or information of any of the facts hereinbefore set forth as to the profit derived by said defendant in the manner above stated as promoter of this corporation, or of any profit having been derived by him, or by any other person interested or participating in the promotion and organization of this corporation, and immediately upon receiving information relating thereto investigated the same, and thereupon promptly made demand upon the defendant.

Twenty-third. Said Leonard Lewisohn died on March 5th, 1902, and was at the time of his death a citizen and resident of the City, County, and State of New York. The executors of the estate of said Lewisohn, who are also citizens and residents of said City, County and State, have been duly appointed by the courts of said state, but no executors or legal representatives of said Lewisohn have been appointed or are within this Commonwealth, and there is no property within this Commonwealth belonging to said estate which could be reached by any process, and it is impossible to get

service within this Commonwealth upon the executors of said Leonard Lewisohn.

Twenty-fourth. The property conveyed to the plaintiff by the Baltimore Old Dominion Company, as above set forth, consists mainly of the copper mine which was then and ever since has been in active operation, and from which large amounts of ore have since been taken, and upon which large expenditures have been made in
21 the development and establishment of the necessary plant. The property conveyed to the plaintiff by Leonard Lewisohn as above stated consists merely of mining claims and a parcel of land for a mill site, all of which property has since said conveyance remained undeveloped and is now in substantially the same condition that it was in at the time of the conveyance by said Lewisohn to the plaintiff.

Twenty-fifth. The plaintiff desires to rescind the sale of said parcels of real estate conveyed to it by said Lewisohn as hereinbefore set forth, and has offered to convey all said last named real estate to the defendant or to such person as he may request upon receiving from said defendant the consideration paid by this plaintiff for the conveyance thereof to it, to wit, thirty thousand (30,000) shares of its capital stock, or if and in so far as said shares have been disposed of, upon said defendant's duly accounting therefor, but said defendant refused to make any such restitution or accounting; and the plaintiff is still ready and willing, and hereby offers, to convey said last named real estate to such person as this Honorable Court may direct.

Wherefore the plaintiff prays:

1. That this Honorable Court will declare said sale of said parcels of real estate conveyed by said Leonard Lewisohn to the plaintiff, as hereinbefore set forth, rescinded, and will direct this plaintiff to execute such reconveyance thereof, if any, to such person as this Honorable Court shall think proper.

2. That said defendant be required to return to the plaintiff the consideration paid by this plaintiff for said conveyance, to
22 wit, thirty thousand (30,000) shares of its capital stock, or if, and so far as said shares are no longer in his control, to account to the plaintiff therefor.

3. In the alternative in case this Honorable Court shall deem that the plaintiff has not rescinded and is not entitled to rescind said sale of said parcels of real estate conveyed by said Lewisohn to the plaintiff as above set forth, that this Honorable Court will ascertain the amount of damages suffered by the plaintiff by reason of the sale of said parcels of real estate as above set forth, and will by its decree establish the right of the plaintiff to recover said amount and order said defendant to pay said amount to this plaintiff.

4. For such other relief as to this Honorable Court shall seem meet.

By Their Solicitors, BRANDEIS, DUNBAR & NUTTER.

LOUIS D. BRANDEIS,
WILLIAM H. DUNBAR,
Of Counsel.

23 A.

To the Old Dominion Copper Mining & Smelting Company, a Corporation Organized and Existing Under the Laws of the State of New Jersey:

The Old Dominion Copper Company of Baltimore City, a corporation organized and existing under the laws of the State of Maryland being the owner of certain mines and mining properties at Globe in the Territory of Arizona described in the annexed Schedule and of machinery, lumber, wood, tools, implements and other personal property for use for and in connection with the operation and maintenance thereof hereby makes the following proposition. To convey, assign and transfer all its property, both real and personal of every kind and nature whatsoever and wheresoever situated by good and sufficient deeds and instruments properly executed so as to confer absolute title thereto to the Old Dominion Copper Mining and Smelting Company upon receiving from said Company one Hundred thousand shares of its capital stock to be issued to said Old Dominion Copper Conapany or to its nominees.

It being understood that the Old Dominion Copper Mining and Smelting Company shall assume all obligations of The Old Dominion Copper Company of Baltimore City incurred since the first day of June 1895, and shall be entitled to all earnings and profits of said Company since that date.

July eleventh 1895.

A. S. BIGELOW, *President.*

A. W. EVARTS, *Secretary.*

Schedule.

First. The Globe Mine, patented by the United States Government to B. W. Reagan on the 18th day of October 1881, by patent recorded in the office of the Recorder of Pinal County, Territory of Arizona on the 19th day of November 1881, to which record reference is made for a fuller description of said Mine.

Second. The Globe Ledge Mine, patented by the United States Government to Benjamin W. Reagan on the eighteenth day of October 1881, by patent recorded in the office of the Recorder of Pinal County, Territory of Arizona on the nineteenth day of November 1881, to which record reference is made for a fuller description of said Mine.

Third. The Copper Jack Mill Site of which the location is recorded in the office of the Recorder of Gila County Arizona in Book 2 of Records of Mines at page 311, and to which record reference is hereby made for a fuller description of said Mill Site, and upon which the Smelting Works, formerly owned by the Old Dominion Copper Mining Co. are situated.

Fourth. The Globe Mill Site, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona in Book 2 of Records of Mines at page 311, to which record reference is hereby made for a fuller description of said Mill Site.

Fifth. The Globe Ledge Mill Site, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona in Book 2 of Records of Mines at page 310, to which record reference is hereby made for a description of said Mill Site.

24 A (Continued).

Sixth. The South-east Globe Mine, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona in Book 2 of Records of Mines at page 312, and reference is hereby made to said records for a fuller description of said Mine.

Seventh. All of the certain Mining claim known as the Interloper in Globe District, County of Gila, Territory of Arizona, and recorded in Globe District Records on pages 116 and 117 in Book 3, reference to which will more fully show, being the same property conveyed to William Keyser by Thomas H. Mason, by deed bearing date January 3rd, 1887 and recorded at page 586, Book 2, record of deeds to Mines Gila County, Arizona Territory.

Eighth. The Fraction Mine of which the location notice is recorded in the office of the Recorder of Gila County, Arizona in Book 2 of Records of Mines at page 569, to which record reference is hereby made for a fuller description of said mine.

Ninth. The Alice Mine or lode, located October 10th, 1875 by A. R. Hammond and J. W. Reed and notice of location recorded in Book 1, page 131, Globe District Mining Records (now a part of the Records of Gila County) and relocated February 28th 1879, and notice of location recorded in Book 5, Globe District Mining Records (now a part of the Records of Gila County) on pages 184 and 185, said Mine or Lode being more particularly described in the last mentioned notice of location, as follows to wit:—Commencing at this monument of stones in a gulch, being the centre of South west end of claim, and upon which this notice is posted, thence South east 300 feet to a monument of stones, thence North east 1400 feet to a monument of stones, thence north west 300 feet to a monument of stones, being the centre of the North east end of claim, thence North west 300 feet to a monument of stones thence South west 1400 feet to a monument of stones, under a tree, thence South east 300 feet to the place of beginning, being the same mining claim conveyed to Michael H. Simpson, deceased, by deed of the Globe City Mining Company dated July 1st, 1884, and recorded with Gila County Deeds to Mines Book 2 page 227 et seq.

Tenth. The Mining Claim called and known as the Hypatia Mine, situated, lying and being in Globe Mining District, Gila County, Territory of Arizona and more particularly described in the notice of location recorded at page 66, Book 2, Records of Mines, Gila County Records, to which record reference is made for a more definite description of said Mine. Said Mine was formerly known as the South west Alice Mine, being the same mining claim conveyed to said Michael H. Simpson, lately deceased, by deed of William H. Cook, dated November 18th 1884, and recorded with Gila County Deeds, Book 2, page 305.

B.

To the Old Dominion Copper Mining and Smelting Company:

I hereby offer to convey the following described property now owned and held by me upon receiving thirty thousand shares of the capital stock of the Old Dominion Copper Mining and Smelting Company to be issued to me or to my nominees.

1st. The Old Dominion Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land Office at Tucson, Arizona, Entry #267, Lot #45 situated in Globe Mining District, Gila County, Arizona.

2nd. The New York Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1883, in the United States Land Office at Tucson, Arizona, Entry #268, Lot #46 in Globe Mining District in Gila County, Arizona.

3rd. The Chicago Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1883, in the United States Land Office at Tucson, Arizona, Entry #269, Lot #51, in Globe Mining District, Gila County, Arizona.

4th. The Keystone Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1885, in the United States Land Office at Tucson, Arizona, Entry #384, Lot #54 in Globe Mining District, Gila County, Arizona.

5th. A lot or parcel of land situated near the Bloody Tanks and deeded by E. A. Saxe to the Old Dominion Copper Mining Company, Deed recorded in Book 1 of Deeds to Real Estate at page 126 and 127 in the office of the Recorder of Gila County, Arizona and reference is hereby made to said record for a fuller description of said parcel of land.

New York, July 11, 1895.

LEONARD LEWISOHN.

Please issue said 30,000 shares of stock to Mr. A. S. Bigelow and myself.

LEONARD LEWISOHN.

This Bill was filed and entered in this Court on the seventh day of October, A. D. 1902, and thereupon a writ of summons and attachment was issued, returnable at the Rules holden at Boston aforesaid on the first Monday of November then next ensuing, which said writ was returned with acceptance of service by the defendant endorsed thereupon by his attorney, Alfred Hemenway, Esquire.

And on the second day of December A. D. 1902, the defendant filed his demurrer, the same being in the words following, to wit:

Defendant's Demurrer to the Whole Bill.

The defendant, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint to be true, in such manner and form as the same are therein set forth and alleged,

doth demur to said bill, and for cause of demurrer doth show that it appears by said bill that the same sets up against the de-
26 fendant different and distinct cases which are inconsistent with each other and cannot properly be joined, that different reliefs inconsistent with each other are prayed for, and that the said bill is altogether multifarious. Wherefore the defendant doth demur thereto, and demands judgment of this Court whether he shall be compelled to make any further or other answer to the said bill; and prays to be hence dismissed with his costs and charges in this behalf wrongfully sustained.

ALFRED HEMENWAY,
Solicitor for Defendant.

I certify that this demurrer is not intended for delay.

ALFRED HEMENWAY,
Solicitor for Defendant.

Defendant's Demurrer to a Part of the Bill.

The defendant, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint to be true, in such manner and form as the same are therein set forth and alleged, and not waiving his demurrer to the whole bill, but insisting and relying thereon, further doth demur to so much of said bill as seeks to have the sale of certain parcels of real estate conveyed to the plaintiff by Leonard Lewisohn rescinded, and to have the defendant ordered to return to the plaintiff the consideration paid by the plaintiff for said conveyance; and for causes of demurrer the defendant doth show:

1. That the plaintiff has not in and by said bill stated such a case as entitles it to the aforesaid relief against the defendant.

2. That it appears by said bill that the legal representa-
27 tives of Leonard Lewisohn therein referred to are indispensable parties defendant to said bill, so far as it seeks the rescission of the aforesaid sale, but that they have not been made parties defendant.

Wherefore the defendant doth demur to so much of the plaintiff's bill as is above specified, and demands judgment of this Court whether he shall make any further or other answer to such part of the said bill as is so demurred unto as aforesaid, and prays to be hence dismissed with his costs in this behalf sustained.

ALFRED HEMENWAY,
Solicitor for the Defendant.

I hereby certify that this demurrer is not intended for delay.

ALFRED HEMENWAY,
Solicitor for the Defendant.

And on the sixth day of June, A. D. 1904, the case was reserved for the consideration and determination of the Full Court, said reservation being in the words following, to wit:

This cause came on to be heard at the Equity Sitting in Boston upon the bill of complaint and the demurrers of the defendant thereto, and upon consideration thereof I now reserve for the determination of the Full Court the cause and the questions so raised.

If the demurrers, or either of them, are sustained on the merits, the bill or such part as the demurrer applies to, is to be dismissed with costs. If they, or either of them, are sustained on matter of form or non-joinder of proper parties, such order or decree
28 is to be made as the court shall deem meet. If the demurrers are overruled the defendant is to have leave to answer over.

JOHN LATHROP,
J. S. J. C.

June 6, 1904.

And thereafterwards on the nineteenth day of June, A. D. 1905, it was ordered by the Supreme Judicial Court for the Commonwealth, by its Rescript, that the Clerk of this Court for the County of Suffolk make the following entry under this case in the docket of the Court, viz:

"So called demurrer as to part of the bill shall stand as an assignment of a cause of demurrer. Demurrer overruled, defendant to answer over."

And on the sixth day of December, A. D. 1905, the defendant filed his answer, the same being in the words following, to wit:

Defendant's Answer.

1. The defendant admits the allegations contained in the first, second, twenty-third and twenty-fourth paragraphs of the plaintiff's bill, but avers that the title alleged in the second paragraph to have been held by William Keyser was held by him in trust for the Baltimore Old Dominion Company. The defendant admits the allegations contained in paragraphs eight, nine, ten, twelve, thirteen, fourteen and sixteen of the bill, subject to the qualifications
29 stated in paragraph seven of this answer and except in so far as inconsistent with later matter set forth in this answer, in which case the allegations are denied.

2. The defendant denies the allegations contained in paragraphs three, four, five, six, seven, eleven, fifteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two and twenty-five of the bill, except as to such matters and things set out in said allegations as are hereinafter specifically admitted.

3. Further answering, the defendant says that on April 30, 1895, J. Morris Meredith procured from one of the executors of the will of Michael F. Simpson an option to himself and his assigns for the purchase of 17,857 shares of the capital stock of the Baltimore Old Dominion Company belonging to the state of said Michael F. Simpson. This option was superseded by a contract executed May 4, 1895, by and between said Meredith and all the executors of said will. By the terms of this contract Meredith was given the right in consideration of $2000 paid by him to the executors, to purchase

said 17,857 shares of stock from said executors on or before May 28, 1895, for $40 a share, or $714,280 in all, payable $100,000 in cash and the balance in satisfactory notes of thirty, sixty and ninety days, bearing interest at the rate of five per cent. per annum, the shares of stock to be delivered endorsed in blank to the Old Colony Trust Company in trust to hold as collateral security for the payment of the notes, and upon their payment to deliver to said Meredith or his assigns. It was stipulated that the surplus assets of the company, consisting of ingot copper, pig copper, and notes and bills receivable should be paid over to said executors and to William Keyser, who owned the remaining shares of the capital stock of the company, and that all debts of the company should be met by said executors. Said Meredith agreed that if required to and upon notice and tender he would purchase the shares of stock owned by said Keyser at the same pro rata price and upon the same general terms and conditions as above set forth. The contract ran to Meredith and his assigns. Upon its execution it was sold and assigned by said Meredith to Leonard Lewisohn.

4. Thereafterwards, but prior to May 24, 1895, said Lewisohn agreed to give the defendant one-half of his interest under said contract, and the defendant agreed with said Lewisohn to furnish one-half of the purchase price provided for by said contract. Subsequently it was arranged between them that as to the Keyser stock, the defendant's interest should be two-thirds, and Lewisohn's interest one-third.

On May 24, 1895, a syndicate called the Old Dominion Syndicate, and consisting of the defendant, said Lewisohn and others, was formed as a pool for purposes to be determined and carried out by the defendant and said Lewisohn, in the exercise of their own discretion exclusively, after their acquisition of the shares of the capital stock of the Baltimore Old Dominion Company to be purchased by them from the Simpson Estate and from William Keyser. It was agreed that said Lewisohn and the defendant should purchase and pay for said shares as aforesaid, and in their own names hold and deal with the same and with the property of said company as to them should seem best; and that their associates in the syndicate should receive so much only of the profit realized in the enterprise as the defendant and said Lewisohn might deem it proper to distribute among them, and that the remaining profit should be retained by said Lewisohn and the defendant to their own use. The members of the syndicate agreed to pay into the pool stated sums upon the terms aforesaid, and to pay such sums to the defendant and said Lewisohn as follows. Fourteen per cent. May 27, 1895; twenty-eight and two-thirds per cent. July 26, 1895; twenty-eight and two-thirds per cent. August 26, 1895; twenty-eight and two-thirds per cent. September 24, 1895; with interest at the rate of five per cent. Said payments were duly met as they severally became due.

On May 28, 1895, the defendant and said Lewisohn exercised the option conferred by the aforesaid contract with the executors of the will of Michael Simpson, paying to said executors $100,000, which

they furnished in equal shares from their own moneys, and delivering notes made by said Lewisohn and indorsed by the defendant for $614,280, payable in thirty, sixty and ninety days, with interest at the rate of five per cent. per annum; and said executors delivered to the Old Colony Trust Company the said 17,857 shares of stock, endorsed in blank, to be held by said company upon the trust aforesaid.

5. At and prior to the time when the defendant and said Lewisohn exercised the option to purchase the shares of stock held by the Simpson estate, they had no knowledge of the fact that the Baltimore Old Dominion Company was the beneficial owner of the mines, mining claims and lands known as the Old Dominion mines, the New York mine, the Chicago mine, the Keystone mine, and a certain parcel of land near the Bloody Tanks, so-called, in Arizona, being the mines, mining claims and land referred to in the plaintiff's bill. During the negotiation for the purchase of the shares of stock of the Baltimore Old Dominion Company held by William Keyser, they learned that, although the legal title to said mines and mining claims stood in the name of said William Keyser, that the
32 Baltimore Old Dominion Company was the beneficial owner of said mines, mining claims and land. Thereupon they insisted that said mines, mining claims and land should follow the ownership of the stock. The said Keyser and the executors of the will of Michael Simpson thereupon agreed that said mines, mining claims and land should be conveyed by said Keyser to said Lewisohn upon payment of the notes given in accordance with the requirements of said contracts for the purchase of the shares of stock of the Baltimore Old Dominion Company, hereinbefore and hereinafter referred to.

6. On June 10, 1895, William Keyser agreed to sell his shares of the capital stock of the Baltimore Old Dominion Company, to wit, 7143 shares, to said Lewisohn for $40 per share or $285,720 in all, and upon the same general conditions set out in the aforesaid contract between Meredith and the executors of the Simpson will; and thereupon notes for said amount of $285,720 made by said Lewisohn and endorsed by the defendant were delivered to said Keyser, and said Keyser delivered the shares of stock endorsed in blank, to the Old Colony Trust Company to hold as collateral security for the payment of said notes, and to turn over to the defendant and said Lewisohn when said notes should be paid.

7. It was agreed between said Lewisohn and the defendant that said Lewisohn should hold, when conveyed to him, the title to said mines, mining claims and land as property acquired under the aforesaid contracts, to be dealt with by the said Lewisohn and the defendant according to the terms of their agreement with the syndicate hereinbefore set out.

8. On or about June 20, 1895, the notes which had been
33 executed by said Lewisohn and the defendant to the executors of the will of Michael Simpson and to William Keyser as aforesaid were paid by said Lewisohn. The shares of stock held by the Old Colony Trust Company were given over to said Lewisohn and the defendant, and a meeting of the Baltimore Old Dominion

Company was held at which all the shares of the capital stock were transferred to said Lewisohn and the defendant. At the same time the said mines, mining claims and land were conveyed by said Keyser to said Lewisohn. The defendant avers that said stock and said mines, mining claims and land were purchased by himself and by said Lewisohn as aforesaid, and were paid for out of their own moneys before any steps were taken towards the promotion or formation of the plaintiff corporation, or before the defendant and said Lewisohn had formed the purpose, intent or plan of forming said corporation; that said stock and said mines, mining claims and land were purchased by the said defendant and Lewisohn as and for their own individual property, subject only to their agreement with the said syndicate; that they made and had the right to make the purchase for themselves, and that the plaintiff corporation is not entitled to claim the benefit of the purchase or their profit.

9. At the said meeting of the Baltimore Old Dominion Company a new board of directors was chosen consisting of said Lewisohn, the defendant, William Keyser, P. Brent Keyser and George A. Pope. The defendant was chosen president and Allen W. Evarts secretary. The defendant and said Lewisohn upon acquiring the shares of stock of the said Baltimore company continued the operation of the mines of the said Baltimore company under and through the said Baltimore Company at a profit until the plaintiff corporation was formed and the said mines and the property were conveyed to it.

The said mines of the said Baltimore company had been worked by the Baltimore company at a large profit for many years. In addition to the purchase price paid for the shares of stock of the Baltimore Old Dominion Company, the defendant and said Lewisohn paid out large sums of money for necessary expenses incurred by them in the transactions hereinbefore set forth. All said cash transactions, expenditures and operations took place before the said defendant had determined upon the organization of the plaintiff corporation or decided upon their plans as to the final operation and disposition of the property of the said Baltimore Old Dominion Company.

10. On or about July 8, 1895, the plaintiff corporation was organized. The defendant admits that the allegations as set forth in paragraphs 8, 9, 10, 12, 13, 14 and 16 of the plaintiff's bill contain a substantially correct statement of the facts and dates of the formation of the plaintiff corporation, but he denies all the allegations contained in said paragraphs as to conspiracy, purpose and plan therein set forth and the allegations as to the selection, nomination and employment by the defendant of attorneys, incorporators, directors and officers of the plaintiff corporation and as to instructions, orders and directions by the defendant to said attorneys, incorporators, directors and officers; and as to the manner in which said directors and officers became shareholders in order that they might be qualified to act as directors and officers and as to their actual non-interest.

11. Thereafter it was agreed between the plaintiff corporation and the defendant and said Lewisohn that the defendant and said Lewisohn should convey or cause to be conveyed to the plaintiff cor-

poration all the property of the Baltimore Old Dominion
35 Mining Company, including the mines, mining claims and land in which the said Baltimore Old Dominion Company held the beneficial interest, and which then stood in the name of said Lewisohn, and should furnish the plaintiff corporation with a working capital of $500,000 in cash. That in consideration therefor the plaintiff corporation should issue to the defendant and said Lewisohn or their nominees its entire capital stock, to wit, 150,000 shares.

12. The transactions which thereafter took place, though in form separate, were in fact all in pursuance of the said agreement. In form the transactions were separable as to the property held by the Baltimore Old Dominion Company, the said mines, mining claims and lands held by Lewisohn, and the capital to be furnished by the said Lewisohn and the defendant; but in fact the contract for the purchase and sale of all said property and for the furnishing of said capital was an entire contract and for an entire price, namely, all the capital stock, to wit, 150,000 shares of the plaintiff corporation.

13. The said transactions which thereafter took place as above stated were the conveyance to the plaintiff corporation of the property of the Baltimore Old Dominion Company by said Baltimore Old Dominion Company, the conveyance by said Lewisohn of said mines, mining claims and land to the plaintiff corporation, the obligation and later fulfillment of said obligation by the defendant and said Lewisohn to furnish a working capital of $500,000 to said plaintiff corporation. Upon the conveyance of said property, mines, mining claims and land, and upon the undertaking of the defendant and said Lewisohn to furnish the said capital of $500,000, the plaintiff corporation issued all of its said shares, to wit, 150,000 shares, to the following named persons: the defendant and said Lewisohn, and Philip K. Dumaresq and Thomas Nelson as
36 agents and nominees of the defendant and said Lewisohn, that is to say, one hundred thousand shares to said Dumaresq nominally on account of the property standing in the name of the Baltimore Old Dominion Mining Company, thirty thousand shares to the defendant and said Lewisohn nominally on account of the mines, mining claims and land, and twenty thousand shares to said Nelson nominally on account of the working capital of $500,000 to be furnished by the defendant and said Lewisohn. And the defendant further says that said persons, as holders and owners of the entire capital stock of the plaintiff corporation, procured and consented to the issue of said entire capital stock to themselves, as performance by the plaintiff corporation of its part of the aforesaid agreement; that the defendant and said Lewisohn fully performed their part of said agreement; that subsequent shareholders acquired their shares not from the plaintiff corporation but from the owners of said shares, namely, the defendant and said Lewisohn, either directly or through their agents, the said Nelson and Dumaresq; and that none of said shares were offered to the public, by prospectus or otherwise, by or in behalf of the corporation, but were disposed of to various persons by the defendant and said Lewisohn under contracts of subscription

which they took and received wholly on their own account, as the owners of said shares.

14. At the time when the plaintiff corporation made the said purchases and both before and after the issue of its shares in payment for the mining properties of the Baltimore Old Dominion Company as hereinbefore stated, and for the mines, mining claims and lands from said Lewisohn as hereinbefore stated, and for the obligation for the furnishing of working capital as hereinbefore stated, the defendant and said Lewisohn and their associates in the
37 syndicate were the only shareholders of the plaintiff corporation, and all said shareholders had full knowledge of all the facts relative to the purchase by the defendant and said Lewisohn of the shares of the capital stock of the Baltimore Old Dominion Company and of said mines, mining claims and lands and the price paid therefor, and also of the facts in connection with the formation and organization of the plaintiff corporation and the purchase by it of the property of the Baltimore Old Dominion Company and of said mines and mining claims. The authorized capital of the plaintiff corporation is $3,750,000, divided into 150,000 shares of $25 each. The defendant and said Lewisohn and their associates in the syndicate held all the captial stock, both before and after the authorization and issue of said full amount of capital stock. There were at the time of the transaction hereinbefore set forth no shares of stock held by persons who did not have full knowledge of all these transactions and who had not consented and assisted in the same, nor was there at that time any unissued stock, nor has any further stock in said corporation since been issued. There is at this time no share of stock in the plaintiff corporation which was not originally issued to and held by a person with full knowledge of the aforesaid transactions and who ratified and consented to the same.

15. And the defendant, in addition to the foregoing answer, avers that the cause of action, if any there may be, arising to the plaintiff corporation on account or by reason of the several allegations and complaints in the bill contained, did not accrue within six years before the said bill was filed and that the plaintiff is guilty of laches; and this allegation the defendant makes in bar of the bill and
38 prays that he may have the same benefit therefrom as if he had formally pleaded the same.

By His Attorney, ALFRED HEMENWAY.

And on the twenty third day of said December the plaintiff joined issue upon the defendant's answer. And on the sixth day of November A. D. 1907 the defendant filed his Substituted Answer, the same being in the words following, to wit:

Defendant's Answer.

1. The defendant admits the allegations contained in the first, second, twenty-third and twenty-fourth paragraphs of the plaintiff's bill, but avers that the title alleged in the second paragraph to have been held by William Keyser was held

by him in trust for the Baltimore Old Dominion Company. The defendant admits the allegations contained in paragraphs eight, nine, ten, twelve, thirteen, fourteen and sixteen of the bill, subject to the qualifications stated in paragraph nineteen of this answer and except in so far as inconsistent with later matter set forth in this answer, in which case the allegations are denied.

2. The defendant denies the allegations contained in paragraphs three, four, five, six, seven, eleven, fifteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, and twenty-five of the bill, except as to such matters and things set out in said allegations as are hereinafter specifically admitted.

3. Further answering, the defendant says that on April 30, 1895, J. Morris Meredith procured from one of the executors of the will of Michael F. Simpson an option to himself and his assigns for the purchase of 17,857 shares of the capital stock of the Baltimore Old
39 Dominion Company belonging to the estate of said Michael F. Simpson, said 17,857 shares being five-sevenths of the entire capital stock of said Baltimore Company. This option was superseded by a contract executed May 4, 1895, by and between said Meredith and all the executors of said will. By the terms of this contract Meredith was given the right in consideration of $2,000 paid by him to the executors to purchase said 17,857 shares of stock from said executors on or before May 28, 1895, for $40 a share, or $714,285 in all, payable $100,000 in cash and the balance in satisfactory notes of thirty, sixty and ninety days, bearing interest at the rate of five per cent. per annum, the shares of stock to be delivered endorsed in blank to the Old Colony Trust Company in trust to hold as collateral security for the payment of the notes, and upon their payment to deliver to said Meredith or his assigns. It was stipulated that the surplus assets of the company, consisting of ingot copper, pig copper, and notes and bills receivable should be excepted and that the company should be free of debt. Said Meredith agreed that if required upon notice and tender he would purchase any or all of the remaining two-sevenths of the shares of stock of said Baltimore Company at the same pro rata price and upon the same general terms and conditions as above set forth. This contract ran to Meredith and his assigns, and after its execution it was sold and assigned by said Meredith to Leonard Lewisohn.

4. Thereafter, on or before May 15, 1895, said Lewisohn agreed to give the defendant one-half of his interest under said contract, and the defendant paid said Lewisohn $1000 as one-half the consideration given for said contract, and agreed to take one-half in-
40 terest in said contract and to furnish one-half of the purchase price provided for by said contract. At this time there was no contract, plan or understanding in regard to the acquisition of said remaining two-sevenths of said stock of said Baltimore Company other than a willingness to purchase the same in accordance with the terms of said contract between said Baltimore Company and said Meredith, as above set forth.

5. Thereafter the defendant and said Lewisohn, each having severally undertaken to provide one-half ($357,142.50) the considera-

tion ($714,285) provided for in said contract, each made arrangements to provide for obtaining his share of said consideration. In this respect, however, there was no privity or understanding between the defendant and said Lewisohn, each making his own arrangements irrespective of the other, said arrangements in no wise affecting the relation of said Lewisohn and the defendant, and said Lewisohn and the defendant remaining the sole persons holding said option or contract for said five-sevenths of said capital stock of said Baltimore Company.

The defendant accordingly entered into an arrangement with five other persons, whereby the defendant and said persons agreed to take and pay for the defendant's proportion of said 17,857 shares of the Baltimore Company, to-wit, 8928 shares, at the same price, to-wit, $40 per share, as provided in said contract or option of Meredith which had been assigned to said Lewisohn.

The terms of said arrangement are set forth in the following copy of the original agreement, but although said agreement is dated May 22, 1895, said arrangement had been made with said five other persons on or prior to May 16, 1895.

"Whereas A. S. Bigelow has contracted to purchase eighty-nine hundred and twenty-eight (8928) shares of the stock of the Old
41 Dominion Copper Company, a Corporation organized under the laws of Maryland, and owning property in Arizona, at Forty Dollars ($40) per share, or thereabouts, the under-signed hereby agree to take the number of shares set opposite their respective names and pay for the same at the rate of Forty Dollars ($40) per share; the said stock to remain in the hands of A. S. Bigelow, and the management of the property to be left with him.

Payments to be made as follows:—

May 27th, 1895, fourteen per cent (14%)

July 26th 1895, Twenty-eight and two thirds per cent (28 2-3%) and interest at 5% from date of first payment.

August 25th, 1895, Twenty-eight and two thirds per cent (28 2-3%) and interest at 5% from date of first payment.

September 21, 1895, Twenty-eight and two thirds per cent (28 2-3%) and interest at 5% from date of first payment.

The conditions, covenants and agreements herein contained shall be binding on the substitutes, successors, heirs, representatives and assigns of the respective subscribers hereto.

In witness whereof we have hereunto set our hands and opposite thereto the amounts of our subscriptions respectively, this 22d day of May A. D. 1895.

Matthew Luce	$100,000
A. S. Bigelow	50,000
J. A. Coram	100,000
Henry M. Whitney	50,000
J. Morris Meredith (in pencil)	25,000
Thomas Nelson	32,142.50
(in pencil)	$357,142.50

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6. By reason of the circumstances hereinafter set forth the parties to the said agreement were never called upon to fulfill the terms thereof, but it was the intention and understanding of the defendant that said Luce, Coram, Whitney, Meredith and Nelson should thereby become entitled to an interest with the defendant in the profits of said contract or option of said Meredith, and the defendant thereafter divided with said persons profits made by him, not only from his interest in said contract or option of said Meredith, but also profits made by him from the entire transaction.

7. On or about May 24, 1895, the defendant began to form a syndicate called the Old Dominion Syndicate as a means of reimbursing himself in part for moneys to be expended in the fulfillment of said contract or option of said Meredith. This Syndicate was formed as a pool for purposes to be determined and carried out by the defendant in the exercise of his uncontrolled discretion, the terms of said syndicate subscription being set forth in several papers of the same tenor but different dates.

A copy of the form of said papers follows:

"We the undersigned propose to form a syndicate to be called the Old Dominion Syndicate.

And we hereby agree to pay to A. S. Bigelow the sums set against our respective names.

Subscriptions to this syndicate shall be payable as follows:

May 27, 1895, fourteen per cent (14 per cent).

July 26, 1895, twenty-eight and two thirds per cent (28 2-3 per cent) and interest at five per cent from date of first payment.

August 25, 1895, twenty-eight and two thirds per cent (28
43 2-3 per cent) and interest at five per cent from date of first payment.

September 24, 1895, twenty-eight and two thirds per cent (28 2-3 per cent) and interest at five per cent from date of first payment.

It is expressly agreed and understood that each subscriber hereto acts for himself alone and that the relation of partners shall not exist or be deemed to exist between the subscribers hereto by virtue hereof.

The conditions, covenants and agreements herein contained shall be binding on the substitutes, successors, heirs, representatives and assigns of the respective subscribers hereto.

In witness whereof we have hereunto set our hands and opposite thereto the amounts of our subscriptions respectively this twenty-first day of May, A. D. 1895."

8. It was the intention, understanding and agreement of all parties that said Lewisohn and the defendant, having purchased and paid for said shares as aforesaid and holding them in their own names, should deal with the same as to them should respectively seem best; and that the associates in the syndicate should receive so much only of the profit realized in the enterprise as the defendant might deem it fair and proper to distribute among them, and that the remaining profit should be retained by the defendant to his own use.

9. On or about May 28, 1895, the defendant and said Lewisohn exercised the option conferred by the aforesaid contract of Meredith with the executors of the will of Michael Simpson, paying to said executors $100,000, which they furnished in equal shares from their own moneys, and delivering notes made by said Lewisohn
44 and endorsed by the defendant for $514,285, payable in thirty, sixty and ninety days, with interest at the rate of five per cent. per annum; and said executors delivered to the Old Colony Trust Company the said 17,857 shares of stock, endorsed in blank, to be held by said company upon the trust aforesaid.

10. On or about June 13, 1895, the owners of the remaining two-sevenths of the stock of said Baltimore Company, to-wit, William Keyser and others, agreed, in the name of Keyser, to sell their shares of the capital stock of the Baltimore Old Dominion Company, to-wit, 7143 shares, to said Lewisohn for $40 per share, or $285,715 in all, $40,000 in cash payable June 20, 1895 and the balance in notes then to be delivered, and upon the same general conditions set out in the aforesaid contract between Meredith and the executors of the Simpson will.

11. It was also agreed between the defendant and Lewisohn that in said two-sevenths of the stock of said Baltimore Company the defendant should have an interest of two-thirds and said Lewisohn of one-third; so that the defendant's interest in the entire transaction was one-half of five-sevenths plus two-thirds of two-sevenths, or twenty-three forty-seconds, or 547 1000ths.

12. At and prior to the time when the defendant and said Lewisohn exercised the option to purchase the shares of stock held by the Simpson estate, they had no knowledge of the fact that the Baltimore Old Dominion Company was the beneficial owner of the mines, mining claims and lands known as the Old Dominion mines, the New York mine, the Chicago mine, the Keystone mine, and a certain parcel of land near the Bloody Tanks, so-called, in Arizona, being the mines, mining claims and land referred to in the plaintiff's bill.

During the negotiation for the purchase of the shares of stock
45 of the Baltimore Old Dominion Company held by William Keyser, they learned that although the legal title to said mines and mining claims stood in the name of said William Keyser, that the Baltimore Old Dominion Company was the beneficial owner of said mines, mining claims and land. Thereupon they insisted that said mines, mining claims and land should follow the ownership of the stock. The said Keyser and the executors of the will of Michael Simpson thereupon agreed that said mines, mining claims and land should be conveyed by said Keyser to said Lewisohn upon payment of the notes given in accordance with the requirements of said contracts for the purchase of the shares of stock of the Baltimore Old Dominion Company, hereinbefore referred to; and it was agreed between said Lewisohn and the defendant that said Lewisohn should hold, when conveyed to him, the title to said mines, mining claims and land as property acquired under the aforesaid contracts.

13. After the said agreement for the purchase of said remaining two-sevenths of the shares of said Baltimore Company was

concluded, and it was thereby determined that the total amount of money to be paid by said Lewisohn and the defendant was to be $1,000,000 in all, the said Old Dominion Syndicate was enlarged on the same terms as heretofore set forth.

14. On or about June 20, 1895, all the shares of the said Baltimore Company having been theretofore deposited in the Old Colony Trust Company in accordance with the terms of the said agreements with the executors of said Simpson and William Keyser, the cash payment to Keyser was made and the first notes to Keyser and the said executors were paid by said Lewisohn and the defendant. On the same date there was held in Baltimore a meeting of the
46 Baltimore Old Dominion Company at which the control of said Company was transferred to said Lewisohn and the defendant; at the said meeting of the Baltimore Old Dominion Company a new board of directors being chosen consisting of said Lewisohn, the defendant, William Keyser, P. Brent Keyser and George A. Pope. The defendant was chosen president and Allen W. Evarts secretary.

15. The said mines of the said Baltimore Company had been worked by the Baltimore Company at a large profit for many years; and the defendant and said Lewisohn continued the operation of the mines of the said Baltimore Company under and through the said Baltimore Company until the plaintiff corporation was formed, the said mines and property were conveyed to it and it undertook the operation thereof. In addition to the purchase price paid for the shares of stock of the Baltimore Old Dominion Company, the defendant and said Lewisohn paid out large sums of money for operating expenses at the mines and for necessary expenses incurred by them in the transactions hereinbefore set forth, and expended a large amount of valuable time and service in regard to said transactions.

16. It was not until some time about July 1st, 1895, or thereafter, that the defendant and said Lewisohn formed any definite plan or intention for the ultimate disposition of said stock of said Baltimore Company, and not until long after said Lewisohn and the defendant, as purchasers, had paid for said stock to said executors of said Simpson and said Keyser, was the formation of a new corporation determined upon.

17. Thereafter said Lewisohn and the defendant consulted eminent counsel, to wit, Messrs. Evarts, Choate & Beaman of New York, who advised the formation of a New Jersey corporation. Said
47 Lewisohn and the defendant informed counsel that they would convey or cause to be conveyed to such new corporation all the property of the said Baltimore Company, the said mining claims which said Keyser had agreed to convey to said Lewisohn, and $500,000 for working capital; and in return said Lewisohn and the defendant were to have all the capital stock of said new corporation. Said Lewisohn and the defendant thereafter determined that the new corporation should be capitalized at $3,750,000, divided into 150,000 shares of the par value of $25 each, and thereupon left the details of the organization of said corporation to their counsel.

18. The defendant avers that said stock and said mines, mining claims and land were purchased by himself and by said Lewisohn as aforesaid, and were paid for by them before any steps were taken towards the promotion or formation of the plaintiff corporation and before the defendant and said Lewisohn had formed the purpose, intent or plan of forming said corporation; that said stock and said mines, mining claims and land were rightfully purchased by the said defendant and said Lewisohn as and for their own individual property, and that the plaintiff corporation is not entitled to claim the benefit or profit of such purchase.

19. On or about July 11th, 1895, the plaintiff corporation was organized. The defendant admits that the allegations as set forth in paragraphs 8, 9, 10, 12, 13, 14 and 16 of the plaintiff's bill contain a substantially correct statement of the facts and dates of the formation of the plaintiff corporation, but he denies all the allegations contained in said paragraphs as to conspiracy, purpose and plan therein set forth and the allegations as to the selection, nomination and employment by the defendant of attorneys, incor-
48 porators, directors and officers of the plaintiff corporation, and as to instructions, orders and directions by the defendant to said attorneys, incorporators, directors and officers; and as to the manner in which said directors and officers became shareholders in order that they might be qualified to act as directors and officers and as to their actual non-interest.

20. Thereafter it was agreed between the plaintiff corporation and the defendant and said Lewisohn that the defendant and said Lewisohn should convey or cause to be conveyed to the plaintiff corporation all the property of the Baltimore Old Dominion Company, including the mines, mining claims and land conveyed by said Keyser to said Lewisohn, and which then stood in the name of said Lewisohn, and should furnish the plaintiff corporation with a working capital of $500,000 in cash. That in consideration therefor the plaintiff corporation should issue to the defendant and said Lewisohn or their nominees and to the nominees of said Baltimore Company, of which said Lewisohn and the defendant owned the entire capital stock, its entire capital stock, to wit, 150,000 shares.

21. The transactions which thereafter took place, though in form separate, were in fact all in pursuance of the said agreement. In form the transactions were separable as to the property held by the Baltimore Old Dominion Company, the said mines, mining claims and lands held by Lewisohn, and the capital to be furnished by the said Lewisohn and the defendant; but really the contract for the purchase and sale of all said property and for the furnishing of said capital was an entire contract and for an entire price, to wit, all the capital stock, or 150,000 shares, of the plaintiff corporation.

49 22. The said transactions which thereafter took place as above stated were the conveyance to the plaintiff corporation of the property of the Baltimore Old Dominion Company by said Baltimore Old Dominion Company, the conveyance by said Lewisohn of said mines, mining claims and land to the plaintiff corporation, the

obligation and later fulfilment of said obligation by the defendant and said Lewisohn to furnish a working capital of $500,000 to said plaintiff corporation. Upon the conveyance of said property, mines, mining claims and land, and upon the undertaking of the defendant and said Lewisohn to furnish the said capital of $500,000, the plaintiff corporation issued all of its said shares, to wit, 150,000 shares, to the following named persons: the defendant and said Lewisohn, Philip K. Dumaresq, as the agent and nominee of said Baltimore Company, the total capital stock whereof was owned by said defendant and said Lewisohn, and Thomas Nelson, acting for the defendant, the syndicate managed by the defendant and said Lewisohn, that is to say, one hundred thousand shares to said Dumaresq nominally on account of the property standing in the name of the Baltimore Old Dominion Mining Company, thirty thousand shares to the defendant and said Lewisohn, nominally on account of the mines, mining claims and land, and twenty thousand shares to said Nelson, nominally on account of the working capital of $500,000 to be furnished by the defendant and said Lewisohn. And the defendant further says that said persons, as holders and owners of the entire capital stock of the plaintiff corporation, procured and consented to the issue of said entire capital stock to themselves, as performance by the plaintiff corporation of its part of the aforesaid agreement; that the defendant and said Lewisohn fully performed their part of said agreement; that subsequent shareholders acquired their shares, not from the plaintiff corporation but from the owners of said shares, namely, the defendant and said Lewisohn, either directly or through their agents, the said Nelson and Dumaresq; and that none of said shares were offered to the public, by prospectus or otherwise, by or in behalf of the corporation, but were disposed of to various persons by the defendant and said Lewisohn under contracts of subscriptions which they took and received wholly on their own account, as the owners of said shares.

23. Thereafter the defendant was solicited by many friends and acquaintances to allow them to purchase some of his shares of stock in the plaintiff corporation. In order to in part reimburse the defendant and said Lewisohn for the moneys paid by them for the purchase of the stock in the said Baltimore Company, and in order to assist said Lewisohn and the defendant in fulfilling their obligation of furnishing $500,000 to the plaintiff corporation, the defendant formed a list upon which were set down the offers to him to purchase his said stock.

24. It thereafter appeared that many of the persons who, by the Old Dominion Syndicate papers, had agreed to pay certain sums of money to the defendant, desired in some way to take all profit or reimbursement to which the defendant might determine them entitled in the form of stock in the plaintiff corporation, in lieu of money. It was moreover agreed between the defendant and said Lewisohn that said Lewisohn should take as part reimbursement for the moneys paid by him for the purchase

of the stock of said Baltimore Company, stock in the plaintiff corporation.

25. Accordingly the defendant on July 19th sent a circular letter to the members of the Old Dominion Syndicate, including said Lewisohn, a copy of the form of said circular letter being as follows:

51 (*Letter of July 19.*)

"A number of the largest subscribers to the Old Dominion syndicate have requested that they be allowed to take shares in the new company at a par value of $25 in lieu of the money which they originally advanced and which was to be repaid to them from the proceeds of the new stock. As a subscriber to the syndicate, you are hereby informed that it has been decided to grant this request. If you wish to avail yourself of the opportunity, you must notify me in writing on or before August 1, 1895, after which date this option will positively expire.

(Signed) A. S. BIGELOW."

26. Nearly all of the members of the Old Dominion Syndicate notified the defendant that they desired to purchase his stock in the plaintiff corporation to the extent of the option afforded them by said letter of July 19th, and certain members of the syndicate also offered to buy from the defendant further shares of said stock at the rate of $25 per share, and certain other friends and acquaintances offered to buy still further shares of stock at the same rate.

27. The defendant determined to allot to the members of the Old Dominion Syndicate as their profit in the transaction 40,000 shares, and further determined to sell 60,000 shares of the stock owned by him and said Lewisohn in accordance with these several offers. Said offers in the aggregate were for 72,120 shares, were all addressed to the defendant personally, were from friends and acquaintances of the defendant, and neither the defendant nor anyone on his behalf or on the behalf of the corporation made any representation, misrepresentation or solicitation to obtain said
52 offers and concealed nothing from anyone. Thereupon it was determined to accept said offers in part, and the defendant did so according to his personal and uncontrolled discretion, arbitrarily determining which of said offers he would accept, which he would reject, and which accept in part and reject in part.

28. It having been determined by the defendant to return to each syndicate member one share for each $25 subscribed to the defendant by the Old Dominion Syndicate paper, and for how many shares he would accept the offer of those persons offering new cash, whether said persons were originally members of the Old Dominion Syndicate or otherwise, the defendant thereupon notified said persons appearing on the said "List of July 18" by sending to each circular letters of one of the following forms:

"Sears Building, Boston, Mass., *Aug.* 13, 1895.

Referring to your subscription to the stock of the Old Dominion Copper Mining and Smelting Company, you are hereby notified that — shares have been allotted to you at $25 a share. Notice will be sent in due course when payment for this should be made.

Besides this, you will receive — shares on your subscription of $— to the Old Dominion Syndicate, being the stock taken by you in accordance with circular of July 19th, 1895; and, of course, in addition, the — shares to which you are entitled under your original subscription to the Old Dominion Syndicate.

In other words, on a further payment by you of $— you will be entitled to — shares of the stock of the Old Dominion Copper Mining and Smelting Company. When the stock is ready for delivery you will be notified.

To —— ——.

A. S. BIGELOW."

52½ "Boston, Mass., *August* 23, 1895.

Referring to your subscription to the stock of the Old Dominion Copper Mining and Smelting Company, you are hereby notified that — shares have been allotted to you at $25 a share. Notice will be sent in due course when payment for this should be made and also of the time when the stock will be ready for delivery.

(Signed) A. S. BIGELOW."

29. The defendant by this acceptance having obligated himself to deliver shares to those persons whose offer he had accepted, thereafter delivered said shares in accordance with this obligation.

30. The entire capital stock of the plaintiff corporation, to wit, 150,000 shares, was issued to the defendant, to said Lewisohn or to their nominees, and to persons having full and complete knowledge of all transactions entered into by the corporation and all matters in relation thereto or connected therewith, and each and every stockholder in the plaintiff corporation acquiesced in the transaction complained of or acquired his interest or share in said corporation from some one or more of the persons who so acquiesced.

31. All the aforesaid transactions were done with the utmost publicity, full and truthful information being given to all persons making inquiry, and the account of said transactions appeared in the public press and in the columns of financial journals, before there was any contract completed between the defendant and the persons offering to buy his stock. Absolutely no mis-representation of any kind was made by the defendant or by anyone connected with the corporation, and there was no concealment of any of
53 said transactions or of anything in relation to them. There was absolutely no solicitation of purchasers for the defendant's stock in the plaintiff corporation, and no stock was sold by the defendant or by the corporation except stock of the defendant's to persons who had requested the defendant personally to allow them to

purchase said stock, and no contracts for the sale or purchase of stock were made except between the defendant individually and persons purchasing from him.

32. In return for the said 150,000 shares of the stock of the plaintiff corporation, the defendant and said Lewisohn gave the plaintiff corporation moneys and property purchased with their own money and for their own use, which moneys and property were and are, and which they then believed and still believe to be of far greater value than the par value of said 150,000 shares of the plaintiff corporation's stock. No shareholder paying $25 for his share or shares of stock has been in any wise deceived; he has received full value, and said stock has been and now is of far higher value than its par value.

33. The conveyance to the plaintiff of said mining claims was a part of the entire transaction, as above stated, and moreover was a part of a contract by the defendant and said Lewisohn to convey or cause to be conveyed the property of said Baltimore Company and said mining claims as an entire transaction and contract and not severally; and for an entire price and not a several price; and neither said Lewisohn and the defendant nor the plaintiff corporation intended or was willing to separate said transactions or would have been willing to make or perform one part of said contract without the other. Said property of the Baltimore Company and said mining claims were and are and were believed and still are believed by the defendant to be of a
54 fair value greatly in excess of the par value of the stock received therefor.

34. The stockholders of the plaintiff corporation have on September 18th, 1899, April 5, 1899, June 15th, 1899 and April 3d, 1901, ratified and acquiesced in all said transactions, and at none of those times, except perhaps the first, did the defendant and said Lewisohn or either of them control the said plaintiff corporation or the action of its stockholders.

35. The transactions, matters and contracts complained of in the plaintiff's bill took place and were made in the state of New York, by the laws whereof said transactions, matters and contracts are valid and cannot be complained of.

36. The defendant denies each and every allegation in the plaintiff's bill contained as fully and specifically as if each of said allegations was separately recited and denied, except in so far as said allegations have been herein specifically admitted.

37. And the defendant, in addition to the foregoing answer, avers that the cause of action, if any there may be, arising to the plaintiff corporation on account or by reason of the several allegations and complaints in the bill contained, did not accrue within six years before the said bill was filed and that the plaintiff is guilty of laches; and this allegation the defendant makes in bar of the bill and prays that he may have the same benefit therefrom as if he had formally pleaded the same.

Wherefore the defendant prays that the plaintiff's bill may be dismissed with costs.

By His Solicitor, J. W. FARLEY.

Of Counsel:

ALFRED HEMENWAY.
EUGENE TREADWELL.

55 And on the eleventh day of said November, the plaintiff filed its amendment to its Bill of Complaint, which was allowed, the said amendment being in the words following, to wit:

Amendment to Bill of Complaint.

In the above entitled case the plaintiff amends the Bill of Complaint therein by striking out the Tenth paragraph thereof and substituting therefor the following:

Tenth. The defendant and said Leonard Lewisohn caused all the directors aforesaid, except said Montgomery, to assemble at the office in New York City of the firm of Lewisohn Brothers, of which firm said Leonard Lewisohn was a member, and all said directors except said Montgomery were present, and said Montgomery was absent, was not notified of said meeting, and did not waive notice thereof. Pursuant to instructions from the defendant, the resignation of said Montgomery as a director was presented to said other six persons and accepted, and the defendant was thereupon chosen by them a director in his place. Thereupon, pursuant to instructions from the defendant, the successive resignations of said Rowe as a director, of said Welch as a director, of said Jesse Lewisohn as treasurer and as director, of said Evarts as president, and of said Riddlesdorffer as vice-president and as director were presented and duly accepted, and said Leonard Lewisohn, one Henry M. Whitney, one Thomas Nelson and one Joseph G. Ray were successively chosen directors by said persons present, and said Thomas Nelson was duly chosen treasurer and said defendant was duly chosen president of said corporation. Said defendant and said Leonard Lewisohn were present at said meeting, and upon their respective elections as directors took their places in said meet-

56 ing, but said Whitney, said Nelson and said Ray were not present at said meeting, had no notice thereof, and did not waive notice thereof; and said meeting was not a legal meeting of the Board of Directors of the plaintiff corporation under and in accordance with the laws of the State of New Jersey, and the acts done at said meeting were not valid and binding acts of said corporation or of the Board of Directors thereof.

The plaintiff further amends the Bill of Complaint in the above entitled case by adding in the Sixteenth paragraph thereof, in the tenth line of said paragraph, after the word "called" the words "and held in Boston in the Commonwealth of Massachusetts."

By Its Attorneys, BRANDEIS, DUNBAR & NUTTER.

And thereafterwards on the fifth day of December, A. D. 1907, after having heard the parties and their evidence and the arguments of counsel, the following Report of Facts and Order for Decree was filed by the Court (this case and case numbered 8099, between the same parties, having been heard together upon the same evidence) to wit:

Report of Facts Found at the Hearing and Order for Decree.

At the request of counsel for the plaintiff, I file the following statement of facts found by me, and this report, although filed in only one case, is intended to be applied to both of them.

For some time prior to April 1, 1895, the Old Dominion Copper Company of Baltimore, Maryland, a corporation organized under the laws of Maryland and hereinafter called the Baltimore company, had been operating copper mines in Arizona. It had
57 had a fair success, and had been paying dividends upon its stock, but to what amount did not appear. The defendant was largely interested in copper mining, and was the president of and interested in several mining companies. Leonard Lewisohn, of New York, both individually and as a member of the firm of Lewisohn Brothers and of a corporation of the same name, was also largely interested in copper. At some time in April, 1895, they formed a plan or device to secure control of the stock of the Baltimore company and to cause its property to be transferred to a new corporation which they should procure to be organized with a much larger capital, for a much increased price. The capital stock of the Baltimore company was $500,000, divided into 25,000 shares, of the par value of $20 each; and 5-7 of this stock, or 17,857 shares, were held by the executors of Michael H. Simpson, deceased, and 2-7, or 7,143 shares, were held by one William Keyser of Baltimore, and others represented by him. The defendant and said Lewisohn procured J. M. Meredith, a real estate broker of Boston, to negotiate with the executors of Simpson, and he did so. The executors were unwilling to deal with the defendant or to make any sale to him; but Meredith finally did obtain from them a written agreement, signed by one of them, dated April 30, 1895, for the sale to himself of their stock at the price of forty dollars a share upon the terms therein stated, for which Meredith paid them down the sum of two thousand dollars. This agreement he forwarded to Lewisohn. Its form and provisions were unsatisfactory to Lewisohn's attorneys, and a new agreement or option was substituted for it, dated May 4, 1895, of which a copy is annexed, marked "A." Lewisohn repaid the $2000 to Meredith, and Meredith assigned the agreement to him. The defendant then repaid $1000 of this sum to Lewisohn. Afterwards, on June 13,
58 1895, a somewhat similar agreement was made by Lewisohn with William Keyser, for the purchase of the remaining 7,143 shares of the stock of the Baltimore company. A copy of this agreement is annexed, marked "B." There are mentioned also in this agreement certain other mining properties in Arizona, hereinafter called the outside proper-

ties. The legal title to these was held by William Keyser, but really in trust, one-half for the Baltimore company and one-half to Simpson; but Keyser agreed, and all other parties in interest consented, that these should go with the stock of the Baltimore company, without any further consideration being paid.

The defendant, by the understanding between himself and Lewisohn, was to pay for and have one-half of the Simpson stock and two-thirds of the Keyser stock; Lewisohn was to take and pay for the rest; and they arranged to take, pay for and hold the whole, including both stock and outside properties, in the proportion of 547 parts to the defendant and 453 parts to Lewisohn, so that of the $1,000,000 *dollars* needed to carry through the transaction ($714,285 to the Simpson estate and $285,715 to Keyser and his associates) $547,000 was to be furnished by the defendant and $453,000 by Lewisohn. The defendant and Lewisohn availed themselves of these agreements; paid the price thereof before July 10, 1895, in advance of the coming due of their notes given therefor; and the stocks were delivered to them, and the outside properties were conveyed to Lewisohn for them.

In the meantime they had proceeded to make their respective arrangements for the raising of the money needed to make these payments; for each one of them was to provide separately his money, although they were acting together in dealing with Simpson's executors and Keyser, and intended to act together in disposing of the stock when they should have acquired it.

59 For this purpose, the defendant, before taking up either of these options and before any agreement had been made with Keyser, procured first an underwriting agreement, which was made verbally before May 16, 1895, and afterwards was reduced to writing and dated May 22, 1895, and signed by Matthew Luce, J. A. Coram, Henry M. Whitney, —— Meredith, Thomas Nelson, and the defendant, whereby each of these parties agreed to take a certain number of the shares of the Baltimore company at $40 a share, the total price amounting to $357,142.50, or the amount to be paid by the defendant for his one-half part of the Simpson shares. But it was understood that these men, called the underwriters, were to be called upon to pay only for what should not be paid by the members of the syndicate hereafter mentioned, which was intended to be formed and which was soon after formed. A copy of this underwriting agreement is hereto annexed, marked "C."

The defendant also formed what was called the "Old Dominion Syndicate," hereinafter called his syndicate, to provide the means for making his payments, and to share in the profits expected to be realized. Those who joined the syndicate signed written agreements, of which the first (though actually subsequent to the underwriting agreement) was dated May 21, 1895. A copy of this first agreement is annexed, marked "D." Other papers of the same purport were dated May 24 and June 14, and a blank date, 1895. The amounts so subscribed on these four papers were respectively $100,000; $20,000; $179,119; and $123,500; or in all $422,619. In addition to this, of the underwriters, Whitney was

treated as a syndicate subscriber for $50,000; Meredith for $25,000; and the defendant himself for $50,000; making in all $547,619,—practically the amount that the defendant was to pay.

The members of the syndicate made their payments, and
60 the defendant and Lewisohn made their payments to Simpson and Keyser, taking up their notes as aforesaid, on July 9, 1895.

When the scheme was first formed, it had been the plan and the avowed intention of the defendant and Lewisohn to form a new corporation with a capital stock of $2,500,000, which should take the property of the Baltimore company and the outside properties for $2,000,000, and raise $500,000 of working capital with the rest of its stock. This would give the defendant stock for the money raised and applied by him at the rate of just two for one, and he expected, and stated to various members of his syndicate that he expected, to give to each subscriber to his syndicate cash to the full amount of his subscription and stock at par to the same amount, the cash to be raised by selling the surplus stock, which at par would produce just that amount. They proceeded, however, to organize the plaintiff corporation under the laws of New Jersey, with a capital stock of $3,750,000, being one hundred and fifty thousand shares of the par value of $25 each.

The organization of this corporation was controlled entirely by the defendant and Lewisohn, with the advice of the latter's attorneys. The formal written agreement for its formation was signed by Lewisohn's son, one of his attorneys, and five of the employees of Lewisohn Brothers. The first meeting of the stockholders was held July 7, 1895, and the seven incorporators above mentioned were elected directors. Six of these appeared to have taken and paid for four shares each, and the seventh to have taken and paid for sixteen shares, or forty shares in all. These forty shares really had been paid for by Lewisohn; and although the money was deposited in bank to the credit of the company upon its organization, it afterwards was returned by the company to Lewisohn in accounting with him. Through these incorpo-
61 rators the organization was effected; and they were elected directors of the plaintiff company.

A meeting of these directors was held in New York, at the office of Lewisohn Brothers, on July 11, 1895, at which some of these directors successively resigned, and the vacancies thus created were filled by the board, so that the new board of directors consisted of the defendant, Lewisohn, Thomas Nelson, and Messrs. Whitney, Ray, Buffum and Evarts. These directors were all selected and were controlled by the defendant and Lewisohn. The defendant and Lewisohn had now taken full control of the Baltimore company; the quick assets and working capital of that company including all the surplus assets mentioned in the first and — clause of the Simpson agreement, marked "A," had been divided among its former stockholders; the defendant had become its president, and its board of directors had come under the control of the defendant and Lewisohn.

At the meeting of the directors of the plaintiff company held as aforesaid at New York on July 11, 1895, there were present,

after the new appointments, four directors, being the defendant, Lewisohn, their attorney Mr. Evarts, and Lewisohn's employee, Mr. Buffum. The three absent directors, Nelson, Ray and Whitney, were members of the defendant's syndicate, and Nelson and Whitney were two of the defendant's original underwriters. Whether these three directors had had any notice of the meeting did not appear; the records of the company do not show that any such notice had been given to them. At this meeting, under these circumstances, the defendant, through Mr. Evarts, presented an offer from the Baltimore company to transfer all its property and assets to the plaintiff company in return for 100,000 shares of the plaintiff company, to wit, a par value of $2,500,000. A copy of this offer is hereto annexed, marked E. Thereupon Lewisohn
62 proposed and Evarts seconded a resolution accepting this offer and appointing the defendant and Nelson a committee to supervise and carry out the details. The resolution was passed. A copy of this resolution is hereto annexed, marked F. In fact no report as to the value of the property had been made to the plaintiff corporation; but one Hyams and one Colquhoun had examined the property and had made a report to Lewisohn and the defendant for their guidance in buying from Simpson and Keyser, which was put in evidence. This report was not communicated to the plaintiff.

Lewisohn then presented a written proposition to convey to the plaintiff company the outside properties acquired from Keyser, in return for 30,000 shares of the capital stock of the plaintiff company, to wit, a par value of $750,000. A copy of this offer is annexed, marked "G," with a request to issue said stock to the defendant himself. Thereupon Evarts moved and Buffum seconded a resolution accepting the offer, and appointing the same committee to supervise and carry out the details. This resolution was carried. A copy of the resolution is annexed, marked "H." No examination had been made of these properties, and no report was or had been submitted about them either to the plaintiff company or the defendant or Lewisohn, as they were not regarded by the defendant or by Lewisohn, or, so far as appeared, by any one else, as possessing any substantial value. These transactions were carried out; deeds from the Baltimore company of its properties, and from Lewisohn of the outside properties, were delivered to the plaintiff company in December, 1895, or January, 1896, and the stock aforesaid, amounting to 130,000 shares of the par value of $3,250,000, and then of fully as great market value, was issued to Lewisohn and the
63 defendant, or to their nominees, on September 18 and 19, 1895.

During all these transactions, the full control of the plaintiff company was in the hands of and was exercised by the defendant and Lewisohn, who were its promoters, and who themselves determined upon and dictated, under the advice of their counsel, everything that was done by the plaintiff company or in its behalf; it had no directors, representatives or advisers other than themselves or their agents; and they did not disclose to it any of the facts which have been stated. This continued to be the case until April, 1902, as hereinafter stated.

It was intended also by Lewisohn and the defendant that 20,000 shares of the capital stock of the plaintiff should be issued to new subscribers at par; and this was done in the summer and fall of 1895.

Neither the defendant nor Lewisohn disclosed to the new corporation the fact that they had paid only $1,000,000 for the stock representing all the mining property of the Baltimore company, or that they procured the outside properties without any other consideration; nor did they or either of them see that the new company had any independent advice before accepting the offers made to it as aforesaid, really by themselves. On the contrary they organized and promoted the plaintiff company for the purpose of having it accept, and they exercised their control over it to cause it to accept, said offers, and really, through their own action and that of their employees, themselves accepted said offers in the name of the corporation. The stock which they thus took was then of fully its par value, this being due mainly to the skilful conduct and manipulation of the defendant and Lewisohn, and continued to be so for some time, and until the defendant had sold out substantially all the stock that he took for his own use.

64 If it be material, I find also that the defendant did not act towards the members of his syndicate with the good faith which they had a right to expect. The result of his and Lewisohn's transactions with the plaintiff company was that for the $1,000,000 of their own and their associates' money which they invested, they received, subject to the payment of legitimate expenses of not over $20,000, stock to the par value of $3,250,000, and of the then actual value of at least that amount; that is at the rate of more than three dollars for one. He gave to the members of his syndicate two dollars for one, either wholly in stock or half in cash and half in stock as they elected. With a few individual exceptions, he did not disclose the facts to them. The very great majority of the members of his syndicate did not become aware of the details of what he and Lewisohn had done; they did receive what it had been represented to them that they would receive; and they generally contented themselves in their ignorance with the fact that they had doubled their money. The residue of the gain received by the defendant he dealt with as he chose, taking a part of it to himself, distributing a part among some of the underwriters, or otherwise disposing of it. But the averments of the eighth paragraph of the defendant's final answer (filed November 6, 1907) are not according to the facts.

The defendant contended that the real transaction as intended to be carried out between Lewisohn and himself on the one side and the plaintiff company on the other was that they should convey or cause to be conveyed to the plaintiff company the property of the Baltimore company and the outside properties, and should supply to it the sum of $500,000 for working capital, and should receive therefor all the capital stock of the plaintiff company; that this was actually

65 done, though put in the form of different transactions; that Lewisohn and the defendant really took accordingly themselves the 20,000 shares which were to be used for raising the working capital, and bound themselves to pay to the plaintiff company therefor the said sum of $500,000; that the parties who

afterwards subscribed for and received these shares really took them from the defendant and Lewisohn and not from the plaintiff company; and that at the time of the transactions above stated Lewisohn and the defendant became and were the real owners of all the authorized capital stock of the plaintiff company. There was some evidence in support of this contention; but I find that the real facts are as already stated.

The mining property of the Baltimore Company so conveyed to the plaintiff company was not of the intrinsic value of more than $1,000,000. But its market value at the time of its transfer to the plaintiff company seems to have been greater than this. This increased market value may have been, and probably was, due in large part to the skilful manipulation of the defendant and Lewishon, and the ingenious manner in which they created a desire on the part of men interested in mines as investors or speculators to be allowed to join in the transaction they were carrying out. This market value however was less than $2,000,000. But taking the most favorable view of the situation possible for the defendant, he and Lewisohn did by reason of their failure to disclose the real facts as aforesaid make out of their sale to the plaintiff company a secret profit of 50,000 shares of its capital stock, of which the defendant's portion was 27,350 shares and Lewisohn's portion 22,650 shares. If he had fully disclosed the facts to the plaintiff company and had secured for it independent advice, it would not have given to him this secret profit; if he had dealt fairly and openly with the mem-
66 bers of his syndicate, he would have shared with them this secret profit less a comparatively small sum to reimburse his expenses. Unless one of his independent defenses is made out, he must account to the plaintiff for his secret profit. This amount of 50,000 shares includes however the 30,000 shares received for the outside properties, so that in the suit numered 8,099 the defendant is to be held accountable only for 20,000 shares, or for 10,940 shares if he is not liable in solido for the total amount received by Lewisohn and himself.

I am of opinion that the defendant is liable in solido, and must account to the plaintiff company for the whole of the secret profit realized by Lewisohn and himself, and not merely for the part which he himself actually received. Lewisohn and he were acting in the formation and execution of the scheme together and in concert. Each of them was doing his part to carry out a joint scheme, which was intended to inure to the advantage of both. The control exercised by them over the plaintiff company was a joint control, and was exercised by each for the benefit of both. A proper disclosure of the real facts by either would have frustrated the schemes of both; they both acted together in pursuance of a common design, and for the profit of both. The equitable tort of which the plaintiff complains was the act of both; and they must be held responsible for it both jointly and severally.

In the other suit, that numbered 8,098, the outside properties conveyed by Keyser to Lewisohn for the benefit of himself and the defendant, and then turned over to the plaintiff in return for 30,000 shares of stock, were acquired by them really for nothing. They were

thrown in as a mere make-weight in the purchases made by Lewisohn and the defendant from Keyser and the Simpson estate. It cannot be said that they were of no value; nor can I find on the evi-
67 dence exctly what their value was. But I am satisfied on the evidence that this value could not have exceeded the sum of $50,000. The plaintiff seeks in the first instance to rescind this transaction, and, upon reconveying to the defendant these outside properties, to have him ordered to return to it the 30,000 shares issued therefor. But I think that the situation of the parties has so far changed that this ought not now to be permitted. The properties themselves have not been worked; and are in the same condition as when conveyed to the plaintiff. But substantially all the capital stock of the plaintiff company has been transferred to another company, the Old Dominion Company of Maine, a holding company; the defendant disposed of his stock some time before the suit was brought, has not the 30,000 shares to surrender, and apparently could not procure them in the market. He ought not to be required to buy them of the holding company at whatever price that company might choose to fix. Moreover, since these transactions the plaintiff company has increased its capital stock to 200,000 shares, of the amount at par of $5,000,000, and has bought new and additional mining properties, the value and profitableness of which have not been shown. 30,000 shares out of 200,000 representing a larger number of mines cannot be said to be the same thing as the same number of shares out of 150,000 shares representing a smaller number of mines. Accordingly I do not think that the plaintiff can now have this transaction rescinded. But as the shares issued were then of the value of at least $750,000, while the properties received for them were worth less than $50,000, the plaintiff has sustained damages in this transaction of not less than $700,000, of which $382,900 went to the advantage of the defendant, and $317,100 to that of Lewisohn; and for the reasons already stated as to the other transaction, I think that the defendant is liable for the whole $700,000.

68 It has been claimed that the agreements made at the directors' meeting of July 11, 1895, are governed by the law of New York. That meeting was held in New York city, and the proposals were made and accepted there. The plaintiff is a New Jersey corporation, and was to have places of business also in Arizona, New York and Massachusetts. I find that it was the intention of the parties that these agreements should be carried out and consummated by the delivery of the deeds and the issue of certificates of stock in Massachusetts, where it was intended that the offices of the company should be, and where they were, established, in Boston, and where in fact they were so carried out. It was intended that the business of the company, outside the actual mining and smelting operations, which were to be conducted in Arizona, should be carried on in Massachusetts; and this was done. I rule on these findings that the agreements in question are governed by the law of Massachusetts. If however they are governed by the law of New York, then I find that the law of New York applicable to the case upon the facts which I have found, does not differ from the law of Massachusetts.

As to the claim that the transactions in question have been ratified and acquiesced in by the stockholders of the plaintiff company, I find that at a meeting of the directors of the plaintiff company, held at Boston September 18, 1895, it was voted that 100,000 shares of the company's full paid stock be issued to Philip E. Dumaresq, and 30,000 shares to the defendant and Lewisohn; and this was done. The 100,000 shares were for the property of the Baltimore company, and Dumaresq took them as the nominee for the benefit and subject to the orders of the defendant and Lewisohn. The 30,000
69 shares were for the outside propeties. At the end of the records of this meeting, which had been attended only by five directors, all the directors signed on the record of the company a statement that all the action taken by the directors at that meeting was confirmed and approved of in all respects; and the following statement was then appended:

"The undersigned, stockholders of the Old Dominion Copper Mining & Smelting Co., do hereby approve of the action of the Directors shown by the above record of meeting held on the 18th day of September, 1895."

This was signed by the defendant and Lewisohn, purporting to represent 30,000 shares; by Dumaresq, 100,000 shares; and by Thomas Nelson, Treasurer, 20,000 shares, being the total authorized capital of the company. The Dumaresq shares, as already stated, were held for and controlled by the defendant and Lewisohn. Thomas Nelson was treasurer of the defendant company, and the 20,000 shares which he claimed to represent were the stock which was to be issued to independent subscribers for a working capital as already stated, and were still the property of the corporation itself; and Nelson had no right to sign for them. This action, like everything else in the conduct of the company at, and for some years after, that time, was taken at the dictation of the defendant and Lewisohn, in the manner and for the purpose already stated.

On June 15, 1899, a special meeting of the stockholders was held, having been duly called "to consider and act upon the question of increasing the capital stock of the corporation." At this meeting a majority in interest of the stockholders were represented, all of them by proxies running to Stone, King, Sheehan and Dumaresq. These men were controlled by the defendant and Lewisohn. At the meeting, after transacting the business for which the meeting had
70 been called, it was voted: "That all acts, matters and things which have been entered into or performed by the board of directors are hereby approved, ratified and confirmed." The terms of the proxies held by the four men who passed this vote did not appear. Neither the stockholders nor the company itself had gained any knowledge of the matters hereinbefore stated as to the transactions in question.

On April 3, 1901, an annual meeting of the stockholders of the plaintiff company was held, at which were present in person two stockholders, representing together 1,700 shares; Dumaresq, representing by proxy 85,200 shares; and three other proxies, representing together 4,563 shares. The terms of none of the proxies appeared.

Dunaresq was still under the control of the defendant. At this meeting, it was by vote "Resolved, that all acts, matters and things entered into and performed by the officers and directors of this company since the organization of this company be and they hereby are fully and in all respects ratified, confirmed and approved." At this meeting the defendant as president of the company had presented a report in which he stated the net profits of the company at a greatly exaggerated amount; and at this time neither the corporation nor the subscribers to the 20,000 shares of stock, nor the other stockholders outside of a few who were in the confidence and under the control and acting in the interest of the defendant and Lewisohn, had learned or knew of the transactions hereinbefore set forth. Full reports of these meetings and of the other meetings of the directors and of the stockholders were in evidence. The very great majority of the stockholders, including both those who took their shares directly from the corporation and those who acquired their stock as mem-
71 bers of the defendant's syndicate, never except as already stated consented to or, until after April, 1902, knew of the operations by means of which the defendant and Lewisohn acquired their 50,000 shares as a secret profit. They had not, until after that date, knowledge of or access to the books or records of the corporation from which some of these operations might have been and afterwards were discovered.

Upon these facts, I rule that these actions are not barred by the acquiescence or ratification of the stockholders of the plaintiff company.

As to laches and the statute of limitations, it appeared that the defendant Lewisohn or the defendant alone, remained in full control of the plaintiff company until April, 1902. The working of the mines had yielded but very scanty profits, and no dividends. At the annual meeting of the stockholders of the company in 1902, a new board of officers was elected. They at once began investigations, learned many of the facts without any unnecessary delay, and thereupon promptly brought these suits. I rule that upon these facts the bills are not barred by laches or by the operation of the statute of limitations.

Of the special findings which the plaintiff has asked me to make, I refuse the one marked D, and make the others. I place on file the request for such special findings. As I have stated my rulings so far as they seem to me material, I have not stated the requests for rulings in detail. So far as not stated to have been given, they may be treated as refused.

In No. 8,098, a decree is to be entered that the defendant pay to the plaintiff the sum of $700,000 with interest from September 18, 1895. In No. 8,099, that the defendant pay to the plaintiff the sum
of $480,000, (being the sum of $500,000 less $20,000 allowed
72 for legitimate expenses,) with interest from the same date.

HENRY N. SHELDON,
J. S. J. C.

A.

Memorandum of Agreement Between Frank E. Simpson of Framingham, Massachusetts, and William Butler of Boston, Massachusetts, for Themselves and the Other Executors of Michael H. Simpson, Parties of the First Part, and J. Morris Meredith of Boston, Massachusetts, Party of the Second Part, Made at New York This Fourth Day of May, Eighteen Hundred and Ninety-five.

The Old Dominion Copper Company is a corporation organized under the laws of Maryland, having a capital of five hundred thousand dollars ($500,000) divided into twenty-five thousand (25,000) shares of twenty (20) dollars each and owns certain property in Arizona known as the Old Dominion mine, which has been worked for some years, and other property in Arizona and elsewhere. The estate of Michael H. Simpson is the owner of seventeen thousand eight hundred and fifty-seven (17,857) shares of the capital stock of said company and is desirous of selling the same. The property owned by the company consists of mines, mining rights, smelting furnaces, buildings, mining tools and other appurtenances; also ores in dump and in process and in the furnaces; also pig or ingot copper and cash and certain notes receivable and amounts due.

Mr. Meredith is desirous of buying the seventeen thousand eight hundred and fifty seven (17,857) shares of the capital stock owned by the said Simpson estate.

Now, therefore, in consideration of two thousand dollars paid to the parties of the first part by the said Meredith, the parties of the first part agree with the said Meredith, his executors, administrators and assigns as follows:

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First. The said parties of the first part agree to sell, transfer and deliver to the said Meredith seventeen thousand eight hundred and fifty seven (17,857) shares of the capital stock of the said Old Dominion Copper Company at and for the price of seven hundred and fourteen thousand two hundred and eighty five dollars ($714,285) and an additional sum not exceeding two hundred and fifty thousand dollars ($250,000), such additional sum to be equal to the value of five sevenths of the pig or ingot copper and of the cash and notes receivable and amounts due which shall constitute part of its assets when the first payment on account of said sale shall have been made as hereinafter provided and which are hereinafter called surplus earnings.

Second. Payments for said stock are to be made as follows: One hundred thousand dollars ($100,000) on the deposit of the said capital stock endorsed in blank with the Old Colony Trust Company in Boston on or before the twenty eighth day of May eighteen hundred and ninety five, said stock to be held by said trust company in trust to secure to the said parties of the first part the balance of the said payments. The balance of said seven hundred and fourteen thousand two hundred and eighty five dollars ($714,285), namely, six hundred and fourteen thousand two hundred and eighty

five dollars ($614,285) shall be evidenced by three notes made by the said Meredith or his assigns, of equal amount each, namely, for two hundred and four thousand seven hundred and sixty one dollars and sixty six cents ($204,761.66), bearing interest at the rate of five per cent per annum and payable respectively in sixty, ninety and one hundred and twenty days from the date of the deposit of said stock, said stock to be held as security for the payment of said notes and the said notes also have an endorsement satisfactory
74 to the said parties of the first part.

Third. It is understand and agreed that the payment of any or all of said notes may be anticipated by the said Meredith with interest down to the date of payment, and the stock shall be delivered to the said Meredith when all of the said notes are paid, and the said parties of the first part will try in all practicable ways to cause such steps to be taken that whenever the first of said notes shall have been paid, the majority of the board of directors of said Old Dominion Copper Company shall be persons satisfactory to said Meredith or his assigns, and that the president or other officers of said company and the superintendent of said mine shall be persons satisfactory to the said Meredith or his assigns.

Fourth. It is further agreed that the value of the five sevenths of said surplus earnings shall be determined as follows: As soon as practicable and prior to the fourteenth day of May eighteen hundred and ninety five the parties of the first part will give to the said Meredith a written memorandum showing in detail said surplus assets, and if the said Meredith purchases the said seventeen thousand eight hundred and fifty seven (17,857) shares of the capital stock, such of the said surplus assets as remain shall either be retained by the company and five sevenths of the value thereof be paid by said Meredith to the parties of the first part or shall be divided in kind pro rata to the said parties of the first part and to the holders of the remainder of the capital stock of said company.

Fifth. The said parties of the first part guarantee and agree that the said mining company and its property is or will be at the time of said [sic.] of said stock free from all debts, claims, liens or mort-
gages, and that there are no outstanding contracts between it
75 and any other person or corporation except as stated in the list thereof to be furnished to the said Meredith on or before the fourteenth day of May eighteen hundred and ninety five.

Sixth. It is also agreed that at the time of depositing said seventeen thousand eight hundred and fifty seven (17,857) shares of stock as above provided and paying said one hundred thousand dollars ($100,000) said Meredith shall give a good and satisfactory guarantee to the said parties of the first part that at any time within sixty days thereafter on ten days' notice and tender he will take and pay for at the same pro rata price and on the same general terms and conditions as hereinbefore provided any part or all of the remainder of the capital stock of said company.

Seventh. Said parties of the first part give to said Meredith the option until and during the twenty eighth day of May eighteen hundred and ninety five to purchase said shares of stock on the terms

herein set forth and agree that meanwhile and until that time said Meredith shall have every facility by himself or by his assigns to examine the property of said company and its title thereto.

Eighth. It is understood and agreed that the two thousand dollars ($2000) paid on the signing of this agreement shall form part of the first one hundred thousand dollars ($100,000) to be paid thereunder.

Ninth. It is understood and agreed that the foregoing agreement binds the estate of Michael H. Simpson and is for the benefit of the executors, administrators and assigns of the said Meredith.

In Witness Whereof the parties hereto have set their hands and seals — day of —— eighteen hundred and ninety five.

76 I, Lucius W. Smith of Boston, Massachusetts, one of the executors of Michael H. Simpson, for value received do hereby approve, ratify and make the agreement hereinbefore made by Frank E. Simpson and William Butler for themselves and other executors of Michael H. Simpson with J. Morris Meredith.

(NOTE.—The following is written in ink on the margin of the first page of this agreement.)

"Received from Leonard Lewisohn, assignee of J. Morris Meredith, one hundred thousand dollars, being the payment due this date under the within agreement on the deposit with the Old Colony Trust Co. of 17,857 shares of the capital stock of the Old Dominion Copper Company.

(Signed) WILLIAM BUTLER,
For Self and Co-executor of Thos. C. Simpson's Estate of M. H. Simpson.

Boston, May 28, 1895."

B.

William Keyser of Baltimore and associates are the owners of seven thousand one hundred and forty three shares of twenty dollars each of the Old Dominion Copper Company of Baltimore City. Leonard Lewisohn and associates have already bought seventeen thousand eight hundred and fifty seven shares of the capital stock of the said company from the estate of Michael H. Simpson, and Lewisohn and associates are desirous of buying the other seven thousand one hundred and forty three shares and Keyser and associates and Lewisohn and associates have agreed together as follows:

Keyser and associates agree to sell their shares of stock for

77 two hundred and eighty five thousand seven hundred and fifteen dollars, forty thousand dollars of which shall be payable on Thursday the twentieth day of June, and the balance of the payments shall be made by three promissory notes, each for eighty one thousand nine hundred and five dollars bearing interest at five per cent from the twenty eighth day of May eighteen hundred and ninety five, and running respectively sixty, ninety and one hundred and twenty days from that date. The payments of any or all of these notes may be anticipated, and on the payment of the

first note Keyser and associates agree to do everything practicable to turn over to Lewisohn and associates the board of directors and the absolute management of the company.

The stock is to be deposited with the Old Colony Trust Company in Boston as security for the parties here and for the payment of the notes, the general understanding being that this sale is made in pursuance of and in general accordance with the agreement made between Frank E. Simpson and others representing the estate of Michael H. Simpson and J. Morris Meredith for himself, dated the first day of May eighteen hundred and ninety five, Lewisohn and associates having become the assignees of the rights of said Meredith under said contract.

It is further understood that so far as this particular sale is concerned of the seven thousand one hundred and forty three shares Lewisohn and associates are to protect Keyser and associates from any claim for commissions by J. Morris Meredith, the understanding being that Keyser and associates are to receive their agreed price net.

There are certain mines in Arizona near the property of the Old Dominion Copper Company which are known as the Old Dominion mine, the Keystone mine and the Chicago and New York
78 mine. Those mining properties now stand in the name of William Keyser, but he states that he is only interested to the extent of one-half thereof, and that Michael H. Simpson's estate is the owner of the other half thereof, and Mr. Keyser agrees that in consideration of the purchase of the stock hereinbefore arranged for, he will transfer, deliver and assign to Leonard Lewisohn or to his order all his interest in the said mines without any additional consideration than the purchase of the stock herein provided for.

Keyser and associates agree to guarantee to Lewisohn and associates that they will hold them and the Old Dominion Copper Company harmless from all debts, claims, liens or mortgages or outstanding contracts existing between it and any other person or corporation as of May twenty-eight. It is understood that in this matter William Keyser represents himself and all associates, and that payments may be made to him and the note made payable to his order.

Baltimore, June 13th, 1895.

WILLIAM KEYSER.

Witness:
N. S. WHEAT.

Received June 20th, 1895, of Leonard Lewisohn & associates one hundred & twenty two thousand one hundred & 66/100 dollars and two notes of eighty one thousand nine hundred and five dollars each in accordance with the foregoing agreement, said money and notes having been paid to the Old Colony Trust Co., Boston, for my account.

WM. KEYSER.
P. P. R. BRENT KEYSER.

C.

Whereas A. S. Bigelow has contracted to purchase eighty-nine hundred and twenty-eight (8928) shares of the stock of the
79 Old Dominion Copper Company, a Corporation organized under the laws of Maryland, and owning property in Arizona, at Forty dollars ($40) per share, or thereabouts, the undersigned hereby agree to take the number of shares set opposite their respective names and pay for the same at the rate of Forty dollars ($40) per share; the said stock to remain in the hands of A. S. Bigelow, and the management of the property to be left with him.

Payments to be made as follows:

May 27th, 1895, fourteen per cent (14%).

July 26th, 1895, Twenty-eight and two-thirds per cent (28 2/3%) and interest at 5% from date of first payment.

August 25th, 1895, Twenty-eight and two thirds per cent (28 2/3%) and interest at 5% from date of first payment.

September 24, 1895, Twenty-eight and two-thirds per cent (28 2/3%) and interest at 5% from date of first payment.

The conditions, covenants and agreements herein contained shall be binding on the substitutes, successors, heirs, representatives and assigns of the respective subscribers hereto.

In witness whereof we have hereunto set our hands and opposite thereto the amounts of our subscriptions respectively, this 22d day of May, A. D. 1895.

MATTHEW LUCE,	$100,000
A. S. BIGELOW,	$50,000
J. A. CORAM,	$100,000
HENRY M. WHITNEY,	$50,000
J. MORRIS MEREDITH,	$25,000
	(in pencil)
THOMAS NELSON,	$32,142.50
(in pencil)	$357,142.50

80 D.

We the undersigned propose to form a syndicate to be called the Old Dominion Syndicate.

And we hereby agree to pay to A. S. Bigelow the sums set against our respective names.

Subscriptions to this syndicate shall be payable as follows:

May 27, 1895, fourteen per cent (14 per cent).

July 26, 1895, twenty-eight and two-thirds per cent (28 2/3 per cent) and interest at five per cent from date of first payment.

August 25, 1895, twenty-eight and two-thirds per cent (28 2/3 per cent) and interest at five per cent from date of first payment.

Sept. 24, 1895, twenty-eight and two-thirds per cent (28 2/3 per cent) and interest at five per cent from date of first payment.

It is expressly agreed and understood that each subscriber hereto acts for himself alone and that the relation of partners shall not exist or be deemed to exist between the subscribers hereto by virtue hereof.

The conditions, covenants and agreements herein contained shall be binding on the substitutes, successors, heirs, representatives and assigns of the respective subscribers hereto.

In witness whereof we have hereunto set our hands and opposite thereto the amounts of our subscriptions respectively this twenty-first day of May, A. D. 1895.

CHARLES J. HODGE.	Ten thousand dollars,	$10,000.
D. L. DEMMON.	Ten thousand dollars,	10,000.
HENRY T. COE.	Six thousand dollars.	6,000.
By S. B. CAPEN.		
C. H. PALMER,	Ten thousand dollars,	10,000.
81		
JAMES S. CUMSTON AND WILLIAM CUMSTON.	Ten thousand dollars,	10,000.
By S. W. RICHARDSON.		
STEPHEN M. CROSBY.	Ten thousand dollars,	10,000.
SAMUEL N. BROWN.	Ten thousand dollars,	10,000.
GEORGE H. BALL.	Ten thousand dollars,	10,000.
H. H. STEVENS,	Five thousand dollars,	5,000.
A. S. MALTMAN.	Ten thousand dollars,	10,000.
By J. A. CORAM, *Atty.*		
		$91,000
J. A. CORAM,	Nine thousand dollars,	9,000
		$100,000

MEMO.—See other paper.

E.

Minutes of a Meeting of the Directors, Duly Called, Held at the Office of Lewisohn Brothers, at 81 Fulton Street, in the City of New York, on the Eleventh Day of July, 1895, at 12 O'clock Noon.

* * * * * * *

"Mr. Evarts presented and read a proposition from 'The Old Dominion Copper Company of Baltimore City' as follows:

To the Old Dominion Copper Mining and Smelting Company, a corporation organized and existing under the laws of the State of New Jersey.

The Old Dominion Copper Company of Baltimore City, a corporation organized and existing under the laws of the State of Maryland being the owner of certain mines and mining properties at Globe in the Territory of Arizona described in the annexed Schedule and of machinery, lumber, wood, tools, implements and other per-

sonal property for use for and in connection with the operation and maintenance thereof hereby makes the following proposition: To convey, assign and transfer all its property, both real and personal of every kind and nature whatsoever and wheresoever situated by good and sufficient deeds and instruments properly executed so as to confer absolute title thereto to the Old Dominion Copper Mining and Smelting Company upon receiving from said Company one hundred thousand shares of its capital stock to be issued to said Old Dominion Copper Company or to its nominees.

It being understood that the Old Dominion Copper Mining and Smelting Company shall assume all obligations of the Old Dominion Copper Company of Baltimore City incurred since the first day of June 1895, and shall be entitled to all earnings and profits of said Company since that date.

July eleventh 1895.

A. S. BIGELOW,
President.

A. W. EVARTS,
Secretary."

82 F.

* * * * * * *

"Whereupon Mr. Lewisohn moved and Mr. Evarts seconded the adoption of the following resolutions:—

"Whereas The Old Dominion Copper Company of Baltimore City has made and submitted a proposition to convey all of its property to this Company which has just been presented and read; and

Whereas it is reported and appears that such property is reasonably and fairly worth the par value of the stock proposed to be paid and issued and received therefor,

Resolved: that said proposition be and the same is hereby accepted and that this Company do purchase and acquire all said property upon the terms contained in said proposition and in payment therefor issue one hundred thousand shares of its capital stock to said The Old Dominion Copper Company of Baltimore City or to its nominees, all such stock to be full paid and not subject to assessment: and

Resolved that Messrs. Bigelow and Nelson be appointed a committee to supervise and carry out the details of such purchase and issue of stock, which were thereupon duly adopted."

G.

"Mr. Lewisohn presented and read a written proposition as follows:

"To the Old Dominion Copper Mining and Smelting Company:

I hereby offer to convey the following described property now owned and held by me upon receiving thirty thousand shares of the capital stock of the Old Dominion Copper Mining and Smelting Company to be issued to me or to my nominees:

1st. The Old Dominion Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1883 in the United States Land Office at Tucson, Arizona, Entry No. 267, Lot No. 45, situated in Globe Mining District, Gila County, Arizona.

2nd. The New York Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1883, in the United States Land Office at Tucson, Arizona, Entry No. 268, Lot No. 46 in Globe Mining District, in Gila County, Arizona.

3rd. The Chicago Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1883, in the United States Land Office at Tucson, Arizona, Entry No. 269, Lot No. 51 in Globe Mining District, Gila County, Arizona.

4th. The Keystone Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1883, in the United States Land Office at Tucson, Arizona, Entry No. 384, Lot No. 54 in Globe Mining District, Gila County, Arizona.

5th. A lot or parcel of land situated near the Bloody Tanks and deeded by E. A. Saxe to the Old Dominion Copper Mining Company. Deed recorded in Book 1 of Deeds to Real Estate at page 126 & 127 in the office of the Recorder of Gila County, Arizona, and reference is hereby made to said record for a fuller description of said parcel of land.

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New York, July 11th, 1895.

LEONARD LEWISOHN.

Please issue said 30,000 shares of stock to Mr. A. S. Bigelow & myself.

LEONARD LEWISOHN."

II.

"Whereupon Mr. Evarts moved and Mr. Buffum seconded the adoption of the following resolutions:

"Whereas Mr. Leonard Lewisohn of the City of New York has made and submitted a proposition to convey certain mining properties in Arizona to this Company which has just been presented and read: and

Whereas it is reported and appears that such properties are reasonably and fairly worth the par value of the stock proposed to be paid and issued and received therefor:

Resolved that said proposition be and the same is hereby accepted and that this Company do purchase and acquire said properties upon the terms contained in said proposition and in payment therefor issue thirty thousand shares of its capital stock to said Leonard Lewisohn or to his nominees all such stock to be full paid and not subject to assessment: and

Resolved that Messrs. Bigelow and Nelson be appointed a Committee to supervise and carry out the details of such purchase and issue of stock, which were thereupon duly adopted."

And on the tenth day of said December, the following Final Decree was entered by the Court to wit:

Final Decree.

This cause came on to be further heard this tenth day of December, 1907, for the entry of a final decree, and was argued by counsel for both parties, and was considered by the Court, and upon consideration thereof it was and hereby is

Ordered, adjudged and decreed that the complainant the Old Dominion Copper Mining and Smelting Company recover of the respondent Albert S. Bigelow the sum of seven hundred thousand dollars ($700,000) and interest thereon from September 18, 1895, amounting to five hundred and thirteen thousand five hundred and sixty-six and 67/100 dollars ($513,566.67),—being the total
84 sum of one million two hundred and thirteen thousand five hundred and sixty-six and 67/100 dollars ($1,213,566.67), and costs taxed by the clerk at twenty six dollars and sixty six cents ($26.66); and that execution issue for said total sum and costs in common form in favor of said Old Dominion Copper Mining and Smelting Company against said Albert S. Bigelow.

By the Court:

WALTER F. FREDERICK,
Ass't Clerk.

December 10, 1907.

And on the twenty fourth day of said December, the plaintiff appealed from the Final Decree, the claim of appeal being in the words following, to wit:

Claim of Appeal.

Now the complainant appeals to the Full Court from the final decree entered in this case on December 10, 1907, by reason of the fact that the amount of said final decree should have been larger.

By Its Attorneys, BRANDEIS, DUNBAR & NUTTER.

And on the sixth day of January, A. D. 1908, the defendant appealed from the Final Decree, the claim of appeal being in the words following, to wit:

Respondent's Claim of Appeal.

And now comes the respondent in the above entitled cause and appeals to the full Court from the final Decree entered therein
85 on December 10th, 1907.

ALBERT S. BIGELOW,
By His Solicitors, ALFRED HEMENWAY,
J. W. FARLEY.

And on the sixth day of August, A. D. 1908, the plaintiff filed his petition for injunction and attachment for contempt, the same being in the words following, to wit:

Petition for Injunction and Attachment for Contempt.

The complainant in the above entitled cases says as follows:

1. These cases were upon the printed list of cases for argument before the Full Bench of this court at its sitting beginning on January 6, 1908, and said cases were ready for argument at said sitting.

2. On January 6, 1908, the respondent, by his attorney, Alfred Hemenway, moved for a postponement of the cases in terms as follows:

"I have asked for a postponement of this case until March, so that the other cases the defendant appeals may be argued at the same time."

3. The court thereupon made this order, namely:

"The court is unanimously of the opinion that the case should be continued and assigned for the first case at the March sitting."

4. On February 26, 1908, six days prior to the beginning of said sitting, the respondent filed in the Court of Chancery of New Jersey a bill of complaint, a copy whereof is hereunto annexed
86 Exhibit 1, and made a part hereof. The record referred to in said bill of complaint as "Exhibit C" is a facsimile of the record of these cases in this Supreme Judicial Court, pages 1-78, both inclusive.

5. At this time the only office of the complainant corporation in New Jersey was in the city of Jersey City, which is the most accessible place in the state of New Jersey to persons going there from the state of Massachusetts. The solicitors of said Bigelow in said bill of complaint was John Griffin, Esquire, who is a resident of said City of Jersey City, and has his only office for the practice of law in said city.

6. Said Court of Chancery of New Jersey is presided over by the Chancellor of the State of New Jersey, and he has as his advisers seven Vice Chancellors. The respondent Bigelow presented his bill of complaint to the Vice Chancellor sitting—with one exception—more remotely than any other from said Jersey City, namely, in the city of Trenton.

7. Said Vice Chancellor directed the issuance of a restraining order and order of notice, a copy whereof is hereunto annexed marked Exhibit 2.

8. Notwithstanding the fact that said order of notice was issued on said day, and that the complainant corporation had an office in said Jersey City, no notice of the intention to file said bill or to apply for said order, or of the fact that said order had been granted, was served upon said corporation or anyone connected therewith until February 28, 1908, three working days prior to the time at which this case was assigned for argument before this Supreme Judicial Court.

9. The time when said notice was served did not permit of an adequate hearing before said Court of Chancery of New
87 Jersey, nor, except by the exertion of unusual effort, of an appearance before said court before the time set for the argument of these cases in this Supreme Judicial Court.

10. All the facts alleged as a basis for relief from said Court of Chancery of New Jersey had for a long time been well known to the

respondent Bigelow. The suits of the complainant corporation against the Executors of the Estate of Leonard Lewisohn—which suits are referred to in said bill of complaint—were begun in the year 1903, and the fact that they were then begun was then well known to the respondent Bigelow. The decision of the Circuit Court of the United States for the Southern District of New York sustaining the demurrer of said executors was rendered February 24, 1905, was known to the respondent Bigelow on or about said date, and was referred to in the opinion of this Supreme Judicial Court filed June 19, 1905. The decision of the Circuit Court of Appeals in the suit against said executors was rendered on December 4, 1906, and was known to the respondent Bigelow on or about said date. There has been no change in the laws of the state of New Jersey favorable to the respondent Bigelow, and no announcements by the courts of said state concerning the laws thereof favorable to said Bigelow since the institution of these present suits in this Supreme Judicial Court.

11. The law of the state of New Jersey is no more favorable to the respondent Bigelow upon the facts appearing in these cases before this Supreme Judicial Court than the laws of this Commonwealth of Massachusetts.

12. When these suits were called for argument on March 3, 1908, before this Supreme Judicial Court, the complainant corporation was ready, able and willing to argue said cases, and had filed its briefs, but deemed it impossible to argue said cases with due
88 respect to the restraining order issued by said Court of Chancery of New Jersey.

13. On or about March 24, 1908, the respondent Bigelow caused to be introduced into the legislature of the state of New Jersey a bill, a copy whereof is hereunto annexed and marked Exhibit 3, and made a part hereof; and thereafter the respondent, by his attorneys, was actively engaged in seeking to obtain the passage of said bill; and no persons except the respondent and his attorneys and persons whom they interested in said bill sought the passage thereof; but said legislature refused to pass said bill and has adjourned for the year.

14. Said bill, so far as by its terms it purported to affect the rights of a corporation against an individual standing in the position occupied by the complainant corporation and the respondent Bigelow, would be contrary to the provisions of the Constitution of the United States,—which fact was well known to said Bigelow and the attorneys acting for him.

15. Said bill of complaint did not present to the Court of Chancery of New Jersey any question open to legitimate argument under the laws of said state, but on the contrary it is the law of said state, well established by decisions rendered therein, that where a suit is pending before a court having jurisdiction of the parties and of the subject matter of the nature of these suits before this Supreme Judicial Court, the courts of the state of New Jersey will not interfere by injunction against the parties with the prosecution of such suits before the courts already having jurisdiction of

them. These announcements appear in numerous reported cases in said state, and among other in these cases, namely:

89 Home Ins. Co. v. Howell, 24 N. J. Eq. 238.
N. J. Zinc Co. v. Franklin Iron Co., 29 N. J. Eq. 422.
Title Guaranty & Trust Co. v. Trenton Potteries Co., 56 N. J. Eq. 441.
Shaw v. Frye, 69 N. J. Eq. 321.
Minchin v. Second Nat. Bank, 36 N. J. Eq. 436.

And the complainant corporation makes said decisions a part of this petition, and prays leave to refer thereto.

16. In accordance with the law of the state of New Jersey, the court first acquiring jurisdiction—as this Supreme Judicial Court has acquired jurisdiction—has the right to enjoin, and should enjoin, any interference with the prosecution of a suit before it, although said interference is in the form of a proceeding subsequently begun before another court.

17. The grounds assigned by said Bigelow for relief in the said bill of complaint in the Court of Chancery in New Jersey are not, according to the law of the state of New Jersey, grounds for relief therein, and said Court of Chancery of New Jersey has no greater power or jurisdiction than that of this Supreme Judicial Court to consider said various grounds for relief and to give to said grounds such weight as, in accordance with the principles of law and equity, should be given to them.

18. The complainant corporation promptly applied to the Chancellor of said Court of Chancery of New Jersey to dismiss said bill of complaint, and said motion and arguments thereon by the counsel for complainant and counsel for defendant were heard by said Chancellor on April 6, 1908.

19. According to the practice in the Court of Chancery of the State of New Jersey, said motion to dismiss is equivalent to a demurrer filed to a bill in equity in this Commonwealth of Massachusetts.

90 20. On August 4th, 1908, said Chancellor entered an order dismissing said bill of complaint.

21. Said order has the same effect under the practice of said court as a final decree dismissing a bill of complaint in the Commonwealth of Massachusetts after hearing upon demurrer, and also has the effect of dissolving any restraining order or preliminary injunction issued in said suit.

22. Under the law and practice of the state of New Jersey, the respondent Bigelow has the right to appeal from said order dismissing said bill of complaint, and will appeal from said order unless restrained therefrom by this Supreme Judicial Court.

23. An appeal from said order takes the case to the Court of Errors and Appeals of the State of New Jersey, which is the court of last resort of said state.

24. There is grave danger that the respondent will, unless restrained by this court, not only prosecute said appeal, but will also seek to obtain other restraining orders and injunctions, and bring

other suits and proceedings, and seek other legislation,—all solely for the purpose of harassing the complainant corporation and preventing it from obtaining a final decision and decree in this Supreme Judicial Court in these pending cases.

25. None of the proceedings undertaken by the respondent Bigelow as aforesaid have presented any question for legitimate argument before a court; none of them have been brought for said purpose; on the contrary, they have been brought solely for the purpose of hampering the complainant corporation and preventing it from presenting these cases to this Supreme Judicial Court and obtaining the decision of this court thereon and final decrees therein; and the delay in bringing said suit and in notifying
91 the complainant corporation thereof and of the restraining order therein until within three working days prior to the time set for the argument of these cases in this Supreme Judicial Court, was solely for the purpose of permitting so short a time to elapse after said proceedings had been begun that it would be impossible to get these cases before this Supreme Judicial Court for hearing at its March sitting in 1908.

26. The conduct of the respondent in the respects aforesaid was in contempt of the power, dignity and authority of this Supreme Judicial Court.

27. Unless these cases are heard by this Supreme Judicial Court before its regular sitting in November, 1908, the purpose of the respondent to delay these cases until said sitting will have been accomplished.

28. The complainant corporation is without any security for the satisfaction of any final decrees that may be entered in these cases except an attachment bond in the sum of $500,000.

29. The complainant corporation makes the allegations contained in the 1st, 2nd, 3rd, 4th, 7th, 8th, 9th, 12th, 18th, 20th, 27th and 28th paragraphs of its own knowledge, and those contained in the 5th, 6th, 10th, 11th, 13th, 14th, 15th, 16th, 17th, 19th, 21st, 22nd, 23rd, 24th, 25th and 26th paragraphs as it has made careful investigation thereof, been credibly informed, and verily believes that they are true.

Wherefore the complainant corporation prays as follows:

First. That the respondent Albert S. Bigelow, his servants, agents, attorneys and representatives, be forthwith enjoined from instituting any suits or prosecuting any suits, taking any appeals therein, prosecuting any appeals, or taking any other action, or attempting
92 to take any other action not in the Supreme Judicial Court of Massachusetts tending to prevent the plaintiff corporation from arguing the cases pending in said court, or to prevent the obtaining of final decrees therein, and the orderly and regular use of process thereon to secure satisfaction of said decrees, or in any manner tending to delay or impede the arguing of said cases in said court, the obtaining of final decrees therein, and the obtaining of satisfaction of said decrees.

Second. That said injunction be made permanent.

Third. That said Albert S. Bigelow be attached and held to answer

for contempt of this court by reason of the proceedings set forth in this petition.

Fourth. That these cases be heard by this court forthwith.

OLD DOMINION COPPER MINING AND SMELTING COMPANY,
By Its Solicitors, BRANDEIS, DUNBAR & NUTTER.

BRANDEIS, DUNBAR & NUTTER,
Solicitors for Old Dominion Copper Mining & Smelting Company.

COMMONWEALTH OF MASSACHUSETTS,
County of Hampden, ss:

AUGUST FIFTH, 1908.

I Edward F. McClennen being duly sworn depose and say that I am one of the solicitors for the complainant in this case, that I have read the foregoing petition and am familiar with the contents thereof and that as therein set forth the allegations thereof are true of my own knowledge except as to those matters alleged on information and belief and as to them I believe them to be true and this affidavit is not made by an officer of the complainant company, solely because the knowledge of all of said officers concerning said matters has come from reports, coming
93 through me or my firm, of the facts aforesaid and because it has been impossible, since the dismissal of said bill of complaint in New Jersey to obtain the presence of such officer.

EDWARD F. McCLENNEN

Subscribed and sworn to before me

LOUIS D. BRANDEIS,
Justice of the Peace.

EXHIBIT 1.

In Chancery of New Jersey.

To his Honor Mahlon Pitney, Chancellor of the State of New Jersey:

Humbly complaining, showeth unto your Honor your orator Albert S. Bigelow of Cohasset, in the Commonwealth of Massachusetts:

(1) That prior to March, 1895, the Executors of the Will of Michael H. Simpson owned 17857 shares of the capital stock of the Old Dominion Copper Company of Baltimore City, a corporation of the State of Maryland (hereinafter called the Baltimore Company), and one William Keyser of Baltimore owned 7143 shares of the capital stock, making in all the sum of 25,000 shares, being the entire capital stock of said Baltimore Company, which shares were of the par value of $20 each, and the aggregate capitalization amounted to $500,000. That one Leonard Lewisohn of the City, County and State of New York, who had a great familiarity and experience with

mining properties, and was an expert in their management and operation began to acquire the capital stock of said Baltimore
94 Company. That one J. Morris Meredith of Boston entered into negotiations with the Executors of the Will of said Simpson, to procure a contract to purchase the stock held by them, the final executed copy of said contract being prepared by and the legal work in connection therewith being done under the advice and direction of C. C. Beaman of the firm of Evarts, Choate & Beaman, which resulted finally in said Meredith procuring a contract to purchase the said shares from said Executors at $40 a share, amounting in the whole to $714,285, payable $100,000 in cash and the balance in notes at thirty, sixty and ninety days, bearing interest at the rate of 5% per annum, the shares of stock to be delivered, endorsed in blank, to the Old Colony Trust Company, in trust to hold as collateral security for the payment of the notes, and upon their payment to deliver the stock to said Meredith or his assigns; that there was paid by said Meredith, on account of his contract, the sum of $2,000, which sum was repaid to him by said Lewisohn, as so used for that purpose. That thereafter said Meredith assigned said contract to said Leonard Lewisohn. That on or before May 15th, 1895, said Lewisohn agreed that your orator was to receive one-half of his interest under said contract, and complainant paid to him $1,000, being one-half the sum paid by Meredith on the contract to purchase.

That on or about May 28th, 1895, your orator and said Lewisohn completed said contract and paid said executors $100,000, which they furnished in equal shares from their own moneys, and delivered notes, made by said Lewisohn and endorsed by your orator, for the sum of $614,285, payable in 30, 60 and 90 days, with interest at 5% per annum, and said stock, endorsed in blank, was delivered by said executors to the Old Colony Trust Company, to be held by it upon the trust aforesaid.

That on or about June 13, 1895, the owners of the remain-
95 ing two-sevenths of the stock of said Baltimore Company agreed to sell their shares of said capital stock namely 7143 shares, to said Lewisohn at $40 per share, or $285,715 in all, $40,000 in cash, payable June 20, 1895, and the balance in notes then to be delivered upon the same general conditions set out in the aforesaid contract between Meredith and the executors of Simpson's Will. That of this latter stock so agreed to be purchased your orator, by agreement with the said Lewisohn, was to receive two-thirds and the said Lewisohn to retain one-third thereof.

And your orator further shows that while the title to the mines, mining claims and lands, known as the Old Dominion Mines, the New York Mine, the Chicago Mine, the Keystone Mine, and a certain parcel of land, near the Bloody Tanks so-called, in Arizona, stood in the name of William Keyser, said Keyser held the same in trust for the sole benefit of the Baltimore Company; that these facts were not known to said Lewisohn or your orator at the time of the negotiations with the executors of Simpson, but the facts were learned during the negotiations for the purchase of the Keyser

stock, and thereupon the said Lewisohn and your orator insisted that the said mines, mining claims and land so held should follow the ownership of the stock, which was agreed to by said Keyser and the executors of the Simpson Will and the Baltimore Company, and that the said Keyser should convey said mines, mining claims and lands to said Lewisohn upon payment of the notes given on account of the purchase price of the stock; that it was agreed between the said Lewisohn and your orator that when so conveyed to said Lewisohn he should hold the title to said mines, mining claims and land as property acquired under the contracts for the purchase of the stock.

96 (2) And your orator further shows unto your Honor that on or about the 20th day of June, 1895, the cash above provided to be paid to the said executors and the said Keyser having been paid, and the first notes of the said Lewisohn, endorsed by your orator, to the said executors and Keyser having been paid a meeting of the Baltimore Company was held, in which the control of said company was transferred to Lewisohn and your orator, and a new board of directors was chosen, consisting of Lewisohn, William Keyser, R. Brendt Keyser, George A. Polk, and your orator; that your orator was chosen president, and Allen W. Evarts, a member of the law firm of Evarts, Choate & Beaman of New York City, secretary.

(3) And your orator further shows unto your Honor that he is thoroughly familiar with mining properties and investment and the management and operation thereof and is and has for many years been the President and Manager of various large mining properties which have been successfully and profitably operated; and both he and the said Lewisohn had a thorough investigation made of these mining properties, to ascertain their value, prior to the purchase; that this investigation was made by Messrs. Hyams and Colquhoun, experts in such matters, who reported that the minimum earnings of said properties should not be less than $350,000 annually, a copy of such report being hereto annexed and marked "A." That said mining properties had been worked by the Baltimore Company at a large profit for many years and justified the report of said experts, and your orator and Lewisohn continued the operations of the mines under and through the Baltimore Company until the defendant herein was formed as a corporation of the State of New Jersey and the said mines and property were conveyed to it and it undertook the operation thereof.

97 That the subsequent notes were paid to said executors and Keyser before maturity and before the formation of the defendant company and in addition to the purchase price paid for the shares of stock your orator and said Lewisohn expended a large amount of valuable time and rendered very valuable service in regard to said transactions.

(4) And your orator further shows that at the time of the making of the contracts for the purchase of said stock and the taking over of the control of the Baltimore Company, your orator and said Lewisohn had no definite plans with respect to the disposition of the stock of said Baltimore Company or the property thereof, and it was

not until about July 1, 1895, or some time thereafter, that the formation of a new corporation was determined upon. That thereafter your orator and said Lewisohn consulted Messrs. Evarts, Choate and Beaman, eminent counsel of the city of New York, and fully advised them of the facts above stated and were advised by them throughout as to the legality of the subsequent acts of your orator and Lewisohn and all such acts were done under the advice of said counsel and with their approval as to the legality thereof, said counsel advising the formation of a New Jersey corporation; that your orator and said Lewisohn informed counsel that they would convey or cause to be conveyed to such new corporation all the property of said Baltimore Company, the said mines, mining claims and lands which said Keyser had agreed to convey to said Lewisohn, and furnish $500,000 for working capital, in return for all the capital stock of the corporation, which should be capitalized at $3,750,000, divided into 150,000 shares of the par value of $25 each; and the details of the organization and the carrying out of said plan was left to counsel.

(5) And your orator further shows unto your Honor that on or about July 8, 1895, the Old Dominion Copper Mining and
98 Smelting Company was organized under the laws of the State of New Jersey, with an authorized capital stock of $3,750,000, divided into 150,000 shares of the par value of $25 each, and the amount said company was to begin business with was $1000, divided into 40 shares of the par value of $25 each; a copy of the certificate of incorporation of which company is hereto annexed as part thereof. That said corporation held its first meeting on or about the 9th day of July, 1895, at which all the incorporators were present, and by-laws were adopted, and the first directors duly elected, viz.—Jesse Lewisohn, Allen W. Evarts, Edgar Buffum, Charles W. Welch, Sydney Riddlesdorffer, William V. Rowe, and William R. Montgomery. That the following officers were elected by said directors: Allen W. Evarts, president; Sydney Riddlesdorffer, vice-president; Jesse Lewisohn, treasurer, and Edgar Buffum, secretary.

(6) And your orator further shows unto your Honor that at a meeting of the directors of the defendant, held on July 11, 1895, Messrs. Montgomery, Rowe, Welch, Lewisohn and Riddlesdorffer resigned as directors, and as each one resigned another director was lawfully appointed in his stead, pursuant to the by-laws, with the result that the following persons then and there constituted the board of directors: Allen W. Evarts, Leonard Lewisohn, Henry M. Whitney, Joseph G. Ray, Thomas Nelson, Edgar Buffum and your orator.

(7) And your orator further shows that thereafter it was agreed between your orator and Lewisohn and the defendant company that your orator and Lewisohn should convey or cause to be conveyed to the defendant company, all the property of the Baltimore Company, including the mines, mining claims and land conveyed by said Keyser to said Lewisohn, and which then stood in the
99 name of said Lewisohn, and should furnish the defendant corporation with a working capital of $500,000 in cash, in consideration whereof the defendant corporation should issue to your

orator and said Lewisohn, or their nominees, and to the nominees of said Baltimore Company (of which your orator and said Lewisohn owned the entire capital stock) its entire capital sotck of 150,000 shares.

(8) And your orator further shows that the transactions which thereafter took place, though in form separate, were in fact all in pursuance of the said agreement; that in form the transactions were separable as to the property held by the Baltimore Company, the said mines and mining claims and lands held by Lewisohn and the capital to be furnished by the said Lewisohn and your orator; but really the contract for the purchase and sale of all of said property and for the furnishing of said capital was an entire contract for an entire price, viz., the capital stock of 150,000 shares of the defendant corporation. That an offer was made by the Baltimore Company, through its proper officers, to the defendant company, to sell and convey substantially all the property of the Baltimore Company to the defendant company (excepting cash assets) for 100,000 shares of the capital stock of the defendant corporation, to be issued to the Baltimore Company or its nominees; that there was then at the same meeting presented the offer of Lewisohn to sell the real estate acquired by him as aforesaid for 30,000 shares of the capital stock of the defendant company, to be issued to him, or his nominees, which offer was accompanied with a request that the stock be issued to said Lewisohn and your orator. That said offers were unanimously accepted by the defendant company, and thereafter the said Baltimore Company requested that said 100,000 shares of capital
100 stock of the defendant company be issued to Philip K. Dumaresq.

(9) And your orator further shows that thereafter the said properties were conveyed by the Baltimore Company to the defendant company, and that the said Lewisohn conveyed to the defendant company the properties conveyed to him by Keyser, and having performed the obligation to furnish $500,000 for working capital, the said defendant company issued 150,000 shares of its capital stock to the following persons: to your orator, said Lewisohn, Philip K. Dumaresq, as the nominee of the Baltimore Company (the total capital stock whereof was owned by your orator and said Lewisohn), Thomas Nelson, acting for your orator, a Syndicate formed by your orator and said Lewisohn for the purpose of furnishing said $500,000; that said stock was issued in the following manner: 100,000 shares to Dumaresq, nominally on account of the property standing in the name of the Baltimore Company; 30,000 shares to your orator and Lewisohn, nominally on account of the mines, mining claims and land conveyed by Lewisohn to the Company; and 20,000 shares to sa. Nelson, nominally on account of the working capital of $500,000 so furnished by your orator and said Lewisohn, which said sum of $500,000 was actually procured by your orator and said Lewisohn through the sale of stock to their friends.

(10) And your orator further shows that the persons, holders and owners of the entire authorized capital stock of the defendant company, procured and consented to the issue of said entire capital

stock as aforesaid as performance by the defendant company
101 of its part of the aforesaid agreement, and no person who was a stockholder at the time of the consummation of the transaction objected or dissented thereto, or therefrom, but on the contrary all and every one assented, ratified and approved formally and on the books of record of the New Jersey Company, such assent, ratification and approval being with full and complete knowledge of all the facts. That subsequent shareholders acquired their shares, not from the defendant company, but from the owners of said shares, viz., your orator and said Lewisohn; that none of said shares were offered to the public by prospectus, or otherwise, by or on behalf of the defendant corporation, but were disposed of to various persons by your orator and said Lewisohn, under contracts of sale which they took and received wholly on their own account as the owners of said shares.

(11) And your orator further shows that prior to the commencement of the suit in the Supreme Judicial Court of Massachusetts for the County of Suffolk, hereinafter stated, no claim was made by the Baltimore Company, the defendant company, or any of the stockholders of the defendant company that the property which was conveyed and turned over to the defendant company, in consideration of the issue of 130,000 shares of the capital stock of the defendant company, was not worth the par value of said stock in cash. And your orator charges and insists the truth to be that the property so turned over by your orator and the said Lewisohn and the Baltimore Company to the defendant company was and still is worth a much greater sum than $3,250,000, and has been worth more than said sum continuously since the date of said sale; that while there have been some fluctuations in the prices paid for stock sold, due to the conditions of the market, said stock sold, in Boston, in September 1907, at $100 per share, being four times its par value, and
102 in February 1907, for $106 per share, being more than four times its par value; and that your orator believes that said stock cannot be purchased at the present time at $100 a share.

(12) And your orator further shows unto your Honor that at the present time about 140,000 shares of the capital stock of the defendant company are owned by a corporation of the State of Maine, known as the Old Dominion Mining Company, as a holding corporation, which company has little other property of known value; that the par value of the stock of said Maine Company is $25 a share; that its issued and outstanding capital stock is $7,200,000, and its stock is selling in the market from $35 to $40 a share, which is accounted for by the fact that the stock of the defendant company has been, and still is, worth at least four times its par value.

(13) And your orator further shows to your Honor that the various transactions, matters and contracts touching and concerning the purchase of the property aforesaid and the issuance of the stock aforesaid, were duly ratified by the stockholders of the defendant company at meetings held on April 5, 1899, June 15, 1899, and April 3, 1901, at none of which times did your orator and said Lewisohn, or either of them, control the said defendant Company or the action of its stockholders.

And your orator further shows unto your Honor that the defendant company, treating the contracts of sale from the Baltimore company and the said Lewisohn to the defendant company and the issue of the 100,000 shares and the 30,000 shares, as afore-said, as separable and distinct contracts, filed two separate bills against your orator, in the Supreme Judicial Court of Suffolk County, in the Commonwealth of Massachusetts, in equity, the prayers of which bills are as follows:

103 (*a*) As to the 30,000 share transaction:

1. "That this honorable court will declare said sale of said parcels of real estate conveyed by said Leonard Lewisohn to the plaintiff, as hereinbefore set forth, rescinded, and will direct this plaintiff to execute such reconveyance thereof, if any, to such person as this honorable court shall think proper.

2. "That said defendant be required to return to the plaintiff the consideration paid by this plaintiff for said conveyance, to wit, thirty thousand (30,000) shares of its capital stock, or if, and so far as, said shares are no longer in his control, to account to the plaintiff therefor.

3. "In the alternative in case this honorable court shall deem that the plaintiff has not rescinded, and is not entitled to rescind, said sale of said parcels of real estate conveyed by said Lewisohn to the plaintiff as above set forth, that this honorable court will ascertain the amount of damages suffered by the plaintiff by reason of the sale of said parcels of real estate as above set forth, and will by its decree establish the right of the plaintiff to recover said amount, and order said defendant to pay said amount to this plaintiff.

4. "For such other relief as this honorable court shall seem meet.

(*b*) As to the 100,000 share transaction:

1. "That said defendant be required to account to the plaintiff for all shares of stock in the plaintiff corporation other than the thirty thousand (30,000) shares issued to him and said Lewisohn, ostensibly as consideration for the conveyance by said Lewisohn of said parcels of real estate, to wit, for all of said one hundred thousand (100,000) shares of stock orignally issued to said Philip K. Dumaresq as hereinbefore set forth, which were received by said defendant or by said Lewisohn, or by any other person or persons as profit in the transaction set forth in the foregoing bill of complaint in connection with the promotion of the organization of the plaintiff corporation.

2. "In the alternative that the damages suffered by the plaintiff corporation from the acts of the defendant above complained of, other than the sale to the plaintiff of said parcels of real estate conveyed to it by said Lewisohn, be ascertained, and that the defendant be ordered to pay to the plaintiff the amount so ascertained.

3. "For such other relief as to this honorable court shall seem meet."

Copies of which bills and answers and other documents forming the record (excluding the testimony) are hereto annexed as part thereof Marked "C".

And your orator further shows unto your Honor that he is advised by counsel that said bills were, in effect, filed to recover from

your orator, as one of the promoters of said defendant company, undisclosed profits made by them in the formation of said corporation and the turning over of said property to the defendant
104 company at a much greater sum than they paid for the same. That upon the filing of said bills your orator filed a demurrer in the 30,000 share suit, and answered in the 100,000 share suit; that said demurrer was argued before the full bench of the Supreme Judicial Court of the Commonwealth of Massachusetts, and in the opinion of said court (which will be found in 188 Mass. 315) the demurrer was overruled, and your orator then answered in said suit, and the causes proceeded to trial. That both said causes were heard together before his Honor Henry N. Sheldon, Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts sitting within and for the County of Suffolk; that said Justice decided said causes in favor of the defendant company and against your orator, in the 100,000 share suit for $832,160, principal and interest, with costs of suit, and in the 30,000 share suit gave judgment for $1,213,566.67, with costs of suit, making in all the sum of $2,045,726.67; that decrees were accordingly entered in said two suits, on the 10th day of December, 1907, and after the entry thereof both parties thereto appealed to the full bench of the Supreme Judicial Court of the Commonwealth of Massachusetts, and the argument of said appeals is set for hearing on March 3rd next, which appeals, by both parties, your orator is advised by Massachusetts counsel, vacated said decrees.

And your orator further shows that after the commencement of the suits against your orator, the defendant Company likewise began two suits in equity, in the Circuit Court of the United States for the Southern District of New York, against Frederick Lewisohn et al. executors of the last will and testament of said Leonard Lewisohn, who was then deceased; that the two bills filed against Lewisohn's executors were identical with the two bills filed against your orator and were predicated and founded upon the same identical
105 state of facts and transactions set out in the bills against your orator; to one of which bills, viz., the 30,000 share bill, the defendants demurred, and answered in the other, following the course of your orator in the Massachusetts suits; that the cause on demurrer was argued before his Honor Judge Lacombe, who filed an opinion (which may be found in 136 Fed Rep. 915) sustaining the demurrer and is as follows:

LACOMBE, *Circuit Judge:*

It was conceded by complainant upon the argument that the bill prayed no relief except rescission of a contract for the sale of certain mining rights and a parcel of real estate in Arizona. Irrespective of such concession, the court would be inclined so to construe the bill. Therefore the objection that it is multifarious cannot be sustained.

The demurrer asserts that the complainant has not by the bill stated such a case as entitled it to have such contract and sale rescinded. This sufficiently challenges the equity of the bill. The facts as

averred in the bill are as follows: The deceased, Leonard Lewisohn, and one Albert S. Bigelow were the promoters of the complainant company, and caused it to be organized under the laws of New Jersey on July 8, 1895, by seven persons selected and employed for said purpose, none of whom had any actual interest in the corporation, or acted in the formation thereof other than as the representative and agent of the promoters. Forty shares were nominally subscribed and paid for by these persons, but, as in fact, all of said subscriptions were made for the benefit and at the request of Bigelow and Lewisohn, and each subscription was paid for by them. The company having been organized, elections for officers and directors ensued, as a result of which, on July 11, 1895, Bigelow and Lewisohn both became directors, and Bigelow the president of the Company. Prior to July 11th they had become the owners of several mining claims and a parcel of real estate in Arizona, which were worth on that day, as the bill alleges, not more than $5,000. On that day, at a directors' meeting attended by themselves and two of their dummy directors, they sold and conveyed to the corporation the said mining claims and real estate for 30,000 shares of the capital stock of the par value of $25 a share. Thereafter, at times not specified, additional shares of capital stock (to the amount of 20,000) were from time to time offered and sold to the public at par, to obtain working capital. The bill also alleges a similar sale, for stock, on July 11th, of a mine owned by the promoters, at an excessive valuation, but no relief is prayed as to that transaction. The prayer of the bill is that the sale of the mining claims and real estate be rescinded, the property reconveyed, and the shares of stock returned or accounting had therefor, or, in the alternative of rescision, that the court will ascertain the amount of damages suffered by the complainant, and decree therefor.

[106] Whether the contract for the sale of the real estate was voidable, so as to give the corporation the right to rescind or to demand damages, must be determined under the conditions which existed when it was made. Ordinarily, when a director or promoter contracts to sell property to his corporation, the corporation not being independently represented, it may rescind the contract, upon the theory, of course, that the relation between the parties is fiduciary, and that the other stockholders and subscribers to the stock are to be protected against an abuse of trust. But where there are no other stockholders nor subscribers, there is no one who is deceived, no stockholder or subscriber who is defrauded, since all the profit put into one pocket by the "faithless" directors is taken out of their other pocket as the sole stockholders. This principle is abundantly established by decisions controlling here, so it will be unnecessary to cite numerous authorities from other courts. In Foster v. Seymour (C. C.) 23 Fed. 65, which was decided in this court (Wallace, J.) the facts were very similar, except that the sale was for scrip, the stock not having yet been issued. The court said:

"There was no fraud on the corporation. At the time the scrip was exchanged for the mining property, the trustees were all there

were of the corporation. There were no stockholders unless they were stockholders. What was done was done by the corporation: By the exchange the corporation got the mining property, and gave it back again to those from whom it got it, divided into 100,000 shares of the nominal value of $100 each."

And it held that whether or not a subsequent purchaser of stock could recover against those who had misled him, against the corporation or the trustees, "the corporation has no cause of action against the trustees." Subsequently the same question came before the Court of Appeals in this circuit (McCracken v. Robinson, 57 Fed. 375, 6 C. C. A. 400), where, as the court expressed it,

"When they entered into the contracts they owned the corporation and all its stock, and represented only themselves. While directors in fact, they were principals in name."

It was held that in such a case the rule prohibiting persons in a fiduciary relation from contracting for their own advantage in the name of their beneficiaries had no application.

This demurrer to the bill is well taken, and it is therefore unnecessary to discuss the special demurrer as to defect of parties. The bill is dismissed with costs.

and a final decree was entered thereon; that from said decree this defendant company appealed to the United States Circuit Court of Appeals for the Second Circuit, and said Court affirmed the decree of the Court below in sustaining the demurrer (the opinion may be found in 148 Fed. Rep. 1020) and is as follows:

107 The Bill prays for relief as follows:

First. That the sale of the mining claims to the complainant by Leonard Lewisohn—the defendants' testator—and Albert S. Bigelow—a citizen of Massachusetts and not a party to this action, be rescinded and the real estate reconveyed to the defendants upon receipt by the complainant of the consideration paid therefor.

Second. That defendants return to the complainant the consideration paid by complainant for said property, namely, 30,00- shares of its capital stock, or account therefor.

Third. That if the Court shall decide that the complainant is not entitled to rescind the sale of said real estate to it, then, and in that event, that the court ascertain the amount of damages sustained by complainant and direct the defendants asexecutors to pay the amount to complainant.

We are unable to perceive how this relief or any part thereof can be granted the complainant upon the facts alleged in the bill.

The fundamental difficulty with the bill is that it fails to state any facts showing that the complainant was in any way injured or defrauded by the transactions complained of. At the time of the transfer by Bigelow and Lewisohn to the company Bigelow and Lewisohn and their representatives owned the entire issue of stock of the corporation. The sale by them to the corporation was in effect a sale by them to Bigelow and Lewisohn. A corporation can only act through the human beings who compose it; it cannot be deceived or defrauded unless its stockholders and directors are deceived or

defrauded. The corporation knew all that Bigelow and Lewisohn knew and no one of the original parties to the transfer was defrauded by the exchange of the stock controlled by Bigelow and Lewisohn for the real estate controlled by them.

It may be that such a large over-capitalization as is alleged in the bill might mislead and deceive careless and credulous purchasers of the stock, but we are not now dealing with the case of a stockholder alleging concealment, fraud and misrepresentation. The stockholders, apparently, have no complaint: at least they have not propounded any.

Indeed, it is not easy to see how a purchaser, who paid $25 per share, could be defrauded in view of the allegation of the bill that "The shares of this corporation so issued in payment for the property sold to it as aforesaid were at the time of the fair market value of twenty-five (25) dollars each, and continued for a long time thereafter to be of such or greater value." It is enough, however, that this is not a stockholders' action.

The subscribers for the 20,000 shares subsequently issued
108 were not deceived; they asked for no statement and received none; they got what they purchased and are not complainants here.

A protracted discussion is unnecessary for the reason that this court and the Circuit Court of the Southern District have decided the question adversely to the complainant's contention.

Foster v. Seymour (23 Fed. Rep. 65); McCracken v. Robinson (57 Id. 375).

To the same effect are the decisions of the New York Court of Appeals.

Barr v. N. Y. L. E. & W. R. Co. (125 N. Y. 263); Blum v. Whitney (185 N. Y. 232).

It is true that the Supreme Court of Massachusetts (188 Mass. 315) has taken a different view, but we feel constrained to adhere to the prior adjudication of this circuit.

The decree is affirmed with costs.

That thereupon the defendant company presented its petition to the Supreme Court of the United States for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, alleging as a reason why said Court should take jurisdiction of the cause, that there was conflict between the decisions of the Circuit Court of Appeals of the Second Circuit and the Circuit Court of Appeals of the Sixth Circuit and the Supreme Judicial Court of Massachusetts, and that the questions involved were of great public importance; that thereupon the Supreme Court of the United States granted the petition and allowed the writ of certiorari.

And your orator further shows unto your Honor that the order of the decrees on the demurrers of your orator in the Massachusetts Court and of Lewisohn in the United States Circuit Court was as follows: (1) The United States Circuit Court sustained the Lewisohn demurrer; (2) The Supreme Court of Massachusetts overruled your

orator's demurrer; and (3) The United States Circuit Court
109 of Appeals affirmed the judgment below sustaining the demurrer.

And your orator further shows unto your Honor that the total profit of your orator on the whole transaction was the sum of $151,000, but that in the decrees entered in Massachusetts said Court charged your orator not only with the sum which it conceived he would have been primarily liable for if Lewisohn had been a party to the suit and it had likewise been adjudged against him, but with the whole sum it conceived. That your orator and Lewisohn should return to the company as appears by Judge Sheldon's finding copy of which is hereto annexed and marked "C."

And your orator further shows unto your Honor that he is advised by New Jersey counsel (1) that under the laws and decisions of the State of New Jersey your orator is not liable to respond to the defendant company in manner and form set out in said decrees, or otherwise; (2) that if your orator is liable for any sum such sum should not exceed the profit he personally realized on the transaction. (3) That the liability of your orator on the matters and facts set out in the bills filed in the Massachusetts Court is fixed and governed by the laws of our State, the decisions of our courts, and the policy of our State, and not by the laws, decisions and policies of other States; that the decision of the Massachusetts Court, in said suits, is contrary to the laws, decisions and policies of this State, and charges your orator with a liability not existing in this State. (4) That if the judgment of the Massachusetts Court sounds in tort, the judgment of the United States Circuit Court for the Southern District of New York likewise sounds in tort; and as the proceeding in the United States Circuit Court was instituted by the defend-
110 ant company without the assent of your orator, and the decree entered therein, if affirmed by the United States Supreme Court, operates as an absolute discharge of the estate of said Lewisohn, it likewise operates as a discharge of the causes of action set out in the bills filed in Massachusetts as against your orator, the decrees therein not having been entered until after the final decree was entered in the United States Circuit Court on demurrrr and the decree on remittitur from the Circuit Court of Appeals had been entered. (5) That he is advised that said judgment of the United States Circuit Court for the Southern District of New York estopped the defendant company from further proceeding with its suits in Massachusetts. (6) That if the United States Supreme Court upholds the judgment of the Circuit Court for the Southern District of New York, and the Supreme Judicial Court of Massachusetts should affirm the decree of its Court below, then your orator will be without remedy against the estate of said Lewisohn, because it was judicially determined, in the suits against said executors, that they were not liable.

And your orator further shows that in view of the fact that the defendant company is a corporation organized and existing under the laws of the State of New Jersey, that the matters in controversy between the defendant company and your orator, as well as their

several rights and liabilities, arise under the laws of the State of New Jersey and should be decided in conformity with the laws and decisions of the State of New Jersey, and in view of the fact that there is a conflict between the decisions of the United States Circuit Court of Appeals for the Second Circuit and the Supreme Judicial Court of Massachusetts, in suits where the pleadings are identically the same, and where the legal responsibility, if any, of the
111 estate of Lewisohn, for the acts complained of, is is at least as great, if not greater, than that of your orator, on the facts alleged in said bills, and the decision of the Supreme Judicial Court of Massachusetts is also in conflict with the laws and decisions of the State of New Jersey, and charges your orator with a liability not existing under the laws and decisions of the State of New Jersey, and thereby the defendant company has obtained an unconscionable and inequitable advantage over your orator, due solely to the selection of the court in which the proceedings were instituted, and may, if permitted to proceed with the prosecution of said cause in the Supreme Judicial Court of Massachusetts, obtain a further unconscionable and inequitable advantage over your orator, by the said court following the doctrine theretofore enunciated in the decision of the cause on your orator's demurrer, wherein it refused to follow the laws and decisions of the State of New Jersey, as well as the decision of the United States Circuit Court in the Lewisohn suit, this honorable court should assume jurisdiction of the controversy between the defendant company and your orator, to determine and fix the rights and liabilities of the defendant company, your orator and all parties to the controversy, in accordance with the laws and decisions of the State of New Jersey, and to prevent the manifest injustice and unconscionable and inequitable advantages which have heretofore been obtained in the Supreme Judicial Court of Massachusetts, on the argument of said demurrer, being availed of by the defendant company, and the further manifest injustice and unconscionable and inequitable advantages which may be done, and which the defendant company may obtain, if it is permitted to proceed with the prosecution of the cause above stated, before the Supreme Judicial Court of Massachusetts, being the same court which
112 decided the cause on demurrer, which court is the court of last resort in said Commonwealth of Massachusetts.

And your orator further shows unto your Honor, that in said suits in Massachusetts your orator gave a surety bond or bonds in the sum of $500,000 to indemnify the defendant company; that the term of the Supreme Judicial Court of Massachusetts following the March term is the November term; that the case of the defendant company against the executors of Lewisohn now pending on certiorari in the Supreme Court of the United States, it is expected, will be argued during the month of March of this year, and it is practically sure that the cause will be decided by the United States Supreme Court prior to the November term of the Supreme Judicial Court of Massachusetts, and that to restrain the defendant company from prosecuting its cause in the Supreme Judicial Court of Massachusetts and from proceeding further in said

suit, in Massachusetts, will do no injury whatsoever to the defendant company; whereas, in the situation as it now presents itself, if the cause is prosecuted in Massachusetts and the final decrees entered therein against your orator, your orator will be without remedy, and will suffer an irreparable injury.

And your orator further shows unto your Honor that it is the intention of said defendant company, unless restrained by the injunction or decree of this honorable court, to prosecute said causes before the Supreme Judicial Court of Massachusetts, on the third day of March next, or as soon thereafter as counsel can be heard, and to proceed therein, after which procedure the decisions of the court below can be affirmed and final decrees entered therein, without the intervention of the defendant; and that to permit such procedure of said causes places the defendant company beyond the control of
113 this honorable court, in that if the above court should decide in favor of the defendant company against your orator, it would thereby obtain an inequitable and unconscionable advantage against your orator, and your orator might be bound thereby and without remedy, even though the Supreme Court of the United States should, on the same subject matter and cause of action, enunciate a different rule to that found in the Supreme Judicial Court of Massachusetts and declare that the defendant company was not entitled to the relief prayed for in its bills.

And your orator further shows that he submits himself to the jurisdiction of this honorable court, and is willing to submit himself to the jurisdiction of this honorable court, in any proceeding which may be brought by the defendant company against him, touching the subject matters set out in said bills in the Massachusetts suits, and to do and perform every act and thing required by this court, and to obey such decrees, and pay such sums of money, if any, as this court may make or direct in the premises.

And your orator further shows that the estate of said Lewisohn owns a large amount of property within the State of New Jersey and can, and he believes that said executors may, be brought within the jurisdiction of this honorable court, and that it is proper in the settlement of the matters in controversy that the estate of Lewisohn and your orator should be joined in the same suit, to the end that all the parties interested or who should be affected by the decrees, will be brought before this court, and the court, by its decree, may then and there settle once for all, all controversies existing between the parties.

And your orator further shows that in the suit against your orator in Massachusetts the said defendant company urged as an excuse for
not making the executors of the estate of Lewisohn parties
114 to the suit, on the ground of non-residents, and stated in its bills as follows:

"Said Leonard Lewisohn died on March 5, 1902, and was at the time of his death a citizen and resident of the City, County and State of New York. The executors of the estate of said Lewisohn were also residents of said City, County and State and have been duly appointed by the courts of said State, but no executors or legal represen-

tatives of said Lewisohn have been appointed or are within this commonwealth, and there is no property within this commonwealth belonging to said estate which could be reached by any process, and it is impossible to get service within this commonwealth upon the executors of said Leonard Lewisohn."

That in the bills filed in the United States Circuit Court as aforesaid, the defendant company excused its failure to make your orator a party to said suit, alleging as follows:

"Said Bigelow is a citizen and resident of Boston, in the Commonwealth of Massachusetts, and cannot be served with process in this District or in the State of New York."

But by reason of the willingness of your orator to appear in a suit brought in the State of New Jersey, and the presence of property of the estate of Lewisohn within the State of New Jersey, jurisdiction can be obtained over all the parties concerned in the state of New Jersey.

And your orator further shows to your Honor that in view of the premises the determination of the controversies existing between the defendant Company and your orator and the Lewisohn estate should be and is properly cognizable before this Honorable Court to prevent a multiplicity of suits and to prevent injustice through technical conflicts in different jurisdictions, and to the end that a decision might ultimately be reached binding on all the parties in conformity with the spirit of the laws of the State of New Jersey, under whose laws said corporation was organized and the duties and obligations of the parties were created and exist.

That after the institution of the suits aforesaid certain in-
115 terests owning or controlling about 100,000 out of the total 150,000 shares of the capital stock of the New Jersey Corporation, caused to be formed a Maine Company known as the Old Dominion Copper Company, and caused to be conveyed to such Maine Company at or about the time of its incorporation 100,804 shares of the capital stock of the New Jersey Company, and since such time have caused to be conveyed to the Maine Company further shares of the New Jersey Company to the amount of about 10,000 shares, and as a part of such conveyance and transfer and as a part of the plan of organization of said Maine Company, an agreement was entered into between the New Jersey Company and the Maine Company and one Charles Sumner Smith, Vice-President of the Maine Company and President of the New Jersey Company, and one D. Blakely Hoar, a partner or associate of counsel for the New Jersey Company in all four suits, providing that the Maine Company as a majority shareholder of the New Jersey Company should cause the New Jersey Company to realize upon these four suits against your orator and the Lewisohn estate and distribute the proceeds thereof, as in said agreement provided, a copy of which said agreement is hereto annexed and marked "Exhibit F." Thereafter or substantially at the same time the said Smith and Hoar executed a trust deed in which they declared themselves to be Trustees of any fund obtained by virtue of the foregoing arrangement, and issued certificates of interest known as Old Dominion Trust Receipts, a copy of one of such trust receipts which is referred to in Wainwright's affidavit (as annexed)

hereto annexed and marked "B." Such trust receipts are sold from time to time in the markets of Boston, New York and elsewhere, and the holders of such certificates are not in any substantial part the holders of the shares of the Maine Company or the holders of the shares of the New Jersey Company, and the complainant is ad-

116 vised and therefore alleges that the holders of the trust receipts are the persons ultimately entitled to the sums of money to be paid by the Maine Company to the respondents Smith and Hoar under the agreement aforesaid. The complainant is informed and believes that the voting power on the stock of the New Jersey Company held and owned by the Maine Company as aforesaid, has been as to the matters referred to in said agreement between the Maine Company and the said Smith and Hoar, transferred to the said Smith and Hoar, Trustees as aforesaid, who are not in that capacity shareholders in the New Jersey Company, and the prosecution of the claims and suits against Bigelow and Lewisohn is not being had with the object or purpose of benefiting the New Jersey Company, but for the purpose of realizing the largest sum possible on the trust certificates issued as aforesaid, so that the above trust receipts are simply evidences of the owners' interest in the law suits which the Old Dominion Copper Mining & Smelting Company of New Jersey in name has brought against the Lewisohn Estate and your orator, and the buying and selling of such certificates constitutes the trading in a law suit and the proceeds of any recovery in any or all of the aforementioned four law suits will neither go to any persons who were originally interested in the New Jersey Company as stockholders, syndicate subscribers or in any other way whatsoever, nor will it go substantially as far as fourteen-fifteenths is concerned, to the New Jersey Company, but to persons who are entire strangers to the transactions but who have bought in purchasing such trust receipts as a speculative interest in law suits.

All which actings and doings of the said defendants are contrary to equity and good conscience, and tend to the manifest, wrong, injury and oppression of your orator in the premises.

117 In tender consideration whereof, and forasmuch as your orator is without adequate remedy in the premises, at and by the strict rules of the common law, and can only obtain relief in this Honorable Court where matters of this nature are properly cognizable and relievable.

To the end therefore, that the said Old Dominion Copper Mining and Smelting Company of New Jersey may, to the best and utmost of its knowledge, remembrance, information and belief (but without oath, the oath being waived), full, true and perfect answer make to all and singular the matters aforesaid, and that as fully and particularly as if the same were here repeated and they and every of them distinctly interrogated thereto, and that the said Old Dominion Copper Mining and Smelting Company, its officers, servants, agents, attorneys, solicitors, counsel and employés, be by the injunction and decree of this Honorable Court perpetually restrained and enjoined from proceeding in any manner to enforce or establish its claims against your orator as stated in two bills of complaint in

the Supreme Judicial Court of Massachusetts entitled, Old Dominion Copper Mining and Smelting Company, a corporation duly organized under the laws of the State of New Jersey and having a usual place of business at Boston in said County of Suffolk, against your orator, described as Albert S. Bigelow, of Cohasset in the County of Norfolk and Commonwealth of Massachusetts, having his usual place of business in Boston, and from taking any further action or proceedings in said suits or otherwise, and from in any manner instituting proceedings and suits with respect to or touching the claims against your orator set out in said two bills filed as aforesaid, in any court or jurisdiction whatsoever excepting the courts of the State of New Jersey,

118 and that this court will take jurisdiction of the controversies alleged to exist between the Old Dominion Copper Mining and Smelting Company and your orator and determine if any liability exists from your orator to the Old Dominion Copper Mining and Smelting Company, and that if any liability is found the estate of said Leonard Lewisohn being made a party hereto, this Honorable Court will determine the respective rights of your orator and the said estate, and do equity between them whether by contribution or otherwise, and that your orator may have such further or other relief in the premises as the nature of the case may require, and as shall be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to grant unto your orator not only the state's writ of injunction, issuing out of and under the seal of this Honorable Court, to be directed to the said Old Dominion Copper Mining and Smelting Company, its officers, servants, agents, attorneys, solicitors, counsel and employés, restraining them and each of them from proceeding in any manner to enforce or establish its claims against your orator as stated in two bills of complaint in the Supreme Judicial Court of Massachusetts, entitled Old Dominion Copper Mining and Smelting Company a corporation duly organized under the laws of the State of New Jersey and having a usual place of business at Boston in said County of Suffolk, against your orator, described as Albert S. Bigelow, of Cohasset in the County of Norfolk and Commonwealth of Massachusetts, having his usual place of business in Boston, and from taking any further action or proceeding in said suits or otherwise, and from in any manner instituting proceedings and suits with respect to or touching the claims against your orator set out in said two bills filed as aforesaid, in any court or jurisdiction whatsoever, excepting

119 the courts of the State of New Jersey, and from in any manner assigning, selling or disposing of said claims, but also the state's writ of subpœna, issuing out of and under the seal of this Honorable Court, to be directed to the said Old Dominion Copper Mining and Smelting Company, commanding it by a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor in this Honorable Court, then and there to answer all and singular the premises and to stand to, abide by and perform such order and decree therein as to your Honor shall seem meet, and shall be agreeable to equity and good conscience.

And your orator, as in duty bound, will ever pray, &c.

(Signed) JOHN GRIFFIN,
Solicitor and Counsel with Complainant.

A.

CLIFTON, ARIZONA, *June 18th*, 1895.

To Messrs. A. S. Bigelow and Leonard Lewisohn.

GENTLEMEN: In compliance with your instructions we have examined the property of the Old Dominion Copper Co., of Globe, Ariz., and we now take pleasure in submitting our report on the same.

Globe is situated about 100 miles to the Northwest of the Clifton copper belt and is reached by the G. V. G. & N. Ry. which terminates at Fort Thomas, 61 7-10 miles distant from the connection with the Southern Pacific Railway at Bowie, and 71 miles distant from Globe. From Fort Thomas freight and passengers are presently conveyed by wagons and by stage. We may here state that for the proper and economical working of the Globe properties it is necessary that the G. V. G. & N. Ry. should be extended to
120 Globe.

In our calculations we have considered the completion of the railroad as an assured fact. The property of the Old Dominion Co. comprises the following:—

The Globe Mine.
" Globe Ledge.
" Fraction.
" S. E. Globe.
" Interloper.
" Globe, S. W.
" Hidden Globe.
" Alice.
" S. W. Alice of Hypatia.
" S. E. Globe Millsite } Of these the present Smelting Plant
" Interloper " } is built.
" Hidden Globe " }
" S. W. Globe Millsite.
" Hypatia "
" Alice "

Smelting Plant.

The smelting plant consists of 2 60-ton water jacket furnaces and 1 40-ton furnace, each supplied with an independent Baker blower propelled by independent engines. The steam boilers and machinery we found ample for the requirements of the plant. The building covering the plant and the ore bins we found roomy and commodious, the ore bins having a capacity of 3500 tons. On a self-fluxing charge the furnaces could be pushed to 80 or 90 tons per day, as the ore is probably the finest smelting ore in the world, being remarkably free from fines and admirably suited for rapid and economical running. For matting the ores a somewhat
121 larger furnace, say 7 ft. x 3' 3" would be required. But if the object be to make black copper, in that case the present plant is probably as economical as any, and it had the advantage of being

ready to commence work at a moment's notice. The admirable condition of everything connected with this plant showed that the management had taken the greatest pains to keep everything in perfect order.

The Interloper shaft, the main outlet for the mines, is situated less than a quarter of a mile from the smelting Works on an upper slope of the same hill, and a Bleichert tramway, with a capacity of 200 tons in 10 hours, furnishes a cheap and exceedingly convenient method of haulage. For the present system of working, the Smelting Plant and the haulage leave but little to be desired.

Mines.

In locating the Mines of the property the locators have been singularly happy in covering in length and width what we cannot but regard as the principal lode of the district and one of the largest in Arizona. The surface level and the first level are tapped without hoisting, both delivering their ores direct to the Bleichert tramway. The second, third, fourth, fifth, sixth and seventh levels are connected to and deliver their ores through the Interloper shaft, which has been sunk to the eighth level, the latter being at the present time no more than a pumping station. The levels have not been run in straight lines and they are therefore longer than is shown by the figures given below, which represent the length in a straight line opened up by each level.

Surface level	625	feet.
Alice Tunnel	600	"
No. 1 level	2500	"
122 No. 2 level	2500	feet.
No. 3 level	1500	"
No. 4 level	850	"
No. 5 level	1650	"
No. 6 level	1350	"
No. 7 level	1700	"
No. 8 level	375	"

Surface Level.

The surface level, run in at an average depth of 50 feet below the surface of the hill, exposes large ore bodies at three different points on each of which stoping to a considerable extent has been done. At the main outcrop the vein is 200 feet in width and practically all ore, mainly of the low grade self-fluxing character. The tremendous outcrop, the most noticeable feature on the property, at once stamps the lode as one of extraordinary character. In stoping here, as on all the other levels, only the rich streaks have been followed, and the main portion of the vein has, therefore, been but little disturbed.

The rich ore descends in sheets with layers of the low grade ore and occasionally of vein matter between. This characteristic we found repeated on the lower levels. A careful examination satis-

fied us that there is every reason to expect a continuous ore body for a distance of 700 feet on this level. In opening up this ground the footwall should be closely followed and in stoping upwards the ore should be followed to its junction with the hanging wall, and this also applies to the lower levels. The low grade ore in the backs will nearly all pay to smelt and in running we expect that sheets of richer ore will be uncovered.

First Level.

Development on this level has been done altogether between the Moony shaft and the outcrop, the total length of vein broken into being 600 feet, the main working being on the downward
123 extension of the outcrop which showed as strong here as it did on the surface 160 feet above. With the exception of the work on the extension of the outcrop, stoping has not been conducted to a height greater than from 20 to 25 feet above the level, the lower grade ores being as usual left untouched in the backs. The promising ground lying to the Southwest of the Moony shaft lies untouched. Here there should be no difficulty in finding the extension of the ore body. It is evident that this level should produce much more than it has done heretofore.

Second Level.

On this level ore has been touched in spots for a length on the vein of 1200 feet, but only over a distance of 500 feet has stoping been done to a considerable extent and that altogether on the hanging wall and away from the main contact. At the Moony shaft, ore is to be seen in place on the footwall. Ore is again exposed at a point 50 feet to the Southeast of the same shaft. At this point the vein narrows to a few feet in width, but it opens out immediately. In the belt of ground 1400 feet in length practically no work has been done along the footwall. Judging from the relative position of the stopes it would appear as if the ore body might have left the footwall immediately below the first level and folding out horizontally had again descended on the hanging wall. This theory however finds no support in the developments on the levels above and below which invariably expose the main ore body making on the footwall. The development of the ore bodies on the hanging wall has no doubt been due to the driving of the main levels through the limestone. These ore bodies will I have no doubt be ultimately followed to their starting point,—the footwall. With ore to commence upon at the Moony shaft it should not be
124 difficult to prove up this ground.

Third Level.

With the exception of two small stopes on the footwall on the S. W. end of the property, all the development work has been done in the hanging wall. The work to the N. E. of the Moony shaft

has been run too far into the country rock and has been done in ground which cannot be considered as in the vein or as likely to be ore bearing. We consider this level as practically so much undeveloped ground. As the ore is very strong on the footwall in the fourth level we see no reason why it should not be found in the same position on the third.

Fourth Level.

With the exception of a block of 90 ft. the ore has been followed on the footwall and found to be continuous for a distance of 900 feet. All of this work has been done to the S. W. of the Moony shaft. Stoping as usual has been done only on the rich ore sheet, good fluxing ore being left in the back. Ore has also been mined to a considerable extent along the footwall. The vein shows a width between walls of fully 200 feet for quite a distance. Much good stoping ground remains, and between the walls there is a big unprospected territory which can hardly fail to be highly productive. The ground lying to the N. E. of the Moony shaft should be tested along the footwall.

Fifth Level.

On this level the ore body on the footwall has been shown up and stoped for a distance of about 800 feet on the vein, the work being done to the S. W. of the Moony shaft. Most of this ground being inaccessible on account of a large cave due to insufficient timbering, it is impossible to judge with any degree of accuracy how much ore has been left. As only the rich ore was stoped, it is obvious
125 that the bulk of it will pay to turn over, and we should expect it to yield besides the low grade fluxing ores quite abundantly in high grade ore. With the exception of a stone situated 600 feet to the Northeast of the Moony shaft no ore has been developed or touched on the extension of the vein in that direction. No doubt this is due to the fact that the main level and all cross-cuts have been driven in the country rock and away from the vein. In a distance of 850 feet not a single cross-cut has been run to test the footwall. While indications point to a narrowing of the vein on its Northeast extension there is good reason to believe that ore will be found by prospecting along the footwall and by following up the ore body in the stope last referred to. This view is strengthened by the work on the sixth and seventh levels which show the extension of the vein for a distance of 600 feet N. E. of the Moony shaft.

Sixth Level.

Ore has been stoped at intervals for a total distance of 1100 feet on the vein. In a total number of nine crosscuts run in to cut the footwall, no less than eight of them struck ore, which is an excellent proof of the continuity of the ore body and emphasized the need of

systematic work in this direction. The most noticeable feature of this and of the fifth level has been the development of the ore body to the S. W. of the Interloper shaft. The ground in this direction justifies further prospecting in height, length and width. We consider it very important ground.

Seventh Level.

The continuation of the ore body in depth is shown by three large stopes opened at widely separate points on the vein. As on the upper levels the bulk of the development work has been done in the hanging wall and in no case has ore been found on this
126 level in cross-cutting into the limestone. All the ore found has been discovered in cross-cutting towards the footwall. Rich sulphide ore in pay streaks shows for a considerable distance, along the floor and roof of the main level. These streaks should be followed downward and upward, especially downward in order to develop the sulphides as rapidly as possible. So little real development work has been done that this level must be regarded as new and undeveloped. The vein is undoubtedly slimmer here than on the upper levels, but it is still wide enough to hold large ore bodies. Development work to the S. W. of the Interloper should also be pushed with vigor as the ground is very favorable and inviting.

Summary.

We need not encumber this report with a detailed description of the geological conditions which obtain in the Mines at Globe. It will suffice for your clear understanding of the situation if we explain only its more important features. The ores occur altogether in a strong fissure between the diorite which forms the footwall and the limestone which is the country rock lying to the East of the vein. The ore body has been found in the various levels, at intervals, over a total length of 1800 feet, and it has been followed to a depth of 515 feet from the surface of the main outcrop to the floor of the seventh level, where such small developments as have been made go to show that it is still a strong body. Near the fissure the limestone has been fractured, leaving fissures and pockets in it which have in places been filled with ore derived no doubt from the same source which impregnated the main vein. This is particularly evident on the third level where the ore makes in the limestone and away from the vein.
On the same level the ore is also found in the vein on the foot-
127 wall. The nature of the vein being such—and in this it resembles most limestone formations—it was impossible to block out and measure the ore in sight, and we were compelled to rely altogether on our own judgment of the ground, assisted, of course, by our knowledge of what it had produced in the past, and by our experience in other limestone formations and also by a close study of the geological conditions. The immensity of the vein and of the ore bodies in sight made this a fairly simple task. Particularly were we impressed by the enormous bodies of low grade fluxing

ores, nearly all of which can be treated to profit with the assistance of the cheap coke which will be obtained when the railroad is completed. With coke ranging from 40 to 60 per ton, all low grade ore had to be avoided, and wherever struck it was left standing in the Mine. Sulphide ore, in like manner, whenever found *were* at once abandoned, on the ground that it was difficult to treat.

Metallurgy.

The method of treatment heretofore followed had been the simple one of smelting oxidized ores into black copper of high grade. The same method can still be followed and with good profit, but there are heavy losses in it which can be avoided by converting all the ores into copper matte and then bessemerizing. But to make the ores, a great deal more sulphur will be required than is presently in sight. It is therefore highly necessary that while the plant is shut down the development of the sulphides should proceed with vigor. The sinking of the Interloper shaft for a further depth of 500 feet we look upon as an immediate necessity. At the same time winzes should be sunk in the sulphide ores to prove them in depth and thus work should keep pace with the shaft sinking. As this work proceeds, short campaigns should be made in
128 smelting to treat the ores now in stock and those that will be derived from the prospecting. If necessary the production of black copper may be commenced at any time; but as the present shaft would not be able to keep up a large output and at the same time allow of its being sunk, we deem it better to sink before commencing to smelt on the large scale. The rich sulphide ores will probably be found for a considerable depth, possibly 200 to 300 feet below the eighth level, and much of it will be associated with considerable vein matter, forming a low grade ore which will require to be concentrated. For the treatment of this ore a concentrator will be required. Later it will be necessary to erect a leaching plant, but this need not be thought of until a sufficiency of iron pyrites has been developed. Since the commencement of the Company there has been produced about 68,000,000 lbs. fine copper, and we think that a very conservative estimate would give a like amount still to be extracted from the ground opened by the Old Company. This would give a supply of five and a half years at the rate of 6,000 tons copper per annum. Taking the figures of the Old Company as a basis and reducing them to figures based on present situation of the railroad showing a wagon haul of 65 miles, will show a net profit at present price of black copper (10½c.) of $60. per ton, or $360,000. on 6,000 tons of copper per annum. To this can be added $60,000. when the railroad is completed into Globe.

Of course when the low grade sulphides are mined and the matter obtained treated by the Bessemer process, this yield can be materially increased, but of this we have taken no account in our calculations. Calculating on a yearly output of 6,000 tons of black copper and on the market value of the same of 8½ cents per pound, and also the completion of the railroad, the profit should be $480,000.

per annum; with black copper realizing 9½c. per pound, the
129 profits should be $300,000. per annum; with black copper realizing 10 cents per pound, $350,000. per annum, and with black copper realizing 10½ cents, $420,000. per annum.

In this estimate we have counted upon a yield from the ores of 9 per cent. of copper, an average which can easily be sustained, and we have not counted upon the richer sulphides likely to be opened out in depth. With this much assured from the ground already opened out, and with every prospect of an extension of the ore bodies both in length on the vein and in depth, we consider the property as certain to be a heavy producer for many years to come.

Attached hereto is a plan showing the ground covered by the various claims and also the trend of the footwall through the Globe Ledge and Globe claims, which have produced nearly all of the ore so far produced.

The following analysis shows the composition of the ore, amounting to 4,600 tons, now in the furnace bins and ready for smelting. The sample was taken from all over the surface of the ore pile:

	Per cent.
Moisture and volatile matter	12.40
Silica	22.48
Oxide of Copper (Metallic copper 16.9%)	21.18
Oxide of Iron (F2O)	27.26
Alumina	9.44
Oxide of Manganese	2.09
Lime (Ca O)	1.35
Alkalies, Oxygen and loss	3.80
	100.00

This ore should form a slag not exceeding 36% in silica. It is perfectly self fluxing. Samples of the sulphide ores taken from various parts of the Mine assayed as follows:—

	Per cent. copper.
Sulphide streaks in raise from 5th level	28.85
" " " Main drift "	9.60
" ore from stope near 7th level	12.90
" from main drift 7th level	34.90

130 During the 18 months ending at the time the Works were closed down, 50,947 tons of ore were smelted, resulting in a yield of 6,068 tons of black copper, being equal to an average yield of 11.9%.

The cost of Pocohontas coke during the same time was $13.10 per ton at Wilcox or $39.60 per ton at Globe. Timber is obtained from the Pinal Mountains where the Company own a saw mill. The fuel is wood from the same mountains. Water is obtained from Pinal

Creek which flows past the smelter dump. A small quantity will also be obtained from the Mines.

We consider that the railroad should make you a rate of $5 per ton on coke, coal and copper hauled between Bowie and Globe and vice versa. On all other material they should be allowed to make their own rate.

For smelting purposes an ample supply of water can be obtained from the creek and from the Mine. The latter will undoubtedly give an increased supply in depth.

Globe is situated at an elevation of 3500 feet above sea level. The climate is superb, being cool and pleasant every night in the year. The water being of most excellent quality, and the climate so superior, Globe has long been considered the healthiest camp in Arizona.

In conclusion we would say that we consider the property one of very great value. We have found nothing either above ground or below the surface pointing in the slightest degree to a shortening or narrowing of the ore bodies either in depth or length. The work done in the past has served to open up vast ore bodies from which only the richest streaks running from 15 to 30 per cent. copper have been removed, while the large bodies of rich sulphide ores have hardly been touched. The Mining and Smelting Plant is ample for present purposes except a boiler or two, and everything about the property is in excellent shape. We have no hesitation in recommending it as a safe and profitable investment and one which will undoubtedly increase rapidly in value as new development work is completed.

131

All of which is respectfully submitted.

JAMES COLQUHOUN.
G. M. HYAMS.

This is to certify, that we, the undersigned Jesse Lewisohn and Allen W. Evarts of the City, County and State of New York, Edgar Buffum, of Newark, in the County of Essex in the State of New Jersey, Charles W. Welch, of the City of Brooklyn in the State of New York, Sidney Riddlesdorffer, William V. Rowe, and William R. Montgomery, of the City, County and State of New York, do hereby associate themselves into a Company under and by virtue of the provisions of an Act of the Legislature of the State of New Jersey entitled "An Act concerning corporations" approved April 7, 1875, and the several supplements thereto and Acts amendatory thereof for the purposes hereinafter mentioned, and to that end we do by this our Certificate set forth:

First. That the name which we have assumed to designate such Company and to be used in its business and dealings is "Old Dominion Copper Mining and Smelting Company."

Second. That the place in the State of New Jersey where the business of such company is to be conducted is the City of Jersey City, in the County of Hudson. That the principal part of the business of such Company within said State of New Jersey is to be transacted at said Jersey City, in the County of Hudson, and the places out of said State where the same is to be conducted are the

town of Globe and other places in the Territory of Arizona, the City of Boston, in the State of Massachusetts, the City of New York, the States of Massachusetts and New York, and such other states and territories of the United States and such foreign Countries as shall, from time to time be deemed necessary or convenient for any of the purposes of the Company.

That the objects for which such Company is formed are the purchase, acquisition and sale of copper and other mines and mining property and the working, operation and maintenance of the same; the holding, purchase and conveyance of real property useful or convenient for the purposes of its business either in or out of the State of New Jersey and the mortgaging or leasing thereof; the construction and maintenance of water-works, reservoirs, dams, and aqueducts, the erection and maintenance of works, mills, factories, shops and other structures, engaging in and carrying on the business of treating, smelting and refining copper and other ores; manufacturing, buying, selling and dealing in copper, copper ores and other metals and ores and articles made wholly or in part of the same; issuing bonds, debentures or other obligations and securing the same by mortgage of any of the property, rights and franchises of the Company; the acquisition, purchase and sale or other disposition of the stocks, bonds or other securities of other Companies; and in general doing all acts and transacting all business necessary for and incident to the objects aforesaid, or in any wise connected therewith.

That the portion of the business of such Company which is to be carried on out of the State of New Jersey is the owning and operation of mines and such other part of its business as may be lawful and as may from time to time be deemed necessary or convenient by reason of locality, or other conditions, or circumstances.

132 That the principal office and place of business of such Company out of the State of New Jersey is to be situated in the town of Globe in the County of Gila, in the Territory of Arizona. That such Company proposes to carry on operations in the town of Globe and other places in the Territory of Arizona, the States of Massachusetts and New York, and in such other States and Territories of the United States and in such foreign Countries as shall from time to time be deemed necessary or convenient for any of the purposes of the Company.

Third. That the total amount of the capital stock of such Company is to be three millions seven hundred and fifty thousand dollars, divided into one hundred and fifty thousand shares of the par value of twenty-five dollars each.

That the amount with which said Company will commence business is One thousand dollars, divided into forty shares of the par value of twenty-five dollars each as aforesaid.

Fourth. That the names and residences of the Stockholders and the number of shares held by each are as follows, to-wit:

Jesse Lewisohn, of the City, County and State of New York, Sixteen Shares., Allen W. Evarts of the City, County and State of New York, Four shares.

Edgar Buffum, of Newark, Essex County, New Jersey, Four shares.

Charles W. Welch, of the City of Brooklyn, in the state of New York, Four shares.

Sydney Riddlesdorffer, of the City, County and State of New York, Four shares.

William V. Rowe, of the City, County and State of New York, Four shares.

William R. Montgomery, of the City, County and State of New York, Four shares.

Fifth. That the period at which such Company shall commence is the eighth day of July, One thousand eight hundred and ninety five and the period at which it shall terminate is the eighth day of July one thousand nine hundred and forty five.

In witness whereof, we have hereunto set our hands and seals the eighth day of July, One thousand eight hundred and ninety five.

JESSE LEWISOHN.	[L. S.]
ALLEN W. EVARTS.	[L. S.]
EDGAR BUFFUM.	[L. S.]
CHARLES W. WELCH.	[L. S.]
SIDNEY RIDDLESDORFFER.	[L. S.]
WM. V. ROWE.	[L. S.]
WM. R. MONTGOMERY.	[L. S.]

STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered that on this eighth day of July One thousand eight hundred and ninety five, before me the subscriber, a
133 Commissioner of Deeds for the State of New Jersey, personally appeared Jesse Lewisohn, Allen W. Evarts, Edgar Buffum, Charles W. Welch, Sidney Riddlesdorffer, William V. Rowe, and William R. Montgomery, who I am satisfied are the persons named in and who executed the foregoing certificate, and I, having first made known to them the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year last aforesaid.

[SEAL.]

GEO. H. COREY,
Commissioner of Deeds for the State of New Jersey in New York.

Endorsed: "Received in the Hudson Co., N. J. Clerk's Office July 8 A. D. 1895 and Recorded in Clerk's Record No. 25 on Page —. John G. Fisher Clerk. Filed Jul- 8, 1895. Henry C. Kelsey, Secretary of State."

State of New Jersey.
[SEAL.]
Department of State.

I, S. D. Dickinson, Secretary of State of the State of New Jersey, do hereby certify that the foregoing is a true copy of the Certificate of Incorporation of the Old Dominion Copper Mining and Smelting Company," and the endorsements thereon, as the same is taken from and compared with the original filed in my office on the Eighth day of July, A. D. 1895, and now remaining on file and of record therein.

[SEAL.]

In testimony whereof, I have hereunto set my hand and affixed my Official Seal at Trenton, this Twenty-fifth day of February, A. D., 1907.

134 (Signed) S. D. DICKINSON,
Secretary of State.

Endorsed: Certified copy of Certificate of Incorporation of "Old Dominion Copper Mining and Smelting Company."

F.

Agreement Between the Old Dominion Company, a Corporation Organized under the Laws of Maine, and Charles Sumner Smith and D. Blakely Hoar.

Whereas, pursuant to a proposal embodied in an agreement signed by F. S. Mosely & Company and others, dated December 30th, 1903, the Old Dominion Company has been organized and is the corporation referred to in said agreement as the Maine Company, and is about to acquire one hundred thousand eight hundred and four (100,804) shares of the capital stock of the Old Dominion Copper Mining and Smelting Company (hereinafter called the Mining Company); and

Whereas by Article First, section 6, of said agreement, it is stipulated that upon such acquisition of stock by said Old Dominion Company, it shall provide for realizing upon certain assets of
135 said Mining Company and the distribution of the proceeds thereof, as in said agreement, to which reference is hereby made, more fully set forth; and

Whereas Charles Sumner Smith and D. Blakely Hoar (hereinafter called the Trustees) have consented to act as trustees, under a declaration of trust of even date herewith executed by them, for the benefit of said assenting stockholders of said Mining Company referred to in said agreement:

Now, therefore, this agreement witnesseth:

First: The Old Dominion Company acknowledges that the assets of the Mining Company referred to in Article First, section 6, of the agreement above referred to, comprise certain claims against one Albert S. Bigelow and against the estate of one

Leonard Lewisohn, deceased, on which suits are now pending brought by said Mining Company in the Supreme Judicial Court of Massachusetts for the County of Suffolk and in the Circuit Court of the United States for the Southern District of New York, together with the other assets enumerated in the schedule hereto annexed marked "A."

Second: Said Old Dominion Company covenants and agrees with said Trustees to use all reasonable efforts;

1. To cause said Mining Company to realize upon said other assets specified in Schedule "A" in such manner as said Trustees may from time to time direct, subject, however, to the provisions hereinafter contained.

2. To cause said Mining Company actively to prosecute said claims above referred to against said Bigelow and against the estate of said Lewisohn, in such manner and through such counsel and attorneys as said Trustees may from time to time request, and
136 upon like request to make any settlement and adjustment of said claims or any of them, subject, however, to the provisions hereinafter contained.

3. To cause said Mining Company, if and so far as any sums of money are realized from said other assets or from said claims:

(*a*) To pay all expenses that may have been incurred in realizing on said other assets or said claims, including the repayment of all sums that may have been advanced by said Trustees and the satisfaction of all liabilities that may have been incurred by them in realizing on said other assets of said claims; or authority to do so;

(*b*) To apply any surplus moneys then remaining to the payment of all debts and unliquidated claims of said Mining Company incurred prior to January 1, 1904, in excess of Twenty five thousand ($25,000) dollars, other than those incurred for new construction.

(*c*) To receive such part, if any, as said Trustees may request of any surplus then remaining for use in providing for the further expenses of prosecuting said claims and realizing on said other assets, if and so far as the same have not been finally disposed of and realized on;

(*d*) To distribute any surplus then remaining as a dividend among its stockholders, if it lawfully may do so, and if it
137 cannot then lawfully make such a dividend to make the same as soon thereafter as any legal impediment is removed.

Third: The Old Dominion Company agrees to pay over to said Trustees, after making the deductions hereinafter provided for, any and all sums received by it as a stockholder in said Mining Company, or that would have been so received by it if it had at all times remained the holder of the same proportions of the capital stock of said Mining Company outstanding as all the stock in said Mining Company now held and that may hereafter be acquired by said Old Dominion Company bears to the capital stock of said Mining Company now outstanding, whether so received under the foregoing provisions of this agreement or otherwise, so far as each sum is

derived from the other assets and claims of said Mining Company herein referred to.

Said Old Dominion Company shall first deduct from sums so payable amounts advanced under this agreement by the Old Dominion Company for expenses, including counsel fees of the Old Dominion Interest, so called, in connection with the proposal and agreement dated December 30th, 1903, above referred to. It shall pay over the balance of sums so payable to the Trustees from time to time as the same are received or would have been received for distribution by said Trustees among the assenting stockholders of said Mining Company and their assigns, but without responsibility on the part of said Old Dominion Company for the application of any sum so paid over.

Fourth. The Old Dominion Company agrees to use all reasonable efforts, so far as it lawfully may in the performance of Article Second, Section 1, of this agreement, to cause said Mining Company to permit said Trustees in the name and behalf of said Mining
138 Company, but for the purposes set forth in this agreement, to take from time to time all such action as said Trustees shall deem desirable in prosecuting or settling or otherwise realizing on or discounting said claims or any of them, of said other assets or any of them; and to cause said Mining Company from time to time and as often as in writing requested, at the expense of said Trustees so far as any expenditure is required but without charge so far as acts by the officers or employees of the Mining Company or of the Old Dominion Company are concerned, to assist said Trustees in preparing and maintaining any and every suit at law or in equity or other proceedings now pending or that may hereafter be brought to enforce or realize on any of said claims or other assets, and particularly to permit said Trustees to have free access at all reasonable times to the papers and records of said Mining Company relating thereto, and to take for use in any suit or other proceeding any document or books relating to said corporation.

Fifth. Said Old Dominion Company agrees, in case for any reason it is impossible lawfully to carry out this agreement in the manner hereinbefore provided or any part thereof, to do all that it lawfully and reasonably can do to cause said Mining Company to take such action that said other assets and claims shall be realized on to the best advantage reasonably possible, and the net proceeds thereof as defined in said proposal and agreement distributed among the stockholders in said Mining Company, and all sums received by said Old Dominion Company as a stockholder in said Mining Company or that would have been so received by it had it at all times remained the holder of the same proportion of the capital stock of said Mining Company outstanding that all the stock in said Mining Company now held and that may hereafter be acquired by
139 said Old Dominion Company bears to the capital stock of said Mining Company now outstanding, shall be paid over to said Trustees for distribution by them as above provided.

Sixth. Said Old Dominion Company agrees:

1. Upon request of said Trustees to satisfy all expenses incurred

by the Old Dominion interest, so called, for the incorporation fees and incidental expenses connected directly with the organization of the Old Dominion Company.

2. Upon request of said Trustee to pay all expenses including counsel fees, incurred by the Old Dominion interest, so called, in connection with the proposal and agreement dated December 30th, 1903, above referred to.

Seventh. The Old Dominion Company agrees that in case at any time anything is done by which it will cease to hold a majority of the capital stock of the Mining Company it will before such act is done make provision reasonably satisfactory to the Trustees by which the holders of a majority of all the stock of said Mining Company shall until all the purposes of this agreement are carried out be bound to do all things then remaining undone which the Old Dominion Company is hereby bound to do.

Eighth. The word "Trustees in this agreement shall mean the trustees above named and their successors in office who are for the time being such trustees.

(Signed) OLD DOMINION COMPANY,
By JAMES R. PARSONS,
President.
WM. M. BRADLEY,
Treasurer.

(Signed) CHARLES S. SMITH.
(Signed) D. BLAKELY HOAR.

Jan. 15, 1904.

140 "B."

No. —. — Shares.

Old Dominion Trust.

This certifies that —— —— is entitled to — shares in the trust (known as the Old Dominion Trust) created by declaration of trust executed by Charles Sumner Smith and D. Blakely Hoar, dated January 15, 1904, and to all the rights and benefits of a share-holder under the terms of said declaration of trust, to which the holder by acceptance of this certificate fully assents. Shares in said trust are transferable only in writing on the books of the trustees by the shareholder in person or by duly authorized attorney and upon surrender of the certificate therefor.

Witness our hands this — day of —— A. D. 190—.

——— ———,
——— ———,
Trustees.

Countersigned

———
Transfer Agent.

Exhibit 2.

In Chancery of New Jersey.

Between Albert S. Bigelow, Compl't,
and
Old Dominion Copper Mining and Smelting Company, Def't.

On Bill, &c.

Order to Show Cause.

141 On reading and filing the bill, with the affidavits thereto annexed and the exhibits, in the above entitled cause:

It is on this twenty-sixth day of February, nineteen hundred and eight, on motion of John Griffin, solicitor of complainant, Ordered that until the further order of this court the defendant, Old Dominion Copper Mining and Smelting Company, its officers, servants, agents, attorneys, solicitors, counsel and employees be and they are hereby enjoined and restrained from proceeding in any manner to enforce or establish by trial, argument or otherwise the claims of the said defendant against the complainant as stated in two bills of complaint filed in the Supreme Judicial Court of Massachusetts, entitled Old Dominion Copper Mining and Smelting Company, a corporation duly organized under the laws of the State of New Jersey and having a usual place of business at Boston in said County of Suffolk, against the complainant, described as Albert S. Bigelow of Cohasset, in the County of Norfolk and Commonwealth of Massachusetts, having his usual place of business in Boston, and from taking any further action or proceedings by trial, argument or otherwise in said suits, or any other suits or otherwise, and from in any manner instituting proceedings and suits with respect to or touching the claims against the complainant set out in said two bills filed as aforesaid, in any court or jurisdiction whatsoever, excepting the courts of the State of New Jersey, or from selling, assigning or disposing of said claims, and that the defendant entirely stay its present proceedings and suits against the complainant Bigelow.

And it is further Ordered, that said defendant do show cause before this court, on Tuesday, the seventeenth day of March, nineteen hundred and eight, at half past ten in the forenoon, at the

142 Chancery Chambers, in the city of Trenton, why said injunction and restraint should not be continued to final hearing.

And it is further Ordered, that true copies of this order and the bill which copies need not be certified be served upon the statutory agent of the defendant in this State, within five days from the date hereof.

(Signed) MAHLON PITNEY, *C.*

Respectfully advised
E. R. WALKER, *V. C.*

A true copy:
VIVIAN M. LEWIS.

(Endorsed on back:) In Chancery of New Jersey. Between Albert S. Bigelow, Compl't, and Old Dominion Copper Mining and Smelting Company, Def't. On Bill, &c. Rule to Show Cause. John Griffin, Sol'r, 15 Exchange Place, Jersey City, N. J. Filed Feb'y 26, 1908. E. R. W., V. C.

Chancery of the State of New Jersey, the same being a Court of Record, do hereby certify that the foregoing is a true copy of the Order to Show cause filed Feb. 26, 1908, in a cause wherein Albert S. Bigelow is complainant and Old Dominion Copper Mining and Smelting Company is defendant now on the files of my office.

[SEAL.]

In testimony whereof, I have hereto set my hand and
143 affixed the seal of said Court, at Trenton, this Twenty-seventh day of February A. D. nineteen hundred and eight.

(Signed) VIVIAN M. LEWIS, *Clerk*.

I, Mahlon Pitney, Chancellor of the State of New Jersey, do hereby certify that Vivian M. Lewis, whose name is subscribed to the above certificate, was, at the date thereof, and now is, the Clerk of the Court of Chancery of the State of New Jersey; that said attestation is in due form, that the seal thereto annexed is the seal of said Court, and that the signature of the said Vivian M. Lewis is in his own proper handwriting.

Witness my hand at the City of Trenton this Twenty-seventh day of February A. D. nineteen hundred and eight.

(Signed) MAHLON PITNEY, *C.*

NOTE.—This certificate is made pursuant to an act of Congress (Rev. Stat. U. S. 1875, sec. 905, p. 170).

A true copy.
Attest:
ALBERT C. TILDEN.
Deputy Sheriff.

EXHIBIT 3.

As Amended in Committee.

Committee Substitute for Assembly, No. 368.

STATE OF NEW JERSEY:

A Supplement to an Act Entitled "An Act Concerning Cor-
144 porations (Revision of 1896)," approved April twenty-first, one thousand eight hundred and ninety-six.

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. When any director, officer, organizer, promoter or agent of any corporation of this State has been heretofore sued or shall be

hereafter sued without this State by any such corporation on account of any bonus, profit or reward of any kind whatsoever heretofore made or received, or hereafter made or received, out of, or on account of, any transaction taking place within or without this State for or with such corporation because of failure to disclose the fact of such bonus, profit or reward, or failure to obtain the approval of the corporation thereto, he may, at any time after the passage of this act, file a petition in the Court of Chancery making the corporation a party defendant, and have such liability, if any, finally determined on such petition in accordance with the rules and practice of the Court of Chancery.

2. After the filing of such petition the Court of Chancery may, upon the motion of the petitioner, enjoin the corporation from prosecuting, maintaining or continuing any pending or bringing any new suits or proceedings at law or in equity for the enforcement of the liability in question elsewhere in the State of New Jersey.

3. On the hearing of such petition the petitioner, if found liable, may be held and adjudged to be liable only for his own actual net profits, and no more.

4. If any section or part of this act shall be held to be void or unconstitutional, it shall in no wise impair the validity of the balance hereof.

5. This act shall take effect immediately.

And on the fourteenth day of said August, the following memorandum of decision and order for decree was filed by the Court, to wit:

In the matter of the motion or petition of the Plaintiff for
145 an injunction restraining the Defendant from beginning or prosecuting before other courts any action or actions involving the same issues, pending the suit, and for an attachment for contempt, and for a speedy hearing by the Full Court of the Appeal now before it.

Memorandum of Decision.

The hearing having been confined to the first ground only and the allegations as to the course of litigation between the parties both in Massachusetts and in New Jersey either having been proved or not denied, I find them to be true.

From this general finding it appears that after having voluntarily tried before a Justice of this Court all questions of law or fact which, under the pleadings so far as material, either were involved in the controversy or could have been raised by him not only by the pleadings as they stood but by any amendment which became necessary for the presenation of such questions and while the case was pending for argument before the Full Court on cross-appeals from the final decree, Mr. Bigelow, by a bill filed in the Chancery Court of New Jersey, obtained an injunction restraining the plaintiff, whose domicile was in that state, from any further prose-

cution of the case before this court. In substance, with the exception of the allegation as to the effect upon the present suit of the decision, in favor of the defendants, of the Circuit Court of Appeals of the United States for the Southern District of New York, in the case of the Old Dominion Copper Mining & Smelting Co. vs. Frederic Lewisohn, et al, Executors of Leonard Lewisohn, who is alleged in the present suit to have been a copromoter with the defendant and equally liable with him, the issues on the merits of both suits appear to be similar. That Bigelow during the litigation,
146 from the filing of the bill here on October 7, 1902, up to the time of the present petition, was domiciled in Massachusetts, in whose courts the plaintiff had a right to implead him has not been doubted or denied. Indeed it is undisputed that this court has lawfully obtained jurisdiction of the subject matter and of the parties. There is now no question "that whenever the parties are resident within a country, the courts of that country have full authority to act upon them personally with respect to the subject of suits in foreign courts as the ends of justice may require, and with that view to order them to take, or omit to take any steps and proceedings in any other court of justice, whether in the same country or in any foreign country," or the courts of one state may enjoin its citizens from taking such proceedings in the courts of a sister state.

2 Storey Eq. Jur. 13th Ed., Sec. 900.
Bushby v. Munday, 5 Madd. 297.
Carron Iron Co. v. McLaren, 5 H. L. Cas. 416.
De Hon v. Foster, 4 Allen, 545.
Cunningham v. Butler, 142 Mass. 47.
Cole v. Cunningham, 133 U. S. 107,—where may be found a very full review of the cases by Mr. Chief Justice Fuller.

See also on this point the exhaustive opinion of Chancellor Pitney of New Jersey in Bigelow v. Old Dominion Copper Mining & Smelting Co.

This power may be exercised not only to enjoin the bringing of suits, but to stay the prosecution of suits already begun.

Bushby v. Munday, ubi supra.
Dinsmore v. Neresheimer, 32 Hun, 204, 207.
Carson v. Dunham, 149 Mass. 52.

While the bill in New Jersey having been dismissed by the Chancellor and "no order of stay" having yet been granted, the injunction theretofore issued was thereby dissolved, Mr. Bigelow, through counsel there, announced his intention to take and prosecute an appeal from the decision to the Court of Errors and Appeals of New Jersey, the laws of which permit him again to make application for
147 an "order of stay" to the Chancellor; or upon making an appeal then such application may be made to the appellate court itself. If such an application is granted the injunction would be in force, and all further action here would again be indefinitely postponed.

As I have said, the entire merits of the controversy either have been or could have been tried before the single Justice who heard the

case. It would seem as if the time elapsing between the filing of the bill and the filing of the final amended answer, November 6, 1907, was sufficient to enable the defendant to avail himself of every opportunity of defense that he might deem advisable or material. It was only until defeated before a tribunal and in a forum, where he was content up to that point to make the contest,—presumably with all the legal weapons that eminent and learned counsel could furnish,—that Mr. Bigelow sought the courts of New Jersey to obtain, if possible, a different decision, and to prevent any further proceedings here. If he is now to be left either to prosecute at will the appeal in New Jersey, or to begin other suits in the courts of sister states in which, however deftly phrased, substantially the same issues are again presented, he obtains an unjustifiable advantage over the plaintiff by preventing it from prosecuting to a final determination a suit in which it has been so far successful as to obtain a finding and decree for the payment of large damages. Obviously this Court cannot do justice between the parties unless he is enjoined from taking this threatened or possible course of procedure.

Home Ins. Co. v. Howell, 24 N. J. Eq. 238.
See Kempson v. Kempson, 58 N. J. Eq. 94.

What are the objections urged by him against the entry of such an order?

148 First, that a single Justice has no jurisdiction to pass upon the question, as the whole case is before the Full Court on the appeal.

Under R. L. ch. 159, Sec. 19, upon an appeal in equity from the final decree of a single justice and the entry of the appeal in the Supreme Judicial Court for the Commonwealth, the decree is vacated, and the case, as shown by the record, whether of law or law and fact is pending before the Full Court which "shall affirm, reverse or modify the decree appealed from." This means that the case is before the Full Court upon the record as made up at the time of the appeal. If that record is to be either enlarged or diminished, it would seem that the application must be made to a single justice.

Commonwealth & Suffolk Trust Co., 161 Mass., 550, 551.

But is is plain enough that in practice after such an appeal has been taken and perfected, and while it is pending, interlocutory questions, often of much importance, may arise calling for a speedy hearing and decision, but in no wise affecting the questions covered by the final decree.

It was not the purpose of the Legislature, as shown by sections 17, 21 and 22, that the Full Court should hear and determine such matters, but that a single justice in the first instance should hear and pass upon them.

Dorr vs. Tremont Nat'l Bank, 128 Mass., 349.
Parker vs. Nickerson, 137 Mass., 487, 491.

The order asked for does not affect "the proceedings under such decree," but is remedial and purely interlocutory and distinct.

R. L., c. 159, sec. 17.

It is next urged that the equities are such that the Court in its discretion should refuse to interfere. But this objection has been already generally considered and need not be further dis-
149 cussed.

It is also claimed that "the remedy sought by the plaintiff is in violation of a privilege and immunity granted the defendant by the constitution of the United States." But I am unable to see that any federal question is involved.

The defendant further says that "the plaintiff is estopped from further prosecuting these actions by the judgment against it in the Federal Court of New York;" since affirmed by the Supreme Court of the United States.

It is sufficient upon this last objection to say that while the decision of the Supreme Court of the United States in the case of Old Dominion Copper Mining and Smelting Company v. Lewisohn is in favor of the position as to liability taken by the defendant, I am bound by the decision of this Court in Old Dominion Copper Mining and Smelting Company v. Bigelow, 188 Mass., 315, that the bill stated a case for equitable relief, and by the finding on the merits by Mr. Justice Sheldon, who decided that Bigelow was accountable to the plaintiff. But it should be further said that although the defendant had every opportunity to plead the pendency of the litigation in the Federal Courts which might result in an alleged estoppel, he has not done so, and this question is not raised by the pleadings.

If, however, on the motion for a temporary injunction this question of possible estoppel ought to be considered as bearing upon whether the defendant equitably ought to be allowed to contest this question before the Court of Errors and Appeals of New Jersey, it is sufficient, now, for me to say that I understand the present suit and the decree to go upon the ground that the action is in personam to recover from the defendant as a trustee property of the company which it
150 is claimed he wrongfully appropriated, and the fact that Lewisohn, his co-promoter, may have acted with him as a "joint equitable tort feasor," but who during his lifetime was domiciled in another jurisdiction, where his legal representatives are also domiciled, and who have successfully contested the plaintiff's claim, affords no bar to the plaintiff's prosecution of this suit.

Having first obtained jurisdiction, and having judicial authority to hear and determine fully the subject-matter of the suit, the usual rule should be applied, that this right, having once attached, Mr. Bigelow, who is domiciled in Massachusetts, should not be permitted either to nullify or to take it away by proceedings in other courts.

Home Ins. Co. v. Howell, ubi supra.

Stevens v. The Central Nat'l Bank, 144 N. Y. 50, 60.

Hines v. Hobbs, 40 Ga., 356.

Decree accordingly.

HENRY K. BRALEY, *J. S. J. C.*

And on the said fourteenth day of August the following Interlocutory Decree was entered by the Court, to wit:

Interlocutory Decree.

Upon motion of the Plaintiff that the Defendant be enjoined from beginning or prosecuting any suit or suits other than in this Court involving the matters in controversy between the parties, and after taking evidence and hearing the arguments of counsel, upon consideration thereof, it is

Ordered and Decreed that an injunction issue restraining the defendant Albert S. Bigelow, his attorneys, agents and servants
151 from further prosecuting the action commenced by said Bigelow against the plaintiff in the Court of Chancery in the State of New Jersey, as is in the plaintiff's petition set forth; and from commencing or prosecuting any other suit or proceeding either in law or in equity, except in this court, against the plaintiff to prevent it from obtaining the final decision and decree of this Court, or in any manner to delay or impede the presentation of said case according to the due and orderly course of procedure in this Court, or until further order of the Court.

By the Court:

WALTER F. FREDERICK, *Clerk.*

August 14, 1908.

And on the twenty-sixth day of said August, the defendant filed his motion to vacate the decree of August 14, 1908, the said motion being in the words following, to wit:

Application of the Defendant to Vacate the Decree of August 14, 1908, and Dissolve the Injunction Issued Thereon.

And now comes the defendant, Albert S. Bigelow, and moves that the decree entered by this Honorable Court on August 14, 1908, be vacated and the injunction issued thereon be dissolved.

(1) Upon the ground that said decree and injunction denies, impairs and abridges the rights, privileges and immunities of the defendant arising under Article 3, Sections 1 and 2, and Article 4, Sections 1 and 2, of the Constitution of the United States, and under Section 1 of the Fourteenth Amendment to the Constitution of the United States, and the rights, privileges and immunities aris-
152 ing under the Acts of Congress enacted pursuant to, under the authority of and for the purpose of carrying into effect the foregoing provisions of the Federal Constitution.

(2) And, without limitation or waiver of the foregoing ground, the defendant specifically moves that said decree be vacated and said injunction issued thereon be dissolved on the ground that it denies, impairs and abridges the rights, privileges and immunities of the defendant arising under Article 4, Sections 1 and 2, of the Constitution of the United States and under Section 1 of the Fourteenth Amendment of the Constitution of the United States, and the rights, privi-

leges and immunities arising under the Acts of Congress pursuant to, under the authority of and for the purpose of carrying into effect the foregoing provisions of the Federal Constitution in this, that said decree and injunction prevent the defendant from continuing the prosecution of a bill in equity now pending in the State of New Jersey, referred to in the plaintiff's petition in which said decree was entered, wherein the defendant herein is the plaintiff and the plaintiff herein is the defendant, and thereby deprives the defendant herein of his right to enter and prosecute an appeal to the Court of Errors and Appeals in said State of New Jersey, the highest Court of said State, from a decision which has been rendered against him in said cause by an inferior Court in said State; that the defendant herein has the right in said State of New Jersey to perfect said appeal and prosecute said cause, and, to deny the defendant herein such right, will operate to make final and conclusive in favor of the plaintiff herein the decree heretofore entered in said cause in the State of New Jersey in favor of the plaintiff herein, and will operate to dismiss and dissolve the injunction heretofore granted
153 in said cause in the State of New Jersey, and will deprive the defendant herein of his right to apply for a continuance or renewal of said injunction.

(3) And, without limitation or waiver of the foregoing grounds, the defendant specifically moves that said decree be vacated and said injunction issued thereon dissolved, on the ground that it denies, impairs and abridges the rights, privileges and immunities of the defendant arising under Article 3, Sections 1 and 2, and Article 4, Sections 1 and 2, of the Constitution of the United States, and under Section 1 of the Fourteenth Amendment to the Constitution of the United States, and the rights, privileges and immunities arising under the Acts of Congress pursuant to, under the authority of and for the purpose of carrying into effect the foregoing provisions of the Federal Constitution in this, that said decree and injunction prevent the defendant herein from asserting in any of the Courts of the United States in any manner the rights, privileges and immunities guaranteed to him by and arising under the Federal Constitution and laws aforesaid in connection with the matters in controversy in this cause.

By His Solicitors, ALFRED HEMENWAY.
J. W. FARLEY.

And on the said twenty-eighth day of August the defendant filed his application to modify the decree of August 14, 1908, and the injunction issued thereon, said application being in the words following, to wit:

154 *Application of the Defendant to Modify the Decree of August 14, 1908, and the Injunction Issued Thereon.*

And now comes the defendant, Albert S. Bigelow, and moves:

(1) That the decree entered by this Honorable Court on August 14, 1908, and the injunction issued thereon be so modified and lim-

ited as not to prevent the defendant from continuing the prosecution of and perfecting his appeal in a certain cause now pending in the State of New Jersey, referred to in the plaintiff's petition on which said decree was entered, wherein the defendant herein is the plaintiff and the plaintiff herein is the defendant; and the defendant herein says that, unless said decree and injunction are so modified, it will prevent the defendant herein from entering and prosecuting an appeal to the Court of Errors and Appeals in said State of New Jersey, the highest Court of said State, from a decision in said cause which has been rendered against the defendant herein by an inferior court in said State; that the defendant herein has the right in said State of New Jersey to perfect said appeal and prosecute said cause, and to deny the defendant herein such right will operate to make final and conclusive in favor of the plaintiff herein the decree heretofore entered in said cause in the State of New Jersey in favor of the plaintiff herein and will operate to dismiss and dissolve the injunction heretofore granted in said cause in the State of New Jersey, and will deprive the defendant herein of his right to apply for a continuance or renewal of said injunction, and will deny, impair and abridge the rights, privileges and immunities of the defendant
155 herein arising under Article 4, Sections 1 and 2, of the Constitution of the United States, and under Section 1 of the Fourteenth Amendment of the Constitution of the United States, and the rights, privileges and immunities of the defendant herein arising under the Acts of Congress enacted pursuant to, under the authority of and for the purpose of carrying into effect the foregoing provisions of the Federal Constitution.

(2) And, without limitation or waiver of the foregoing ground, the defendant herein further moves for the modification of said decree and injunction of this Honorable Court of August 14, 1908, so as not to restrain the defendant herein from proceeding in any of the Courts of the United States, and the defendant herein says that, unless said decree and injunction are so modified, the same will deny, impair and abridge the rights, privileges and immunities of the defendant herein arising under Sections 1 and 2 of Article 3, and Sections 1 and 2 of Article 4, of the Constitution of the United States, and under Section 1 of the Fourteenth Amendment to the Constitution of the United States, and the rights, privileges and immunities of the defendant herein arising under the Acts of Congress enacted pursuant to, under the authority of and for the purpose of carrying into effect the foregoing provisions of the Federal Constitution.

(3) And, without limitation or waiver of the foregoing ground, the defendant herein further moves for the modification of said decree and injunction of this Honorable Court of August 14, 1908, so as not to restrain the defendant herein from proceeding in any of the Courts of the several States or Territories of the United States, other than the Courts of New Jersey or the Courts of the United States wherein jurisdiction of the parties and of the subject matter in any manner arising out of or in connection with
156 the controversy herein can be obtained.

By His Solicitors, ALFRED HEMENWAY.
J. W. FARLEY.

And on the said twenty-eighth day of August, the defendant filed his motion to modify the decree of August 14, 1908, and the injunction issued thereon, the said motion being in the words following, to wit:

Application of the Defendant to Modify the Decree of August 14, 1908, *and the Injunction Issued Thereon.*

And now comes the defendant, Albert S. Bigelow, and says:

That the said decree and the injunction issued thereon, except in so far as the same relates to the action for injunction pending in the Court of Chancery in the State of New Jersey is too indefinite, general and uncertain to be a valid decree, and said Albert S. Bigelow respectfully prays,

That the portion of said decree hereinbefore referred to as too indefinite, general and uncertain, and the injunction issued thereon be made specific, definite and certain.

By His Solicitors, ALFRED HEMENWAY.
J. W. FARLEY.

157 And on the said twenty eighth day of August the motions and applications for modification and vacation of the decree of August 14, 1908, were each denied by the Court.

And on the first day of September, A. D. 1908, the defendant appealed from the decree of August 14, 1908, the claim of appeal being in the words following, to-wit:

Defendant's Appeal.

And now comes the defendant and appeals from the decree entered in the above entitled cause on August 14, 1908, and from the orders denying the defendant's motions to modify or vacate said decree.

By His Solicitors, ALFRED HEMENWAY.
J. W. FARLEY.

And on the fourth day of said September, it was ordered by the Supreme Judicial Court for the Commonwealth by its Rescript, that the Clerk of this Court for the County of Suffolk make the following entry under this case in the docket of the Court, viz:

158 The defendant having made an application for leave to file a supplemental answer, the decree is vacated and the case remitted for hearing before a single Justice upon the question whether the defendant shall be allowed to file the supplemental answer, and if his motion for leave to file the supplemental answer is allowed, for a further hearing upon the matters set up in this answer, and for reversal or such modification of the original decree, if any, as ought to be made by reason of these matters. After the hearing or hearings the original decree, unless reversed, is to be entered with or without such modification, and the parties shall have the same right of appeal as they had when the decree was first made, or the Judge may reserve for the full court the questions that arise upon the supplemental answer.

By the Court. C. H. COOPER, *Clerk.*

September 4, 1908.

And on the sixteenth day of said September the defendant filed his motion for leave to file the supplemental answer thereunto annexed, which said motion was allowed by the Court, said motion and supplemental answer being in the words following, to wit:

159 *Motion of the Defendant.*

Now comes the defendant and moves for leave to file the supplemental answer hereto annexed, to introduce evidence to prove the facts therein alleged, and to have said answer and evidence consolidated with and made a part of the existing record in the above entitled causes, for the following reasons:

(1) There are now pending before the Supreme Judicial Court for the Commonwealth of Massachusetts two (2) causes in equity in which the Old Dominion Copper Mining & Smelting Company is plaintiff and Albert S. Bigelow is defendant, and numbered, or heretofore numbered, 8098 and 8099 in Equity for the Supreme Judicial Court for the County of Suffolk. At the time of the hearing of the above entitled causes in the Supreme Judicial Court for the County of Suffolk there were pending in the Circuit Court for the United States for the Southern District of New York two (2) actions in equity brought by the plaintiff, the Old Dominion Copper Mining & Smelting Company, against the Executors of the Estate of Leonard Lewisohn, said Lewisohn being the same person referred to in the bills of complaint in the above entitled causes. One of said actions pending in said Circuit Court was, and is, identical with said above entitled cause numbered 8098, and the other of said actions pending in said Circuit Court was, and is, identical with said above entitled cause numbered 8099.

(2) The allegations set forth in the bills of complaint in said actions in said Circuit Court were, in the first instance, identical mutatis mutandis with the allegations in the bills of complaint in the above entitled causes. One of said bills of complaint in said Circuit Court corresponding to 8098 was thereafter twice

160 amended by the plaintiff, but said allegations remained substantially the same, and throughout said bill of complaint stated and relied upon the same contracts, matters and transactions as set forth in the bills of complaint in the above entitled causes.

(3) Thereafter, that one of the said actions in the Circuit Court, corresponding to No. 8098 of the above entitled causes, having been demurred to by the defendants therein, resulted on July 23, 1908, in a final decree, dismissing the plaintiff's bill of complaint through the course of procedure hereinafter described. The other of said actions in the Circuit Court corresponding to No. 8099 of the above entitled causes, after answer by the defendant therein, has been and now is pending in said Circuit Court, under an agreement between counsel (the counsel for the complainant in said actions in the Circuit Court being the same as the counsel for the plaintiff in the above entitled causes) that the depositions taken in the above entitled causes may be considered as evidence in said pending action. The procedure hereinafter described in said Circuit Court refers only to the action corresponding to No. 8098 of the above entitled causes.

(4) At the time of the hearing in the above entitled causes there was no final judgment or decree or any judgment or decree in the said action or actions in said Circuit Court which could be in any way properly pleaded and proved in the above entitled causes as a bar thereto, nor has there at any time been such a judgment or decree until the twenty-third day of July, 1908.

(5) The course of procedure in said action in said Circuit Court was substantially as follows:—

Said action was begun by the plaintiff on or about the sixth day of January, 1903, the Executors of said Lewisohn, defendants
161 therein, duly demurred to the bill of complaint in said action, and on hearing said demurrer was sustained, and thereafter a decree, in accordance therewith, was entered in said action on or about the eighteenth day of November, 1905. The plaintiff on or about the third day of January, 1906, appealed from said decree to the United States Circuit Court of Appeals for the Second Circuit and said Court sustained the demurrer and affirmed the decree of said Court, said order affirming said decree being filed in said Circuit Court of Appeals on or about the seventeenth day of December, 1906. On or about the fifteenth day of January, 1907, the plaintiff presented a petition to the Supreme Court of the United States for a writ of certiorari in said action to said Circuit Court of Appeals, and, on the twenty-seventh day of February, 1907, said Supreme Court granted said petition and issued said writ of certiorari.

(6) At the time of said hearing in the above entitled causes said action, which had been begun in said Circuit Court, was pending before the said Supreme Court of the United States upon said writ of certiorari, there had been no hearing therein and no decision or decree had been rendered thereon.

(7) Under and by virtue of the law of the State of New York, and of the law as applied by the Federal Courts, which laws the defendant herein expressly offers to prove as a fact, the plaintiff's appeal from the decree of said Circuit Court to said Circuit Court of Appeals operated as a supersedeas to and vacated the decree of said Circuit Court, and said writ of certiorari to said Circuit Court of Appeals vacated and suspended its said decree and that of said Circuit Court, and suspended all action thereunder by either of said Courts or upon the decrees of said Courts.

162 (8) Thereafter, subsequently to said hearing of the above entitled causes and to the decrees therein and the appeals of both parties therefrom, upon hearing said Supreme Court of the United States sustained the demurrer to the bill of complaint in said action in said Circuit Court, and, in due course, on the twenty-third day of July, 1908, in accordance with the mandate from said Supreme Court, a final decree and judgment, dismissing the plaintiff's bill, was entered in said Circuit Court.

(9) Said Lewisohn, the Executors of whose estate were the defendants in New York in said action in said Circuit Court, was in said contracts, matters and transactions complained of in said action, and in the above entitled causes the trustee, representative and agent of your defendant, Albert S. Bigelow, and

the defendant would have been a proper party and was, in fact, a privy to said action, and the defendant, through one of his counsel, participated in the actual defence of said action in the Circuit Court, and assumed with said Lewisohn's Executors the joint defence thereof, and the defendant, both through his agents and counsel, has, by large expenditure of time and money, contributed to and joined and taken part as privy thereto in the defence of said action, with the knowledge of the plaintiff, throughout the entire period of the aforesaid litigation.

(10) By the law of the State of New York and by the law as applied by the Federal Courts and by the law of this Commonwealth, the mere pendency of said action or any action in said Circuit Court was not properly pleadable or provable as a bar or for any purpose in the above entitled causes.

(11) At the time of said hearing of the above entitled
163 causes and until July 23, 1908, owing to the acts of the Old Dominion Copper Mining & Smelting Company the aforesaid matters could not be pleaded and proven in the above entitled causes, and, owing to the acts of said Old Dominion Copper Mining & Smelting Company there was not at that time, and has never since been, until the twenty-third day of July, 1908, any decree or judgment in said action in said Circuit Court which he could plead and prove in the above entitled causes as a bar thereto or for any purpose.

(12) The bill of complaint in said Circuit Court did not allege that the contracts, matters and transactions there complained of were governed by the law of Massachusetts, but on the contrary, the plaintiff in said action in said Circuit Court proceeded on the sole and exclusive ground that the causes of action there sought to be enforced, and the transactions there complained of, arose and were governed by the laws of New York.

(13) The plaintiff in the above entitled causes, the Old Dominion Copper Mining & Smelting Company, by prosecuting to final judgment in another forum an action in equity based on the same cause of action as that in the above entitled causes, and said action having been finally determined adversely to it, is forever estopped and barred against prosecuting the above entitled causes against the defendant herein.

(14) Under and by virtue of the law of the State of New York (which law the defendant herein hereby expressly offers to prove as a fact) the legal effect and operation of said final decree of July 23rd, 1908, in said Circuit Court is to estop and forever bar the plaintiff in any action against this defendant upon either and both of the causes of action set forth in the two (2) bills of complaint now or formerly pending in this Court in the above entitled causes.

Said decree in said action is a conclusive judicial determina-
164 tion that the plaintiff, the Old Dominion Copper Mining & Smelting Company, has no cause of action against the defendant, Albert S. Bigelow, and renders res adjudicata between the plaintiff and this defendant all matters and causes of action complained of or shown by the evidence in the above entitled causes.

(15) The defendant, Albert S. Bigelow, desires to plead to the plaintiff's bills of complaint in the above entitled causes as a bar thereto, and all decrees, if any, now existing or hereafter to exist, in the above entitled causes, said final decree and judgment of July 23rd, 1908, of said Circuit Court. The defendant claims the benefit of all privileges and immunities guaranteed to him by the Constitution and the Acts of Congress of the United States and by Article I, Section X and Article IV, Sections I and II of said Constitution, and by Section I of the Fourteenth Amendment thereto, and all Acts of Congress enacted pursuant to, under the authority of and for the purpose of carrying into effect the foregoing provisions of the Federal Constitution, and the defendant claims that, by virtue of said Constitution and said Articles and Sections thereof and said Acts of Congress, he is entitled to a final adjudication and decree in the above entitled causes dismissing the plaintiff's bills of complaint.

The defendant further claims all the rights, privileges and immunities guaranteed to him by the United States Constitution and the Acts of Congress, and, more especially, by Article I, Section X, Article IV, Sections I and II of said Constitution, and Section I of the Fourteenth Amendment thereto, and all Acts of Congress enacted pursuant to, under the authority of and for the purpose of carrying into effect the foregoing provisions of said Constitu-
165 tion, and claims that to deny him the right to plead and prove the aforesaid matter in the above entitled causes will deprive him of said Constitutional rights, privileges and immunities.

And, without limitation or waiver of the foregoing, the defendant expressly says:

(1) That to deny that said final decree and judgment of July 23, 1908, of said Circuit Court is a final bar to the causes of action in issue in the above entitled causes is to deny to said decree full faith and credit under Section I of Article IV of the Constitution of the United States and the Acts of Congress enacted pursuant thereto.

(2) That to deny that said final decree and judgment of July 23, 1908, of said Circuit Court rendered res adjudicata between the plaintiff and the defendant all contracts, matters and transactions and the alleged cause of action resulting therefrom in issue in the above entitled causes is to deny to said decree full faith and credit under Section I of Article IV of the Constitution of the United States and the Acts of Congress enacted pursuant thereto.

(3) That to deny that said final decree and judgment of July 23, 1908, of said Circuit Court is an estoppel upon the plaintiff from prosecuting the above entitled causes is to deny to said decree full faith and credit under Section I of Article IV of the Constitution of the United States and the Acts of Congress enacted pursuant thereto.

(4) That to deny that the law of New York governed the validity of the contracts, matters and transactions in issue in the above entitled causes is to deny to this defendant the due process of law and the equal protection of the laws under Section I of the Fourteenth

Amendment to the Constitution of the United States and the
166 Acts of Congress enacted pursuant thereto.

(5) That to deny that the law of New York governing the validity of said contracts, matters and transactions in issue in the above entitled causes is not finally determined by said decision of the Supreme Court of the United States is to deny to said decision full faith and credit under Section 1 of Article IV of the Constitution of the United States and the Acts of Congress enacted pursuant thereto.

(6) That to determine or find the law of New York governing the validity of the contracts, matters and transactions in issue in the above entitled causes differently from the law of New York, as expressly enunciated by its highest Court prior to the making of said contracts and the execution of said matters and transactions, and to apply such law as so determined or found thereto so as to render such contracts, matters and transactions invalid and voidable when the same were valid and unassailable by the law of New York theretofore enunciated is to impair the obligation of said contracts under Section X of Article I of the Constitution of the United States and under Section 1 of the Fourteenth Amendment to the Constitution of the United States and under the Acts of Congress enacted pursuant thereto.

(7) That to deny that the law of New York governed the validity of the contracts, matters and transactions in issue in the above entitled causes, after the plaintiff on the sole ground that the law of New York did govern the same, prosecuted to final decree an action based on the same contracts, matters and transactions and cause of
action and thereby released and discharged the estate of said
167 Lewisohn from all liability on account thereof either to the plaintiff or by way of contribution to this defendant is a denial to this defendant of the due process of law, the equal protection of the laws and is an impairment of the obligation of said contracts under Section X of Article I of the Constitution of the United States and under Section 1 of the Fourteenth Amendment to the Constitution of the United States and the Acts of Congress enacted pursuant thereto.

Wherefore, the defendant says that the said decree in said action is a final bar to the cause of action relied upon by the plaintiff in this cause, and that the defendant's motion should be allowed.

By His Solicitors, ALFRED HEMENWAY,
J. W. FARLEY, *Of Counsel.*

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

SEPTEMBER 1, 1908.

Then personally appeared the above named J. W. Farley, and made oath that he was personally familiar with the matters of fact stated in the foregoing motion and that the same were true to the best of his knowledge, information and belief, before me,—

BURTON E. EAMES,
Justice of the Peace.

168 *Supplemental Answer of the Defendant.*

And now comes the defendant, Albert S. Bigelow, in the above-entitled cause, and files this further and supplemental answer to the bill of complaint and says:—

That, on or about January 6, 1903, the plaintiff exhibited its bill of complaint in the Circuit Court of the United States for the Southern District of New York against Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, as Executors of the last will and testament of Leonard Lewisohn, deceased; that said Leonard Lewisohn is the same person referred to by the plaintiff in the bill of complaint in the above entitled cause; that the allegations set forth in said bill of complaint in the Circuit Court of the United States for the Southern District of New York were, in the first instance, identical mutatis mutandis with the allegations in the bill of complaint in the above entitled cause that said bill of complaint in said Circuit Court was thereafter twice amended
169 by the plaintiff, but said allegations remained substantially the same and throughout said bill of complaint set forth the same cause of action and stated and relied upon the same contracts, acts and transactions as those set forth in the bill of complaint, and as shown by the evidence in the above entitled cause, and the contracts, acts, matters and transactions in which it is alleged in the bill of complaint in the above entitled cause that the defendant Bigelow and said Lewisohn participated, are the same contracts, acts, matters and transactions in which it is alleged in the bill of complaint in said Circuit Court that the defendant Bigelow and said Lewisohn participated. Said contracts, acts, matters and transactions as a result of which it was claimed that the respective defendants were liable to the plaintiff, were non-severable parts of one entire transaction, the relation of the defendant and said Lewisohn to the plaintiff in said transaction was the same, and their respective alleged liabilities to the plaintiff were identical and solely based on the determination of the validity of the said contracts, acts, matters and transactions. A copy of said bill of complaint, together with the amendments thereto, is hereto annexed and marked "Exhibit A."

That the said defendants, Lewisohn's executors, appeared and interposed two (2) demurrers to the plaintiff's bill, one of which was stated to be a demurrer to the whole bill and the other of which was stated to be a demurrer to a part of the bill. Copies of said two (2) demurrers are hereto annexed and marked, respectively, "Exhibit B" and "Exhibit B'"; that, after hearing, a decree was entered in said Circuit Court of the United States for the Southern District of New York on or about March 24, 1905, sustaining the said demurrers to so much of said bill of complaint as
sought rescission and allowing the plaintiff thirty (30)
170 days in which to file an amended bill. A copy of said decree is hereto annexed and marked "Exhibit C," and a copy of the opinion of Judge Lacombe ordering said decree is hereto annexed

and marked "Exhibit C'." Thereafter the plaintiff filed an amended bill of complaint in said Circuit Court, a copy of which is hereto annexed and marked "Exhibit D." Thereafter two (2) demurrers were duly filed by the defendants therein, the said Lewisohn's executors, one being a demurrer to the whole bill and the other being a demurrer to a part of the bill. Copies of said two (2) demurrers are hereto annexed and marked, respectively, "Exhibit E" and "Exhibit E'." Thereafter, upon hearing, a decree was entered by said Circuit Court on or about November 18, 1905, by which it was ordered by the Court that the demurrer to the whole of said amended bill of complaint be sustained for want of equity, and that the bill of complaint be dismissed. A copy of said decree is hereto annexed and marked "Exhibit F." Thereafter, on or about December 6, 1905, a final and formal decree was entered, dismissing the bill of complaint, a copy of which is hereto annexed and marked "Exhibit G." Thereafter, on or about January 3, 1906, the plaintiff filed his petition in said Circuit Court for an appeal to the United States Circuit Court of Appeals for the Second Circuit from the decree of said Circuit Court dismissing the plaintiff's bill. A copy of said petition for appeal and a copy of the assignment of errors on which said appeal was based are hereto annexed and marked, respectively, "Exhibit H" and "Exhibit I." Thereafter, on or about January 3, 1906, the plaintiff's petition for appeal having been duly allowed, the plaintiff, in accordance with the Statutes of the United States, in such cases made and provided, duly filed its bond to answer for all damages and costs on account of said appeal, and there-

171 upon said appeal and bond, under the Statutes of the United States in such cases made and provided, operated as a writ of supersedeas and vacated said decree. A copy of said bond is hereto annexed and marked "Exhibit J" and a copy of said Statutes of the United States is hereto annexed and marked "Exhibit J'." Thereafter, on or about December 4, 1906, the said United States Circuit Court of Appeals for the Second Circuit, after hearing, rendered an opinion, affirming the decree of the Court below. A copy of said opinion is hereto annexed and marked "Exhibit K." Thereafter, on or about December 17, 1906, a decree was entered in said cause by the United States Circuit Court of Appeals for the Second Circuit, affirming the decree of the Circuit Court of the United States for the Southern District of New York. A copy of said decree is hereto annexed and marked "Exhibit L." Under the law of the United States and of the State of New York governing the procedure in the United States Circuit Court of Appeals for the Second Circuit and in the Circuit Court of the United States for the Southern District of New York said decree of the United States Circuit Court of Appeals for the Second Circuit was entered only for the purpose of authorizing and was operative only to authorize a mandate to the Circuit Court of the United States for the Southern District of New York. Thereafter on or about January 15, 1907, the plaintiff applied to the Supreme Court of the United States, by motion, for a review of said cause of the Old Dominion Copper Mining & Smelting Company v. Lewisohn theretofore pending in the United States Circuit Court for the Southern District of New York and in the

United States Circuit Court of Appeals for the Second Circuit, and therewith filed in the Supreme Court of the United States its petition for a writ of certiorari to be issued in said cause to the United
172 States Circuit Court of Appeals for the Second Circuit. A copy of said petition is annexed hereto and marked "Exhibit M." Thereafter, on or about February 27, 1907, a writ of certiorari issued on said petition, a copy of which writ is hereto annexed and marked "Exhibit N." Thereafter, due return having been made to said writ and the entire record hereinbefore described in said cause being before the Supreme Court of the United States for review and after full hearing thereon, the Supreme Court of the United States rendered its decision of said cause, affirming the decree of the Court below. A copy of the opinion of Mr. Justice Holmes is hereto annexed and marked "Exhibit O." Thereafter, on May 18, 1908, a mandate was duly issued, remanding the cause to the Circuit Court of the United States for the Southern District of New York. A copy of said mandate is hereto annexed and marked "Exhibit P." Thereafter, on or about July 23, 1908, pursuant to said mandate, a final judgment and decree, in favor of the defendants in said cause, was duly entered in the Circuit Court of the United States for the Southern District of New York. A copy of said final judgment and decree is hereto annexed and marked "Exhibit Q." And the defendant says that there was no final decree reflecting a final and binding adjudication of the issues in said cause or binding upon the parties thereto between January 3, 1906 (the time when the decree of the Circuit Court for the Southern District of New York was vacated by the appeal to the United States Circuit Court of Appeals for the Second Circuit) and July 23, 1908 (when said Circuit Court entered its final decree aforesaid, pursuant to the mandate ordering the same). Copies of certain additional papers constituting a part of the record in said case in said Circuit Court are hereto annexed and together marked Exhibit R.

173 And the defendant says that the said final judgment and decree entered by the United States Circuit Court for the Southern District of New York and the entire proceedings of said Courts and each of them prior thereto proceeded on the merits of the controversy between the complainant and the defendants therein, and not on any technical or formal ground; said controversy put in issue the validity of all the contracts, acts and transactions in which it is alleged in the bill of complaint in the above entitled cause or shown by the evidence herein that the defendant participated and put in issue all questions as to the liability of this defendant and said Lewisohn as to said contracts, acts and transactions which have been or are raised in the above entitled cause. The issues in the said controversy in said Circuit Court were the same issues which are or have been raised in the above entitled cause and the contracts, acts and transactions complained of in the bill of complaint in said Circuit Court, the validity of which was put in issue in said controversy in said Circuit Court, were identically the same contracts, acts and transactions set forth in the plaintiff's bill in the above entitled cause or shown by

the evidence herein; and the defendant says that the said Lewisohn and the defendants in said action in said Circuit Court were, in the acts, matters and transactions complained of therein and in the acts, matters and transactions complained of or in issue herein, the trustees, representatives and agents of this defendant; and this defendant says that he would have been a proper party and was, in fact, a privy to said action and that he participated in the actual defence of said action in the Circuit Court and assumed, with said Lewisohn's Executors, the joint defence thereof, and the defendant, both through his agents and counsel, has, by large expenditure of time and
174 money, contributed to and joined in and taken part in the defence of said action as privy thereto, with the knowledge of the plaintiff, throughout the entire pendency of the aforesaid action in the Circuit Court of the United States for the Southern District of New York, including the defence thereof on appeal and on certiorari and including all matters and proceedings in connection therewith; and the defendant further says that said final judgment and decree of said Circuit Court of July 23, 1908, are in full force and effect and said proceedings have been at all times within the jurisdiction of said Courts and have been carried on in conformity with and according to the due course of law there established and then in force governing the same in the State of New York and in the United States; and the defendant further says that the effect of said decree, under the law and usages of the State of New York, is to make the same final and conclusive against the plaintiff upon the contracts, matters and transactions there complained of and the cause of action set forth in said bill of complaint in said Circuit Court and that said decree is, under the law and usages of the State of New York, effectual to estop and forever bar the plaintiff in any action against the defendant herein upon said contracts, matters and transactions and upon the cause of action set forth in the bill of complaint in this cause or as shown by the evidence herein, and said decree of said Circuit Court is a final judicial determination that the plaintiff has no cause of action against this defendant, on account of the contracts, matters, transactions and causes of action set forth in the plaintiff's bill of complaint in this cause or shown by the evidence herein, and that all the contracts, matters and things complained of in said bill of complaint or shown by said evidence are rendered res adjudicata by said decree, as between the
175 plaintiff and the defendant herein; and this defendant further claims, in connection with the matters hereinbefore set forth, the benefit of Article I, Section X, Article IV, Sections I and II, of the Constitution of the United States, and Section I of the Fourteenth Amendment to the Constitution of the United States, and of all Acts of Congress enacted pursuant to, under the authority of and for the purpose of carrying into effect the foregoing provisions of the Federal Constitution; and this defendant expressly claims that he is entitled to have said decree of said Circuit Court of the United States for the Southern District of New York of July 23, 1908, given that full faith and credit in this cause which it would have by law or custom in the State of New York, and the de-

fendant says that, by the law of the State of New York, said decree would be a final bar and an estoppel against the plaintiff from proceeding with any action or suit at law or in equity to enforce against the defendant the cause of action in issue herein; and this defendant further says that, if said decree is given that full faith and credit to which the same is entitled under the said provisions of the United States Constitution and Acts of Congress, the contracts, matters, transactions and cause of action in issue upon the pleadings and evidence in the above entitled cause are res adjudicata. And this defendant further says that if said decree is given such full faith and credit, then it is res adjudicata that the law of New York governed said contracts, matters, transactions and cause of action, and that such contracts, matters and transactions were valid and legal transactions in the State of New York, and cannot be here complained of by the plaintiff against this defendant.

The defendant further says that the plaintiff in its bill of complaint in said Circuit Court of the United States for the Southern District of New York did not allege that the contracts, mat-
176 ters and transactions there complained of and in issue upon the pleadings and evidence in this cause were governed by any law other than the law of the State of New York, but, on the contrary, the plaintiff in said action in said Circuit Court proceeded on the sole and exclusive ground that the causes of action there sought to be enforced and the contracts, matters and transactions there complained of were governed by the laws of the State of New York; and the defendant further says that the plaintiff having prosecuted said cause in said Circuit Court to a final decree on said ground that said contracts, matters and transactions were governed by the law of the State of New York is now estopped from setting up or claiming against the defendant that said contracts, matters and transactions were governed by the laws of Massachusetts or any law other than the law of the State of New York.

And this defendant further says that said decree of said Circuit Court of New York is a bar and estoppel in the above entitled cause, in that the contracts, matters and transactions complained of in the plaintiff's bill in said Circuit Court in New York, and in the plaintiff's bill in this cause or shown by evidence herein were governed by the law of the State of New York, and that at the time, when the acts complained of were done and the contracts complained of were made, it was the law of the State of New York, as shown by the express decisions of the highest Court of that State, that the contract between the plaintiff, on the one side, and the said Lewisohn and your defendant, on the other, and the transactions resulting from the carrying out of the same were legal contracts and transactions in the State of New York and such as not to subject this defendant or the said Lewisohn to any liability to the plaintiff on account thereof; and
the defendant says that the decision of the Supreme Court of
177 the United States in said cause in the Circuit Court of the United States for the Southern District of New York was a final adjudication and application of the law of New York to the

contracts, matters and transactions complained of in the plaintiff's bill in said Circuit Court and in issue upon the pleadings and evidence in this cause; and this defendant expressly claims, in connection with the matters herein set forth, the benefit of all privileges and immunities granted to him by Section X of Article I, Sections I and II of Article IV, of the Constitution of the United States, and Section I of the Fourteenth Amendment to the Constitution of the United States, and, also, under the Acts of Congress enacted pursuant to, under the authority of and for the purpose of carrying into effect the foregoing provisions of the Federal Constitution.

And, without limitation or waiver of the foregoing, the defendant expressly says:

(1) That to deny that said final decree and judgment of July 23, 1908, of said Circuit Court is a final bar to the cause of action in issue in the above entitled cause is to deny to said decree full faith and credit under Section I of Article IV of the Constitution of the United States and the Acts of Congress enacted pursuant thereto.

(2) That to deny that said final decree and judgment of July 23, 1908, of said Circuit Court rendered res adjudicata between the plaintiff and this defendant all contracts, matters and transactions and the alleged cause of action resulting therefrom, in issue in the above entitled cause is to deny to said decree full faith and credit under Section I of Article IV of the Constitution of the United States and the Acts of Congress enacted pursuant thereto.

178 (3) That to deny that said final decree and judgment of July 23, 1908, of said Circuit Court is an estopped upon the plaintiff from prosecuting the above entitled cause is to deny to said decree full faith and credit under Section I of Article IV of the Constitution of the United States and the Acts of Congress enacted pursuant thereto.

(4) That to deny that the law of New York governed the validity of the contracts, matters and transactions in issue in the above entitled cause is to deny to this defendant the due process of law and the equal protection of the laws under Section I of the Fourteenth Amendment to the Constitution of the United States and the Acts of Congress enacted pursuant thereto.

(5) That to deny that the law of New York governing the validity of said contracts, matters and transactions in issue in the above entitled cause is not finally determined by said decision of the Supreme Court of the United States is to deny to said decision full faith and credit under Section I of Article IV of the Constitution of the United States and the Acts of Congress enacted pursuant thereto.

(6) That to determine or find the law of New York governing the validity of the contracts, matters and transactions in issue in the above entitled cause differently from the law of New York, as expressly enunciated by its highest Court prior to the making of said contracts and the execution of said matters and transactions, and to apply such law as so determined or found thereto so as to

render such contracts, matters and transactions invalid or voidable when the same were valid and unassailable by the law of New
179 York theretofore enunciated, is to impair the obligation of said contracts under Section X of Article I of the Constitution of the United States and under Section I of the Fourteenth Amendment to the Constitution of the United States and under the Acts of Congress enacted pursuant thereto.

(7) That to deny that the law of New York governed the validity of the contracts, matters and transactions in issue in the above entitled cause, after the plaintiff on the sole ground that the law of New York did govern the same, prosecuted to final decree an action based on the same contracts, matters and transactions and cause of action and thereby released and discharged the estate of said Lewisohn from all liability on account thereof either to the plaintiff or by way of contribution to this defendant is a denial to this defendant of the due process of law, the equal protection of the laws and is an impairment of the obligation of said contracts under Section X of Article I of the Constitution of the United States and under Section I of the Fourteenth Amendment to the Constitution of the United States and the Acts of Congress enacted pursuant thereto.

By His Solicitors, ALFRED HEMENWAY.
J. W. FARLEY.

——— ———, *Of Counsel.*

180 EXHIBIT A.

Circuit Court of the United States, Southern District of New York.

No. 2.

OLD DOMINION COPPER MINING & SMELTING CO.
v.
FREDERICK LEWISOHN et al.

Amendment to Bill of Complaint.

Now comes the complainant in the above entitled cause before the Rule Day on which the subpœna issued in said cause is returnable and prays to amend the bill of complaint therein as follows:

First. By striking out in the eighth paragraph of said bill of complaint the words "the respondent" between the words "to wit" and the words "Jesse Lewisohn."

Second. By substituting in paragraph nineteenth of the said bill of complaint for the words and figures "thirty-six hundred and nineteen (3619)" the words and figures "thirty-six thousand one hundred and ninety (36190)."

(Signed) BRANDEIS, DUNBAR & NUTTER,
Solicitors for Plaintiff.

LOUIS D. BRANDEIS,
Of Counsel.

(Signed) CARTER, HUGHES & DWIGHT,
Solicitors for Complainant, 96 Broadway, New York.

CHARLES E. HUGHES,
Of Counsel.

181 Circuit Court of the United States, Southern District of New York.

In Equity.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
v.
FREDERICK LEWISOHN et al.

Bill of Complaint.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY, a Corporation Duly Organized Under the Laws of the State of New Jersey and a Citizen of Said State, Residing at Jersey City, in the Said State and in the District of New Jersey, Complainant,

against

FREDERICK LEWISOHN, WALTER LEWISOHN, ALBERT LEWISOHN and Philip S. Henry, All Citizens of the State of New York, Residing in the Borough of Manhattan, in the City of New York, in the State of New York, and in the Southern District of New York, as Executors of the Last Will of Leonard Lewisohn, Who, at the Time of His Death, was a Citizen of Said State, Residing in Said Borough of Manhattan, Respondents.

To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York:

And thereupon your orator complains and says:

First. The complainant, the Old Dominion Copper Mining and Smelting Company, is a corporation duly organized under the laws of the State of New Jersey, and having a usual place of business at Boston, in the County of Suffolk and Commonwealth
182 of Massachusetts, and a citizen of New Jersey, residing at Jersey City, in said State and in the District of New Jersey. Said corporation is the owner of copper mines and smelting works in the Territory of Arizona, and is carrying on the business of mining, smelting and selling copper.

Second. On and prior to March 21, 1895, there existed a certain corporation called the Old Dominion Copper Company, of Baltimore City (hereinafter called the Baltimore Old Dominion Company), organized under the laws of the State of Maryland, and having a usual place of business in said Baltimore. Said Baltimore Old Dominion Company was then the owner of mines and mining claims in Arizona. It had a capital stock of five hundred thousand ($500,000) dollars, divided into twenty-five thousand (25,000) shares of the par value of twenty (20) dollars each. Of said shares there were then owned by the executors of the will of Michael H. Simpson, late of said Boston, deceased, about seventeen thousand eight hundred and fifty-seven (17857) shares and the balance of said shares were then owned by one William Keyser, of Baltimore, in the State of Maryland, and others. Said Keyser also

then held the title in his own name to certain mines and mining claims known as the Old Dominion Mine, the New York Mine, the Chicago Mine, the Keystone Mine, and a certain parcel of land near the Bloody tanks, so-called, all in said Arizona, but whether said Keyser held said property solely in his own right or in trust, wholly or in part for others or for said corporation, the complainant is ignorant.

Third. At some time prior to May 24, 1895, one Albert S. Bigelow, of said Boston, and said Leonard Lewisohn, deceased, formed the plan of acquiring all the stock of said Baltimore Old Dominion
183 Company and all said real estate, title to which then stood in the name of said Keyser, as aforesaid, and of organizing a new corporation to acquire and of selling to such new corporation at a large advance in price, all the property of said Baltimore Old Dominion Company and all the real estate held by said Keyser, as aforesaid, and putting upon the market and selling to such of the public as might be induced to buy the same a large number of the shares of such new corporation in order to provide the same with a working capital, and make necessary improvements in the plant, and acquire additional mining claims, and of thereby securing for themselves and such persons as they might associate with them a large profit from the purchase and resale to said new corporation to be organized by them of said property; and said Bigelow and said Leonard Lewisohn thereupon conspired together to carry out said plan and thereby to injure said corporation to be formed as aforesaid and the future stockholders in said corporation, and to secure for themselves as promoters and organizers thereof a large secret profit.

Fourth. Pursuant to said plan and conspiracy said Bigelow in conjunction with said Leonard Lewisohn, at some time prior to May 24, 1895, procured a number of persons whose names are to the complainant unknown, to subscribe to the Old Dominion Syndicate, so-called; said syndicate was formed for the purpose of raising about one million (1,000,000) dollars, or so much thereof as was necessary to carry out said plan and conspiracy of said Bigelow and said Leonard Lewisohn above described for the benefit of the members of the syndicate. The terms of said subscription were that the subscribers should pay in fourteen (14) per cent. of the amount of their respective subscriptions on May 27, 1895, twenty-eight and two-thirds (28⅔) per cent. on July 26, 1895, twenty-eight and two-thirds
184 (28⅔) per cent. on August 26, 1895, and twenty-eight and two-thirds (28⅔) per cent. on September 24, 1895, and with each of said last three instalments five (5) per cent. interest thereon from May 27, 1895; and that the amount so subscribed and paid in should be used so far as required for the purpose of acquiring the property or all the capital stock of said Baltimore Old Dominion Company, and that the subscribers to said syndicate should receive in cash or in stock of the new corporation to be formed to purchase said property from said syndicate two million ($2,000,000) dollars to be distributed pro rata according to their several subscriptions. The precise terms of said syndicate agreement are to the complainant unknown, and the complainant has no copy thereof

which it can attach hereto, but said respondent well know the terms of said agreement and have a copy of the original thereof in their possession or control.

Fifth. Thereafter, to wit, on or about May 24, 1895, said Bigelow in conjunction with said Leonard Lewisohn received the first instalment payable by the subscribers to said syndicate amounting to about one hundred and forty thousand ($140,000) dollars. At some time on or about May 2, 1895, said Bigelow in conjunction with said Leonard Lewisohn, for the purpose of carrying out said plan and conspiracy and the purposes of said syndicate, made an agreement with the executors of the will of said Michael H. Simpson for the purchase from said executors of seventeen thousand eight hundred and fifty-seven (17,857) shares of the capital stock of said Baltimore Old Dominion Company, being five-sevenths (5-7) of the total capital stock of said corporation, at a price not exceeding six hundred and thirteen thousand one hundred and thirty-seven dollars and thirty-nine cents ($613,137.39). The complainant is ignorant of the precise terms of said agreement, but is informed
185 and believes, and therefore charges, that said agreement was in the form of an option for which a sum not exceeding one hundred thousand ($100,000) dollars was paid, under which option said Bigelow and said Leonard Lewisohn were entitled to acquire said stock at the price aforesaid by making further payments at a future time or times.

Sixth. At some time prior to July 1, 1895, said Bigelow, in conjunction with said Leonard Lewisohn, for the purpose of carrying out said plan and conspiracy and for the purposes of said syndicate, made an agreement with said William Keyser and with other persons to the complainant unknown by which said Bigelow and said Lewisohn acquired the remaining two-sevenths (2-7) of all the capital stock of said Baltimore Old Dominion Company, to wit, seven thousand one hundred and forty-three (7143) shares at a price not exceeding one hundred and seventy-five thousand one hundred and eighty-two dollars and eleven cents ($175,182.11). The complainant is unable to state more particularly the terms of said purchase, but the terms thereof are well known to the respondents.

Seventh. At about the time of the purchase from the said Keyser and others of said seven thousand one hundred and forty-three (7143) shares of stock in said Baltimore Old Dominion Company said Bigelow and said Lewisohn for their common benefit acquired from said Keyser for the same consideration paid for seven thousand one hundred and forty-three (7143) shares, but, as they claimed, for their own benefit and not for the benefit of said Old Dominion Syndicate, the parcels of real estate in Arizona, title to which then stood in the name of said Keyser, as above set forth, to wit, the four mining claims known as said Old Dominion Mine, said New York
Mine, said Keystone Mine, and said Chicago Mine, and said
186 parcel of land near the Bloody Tanks. All said real estate was acquired in the name of and was conveyed by said Keyser to said Leonard Lewisohn, but for the common benefits of said Lewis-

ohn and said Bigelow, as hereafter set forth, and pursuant to and as a part of the plan and conspiracy and for the purposes hereinafter set forth.

Eighth. On or about July 8, 1895, said Bigelow in conjunction with said Leonard Lewisohn, in pursuance of said plan and conspiracy and for the purpose of carrying out the same for the benefit of themselves and of the subscribers to said Old Dominion Syndicate, so-called, caused the Old Dominion Copper Mining and Smelting Company the complainant herein, to be organized under the general corporation laws of the State of New Jersey. Said corporation was formed by seven persons selected and employed for the purpose by said Bigelow and said Leonard Lewisohn, to wit, the respondent, Jesse Lewisohn, Allen W. Evarts, Edgar Buffam, Charles W. Welch, Sidney Riddlestorffer, William V. Rowe and William R. Montgomery. None of said several persons, except said Jesse Lewisohn, who was a son of said Leonard Lewisohn, had any actual interest in said corporation or acted in the formation thereof otherwise than as the representative and agent of said Bigelow and said Leonard Lewisohn. Each of said individuals nominally subscribed and paid for four (4) shares of the capital stock of said corporation except said Jesse Lewisohn who subscribed and paid for sixteen (16) shares; but in fact all said subscriptions were made for the benefit and at the request of said Bigelow and said Leonard Lewisohn, and each subscription was paid for by said defendant and said Leonard Lewisohn or one of them.

Ninth. On July 9, 1895, the first meeting of said corporation, organized as aforesaid, was held in Jersey City and all of the
187 said incorporators were then present. By-laws were adopted and upon an election of directors by ballot said seven incorporators above named were duly chosen directors, and it was further voted to increase the capital stock to three million seven hundred and fifty thousand ($3,750,000) dollars divided into one hundred and fifty thousand (150,000) shares of twenty five ($25) dollars each. A recess was taken by said meeting, and thereupon said seven directors met and organized and elected officers, to wit, said Allen W. Evarts, president, and said Sidney Riddlestorffer, vice-president, said Jesse Lewisohn, treasurer, and said Edgar Buffam, secretary. Said meeting of directors confirmed the action of the prior meeting of incorporators increasing the capital stock as above set forth. The organization of said corporation and the proceedings of said meetings of incorporators and directors were duly had according to the laws of the State of New Jersey, and the by-laws adopted, as aforesaid, and thereby the complainant became duly organized as a corporation and the individuals above named became the lawful officers of the corporation, holding respectively the offices above named.

Tenth. A meeting of the directors of said complainant corporation, organized as aforesaid, was duly held on July 11, 1895, at the office in New York City of the firm of Lewisohn Brothers, of which firm said Leonard Lewisohn was a member; all of the directors except said Montgomery were present. Pursuant to instructions from said Bigelow and said Leonard Lewisohn, the resignation of said Mont-

gomery as a director was presented and duly accepted, and said Bigelow was thereupon chosen a director in his place. Thereupon, pursuant to instructions from said Bigelow and said Leonard Lewisohn, the successive resignations of said Rowe as a director, of said
188 Welch as a director, of said Jesse Lewisohn as treasurer and as director, of said Evarts as president, and of said Riddlestorffer as Vice-President and as director were presented and duly accepted, and said Leonard Lewisohn, one Henry M. Whitney, one Thomas Nelson, and one Joseph G. Ray were successively duly chosen directors, and said Thomas Nelson was duly chosen treasurer, and said Bigelow was duly chosen president of said corporation. Said Bigelow and said Leonard Lewisohn were present at said meeting, and upon their respective elections as directors took their places in said meeting. All said resignations were duly received and acted on and said elections to fill the vacancies caused by said resignations were duly had pursuant to the laws of the State of New Jersey and the by-laws of said corporation.

Eleventh. At some time prior to July 11, 1895, to-wit, on or about July 8, 1895, said Bigelow and said Leonard Lewisohn, in pursuance of said plan and conspiracy, completed the purchase of all said shares of stock in said Baltimore Old Dominion Company upon the terms of the agreement with the executors of the will of Michael H. Simpson and with William Keyser and others hereinbefore referred to, and all said stock was delivered and transferred to said Bigelow and said Leonard Lewisohn, or to persons designated by them, and the directors and officers of the said Baltimore Old Dominion Company resigned and new directors nominated by said Bigelow and said Leonard Lewisohn were duly chosen and said Bigelow was duly chosen president and said Allen W. Evarts secretary of said corporation. At the same time, to-wit, on or about July 8, 1895, and prior to July 11, 1895, said Keyser, pursuant to said agreement, conveyed to said Leonard Lewisohn said real estate in Arizona above referred to, to-wit, the Old Dominion Mine, New York Mine, Chicago Mine, Keystone Mine, and parcel of land near the Bloody Tanks,
189 so-called and the legal title to said real estate became vested in said Leonard Lewisohn.

Twelfth. At said meeting of the directors of the complainant corporation on July 11, 1895, above referred to, after the several changes of directors and other officers by resignation above set forth, and after said Bigelow had been elected President of said corporation, there remained present four directors, to-wit, said Bigelow, said Leonard Lewisohn, said Evarts, and said Buffam. Said Evarts was the attorney employed by said Bigelow and said Lewisohn to attend to the incorporation of the complainant corporation and to carry out their said plan and conspiracy; said Buffam was a person selected by them and employed by them to act as director, and assist them in carrying out said plan and conspiracy. The remaining directors were said Thomas Nelson, Henry M. Whitney, and Joseph G. Ray, no one of them was present and each of whom was a subscriber to said Old Dominion Syndicate and interested to assist said Bigelow and said Leonard Lewisohn in their plan to sell said

property to the complainant and in the success of said plan and conspiracy.

Thirteenth. At said meeting of the directors of the complainant company on July 11, 1895, after the change of directors and officers above set forth and after said Bigelow had been chosen president as aforesaid, said Bigelow through said Evarts presented to said Board of directors of the complainant an offer to the complainant to sell and convey substantially all the property of said Baltimore Old Dominion Company, except the cash assets, to the complainant for one hundred thousand (100,000) shares of the capital stock of the complainant corporation to be issued to said Baltimore Old Dominion Company or its nominees. Said offer was signed by said Bigelow as president of and by said Evarts as secretary of said Baltimore Old Dominion Company. A copy of said offer and of the schedule
190 therein referred to is hereto annexed and marked "A" and made a part of this bill of complaint. Upon presentation of said offer, on motion of said Leonard Lewisohn, seconded by said Evarts, it was unanimously voted to accept said offer and to issue one hundred thousand (100,000) shares of the capital stock in payment for said property, and said Bigelow and said Nelson were appointed a committee to supervise and carry out the details.

Fourteenth. Immediately after the passage of the vote last above referred to at said meeting of the directors of the complainant on July 11, 1898, said Leonard Lewisohn presented to said Board of Directors of the complainant a proposition to sell and convey to the complainant said real estate in Arizona acquired by said Leonard Lewisohn from said Keyser as above set forth, to-wit, said Old Dominion Mine, said New York Mine, said Chicago Mine, said Keystone Mine, and said parcel of land near the Bloody Tanks, so-called, for thirty thousand (30,000) shares of the capital stock of the complainant to be issued to said Leonard Lewisohn or his nominees accompanied with a request to issue said shares to said Bigelow and said Leonard Lewisohn. A copy of said proposition is hereto annexed and marked "B" and made a part of this bill of complaint. Upon presentation of said proposition said Bigelow and said Leonard Lewisohn caused the directors of the complainant corporation unanimously to vote to accept said proposition and to issue thirty thousand (30,000) shares of the capital stock in payment of said property, and said Bigelow and said Nelson were appointed a committee to supervise and carry out the details.

Fifteenth. Thereafter said Bigelow and said Leonard Lewisohn, pursuant to the original plan and conspiracy, and for
191 the purpose of furnishing the complainant corporation, promoted by them as aforesaid, with working capital and with funds required to develop its plants and other properties, caused to be offered twenty thousand (20,000) shares of the capital stock of the complainant corporation, not theretofore disposed of, for public subscription and sale at the price of twenty-five (25) dollars per share; and all of said shares were so subscribed for and sold and the price therefor paid by said subscribers to the complainant. Said subscribers and purchasers of

said shares were ignorant at the time said shares were offered for subscription and at the time they severally subscribed and paid therefor and received their shares, as hereinafter set forth, of the facts hereinbefore set forth as to the promotion and organization of the complainant corporation by said Bigelow and said Leonard Lewisohn, and the large profit to be made by said Bigelow and said Leonard Lewisohn and by the other members of said Old Dominion Syndicate therefrom.

Sixteenth. Thereafter the sale and conveyance of the property of said Baltimore Old Dominion Company, included in the offer marked Exhibit "A" and the schedule thereto annexed, was consummated by the transfer of said property to this corporation, and the sale and conveyance of the property included in the proposition of said Leonard Lewisohn marked Exhibit "B" was consummated by the transfer of said property to this corporation. Thereafter, to-wit, on or about September 18, 1895, the Board of Directors of the complainant corporation at a meeting duly called voted at the request of said Baltimore Old Dominion Mining Company to issue one hundred thousand (100,000) shares of the capital stock of this complainant to one Philip K. Dumaresq, as representing said corporation as and for the price of said property so transferred and conveyed, and said shares were duly issued pursuant to said vote. And said board of directors of this corporation at said meeting further voted to

192 to issue thirty thousand (30,000) shares of the capital stock of this corporation to said Bigelow and said Leonard Lewisohn as and for the price of said property transferred and conveyed by the latter to this corporation as above set forth, and said shares were thereupon duly issued pursuant to said vote. And said board of directors of this corporation at the same meeting voted to issue twenty thousand (20,000) shares of the capital stock thereof to persons who had subscribed therefor, as above set forth upon receiving payment of twenty-five ($25) dollars per share therefor.

Seventeenth. Said property conveyed to the complainant by said Baltimore Old Dominion Company was at the time of such conveyance fairly worth not more than one million (1,000,000) dollars. Said parcels of real estate sold and conveyed by said Leonard Lewisohn to the complainant as aforesaid, to-wit, said several mining claims known as Old Dominion Mine, New York Mine, Chicago Mine, and Keystone Mine respectively, and said parcel of land near the Bloody Tanks so-called, were at the time of such conveyance fairly worth not more than five thousand dollars ($5,000). Said Leonard Lewisohn and said Bigelow knew when they acquired the stock of said Baltimore Old Dominion Company and said Leonard Lewisohn acquired title to said parcels of real estate, and when said offers to sell to the complainant were made by said Baltimore Old Dominion Company and by said Leonard Lewisohn, respectively, that the value of the property referred to in said offers respectively was not in excess of the amounts above specified. The stock of said Baltimore Old Dominion Company and said parcels of real estate were acquired in the manner aforesaid with intent on the part of said Leonard Lewisohn and of said Bigelow to sell said property of said Baltimore Old

Dominion Company and said parcels of real estate for a large price.

No disclosure was at any time made to the com-
193 plainant corporation of the fact that said property and said real estate was not of more than the values above given respectively, and by reason of the control by said Bigelow and said Leonard Lewisohn of the complainant corporation and its board of directors, as above set forth, said purchase was made without any disclosure to or injury by complainant corporation as to the reasonable value of said properties; and no disclosure was ever made to any of the persons who subscribed for or afterwards purchased shares of stock in the complainant corporation or to any other person of the facts as to the purchase of said properties or as to the reasonable value thereof, and said facts were not known to any of said persons or to any of the members of said Old Dominion Syndicate, except said Bigelow and said Leonard Lewisohn.

Eighteenth. By the transactions above set forth, said Bigelow and said Leonard Lewisohn carried out their said plan and conspiracy, and having, for the purpose of promoting a corporation and selling to such corporation, at a price much in excess of the cost thereof, the property of said Baltimore Old Dominion Mining Company and the property so conveyed to said Leonard Lewisohn, acquired all the capital stock of said Baltimore Old Dominion Company for the sum of less than eight hundred thousand ($800,000) dollars, and acquired without making any further payment, but for themselves as they claimed, all the property conveyed by said Leonard Lewisohn to the complainant, and having promoted the complainant corporation and caused the same to be organized, thereupon did sell to it the property of said Baltimore Old Dominion Company for one hundred thousand (100,000) shares of the capital stock of this corporation of the par value of twenty-five ($25) dollars each, to-wit, the aggregate par value of two million five hundred thousand ($2,500,000) dollars, and

also sold to it all the property conveyed to said Leonard Lewis-
194 ohn for thirty thousand (30,000) shares of said stock of the aggregate par value of seven hundred and fifty thousand ($750,000) dollars. And for the purpose of providing the corporation so promoted and formed by them pursuant to and in execution of said plan and conspiracy, to wit, the complainant corporation with working and other capital, said Bigelow and said Leonard Lewisohn in further execution and performance of said plan and conspiracy, sold to the public twenty thousand (20,000) shares of the capital stock of said corporation so formed as aforesaid, to-wit, this corporation. The shares of this corporation so issued in payment of the property sold to it as aforesaid were at the time of the fair market value of twenty-five ($25) dollars each, and continued for a long time thereafter to be of such or greater value, and said Bigelow and said Leonard Lewisohn thus made for themselves and their associates in said syndicate from the sale of the property conveyed by the Baltimore Old Dominion Company to the complainant a profit of more than one million five hundred thousand ($1,500,000) dollars, and in addition thereto made for themselves alone on the property conveyed

by said Leonard Lewisohn to the complainant a profit of over seven hundred and fifty thousand ($750,000) dollars.

Nineteenth. The subscribers to said Old Dominion Syndicate so-called were entitled by the terms of the agreement forming said syndicate to receive each his proportionate share of two million (2,000,000) dollars in repayment of his original advance and his share of profits. To effect this division each member of said Syndicate was permitted to apply for shares of this corporation at par to the amount so payable to him, and said shares were thereupon issued to such applicant in lieu of his proportionate share of said sum. All or substantially all the subscribers to said Syndi-
195 cate availed themselves of this privilege, and so far as such privilege was not availed of the money required was advanced by said Bigelow or others interested, and the corresponding number of shares was issued to the person so advancing the money. Of the one hundred thousand (100,000) shares of the capital stock of this corporation issued to Philip K. Dumaresq as above set forth, upon and as consideration for the conveyance of all the property of said Baltimore Old Dominion Company as aforesaid, eighty thousand shares were thus distributed to and among the members of said Old Dominion Syndicate, so-called, or persons exercising the privilege of such members in the manner above set forth. And of this amount more than one-half was a profit made in the manner above described, and said syndicate thereby made a profit of not less than one million ($1,000,000) dollars. Of the eighty thousand (80,000) shares thus divided said Bigelow received as his proportion four thousand (4000) shares, and said Leonard Lewisohn received thirty-six hundred and nineteen (3619) shares. Not less than one-half of the shares so issued direct to said Bigelow and to said Leonard Lewisohn represented and was a profit to them respectively as members of said syndicate from the purchase of the stock of said Baltimore Old Dominion Company and the sale of its property aforesaid, to this corporation, pursuant to the plan and conspiracy formed by said Bigelow and said Leonard Lewisohn as hereinbefore set forth.

Twentieth. Said Bigelow and said Leonard Lewisohn by agreement between themselves, and as the complainant is informed and believes without the knowledge or assent of the other members of said Old Dominion Syndicate, took from the one hundred thousand (100,000) shares issued to Philip K. Dumaresq, as above set forth, ostensibly in payment of expenses and their own services in
196 connection with the matter, the twenty thousand (20,000) shares remaining after dividing eighty thousand (80,000) shares among the members of said Syndicate, as above set forth. The expenses actually incurred by them did not exceed six thousand (6000) dollars. These twenty thousand (20,000) shares were divided between said Bigelow and said Leonard Lewisohn, said Bigelow receiving ten thousand nine hundred and forty (10,940) shares as his proportion thereof, and said Leonard Lewisohn nine thousand and sixty (9060) shares as his proportion thereof. Said thirty thousand (30,000) shares issued to said Bigelow and said Leonard Lewisohn from said conveyance of real estate by said

Leonard Lewisohn were also divided between said Bigelow and said Leonard Lewisohn, said Bigelow receiving sixteen thousand four hundred and ten (16,410) shares thereof, and said Leonard Lewisohn thirteen thousand five hundred and ninety (13,590) shares.

Twenty-first. Prior to the formation of said Old Dominion Syndicate, so-called, and prior to making the several agreements hereinbefore referred to for the acquisition of the stock of said Baltimore Old Dominion Company and for the acquisition by said Leonard Lewisohn of said several parcels of real estate in Arizona conveyed to him by said Keyser as aforesaid, said Bigelow and said Leonard Lewisohn had formed the plan and intention of organizing a corporation to acquire the property of said Baltimore Old Dominion Company and to acquire said several parcels of real estate; and had formed the plan and intention of selling said property and said real estate to such new corporation at a large advance in price and of thereby acquiring and obtaining for themselves and such persons as they might associate with them a large profit from such sale to said corporation so to be formed, and of selling to the public a sufficient number of shares in the corporation so formed to provide
197 said corporation with a working capital. And said Bigelow and said Lewisohn formed said Old Dominion Syndicate, so-called, and purchased said stock of said Baltimore Old Dominion Company and said real estate conveyed to said Leonard Lewishon as aforesaid, for the purpose and with the intent of carrying out the prior plan and intention so formed by them as aforesaid, and of selling the property so conveyed to said Leonard Lewisohn to the complainant corporation when the same should be formed, at a large advance in price; and said Bigelow and said Leonard Lewisohn caused the complainant corporation to be organized and to acquire the property of said Baltimore Old Dominion Company and to acquire the real estate conveyed by said Keyser to said Leonard Lewisohn, and caused said corporation to offer for sale and to sell to the public sufficient shares, to wit, twenty thousand (20,000) shares to provide it with working and other capital, in the manner aforesaid in further execution and performance of said plan and intention. When said offer was made by said Baltimore Old Dominion Company to the complainant corporation and when said proposition was made by said Leonard Lewisohn to the complainant corporation, and when said offer and proposition was accepted, said Bigelow and said Leonard Lewisohn were in absolute control of the complainant corporation through the ownership by them and their associates of all stock in said complainant corporation then outstanding, and through the selection of a Board of Directors and other officers chosen by them and selected for the purpose of enabling them to carry out said plan, and consisting of themselves, their employees and associates, all of whom were expressly chosen for the purpose of carrying out said plan and intention, and had expressly undertaken to do so; and said offer of said Baltimore Old Dominion Company and said proposition of said Leonard Lewisohn were accepted by the complainant corporation through its board of directors
198 as above set forth, by the direction of said Bigelow and said Leonard Lewisohn, and the other directors in acting thereon

acted solely at the direction of and pursuant to previous agreement with said Bigelow and said Leonard Lewisohn, and for the express purpose of carrying out the said plan and intention of said Bigelow and said Leonard Lewisohn, and all of said action was taken and was intended by the individuals who took part therein to carry out said plan and intention and to enable said Bigelow and said Leonard Lewisohn and such persons as they had associated with them to make a large profit by the sale of said property of the Baltimore Old Dominion Company and of said real estate to the complainant corporation at a price greatly in excess of the cost to said Bigelow and to said Leonard Lewisohn and their associates of all the stock of said Baltimore Old Dominion Company and of said real estate. And when said twenty thousand (20,000) shares of stock were offered to and were sold to the public, as above set forth, said Bigelow and said Leonard Lewisohn were in absolute control of the complainant corporation, as aforesaid, and said shares were so offered for sale and sold to carry out said plan and conspiracy of said Bigelow and said Leonard Lewisohn aforesaid.

Twenty-second. From July 11, 1895, when said purchase in behalf of the complainant corporation of the property of said Baltimore Old Dominion Company and of said real estate from said Leonard Lewisohn was consummated, as above set forth, until April 4, 1902, said Bigelow was continuously the president and chief executive officer of the complainant corporation; throughout said period the board of directors of the complainant corporation was continuously composed of persons selected by said Bigelow and said Leonard Lewisohn and at all times until April 4, 1902, a large ma-

199 jority of the persons so acting as directors were personal friends of said Bigelow and of said Lewisohn, and had been interested with said Bigelow and said Leonard Lewisohn in the transactions above set forth and had received some share in the profits thereof, and the remaining directors took no active part in the management of the complainant corporation, and were ignorant of the facts hereinbefore set forth. No disclosure was at any time made to any of the subscribers for or to any purchasers of the capital stock of the complainant corporation not disposed of to said Bigelow or said Leonard Lewisohn, or to any purchaser thereof from them or either of them of the profit made by said Bigelow and said Leonard Lewisohn, as above set forth, as promoters of the complainant corporation or of any part thereof, and no disclosure was made to those persons other than said Bigelow and said Leonard Lewisohn who shared in the distribution of eighty thousand (80,000) shares of stock distributed to the members of said Old Dominion Syndicate of the profit made by said Bigelow and by said Leonard Lewisohn in the division between them of said additional twenty thousand (20,000) shares derived from the sale of the property formerly held by the Baltimore Old Dominion Company or of the thirty thousand (30,000) shares derived from the sale of the property conveyed by said Leonard Lewisohn, as above set forth, in the proportion of twenty-seven thousand three hundred and fifty (27,350) to said Bigelow and twenty-two thousand six hundred and fifty (22,650) to

said Leonard Lewisohn. This complainant had not until after April 4, 1902, any knowledge or information of any of the facts hereinbefore set forth as to the profit derived by said Bigelow or by said Leonard Lewisohn in the manner above stated as promoters of this corporation or of any profit having been derived by them,
200 or either of them or by any other person interested or participating in the promotion and organization of this corporation, and immediately upon receiving information relating thereto, the complainant investigated the same and thereupon promptly made demand upon said Bigelow and upon the defendants.

Twenty-third. The property conveyed to the complainant by the Baltimore Old Dominion Company, as above set forth, consists mainly of the copper mine which was then and ever since has been in active operation, and from which large amounts of ore have since been taken, and upon which large expenditures have been made in the development and establishment of the necessary plant. All the property as conveyed at the time it was sold to the complainant as above set forth was worth not over one million (1,000,000) dollars. The property conveyed to the complainant by Leonard Lewisohn as above stated consists merely of mining claims and a parcel of land for a mill site, all of which property has since said conveyance remained undeveloped and is now in substantially the same condition that it was at the time of the conveyance by said Lewisohn to the complainant. Said property so conveyed was at the time of such conveyance fairly worth not more than five thousand (5000) dollars.

Twenty-fourth. Said Leonard Lewisohn died on March 5, 1902, and was at the time of his death a citizen of the State of New York and a resident of the Borough of Manhattan in the City, County and State of New York. On or about April 4, 1902, the last will and testament of said Leonard Lewisohn was duly admitted to probate in the Surrogates' Court for said County of New York, and on or about April 5, 1902, the respondents herein were duly appointed executors of said will, and letters testamentary were duly issued to them as such by said Surrogates' Court, and they are now
201 such executors and duly qualified and acting as such. All said respondents are citizens of the State of New York and reside in said Borough of Manhattan in the City of New York and State of New York in the Southern District of New York.

Twenty-fifth. After April 4, 1902, and prior to July 24, 1902, the complainant made investigations as to the matters above set forth. In the course of such investigations it applied to said Bigelow for information and access to papers. This information was, as the complainant is informed and believes, referred to the respondents, and said Bigelow subsequently notified this complainant that the respondents were unwilling to permit information or access to papers relating to said matters to be given to the complainant. Thereafter, to wit, on or about July 24, 1902, the complainant by its counsel notified the respondents that the complainant had a claim for a very large amount against them as executors as aforesaid to recover the profits made by said Leonard Lewisohn as above set forth. Thereafter, to wit, on or about August 1, 1902, said respondents informed the complainant's counsel that they believed the

claim of the complainant to be absolutely unfounded. Thereafter, to wit, on or about September 12, 1902, the complainant offered to said Bigelow and to the respondents to rescind the sale and conveyance to it from said Leonard Lewisohn of said parcels of real estate in Arizona, to wit, the parcels known as The Old Dominion Mine, New York Mine, Chicago Mine, Keystone Mine, and parcel of real estate near the Bloody Tanks, so-called.

Thereafter, to wit, on or about September 18, 1902, said complainant submitted to the counsel for the respondents a full statement of the claim contained in the bill of complaint, and on September 26, 1902, said counsel for the respondents notified the complainant that after a full investigation, the respondents believe, and coun-
202 sel had so advised them that the claims made upon them were not valid.

Twenty-sixth. The complainant desires to rescind the sale of said parcels of real estate conveyed to it by said Leonard Lewisohn, as hereinbefore set forth, and has offered to convey all of said parcels of real estate conveyed to it by said Leonard Lewisohn, to wit, said parcels known as the Old Dominion Mine, New York Mine, Chicago Mine, Keystone Mine, and parcel of land near the Bloody Tanks, so-called, to said respondents or to such person as they might name upon receiving from them the consideration paid by this complainant for the conveyance thereof to it, to wit, thirty thousand (30,000) shares of its capital stock, or upon a proper accounting for said shares, but said respondents have refused to make any such restitution or accounting; and the complainant is still ready and willing, and hereby offers, to convey said last named parcels of real estate to such person as this Honorable Court may direct. Said Bigelow is a citizen and resident of Boston in the Commonwealth of Massachusetts and cannot be served with process in this district or in the State of New York.

Twenty-seventh. The complainant says that the shares which it seeks to recover are of great value, to wit, greatly in excess of two thousand (2000) dollars, and that the sum recoverable upon an accounting therefor is very large, to wit, greatly in excess of two thousand (2000) dollars, exclusive in each case of interest and costs.

Wherefore the Complainant Prays:

1. That this Honorable Court will declare said sale of said parcels of real estate conveyed by said Leonard Lewisohn to the com-
203 plainant, as hereinbefore set forth, rescinded, and will direct this complainant upon the return to it of or a proper accounting to it for the consideration for said sale and conveyance, to execute such reconveyance, if any, of said several parcels of real estate to such person or persons as this Honorable Court shall think proper.

2. That said respondents, in their capacity of executors of the Will of said Leonard Lewisohn, be required to return to the complainant the consideration paid by this complainant for said conveyance, to wit, thirty thousand (30,000) shares of its capital stock, or if, and so far as said shares are no longer in their control, to account to the complainant therefor.

3. In the alternative, in case this Honorable Court shall deem that the complainant has not rescinded and is not entitled to re-

scind said sale or conveyance of said parcels of real estate conveyed by said Leonard Lewisohn to the complainant as above set forth, that this Honorable Court will ascertain the amount of damages suffered by the complainant by reason of the sale of said parcels of real estate as above set forth, and will by its decree establish the right of the complainant to recover said amount and order said respondents, in their capacity of executors of the will of the said Leonard Lewisohn, to pay said amount to it.

4. For such other relief as to this Honorable Court shall seem meet.

And may it please your Honors to grant unto the complainant a writ of subpœna ad respondendum directed to said respondents Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn, and Philip S. Henry, commanding them each to be and appear in this Honorable Court on a day certain therein to be named to answer
204 this bill of complaint, but not under oath, an answer under oath being specially waived, and to abide by and perform such orders and decrees as may be made herein.

(Signed) OLD DOMINION COPPER MINING AND SMELTING CO.
By BRANDEIS, DUNBAR & NUTTER,
(Its Solicitors),
220 Devonshire Street, Boston, Mass.
CARTER, HUGHES & DWIGHT,
Solicitors for Plaintiff,
106 Broadway.

LOUIS D. BRANDEIS,
Of Counsel for Plaintiff:
CHARLES E. HUGHES,
Counsel for Plaintiff.

A.

To the Old Dominion Copper Mining & Smelting Company, a Corporation Organized and Existing Under the Laws of the State of New Jersey:

The Old Dominion Copper Company of Baltimore City, a corporation organized and existing under the Laws of the State of Maryland being the owner of certain mines and mining properties at Globe in the territory of Arizona described in the annexed schedule and of machinery, lumber, wood, tools, implements and other personal property for use for and in connection with the operation and maintenance thereof, hereby makes the following proposition. To convey, assign and transfer all its property, both real and personal of every kind and nature whatsoever and wheresoever
205 situated, by good and sufficient deeds and instruments properly executed so as to convey absolute title thereto to the Old Dominion Copper Mining and Smelting Company upon receiving from said Company one hundred thousand shares of its capital stock to be issued to the said Old Dominion Copper Company or to its nominees.

It being understood that the Old Dominion Copper Mining & Smelting Company shall assume all obligations of the Old Dominion

Copper Company of Baltimore City incurred since the first day of June, 1895, and shall be entitled to all earnings and profits of said Company since that date.

July eleventh, 1895.

A. B. BIGELOW, *President.*
A. W. EVARTS, *Secretary.*

Schedule.

First. The Globe Mine patented by the United States Government to W. B. Reagan on the 18th day of October, 1881, by patent recorded in the office of the Recorder of Pinal County, Territory of Arizona, on the 19th day of November, 1881, to which record reference is made for a fuller description of said mine.

Second. The Globe ledge mine patented by the United States Government to Benjamin W. Reagan, on the eighteenth day of October, 1881, by patent recorded in the office of the Recorder of Pinal County, Territory of Arizona on the nineteenth day of November, 1881, to which record reference is made for a fuller description of said mine.

Third. The Copper Jack Mill site of which the location is recorded in the office of the Recorder of Gila County, Arizona,
206 in Book 2 of Record of Mines, at page 311, and to which record reference is hereby made for a fuller description of said mill site and upon which the smelting works formerly owned by the Old Dominion Copper Company are situated.

Fourth. The Globe Mill site of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Record of Mines at page 311, to which record reference is hereby made for a fuller description of said mill site.

Fifth. The Globe Ledge Mill site of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Record of Mines at page 310, to which record reference is hereby made for a description of said mill site.

Sixth. The South East Globe Mine of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Record of Mines, page 312, and reference is hereby made to said record for a fuller description of said mine.

Seventh. All of the certain mining claim known as the Interloper in Globe District Record on page- 116, 117, in Book 3, reference to which will more fully show being the same property conveyed to William Keyser by Thomas H. Mason by deed bearing date January 3rd, 1887, and recorded at page 586, Book 2, Record of Deeds to Mines Gila County Arizona Territory.

Eighth. The Fraction Mine of which the location notice is recorded in the office of the Recorder of Gila County Arizona in Book 2 of Record of Mines at page 569, to which record reference is hereby made for a fuller description of said mine.

Ninth. The Alice Mine or Lode located October 10th, 1875, by A. R. Hammond and J. W. Reed and notice of location recorded in Book I, page 131, Globe District Mining Records (now a
207 part of the records of Gila County), and located February 28, 1879, notice of location recorded in Book 5, Globe District

Mining record (now a part of the records of Gila County), on pages 184 and 185, said mine or lode being more particularly described in the last mentioned notice of location as follows, to wit:

Commencing at this monument of stone in a gulch being the centre of southwest end of claim and upon which this notice is posted, thence southeast 300 feet to a monument of stones, thence northeast 1400 feet to a monument of stones, thence northwest 300 feet to a monument of stones, being the centre of the northeast end of claim; thence northwest 300 feet to a monument of stones; thence southwest 1400 feet to a monument of stones under a tree; thence southeast 300 feet to the place of beginning, being the same mining claim conveyed to Michael H. Simpson, deceased, by deed of the Globe City Mining Company, dated July 1st, 1884, and recorded with Gila County Deeds to Mines, Book 2, page 227, etc.

Tenth. The mining claim called and known as the Hypathia Mine, situate, lying and being in Globe Mining District, Gila County, Territory of Arizona and more particularly described in the notice of location recorded at page 55, Book 2 Record of Mines, Gila County Records to which record reference is made for a more definite description of said mine. Said mine was formerly known as the Southwest Alice Mine, being the same mining claim conveyed to said Michael H. Simpson, lately deceased, by deed of William H. Cook dated November 18th, 1884, and recorded with Gila County Deeds, Book 2, page 305.

B.

To the Old Dominion Copper Mining and Smelting Company:

I hereby offer to convey the following described property now owned and held by me upon receiving thirty thousand shares of the capital stock of the Old Dominion Copper Mining & Smelting
208 Company to be issued to me or to my nominees.

First. The Old Dominion Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land Office at Tucson, Arizona, entry number 267, Lot 45, situated in Globe Mining District Gila County, Arizona.

Second. The New York Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, at the United States Land Office at Tucson, Arizona, entry 268, lot 46, in Globe Mining District in Gila County, Arizona.

Third. The Chicago Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land Office of Tucson, Arizona, entry 269, lot 51, in Globe Mining District, Gila County, Arizona.

Fourth. The Keystone Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1885, in the United States Land Office at Tucson, Arizona, entry 384, Lot 54, in Globe Mining District, Gila County, Arizona.

Fifth. A lot or parcel of land situated near the Bloody Tanks and deeded by E. A. Saxe to the Old Dominion Copper Mining Company, deed recorded in Book 1 of Deeds to Real Estate at pages 126 and 127, in the office of the Recorder of Gila County, Arizona, and

reference is hereby made to said record for a fuller description of said parcel of land.

New York, July 11, 1895.

LEONARD LEWISOHN.

Please issue said thirty thousand shares of stock to Mr. A. S. Bigelow and myself.

LEONARD LEWISOHN.

209 EXHIBIT B.

Circuit Court of the United States, Southern District of New York.

In Equity.

OLD DOMINION COPPER MINING AND SMELTING CO.
v.
FREDERICK LEWISOHN et al.

Defendants' Demurrer to the Whole Bill.

The Joint and Several Demurrer of Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, as Executors of the Last Will of Leonard Lewisohn, the Defendants Above Named.

These defendants respectively by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill to be true, in such manner and form as the same are therein set forth and alleged, demur thereto, and for cause of demurrer show that it appears by said bill that the same sets up against the defendants different and distinct causes which are inconsistent with each other and cannot properly be joined; that different reliefs inconsistent with each other are prayed for, and that the said bill is altogether multifarious.

Wherefore, and for divers other good causes of demurrer appearing in the said bill these defendants respectively demur thereto and humbly demand the judgment of this Court whether they shall be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their costs and charges
210 in this behalf wrongfully sustained.

HOADLY, LAUTERBACH & JOHNSON,
Solicitors for Defendants.

STATE OF NEW YORK,
County of New York, ss:

Frederick Lewisohn makes solemn oath, and says, that he is one of the above named defendants, and that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

FREDERICK LEWISOHN.

Subscribed and sworn to before me this 5th day of March, 1903.

MORRIS MAYER.
[L. S.] *Notary Public, N. Y. County.*

I hereby certify That in my opinion the foregoing demurrer is well founded in point of law.

EDWARD LAUTERBACH,
Of Counsel for Defendants.

EXHIBIT B.

Circuit Court of the United States, Southern District of New York.

In Equity.

OLD DOMINION COPPER MINING & SMELTING COMPANY
v.
FREDERICK LEWISOHN et al.

Defendants' Demurrer to a Part of the Bill.

The defendants by protestation not confessing or acknowledging all or any of the matters and things in the plaintiff's bill of complaint to be true in such manner and form as the same are therein set forth and alleged, and not waiving his demurrer to the whole bill, but insisting and relying thereon, further demur to so much of said bill as seeks to have the sale of certain parcels of real estate * * * conveyed to the plaintiff by Leonard Lewisohn rescinded, and to have the defendants ordered to return to the plaintiff the consideration paid by the plaintiff for said conveyance; and for causes of demurrer the defendants show:

1. That the plaintiff has not, in and by said bill, stated such a case as entitled it to the aforesaid relief against the defendants.

2. That it appears by said bill that one Albert S. Bigelow therein referred to is an indispensable party defendant to said bill so far as it seeks the rescission of the aforesaid sale, but that he has not been made a party defendant.

Wherefore, the defendants demur to so much of the complainants bill as is above specified, and demands judgment of this court, whether *he* shall make any further or other answer to such part of said bill as is so demurred unto as aforesaid, and prays to be hence dismissed with their costs in this behalf sustained.

HOADLY, LAUTERBACH & JOHNSON,
Solicitors for the Defendants.

STATE OF NEW YORK,
County of New York, ss:

Frederick Lewisohn makes solemn oath, and says, that he is one of the above-named defendants, and that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

FREDERICK LEWISOHN.

212 Subscribed and sworn to before me this 5th day of March, 1903.

[L. S.]

MORRIS MEYERS,
Notary Public, New York County.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

EDWARD LAUTERBACH,
Of Counsel for Defendants.

EXHIBIT C.

At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, Held at the United States Court House, in the Borough of Manhattan, City of New York, on ——, the Twenty-Fourth Day of March, 1905, in the Year of Our Lord One Thousand Nine Hundred and Five.

Present, Hon. E. Henry Lacombe, Circuit Judge.

In Equity. No. 8333.

OLD DOMINION COPPER MINING & SMELTER COMPANY,
Complainant,
against
FREDERICK LEWISOHN et al., Defendants.

The demurrer of the defendants to a part of the bill of complaint, and the demurrer of the defendants to the whole of the bill of complaint having come duly on for hearing, and after hearing Eugene Treadwell, Esq., of counsel for the defendants, in support of the demurrer to a part of the bill of complaint, and Louis D. Brandeis, Esq., of counsel for the complainant, in oppo-

213 sition thereto, and the consideration by the Court of the demurrer to the whole bill of complaint at this time having been waived in open Court by the Counsel for the respective parties, and the premises having been duly considered, it is

Ordered by the Court, that the demurrer to so much of said bill as seeks rescission be and the same is hereby sustained, with leave to complainant to serve an amended bill of complaint within thirty days from the entry of this order, and the defendants to have leave within thirty days of the service of such amended complaint to answer, plead, demur or take such other proceeding as they may deem advisable. It is

Further Ordered, that the defendants do recover against the said complainant their costs and charges by them upon the said demurrer to be taxed, such costs to abide the event of this suit.

Further Ordered, that in event of the complainant's failure to serve an amended complaint within thirty days from the date of the entry of this order, as above provided, the bill of complaint be dismissed and defendants have execution for costs thereon.

E. M. LACOMBE,
U. S. Circuit Judge.

March 24, 1905.

Approved as to form.
LOUIS D. BRANDEIS,
Counsel for Complainant.
HOADLY, LAUTERBACH & JOHNSON,
Solicitors for Defendants.

214 EXHIBIT C.

In Equity.

OLD DOMINION COPPER MINING CO.
v.
LEWISOHN et al.

On Demurrer to a Bill of Complaint against the Executors of Leonard Lewisohn, Deceased.

Edward Lauterbach, in support of demurrer.
Louis D. Brandeis, opposed.

LACOMBE, *Circuit Judge:*

It was conceded by complainant upon the argument that the bill prayed no relief except rescission of a contract for the sale of certain mining rights and a parcel of real estate in Arizona. Irrespective of such concession, the court would be inclined so to construe the bill. Therefore the objection that it is multifarious cannot be sustained.

The demurrer asserts that the complainant has not by the bill stated such a case as entitles it to have such contract and sale rescinded. This sufficiently challenges the equity of the bill. The facts as averred in the bill are as follows: The deceased, Leonard Lewisohn, and one Albert S. Bigelow were the promoters of the complainant company, and caused it to be organized under the laws of New Jersey on July 8, 1895, by seven persons selected and employed for said purpose, none of whom had any actual interest in the corporation, or acted in the formation thereof other than as the representative and agent of the promoters. Forty shares were nominally subscribed and paid for by these persons, but in fact all of said subscriptions were made for the benefit and at the request of Bigelow and Lewisohn, and each subscription was paid for by them.

The company having been organized, elections for officers and
215 directors ensued, as a result of which, on July 11, 1895, Bigelow and Lewisohn both became directors, and Bigelow the president of the company. Prior to July 11th they had become the owners of several mining claims and a parcel of real estate in Arizona, which were worth on that day, as the bill alleges, not more than $5000. On that day, at a directors' meeting attended by themselves and two of their dummy directors, they sold and conveyed to the corporation the said mining claims and real estate for 30,000 shares of the capital stock of the par value of $25 a share. There-

after, at times not specified, additional shares of capital stock (to the amount of 20,000) were from time to time offered and sold to the public at par, to obtain working capital. The bill also alleges a similar sale, for stock, on July 11th, of a mine owned by the promoters, at an excessive valuation, but no relief is prayed as to that transaction. The prayer of the bill is that the sale of the mining claims and real estate be rescinded, the property reconveyed, and the shares of stock returned or accounting had therefor, or, in the alternative of rescission, that the court will ascertain the amount of damages suffered by the complainant, and decree therefor.

Whether the contract for the sale of the real estate was voidable, so as to give the corporation the right to rescind or to demand damages, must be determined under the conditions which existed when it was made. Ordinarily, when a director or promoter contracts to sell property to his corporation, the corporation not being independently represented, it may rescind the contract, upon the theory, of course, that the relation between the parties is fiduciary, and that the other stockholders and subscribers to the stock are to be protected against an abuse of trust. But where there are no other stockholders nor subscribers, there is no one who is deceived, no stock-
216 holder or subscriber who is defrauded, since all the profit put into one pocket by the "faithless" directors is taken out of their other pocket as the sole stockholders. This principle is abundantly established by decisions controlling here, so it will be unnecessary to cite numerous authorities from other courts. In Foster v. Seymour (C. C.), 23 Fed. 65, which was decided in this court (Wallace, J.), the facts were very similar, except that the sale was for scrip, the stock not having yet been issued. The court said:

"There was no fraud on the corporation. At the time the scrip was exchanged for the mining property, the trustees were all there were of the corporation. There were no stockholders unless they were stockholders. What was done was done by the corporation. By the exchange the corporation got the mining property, and gave it back again to those from whom it got it, divided into 100,000 shares of the nominal value of $100 each."

And it held that whether or not a subsequent purchaser of stock could recover against those who had misled him—against the corporation or the trustees—"the corporation has no cause of action against the trustees." Subsequently the same question came before the Court of Appeals in this circuit (McCracken v. Robinson, 57 Fed. 375, 6 C. C. A. 400), where as the court expressed it—

"When they entered into the contracts they owned the corporation and all its stock, and represented only themselves. While directors in fact, they were principals in name."

It was held that in such a case the rule prohibiting persons in a fiduciary relation from contracting for their own advantage in the name of their beneficiaries had no application.

217 This demurrer to the bill is well taken, and it is therefore unnecessary to discuss the special demurrer as to defect of parties. The bill is dismissed, with costs.

Exhibit D.

Circuit Court of the United States, Southern District of New York.

In Equity. No. 8333.

Old Dominion Copper Mining and Smelting Company
v.
Frederick Lewisohn et al.

Amended Bill of Complaint.

To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York:

The Old Dominion Mining and Smelting Company, a corporation duly organized under the laws of the State of New Jersey, and a citizen of said State, residing at Jersey City, in said State, and in the district of New Jersey, complainant, against Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, all citizens of the State of New York, residing in the Borough of Manhattan, in the City of New York, in the state of New York, and in the Southern District of New York, as executors of the last will of Leonard Lewisohn, who, at the time of his death, was a citizen of said State, residing in said Borough of Manhattan, respondents—

And thereupon your orator complains and says:

First. The complainant, the Old Dominion Copper Min-
218 ing and Smelting Company, is a corporation duly organized under the laws of the State of New Jersey, and having a usual place of business at Boston, in the County of Suffolk and Commonwealth of Massachusetts, and a citizen of New Jersey, residing at Jersey City, in said State and in the District of New Jersey. Said corporation is the owner of copper mines and smelting works in the Territory of Arizona, and is carrying on the business of mining, smelting and selling copper.

Second. On and prior to April 30, 1895, there existed a certain corporation called the Old Dominion Copper Company of Baltimore City (hereinafter called the Baltimore Old Dominion Company), organized under the laws of the State of Maryland, and having a usual place of business in said Baltimore. Said Baltimore Old Dominion Company was then the owner of mines and mining claims in Arizona. It had a capital stock of five hundred thousand ($500,000) dollars divided into twenty-five thousand (25,000) shares of the par value of twenty (20) dollars each. Of said shares there were then owned by the executors of the will of Michael H. Simpson, late of said Boston, deceased, about seventeen thousand eight hundred and fifty-seven (17,857) shares and the balance of said shares were then owned by one William Keyser of Baltimore, in the State of Maryland. Said Keyser also then held the title in his own name to certain mining claims known as the Old Dominion Mine, the New York Mine, the Chicago Mine,

the Keystone Mine, and a certain parcel of land near the Bloody Tanks, so-called, all in said Arizona. Said Keyser held said property for the benefit of himself and of the estate of said Michael H. Simpson.

Third. At some time prior to May 4, 1895, said Leonard Lewisohn, deceased, and one Albert S. Bigelow, of said Boston, formed the plan of acquiring all the stock of said Baltimore Old Dominion Company, as aforesaid, and of organizing a new corporation
219 to acquire and of selling to such new corporation at a large advance in price all the property of said Baltimore Old Dominion Company, and in order to provide the same with a working capital of causing said new corporation to offer for subscription for cash to such of the public as might be induced to subscribe for the same a large number of the shares of such new corporation not previously issued in payment for said property, and of thereby securing for themselves and such persons as they might associate with them a large profit by such persons and the subsequent sale to said new corporation to be organized by them of said property, and of obtaining from the subscribers for shares to be issued for cash the means of operating said mines; and said Leonard Lewisohn and said Bigelow thereupon conspired together to carry out said plan and thereby to injure said corporation to be formed as aforesaid and the future stockholders in said corporation and to secure for themselves as the promoters and organizers thereof a large secret profit.

Fourth. Thereafter, pursuant to said plan and conspiracy, said Leonard Lewisohn and said Bigelow at some time prior to May 24, 1895, procured an option to purchase from the executors of the will of said Michael H. Simpson said seventeen thousand eight hundred and fifty-seven (17,857) shares for seven hundred and fourteen thousand two hundred and eighty-five (714,285) dollars, and formed a syndicate known as the Old Dominion Syndicate, for the purpose of raising the money necessary to purchase said shares. Said syndicate was formed in order, by purchasing said shares pursuant to said option, to carry out the plan and conspiracy of said Leonard Lewisohn and said Bigelow above described for the benefit of themselves and of such persons as might become members of said syndicate. Said Leonard Lewisohn and Bigelow, pursuant to said
220 plan and conspiracy prior to May 24, 1895, induced a large number of persons to subscribe to and join said syndicate, upon the terms that the members of the syndicate should pay in fourteen (14) per cent. of the amount of their respective subscriptions or interests therein on May 27, 1895, twenty-eight and two-thirds ($28\frac{2}{3}$) per cent. on July 26, 1895, twenty-eight and two-thirds ($28\frac{2}{3}$) per cent. on August 25, 1895, and twenty-eight and two-thirds ($28\frac{2}{3}$) per cent. on September 24, 1895, and with each of said last three instalments five (5) per cent. interest thereon from May 27, 1895. It was understood and agreed between the members of said syndicate and said Leonard Lewisohn and Bigelow, and the intention in forming said syndicate was that the amounts so subscribed and paid in should be used so far as required for the purpose of acquiring the property or all or the greater part of the capital stock of said Baltimore Old Dominion Company and disposing of

said property to a new corporation at a large advance in price and that the members of said syndicate should receive in cash or in stock of the new corporation to be formed to purchase said property as aforesaid the profit made by such sale to a new corporation pro rata according to their several subscriptions or interests.

Fifth. Thereafter, to wit, on or about May 27, 1895, said Leonard Lewisohn and said Bigelow received the first instalment, payable by the persons who up to that time had become members of said syndicate, amounting to about one hundred thousand (100,000) dollars. On or about May 28, 1895, said Bigelow, in behalf of himself and of said Leonard Lewisohn and of their associates in said Old Dominion Syndicate, and of such persons as might thereafter become associated with them in said syndicate paid, in large part from the funds received from members of said syndicate other than said Bige-
221 low and said Lewisohn, to the executors of the will of said Michael H. Simpson, in accordance with the terms of said option for the purchase of said seventeen thousand eight hundred and fifty-seven (17,857) shares of stock in said Baltimore Old Dominion Company the sum of one hundred thousand (100,000) dollars, and delivered to said executors three notes each for two hundred and four thousand seven hundred and sixty-one and 66/100 (204,761.66) dollars, all dated May 28, 1895, and payable sixty (60), ninety (90) and one hundred and twenty (120) days after date, respectively, made by said Leonard Lewisohn and endorsed by said Bigelow and by Lewisohn Brothers, a corporation. Said payment was made and said notes were made, endorsed and delivered in pursuance of and for the purpose of carrying out said original plan and conspiracy. Upon said payment and delivery of said notes all said shares of stock were deposited with the Old Colony Trust Company in said Boston, to be by it delivered upon payment of all said notes.

Sixth. On or about June 13, 1895, said Leonard Lewisohn and Bigelow, for the purpose of carrying out said plan and conspiracy, and for the purposes aforesaid of said syndicate, made an agreement with said William Keyser, whereby said Keyser undertook to sell to said Leonard Lewisohn and his associates seven thousand one hundred and forty-three (7,143) shares of stock in said Baltimore Old Dominion Company, being all the remainder of the stock in said Baltimore Old Dominion Company, for two hundred and eighty-five thousand seven hundred and fifteen (285,715) dollars, payable forty thousand (40,000) dollars on June 20, 1895, and the balance by three promissory notes each for eighty-one thousand nine hundred and five (81,905) dollars, payable thirty (30), sixty
222 (60) and ninety (90) days after date, respectively, with the privilege of anticipating any payments. Said Keyser further agreed on payment of said cash and delivery of said notes to deposit all of said shares with the Old Colony Trust Company in said Boston, to be delivered upon final payment of all said notes. By said agreement said Keyser further undertook to convey to said Leonard Lewisohn or his order without any further consideration than the purchase of said stock all the interest of said Keyser, alleged to be one-half, in said Old Dominion Mine, Keystone Mine, New

York Mine and Chicago Mine. Said agreement was made with the intention of providing the means for paying for said stock from the sums to be paid by subscribers to said Old Dominion Syndicate and of dealing with said stock in the same manner as with the stock of the Baltimore Old Dominion Company purchased from said executors. Thereafter, to provide the means of paying said Keyser for said stock, said Leonard Lewisohn and Bigelow induced a number of additional persons to subscribe to said syndicate and receive from such subscribers to said syndicate further large sums for the first instalment payable on such subscriptions, and said Bigelow on or about June 20, 1895, in behalf of himself and of said Leonard Lewisohn and of their associates in said Old Dominion Syndicate and of such persons as might thereafter become associated with them in said syndicate, paid, in large part from the funds received from subscribers to said syndicate other than himself and said Leonard Lewisohn, said sum of forty thousand (40,000) dollars and a further sum in anticipation of the first of said notes and delivered two other notes in conformity with said agreement, and said stock was deposited with said Old Colony Trust Company to be delivered as aforesaid. Said payment was made and said notes were made and delivered in pursuance
223 of and for the purpose of carrying out said original plan and conspiracy.

Seventh. When said Leonard Lewisohn and Bigelow first obtained said agreement for the sale by the executors of the will of said Michael H. Simpson, they did not know that said four mining claims and said parcel of real estate were owned by said Keyser for the benefit of himself and said executors. Thereafter and on or about June 13th they learned that such was the case and formed the plan of securing said claims and parcel of real estate without the payment of any additional consideration and of selling the same for a large profit to the corporation to be formed to acquire the property of the Baltimore Old Dominion Company as above set forth. In pursuance of this plan and conspiracy they required said Keyser to undertake to convey said claims and real estate to them without payment of any additional consideration upon said executors assenting thereto. Thereafter, on or about June 14, 1895, they induced said executors to and said executors did agree that all interest of theirs in said four mining claims known as the Old Dominion, Keystone, New York and Chicago Mines and said parcel of land near the Bloody Tanks, legal title to all of which was then in said Keyser as above set forth, should be transferred without any further consideration than the purchase of said shares of stock from said executors.

Eighth. On or about June 20, 1895, a meeting of the directors of the Baltimore Old Dominion Company was duly held at Baltimore. At said meeting two of the five directors of said corporation and the president and treasurer thereof resigned and their resignations were duly accepted. Said Bigelow and said Leonard Lewisohn were thereupon duly elected directors and duly elected president and treasurer respectively, of said corporation, and the then remaining old
224 directors tendered their resignations to take effect when desired by said Leonard Lewisohn and Bigelow. One Allen W.

Evarts, an attorney employed by said Leonard Lewisohn and Bigelow, was also duly elected secretary of said corporation. At the same time, to wit, on or about June 20, 1895, said William Keyser, pursuant to his said agreement and the agreement of the exectuors of the will of said Michael H. Simpson and without the payment of any consideration other than the payment for the stock in said Baltimore Old Dominion Company purchased as aforesaid, conveyed and transferred to said Leonard Lewisohn said four mining claims known as the Old Dominion Mine, Keystone Mine, Chicago Mine and New York Mine, and said parcel of land near the Bloody Tanks, so-called. Said conveyance was made to said Leonard Lewisohn and the title to said property was acquired by him for the common benefit of himself and said Bigelow, as hereinafter set forth, and as a part of the plan and conspiracy hereinbefore set forth.

Ninth. On or about July 8, 1895, said Leonard Lewisohn, in conjunction with said Bigelow, in pursuance of said plan and conspiracy and for the purpose of carrying out the same for the benefit of themselves and of the subscribers to said Old Dominion Syndicate, so-called, caused the Old Dominion Copper Mining and Smelting Company, the complainant herein, to be organized under the general corporation laws of the State of New Jersey. Said corporation was formed by seven persons selected and employed for the purpose by said Leonard Lewisohn and said Bigelow, to wit, Jesse Lewisohn, Allen W. Evarts, Edgar Buffam, Charles W. Welch, Sidney Riddlestorffer, William V. Rowe, and William R. Montgomery. None of said seven persons except said Jesse Lewisohn, who was a son of said Leonard Lewisohn, had any actual interest in said cor-
225 poration or acted in the formation thereof otherwise than as the representative and agent of said Leonard Lewisohn and said Bigelow. Each of said individuals nominally subscribed and paid for four (4) shares of the capital stock of said corporation except said Jesse Lewisohn, who subscribed and paid for sixteen (16) shares; but in fact all said subscriptions were made for the benefit and at the request of said Leonard Lewisohn and said Bigelow, and each subscription was paid for by said Leonard Lewisohn and said Bigelow or by one of them.

Tenth. On July 9, 1895, the first meeting of said corporation, organized as aforesaid, was held in Jersey City, and all of said incorporators were then present. By-laws were adopted, and upon an election of directors by ballot said seven incorporators above named were duly chosen directors. At said meeting it was further voted to increase the capital stock to three million seven hundred and fifty thousand (3,750,000) dollars, divided into one hundred and fifty thousand (150,000) shares of twenty-five (25) dollars each. A recess was taken by said meeting, and thereupon said seven directors met and organized and elected officers, to wit: Said Allen W. Evarts, president; said Sidney Riddlestorffer, vice-president; said Jesse Lewisohn, treasurer; and said Edgar Buffam, secretary. Said meeting of directors confirmed the action of the prior meeting of incorporators increasing the capital stock, as above set forth. The organization of said corporation and the proceedings of said meetings of incorporators and directors were duly had according to the laws

of the State of New Jersey, and the by-laws adopted, as aforesaid, and thereby the complainant became duly organized as a corporation and the individuals above named became the lawful officers
226 of the corporation holding respectively the offices above named.

Eleventh. A meeting of the directors of said complainant corporation, organized as aforesaid, was duly held on July 11, 1895, at the office in New York City, of the corporation known as Lewisohn Brothers, of which corporation said Leonard Lewisohn was general manager; all of the directors except Montgomery were present. Pursuant to instructions from said Leonard Lewisohn and said Bigelow, the resignation of said Montgomery as a director was presented and duly accepted, and said Bigelow was thereupon chosen a director in his place. Thereupon, pursuant to instructions from said Leonard Lewisohn and said Bigelow, the successive resignations of said Rowe as a director, of said Welch as a director, of said Jesse Lewisohn as treasurer and director, of said Evarts as president, and of said Riddlestorffer as vice-president and as director were presented and duly accepted, and said Leonard Lewisohn, one Henry M. Whitney, one Thomas Nelson, and one Joseph G. Ray, were successively duly chosen directors, and said Thomas Nelson was duly chosen treasurer, and said Bigelow was duly chosen president of said corporation. Said Leonard Lewisohn and said Bigelow were present at said meeting, and upon their respective elections as directors took their places in said meeting. All said resignations were duly received and acted on and said elections to fill the vacancies caused by said resignations were duly had pursuant to the laws of the State of New Jersey and the by-laws of said corporation.

Twelfth. At said meeting of the directors of the complainant corporation on July 11, 1895, above referred to, and after the several changes of directors and other officers by resignation above set forth, and after said Bigelow had been elected president of said cor-
227 poration, there remained present four directors, to wit, said Leonard Lewisohn, said Bigelow, said Evarts and said Buffam. Said Evarts was the attorney employed by said Leonard Lewisohn and said Bigelow to attend to the incorporation of the complainant corporation and to carry out their said plan and conspiracy; said Buffam was a person selected by them and employed by them to act as director and assist them in carrying out said plan and conspiracy. The remaining directors were said Thomas Nelson, Henry M. Whitney and Joseph G. Ray, no one of whom was present and each of whom was a subscriber to said Old Dominion Syndicate and interested to assist said Leonard Lewisohn and said Bigelow in their plan to sell said property to the complainant and in the success of said plan and conspiracy, and had been selected by them to fill said positions.

Thirteenth. On or about July 11, 1895, a meeting of the directors of the Baltimore Old Dominion Company was held at the office of said Lewisohn Brothers, in New York City. There were present said Leonard Lewisohn, said Bigelow and one R. Brent Keyser. On motion of said Leonard Lewisohn it was voted to make the complainant corporation the offer, a copy of which is marked "A" and

attached to and made a part of this bill of complaint. Said Keyser acted at said meeting merely as a representative of said Leonard Lewisohn and said Bigelow, and voted in favor of making said offer at their request and by their instructions. At said meeting of the directors of the complainant corporation on July 11, 1895, after the change of directors and officers above set forth and after said Bigelow had been chosen president and said Leonard Lewisohn treasurer as aforesaid, said Bigelow through Evarts presented to said Board of

228 Directors of the complainant said offer by the Baltimore Old Dominion Company to sell and convey to the complainant substantially all the property of said Baltimore Old Dominion Company, except the cash assets, for one hundred thousand (100,000) shares of the capital stock of the complainant corporation to be issued to said Baltimore Old Dominion Company or its nominees. Said offer was signed by said Bigelow as president of, and by said Evarts as secretary of said Baltimore Old Dominion Company. Upon presentation of said offer, on motion of said Leonard Lewisohn, seconded by said Evarts, it was unanimously voted to accept said offer and to issue one hundred thousand (100,000) shares of the capital stock in payment for said property, and said Bigelow and said Nelson were appointed a committee to supervise and carry out the details.

Fourteenth. Immediately after the passage of the vote last above referred to at said meeting of directors of the complainant on July 11, 1895, said Leonard Lewisohn presented to said Board of Directors of the complainant a proposition to sell and convey to the complainant said real estate in Arizona acquired by said Leonard Lewisohn from said William Keyser as above set forth, to wit, said Old Dominion Mine, said New York Mine, said Chicago Mine, said Keystone Mine, and said parcel of land near the Bloody Tanks, so called, for thirty thousand (30,000) shares of the capital stock of the complainant to be issued to said Leonard Lewisohn or his nominees, accompanied with a request to issue said shares to said Bigelow and said Leonard Lewisohn. A copy of said proposition is hereto annexed and marked "B" and made a part of this bill of complaint. Upon presentation of said proposition said Leonard Lewisohn and said Bigelow caused the directors of the complainant corporation

229 then present unanimously to vote to accept said proposition and to issue thirty thousand (30,000) shares of the capital stock in payment for said property, and said Bigelow and said Nelson were appointed a committee to supervise and carry out the details.

Fifteenth. Thereafter, to wit, on or about July 18, 1895, said Leonard Lewisohn and said Bigelow, pursuant to the original plan and conspiracy, and for the purpose of furnishing the complainant corporation, promoted by them as aforesaid, with working capital and with funds required to develop its plants and other properties, caused said complainant corporation to offer for subscription and sale at the price of twenty-five (25) dollars per share twenty thousand (20,000) shares of capital stock of the complainant corporation remaining unissued and which had not been issued to or appropriated by said Leonard Lewisohn and Bigelow and their

associates as payment for said properties. All of said twenty thousand (20,000) shares were so subscribed for and sold and the price of twenty-five (25) dollars per share paid therefor to the complainant by said subscribers. Said subscribers for said shares were ignorant at the time said shares were offered for subscription and at the time they severally subscribed and paid therefor and received their shares, as hereinafter set forth of the facts hereinbefore set forth as to the promotion and organization of the complainant corporation by said Leonard Lewisohn and said Bigelow, and the large profit to be made by said Leonard Lewisohn and said Bigelow and by the other members of said Old Dominion Syndicate therefrom and of the facts hereinbefore set forth concerning the acquisition of said four mining claims and parcel of real estate by said Leonard Lewisohn for the benefit of himself and of said
230 Bigelow, and the acquisition thereof by said corporation and the issue of thirty thousand (30,000) shares of its capital stock therefor.

Sixteenth. The total subscriptions to the Old Dominion Syndicate amounted to one million (1,000,000) dollars, of which amount said Leonard Lewisohn contributed for his personal account about one hundred ninety-eight thousand and nine hundred and twenty and fifty-five hundredths (198,920.55) dollars, and said Bigelow contributed for his personal account about fifty thousand (50,000) dollars. Payments of the deferred instalments on the subscriptions to said Syndicate were largely anticipated. The three notes payable to the executors of the will of Michael H. Simpson were paid—the note due July 27th on June 20th, the note due August 26th on July 1st, 1895, and the note due September 26th on July 8th, 1895. The two notes payable to William Keyser were paid—the note due August 26th, on July 1st, 1895, and the note due September 25th on July 8th, 1895. All of these payments were made from the funds contributed by the members of said Syndicate or in part from such funds and in part from money advanced by said Lewisohn Brothers or by said Leonard Lewisohn for the purpose, and repaid from the funds of said Syndicate. On or about July 12th, 1895, possession of all of said mining property of said Baltimore Old Dominion Company, included in the offer marked Exhibit "A" and schedule thereto annexed, and of said four mining claims and said parcel of real estate included in the proposition of said Leonard Lewisohn, marked Exhibit "B," was delivered to the complainant corporation, and thereafter said sales were consummated by delivery of deeds of conveyance of said several properties. Thereafter, to wit, on or about September 18, 1895, said Leonard Lewisohn and Bigelow caused the Board of
231 Directors of the complainant corporation, at a meeting duly called, to vote to issue one hundred thousand (100,000) shares of the capital stock of this complainant to one Philip K. Dunaresq, the nominee of said Baltimore Old Dominion Company, as and for the price of said property so transferred and conveyed, and said shares were duly issued pursuant to said vote. And said Leonard Lewisohn and said Bigelow further caused said Board of Directors of this corporation at said meeting to vote to issue thirty thousand

(30,000) shares of the capital stock of this corporation to said Leonard Lewisohn and said Bigelow as and for the price of said property transferred and conveyed by the latter to this corporation, as above set forth, and said shares were thereupon duly issued pursuant to said vote. And said Leonard Lewisohn and said Bigelow further caused said Board of Directors of this corporation at the same meeting to vote to issue the remaining twenty thousand (20,000) shares of the capital stock thereof to persons who had subscribed therefor, as above set forth, upon receiving payment of twenty-five (25) dollars per share therefor, and said shares were thereafter duly issued to said persons and paid for by them.

Seventeenth. Said property conveyed to the complainant by said Baltimore Old Dominion Company was at the time of such conveyance fairly worth not more than one million (1,000,000) dollars. Said parcels of real estate sold and conveyed by said Leonard Lewisohn to the complainant as aforesaid, to wit, said several mining claims known as the Old Dominion Mine, New York Mine, Chicago Mine and Keystone Mine, respectively, and said parcel of land near the Bloody Tanks, so-called, were at the time of such conveyance together fairly worth not more than five thousand
232 (5000) dollars. Said Leonard Lewisohn and said Bigelow knew when they acquired the stock of said Baltimore Old Dominion Company as above set forth, and when the title to said parcels of real estate was conveyed to said Leonard Lewisohn as aforesaid, and when said offers to sell to the complainant were made in the name of said Baltimore Old Dominion Company and by said Leonard Lewisohn, respectively, that the value of the property referred to in said offers respectively was not in excess of the amounts above specified. The stock of said Baltimore Old Dominion Company and said parcels of real estate were acquired in the manner aforesaid with intent on the part of said Leonard Lewisohn and of said Bigelow to sell said property of said Baltimore Old Dominion Company and said parcels of real estate for a much larger price than the cost thereof to them. No disclosure was at any time made to the complainant corporation of the fact that said property and said real estate were of values not greater than the values above given respectively, and by reason of the control by said Leonard Lewisohn and said Bigelow of the complainant corporation and of its Board of Directors, as above set forth, said purchases were made without any disclosure to or inquiry by the complainant corporation as to the reasonable value of said properties, and no disclosure was ever made to any of the persons who subscribed for or afterwards purchased shares of stock in the complainant corporation or to any other persons of the facts as to acquisition of said properties by said Leonard Lewisohn and said Bigelow and the purchase of said properties by the complainant corporation or as to the reasonable value thereof, and said facts were not known to any of said persons or to any of the members of said Old Dominion Syndicate, except said Leonard Lewisohn and said Bigelow.

Eighteenth. By the transactions above set forth said Leon-
233 ard Lewisohn and said Bigelow carried out their said plan and conspiracy, and having for the purpose of promoting a corporation and selling to such corporation at a price much in excess of the cost thereof, the property of said Baltimore Old Dominion Company and the property so conveyed to said Leonard Lewisohn, acquired all the capital stock of said Baltimore Old Dominion Company for the sum of one million (1,000,000) dollars, and acquired for the same consideration and without making any further payment, but for themselves, as they claimed, all the property conveyed by said Leonard Lewisohn to the complainant, and having promoted the complainant corporation and caused the same to be organized, thereupon did sell to it the property of said Baltimore Old Dominion Company for one hundred thousand (100,000) shares of the capital stock of this corporation of the par value of twenty-five (25) dollars each, to wit, the aggregate par value of two million five hundred thousand (2,500,000) dollars, and also sold to it all the property conveyed to said Leonard Lewisohn for thirty thousand (30,000) shares of said stock of the aggregate par value of seven hundred and fifty thousand (750,000) dollars. And for the purpose of providing the corporation so promoted and formed by them pursuant to and in execution of said plan and conspiracy, to wit, the complainant corporation, with working and other capital, said Leonard Lewisohn and said Bigelow in further execution and performance of said plan and conspiracy, caused the corporation so formed, to wit, the complainant corporation, immediately to offer the twenty thousand (20,000) shares of its capital stock then remaining unissued as aforesaid for subscription at twenty-five (25) dollars per share, and caused said corporation to issue said twenty thousand (20,000) shares to subscribers who were ignorant at
234 the time they subscribed and at the time they paid therefor of the facts above set forth. The shares of this corporation so issued in payment for the property sold to it as aforesaid were at the time of the fair market value of twenty-five (25) dollars each, and continued for a long time thereafter to be of such or greater value, and said Leonard Lewisohn and said Bigelow thus made at the expense of the complainant corporation from the sale of the property conveyed by the Baltimore Old Dominion Company to the complainant a profit of more than one million five hundred thousand (1,500,000) dollars and in addition thereto made from the property conveyed by said Leonard Lewisohn to the complainant a profit of over seven hundred and fifty thousand (750,000) dollars.

Nineteenth. Said Leonard Lewisohn and said Bigelow allotted as a bonus or profit to the subscribers to said Old Dominion Syndicate to be divided among them in proportion to their respective subscription forty thousand (40,000) shares of the stock of the complainant corporation part of the one hundred thousand (100,000) shares received as payment for the property conveyed by the Baltimore Old Dominion Company, and further offered to each member of said syndicate the option of receiving without further payment a like number of additional shares part of said one hundred thousand (100,000) shares or the repay-

ment in money of the amount of his original subscription. Substantially all the subscribers to said syndicate availed themselves of the option to take additional shares and such shares, together with the shares first allotted to them, were transferred to them accordingly from said shares issued to said Dumaresq. To such few as elected to receive back in cash the amount of their subscription said Leonard Lewisohn and said Bigelow caused the complainant corporation to pay such amount in cash from the funds of the complainant corporation and the corresponding shares not taken
235 were transferred to persons who paid cash therefor to the corporation to the amount of the par value thereof. Of the one hundred thousand (100,000) shares of the capital stock of this corporation issued to said Dumaresq, as above set forth, upon and as consideration for the conveyance of all the property of said Baltimore Old Dominion Company, as aforesaid, eighty thousand (80,000) shares were thus distributed to and among or for the account of the members of said Old Dominion Syndicate, so called. Of this amount one-half was a profit made in the manner above described, and said syndicate thereby made a profit of not less than one million ($1,000,000) dollars. Of the eighty thousand (80,000) shares thus divided said Bigelow received as his proportion four thousand (4000) shares and said Leonard Lewisohn for himself and other members of the syndicate operating through him received thirty-six thousand one hundred and ninety (36,190) shares, of which about sixteen thousand (16,000) were retained for his personal account. Not less than one-half of the shares so issued direct to said Bigelow and of the shares issued to and retained by said Leonard Lewisohn represented and was a profit to them respectively as members of said syndicate from the purchase of the stock of said Baltimore Old Dominion Company and the sale of its property as aforesaid, to this corporation pursuant to the plan and conspiracy formed by said Bigelow and said Leonard Lewisohn as hereinbefore set forth.

Twentieth. Said Leonard Lewisohn and said Bigelow by agreement between themselves, and as the complainant is informed and believes, without the knowledge or assent of the other members of said Old Dominion Syndicate, or of the subscribers for the twenty thousand (20,000) shares of stock issued by the complainant corporation, took from the one hundred thousand (100,000) shares issued to said Dumaresq, as above set forth, and ostensibly in
236 payment of expenses and their own services in connection with the transaction, the twenty thousand (20,000) shares remaining after dividing eighty thousand (80,000) shares among the members of said syndicate, as above set forth. The expenses actually incurred by them did not exceed six thousand (6000) dollars. These twenty thousand (20,000) shares were divided between said Lewisohn and said Bigelow, said Bigelow receiving ten thousand nine hundred and forty (10,940) shares as his proportion thereof, and said Leonard Lewisohn nine thousand and sixty (9060) shares as his proportion thereof. Said thirty thousand (30,000) shares issued to said Leonard Lewisohn and said Bigelow for said conveyance of real estate by said Leonard Lewisohn were also divided between said Leonard Lewisohn

and said Bigelow, said Bigelow receiving sixteen thousand four hundred and ten (16,410) shares thereof, and said Leonard Lewisohn thirteen thousand five hundred and ninety (13,590) shares.

Twenty-first. Prior to the formation of said Old Dominion Syndicate, so-called, and prior to obtaining said option for and making the several agreements hereinbefore referred to for the acquisition of the stock of said Baltimore Old Dominion Company, said Leonard Lewisohn and said Bigelow had formed the plan and intention of organizing a corporation to acquire the property of said Baltimore Old Dominion Company, and had formed the plan and intention of selling said property to such new corporation at a large advance in price, and of thereby acquiring and obtaining for themselves and such persons as they might associate with them a large profit from such sale to said corporation so to be formed, and of causing said corporation to retain and forthwith to offer for subscription to persons who might be willing to subscribe and pay therefor, a
237 sufficient number of shares in the corporation so formed to provide said corporation with a working capital. And said Lewisohn and said Bigelow formed said Old Dominion Syndicate, so-called, in order to provide the money with which to carry out said plans, and purchased said stock of said Baltimore Old Dominion Company, for the purpose and with the intent of carrying out the prior plan and intention so formed by them as aforesaid, and of selling to the complainant corporation when the same should be formed the property of said Baltimore Old Dominion Company at a large advance in price; and said Leonard Lewisohn, and said Bigelow made this agreement for the acquisition and for the conveyance to said Leonard Lewisohn of said four mining claims and parcel of real estate with the purpose and intention of selling said mining claims and parcel of real estate to a corporation to be formed by them for the purposes above set forth, and of taking to themselves a large profit from such sale and with the intention of causing such corporation to retain and offer for subscription as above set forth a large number of shares of its stock; and said Leonard Lewisohn and said Bigelow caused the complainant corporation to be organized and to acquire the property of said Baltimore Old Dominion Company, and to acquire the mining claims and real estate conveyed by said Keyser to said Leonard Lewisohn as above set forth, and caused said corporation immediately to offer the twenty thousand (20,000) shares of its capital stock remaining unissued after said purchases as aforesaid for subscription to persons who might be willing to subscribe and pay therefor, in order to provide said corporation with working capital, in the manner aforesaid, all in further execution and performance of said plans and intentions. When said offer was made by said Baltimore Old Dominion Company to the com-
238 plainant corporation, and when said proposition was made by said Leonard Lewisohn to the complainant corporation, and when said offer and propositions were accepted, said Leonard Lewisohn and said Bigelow were in absolute control of the complainant corporation through the ownership by them and their associates of all stock in said complainant corporation then outstanding, and through the selection of a board of directors and other officers chosen

by them and selected for the purpose of enabling them to carry out said plan, and consisting of themselves, their employees and associates, all of whom were expressly chosen for the purpose of carrying out said plan and intention, and had expressly undertaken to do so; and said offer of said Baltimore Old Dominion Company and said proposition of said Leonard Lewisohn were accepted by the complainant corporation through its Board of Directors, as above set forth, by the direction of said Leonard Lewisohn and said Bigelow, and the other directors in acting thereon acted solely at the direction of and pursuant to previous agreement with said Leonard Lewisohn and said Bigelow, and for the express purpose of carrying out the said plan and intention of said Leonard Lewisohn and said Bigelow, and all of said action was taken and was intended by the individuals who took part therein to carry out said plan and intention and to enable said Leonard Lewisohn and said Bigelow and such persons as they had associated with them to make a large profit by the sale of said property of the Baltimore Old Dominion Company, and of said mining claims and real estate to the complainant corporation at a price greatly in excess of the cost to said Leonard Lewisohn and to said Bigelow and their associates of all the stock of said Baltimore Old Dominion Company and of said mining claims and real estate. And when said twenty thousand (20,000) shares of stock remaining unissued after said purchases as aforesaid were of-
239 fered for subscription as aforesaid and were issued and sold to the subscribers therefor, as above set forth, said Leonard Lewisohn and said Bigelow were in absolute control of the complainant corporation, as aforesaid, and said shares were so offered for subscription and issued and sold in order to carry out said plan and conspiracy of said Leonard Lewisohn and said Bigelow aforesaid.

Twenty-second. From July 11, 1895, when said purchase in behalf of the complainant corporation of the property of said Baltimore Old Dominion Company and of said mining claims and real estate from said Leonard Lewisohn was consummated, as above set forth, until April 4, 1902, said Bigelow was continuously the president and chief executive officer of the complainant corporation; throughout said period the Board of Directors of the complainant corporation was continuously composed of persons selected by said Leonard Lewisohn and said Bigelow, and at all times until April 4, 1902, a large majority of the persons so acting as directors were personal friends of said Leonard Lewisohn and said Bigelow, and had been interested with said Leonard Lewisohn and said Bigelow in the transactions above set forth and had received some share in the profits thereof, and the remaining directors took no active part in the management of the complainant corporation and were ignorant of the facts hereinbefore set forth. No disclosure was at any time made to any of the subscribers for the twenty thousand (20,000) shares of the capital stock offered for subscription as aforesaid or to any purchasers of said shares of the capital stock of the complainant corporation or to the other members of the Old Dominion Syndicate or to any subsequent purchasers of the shares issued to said Dumaresq or to said Leonard Lewisohn and said Bigelow, and none of said persons

in fact knew of the profits made by said Leonard Lewisohn
240 and said Bigelow, from the division between them of said additional twenty thousand (20,000) shares part of the one hundred thousand (100,000) shares issued for the purchase of the property formerly held by the Baltimore Old Dominion Company from the division between them of the thirty thousand (30,000) shares derived from the sale of the property conveyed by said Leonard Lewisohn, as above set forth. This complainant had not until after April 4, 1902, any knowledge or information of any of the facts hereinbefore set forth as to the profit derived by said Leonard Lewisohn and said Bigelow or said Leonard Lewisohn in the manner above stated as promoters of this corporation, or of any profit having been derived by them, or either of them, or by any other person interested or participating in the promotion and organization of this corporation, and immediately upon receiving information relating thereto, the complainant investigated the same, and thereupon promptly made demand upon said Bigelow and upon the defendants.

Twenty-third. The property conveyed to the complainant by the Baltimore Old Dominion Company, as above set forth, consists mainly of the copper mine which was then and ever since has been in active operation, and from which large amounts of ore have since been taken, and upon which large expenditures have been made in the development and establishment of the necessary plant. All the property so conveyed at the time it was sold to the complainant as above set forth was worth not over one million (1,000,000) dollars. The property conveyed to the complainant by Leonard Lewisohn as above set forth consisted merely of mining claims and a parcel of land for a mill site, all of which property has since said conveyance remained undeveloped and is now in substantially the same condition that it was in at the time of the conveyance by said Lewisohn to the complainant. Said property
241 so conveyed was at the time of such conveyance fairly worth not more than five thousand (5,000) dollars.

Twenty-fourth. Said Leonard Lewisohn died on March 5, 1902, and was at the time of his death a citizen of the State of New York and a resident of the Borough of Manhattan in the City, County and State of New York. On or about April 4, 1902, the last will and testament of said Leonard Lewisohn was duly admitted to probate in the Surrogate's Court for said County of New York, and on or about April 5, 1902, the respondents herein were duly appointed executors of said will, and letters testamentary were duly issued to them as such by said Surrogate's Court, and they are now such executors and duly qualified and acting as such. All said respondents are citizens of the State of New York and reside in the Borough of Manhattan in the City of New York and State of New York and in the Southern District of New York.

Twenty-fifth. After April 4, 1902, and prior to July 24, 1902, the complainant made investigation as to the matters above set forth. In the course of such investigation it applied to said Bigelow for information and access to papers. This information

was, as the complainant is informed and believes, referred to the respondents, and said Bigelow subsequently notified this complainant that the respondents were unwilling to permit information or access to papers relating to said matters to be given to the complainant. Thereafter, to wit, on or about July 24, 1902, the complainant by its counsel notified the respondents that the complainant had a claim for a very large amount against them as executors as aforesaid to recover the profits made by said Leonard Lewisohn as above set forth. Thereafter, to wit, on or about August 1, 1902, said respondents informed the complainant's counsel that they
242 believed the claim of the complainant to be absolutely unfounded.

Thereafter, to wit, on or about September 12, 1902, the complainant offered to said Bigelow and to the respondents to rescind the sale and conveyance to it from said Leonard Lewisohn of said parcels of real estate in Arizona, to wit, the parcels known as The Old Dominion Mine, New York Mine, Chicago Mine, Keystone Mine and parcel of real estate near the Bloody Tanks, so-called.

Thereafter, to wit, on or about September 18, 1902, said complainant submitted to the counsel for the respondents a full statement of the claim contained in the bill of complaint, and on September 26, 1902, said counsel for the respondents notified the complainant that after a full investigation the respondents believed, and counsel had so advised them, that the claims made upon them were not valid.

Twenty-sixth. The complainant desires to rescind the sale of said parcels of real estate conveyed to it by said Leonard Lewisohn as hereinbefore set forth, and has offered to convey all said parcels of real estate conveyed to it by said Leonard Lewisohn, to wit, said parcels known as the Old Dominion Mine, New York Mine, Chicago Mine, Keystone Mine and parcel of land near the Bloody Tanks, so-called, to said respondents or to such persons as they might name upon receiving from them the consideration paid by this complainant for the conveyance thereof to it, to wit, thirty thousand (30,000) shares of its capital stock, or upon a proper accounting for said shares, but said respondents have refused to make any such restitution or accounting; and the complainant is still ready and willing, and hereby offers to convey said last named parcels of real estate to such persons as this Honorable Court may direct. Said Bigelow is a citizen and resident of Boston in the Common-
243 wealth of Massachusetts and cannot be served with process in this District or in the State of New York. The complainant does not in this suit seek any relief as to sale to it of the property of the Baltimore Old Dominion Company or the issue of one hundred thousand (100,000) shares of its capital stock in payment therefor as above set forth or as to any profit made by said Leonard Lewisohn and by said Bigelow or by any other person from such sale, and disclaims all right to any such relief in this suit, having brought a separate suit for the purpose of obtaining such relief.

Twenty-seventh. The complainant says that the shares which it seeks to recover are of great value, to wit, greatly in excess of two thousand (2000) dollars, and that the sum recoverable upon an ac-

counting therefor is very large, to wit, greatly in excess of two thousand (2000) dollars, exclusive in each case of interest and costs.

Wherefore the complainant prays:

1. That this Honorable Court will declare said sale of said parcels of real estate conveyed by said Leonard Lewisohn to the complainant as hereinbefore set forth, rescinded, and will direct this complainant upon the return to it of or a proper accounting to it for the consideration for said sale and conveyance, to execute such reconveyance, if any, of said several parcels of real estate to such person or persons as this Honorable Court shall think proper.

2. That said respondents in their capacity of executors of the will of said Leonard Lewisohn be required to return to the complainant the consideration paid by this complainant for said conveyance, to wit, thirty thousand (30,000) shares of its capital stock, or
244 if, and so far as said shares are no longer in their control, to account to the complainant therefor.

3. In the alternative, in case this Honorable Court shall deem that the complainant has not rescinded and is not entitled to rescind said sale or conveyance of said parcels of real estate conveyed by said Leonard Lewisohn to the complainant as above set forth, that this Honorable Court will ascertain the amount of damages suffered by the complainant by reason of the sale of said parcels of real estate as above set forth, and will by its decree establish the right of the complainant to recover said amount and order said respondents in their capacity of executors of the will of the said Leonard Lewisohn to pay said amount to it.

4. And may it please your Honors to grant unto the complainant a writ of subpœna ad respondendum directed to said respondents Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn, and Philip S. Henry, commanding them each to be and appear in this Honorable Court on a day certain therein to be named to answer this bill of complaint but not under oath, an answer under oath being specially waived, and to abide by and perform such orders and decrees as may be made herein.

OLD DOMINION COPPER MINING AND SMELTING COMPANY,
By BRANDEIS, DUNBAR & NUTTER,
Its Solicitors.

LOUIS D. BRANDEIS.
CHARLES E. HUGHES.

245 (EXHIBIT.)

Schedule.

First. The Globe Mine, patented by the United States Government to B. W. Reagan on the 18th day of October, 1881, by patent recorded in the office of the Recorder of Pinal County, Territory of Arizona, of the 19th day of November, 1881, to which record reference is made for a fuller description of said mine.

Second. The Globe Ledge Mine, patented by the United States Government to Benjamin W. Reagan on the eighteenth day of Oc-

tober, 1881, by patent recorded in the office of the Recorder of Pinal County, Territory of Arizona, on the nineteenth day of November 1881, to which record reference is made for a fuller description of said Mine.

Third. The Copper Jack Mill site of which the location is recorded in the office of the Recorder of Gila County, Arizona, in Book 2, of the Record of Mines at page 311, and to which reference is hereby made for a fuller description of said Mill Site, and upon which the Smelting Works formerly owned by the Old Dominion Copper Mining Co., are situated.

Fourth. The Globe Mill site, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 311, to which record reference is hereby made for a fuller description of said Mill Site.

Fifth. The Globe Ledge Mill Site, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 310, to which record reference is hereby made for a description of said Mill Site.

Sixth. The Southeast Globe Mine, of which the location notice is recorded in the office of the Recorder of Gila County, Ari-
246 zona, in Book 2 of Records of Mines, at page 312, and reference is hereby made to said report for a fuller description of said Mine.

Seventh. All of the certain Mining claim known as the Interloper in Globe District Records on pages 116 and 117 in Book 3, reference to which will more fully show, being the same property conveyed to William Keyser by Thomas H. Mason, by deed bearing date January 3rd, 1887, and recorded at page 586, Book 2, record of deeds to Mines, Gila County, Arizona Territory.

Eighth. The Fraction Mine of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2, of Records of Mines at page 569, to which record reference is hereby made for a fuller description of said mine.

Ninth. The Alice Mine or lode, located October 10th, 1875, by A. R. Hammond and J. W. Reed and notice of location recorded in Book 1, page 131, Globe District Mining Records (now part of the records of Gila County) and relocated February 28th, 1879, and notice of location recorded in Book 5, Globe District Mining Records (now a part of the records of Gila County) on pages 184 and 185, said Mine or Lode being more particularly described in the last mentioned notice of location as follows, to wit: Commencing at this monument of stones in a gulch, being the centre of southwest end of claim, and upon which this notice is posted, thence southeast 300 feet to a monument of stones, thence northeast 1400 feet to a monument of stones, thence northwest 300 feet to a monument of stones, being the centre of the northeast end of claim, thence northwest 300 feet to a monument of stones, thence southwest 1400 feet to a monument of stones, under a tree, thence southeast 300 feet to the place of beginning, being the same mining claim conveyed to Michael H. Simpson, deceased, by deed of the Globe City Mining Company dated July 1st, 1884, and re-
247 corded with Gila County Deeds to Mines, Book 2, page 227 et seq.

Tenth. The Mining Claim called and known as Hypathia Mine, situated, lying and being in Globe Mining District, Gila County, Territory of Arizona, and more particularly described in the notice of location recorded at page 66, Book 2, Records of Mines, Gila County, Records, to which record reference is made for a more definite description of said mine. Said mine was formerly known as the Southwest Alice Mine, being the same mining claim conveyed to said Michael H. Simpson, lately deceased, by deed of William H. Cook, dated November 18th, 1884, and recorded with Gila County Deeds, Book 2, page 305.

(EXHIBIT.)

A.

To the Old Dominion Copper Mining & Smelting Company, a Corporation, Organized and Existing under the Laws of the State of New Jersey:

The Old Dominion Copper Company of Baltimore City, a corporation organized and existing under the laws of the State of Maryland being the owner of certain mines and mining properties at Globe in the Territory of Arizona, described in the annexed schedule and of machinery, lumber, wood, tools, implements and other personal property for use for and in connection with the operation and maintenance thereof hereby makes the following proposition. To convey, assign and transfer all its property, both real and personal of every kind and nature whatsoever and wheresoever situated by good and sufficient deeds and instruments properly executed so as to confer absolute title thereto to the Old Dominion Copper Mining and Smelting Company upon receiving from said Company one hundred thousand shares of its capital stock to be issued to said Old Dominion Copper Company or to its nominees.

248 It being understood that the Old Dominion Copper Mining and Smelting Company shall assume all obligations of The Old Dominion Copper Company of Baltimore City incurred since the first day of June, 1895, and shall be entitled to all earnings and profits of said Company since that date.

July 11th, 1895.

A. S. BIGELOW, *President.*

A. W. EVARTS, *Secretary.*

B.

To the Old Dominion Copper Mining and Smelting Company:

I hereby offer to convey the following described property now owned and held by me upon receiving thirty thousand shares of the capital stock of the Old Dominion Copper Mining and Smelting Company to be issued to me or to my nominees.

(EXHIBIT.)

First. The Old Dominion Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land Office at Tucson, Arizona, Entry No. 267, Lot 45, situated in Globe Mining District, Gila County, Arizona.

Second. The New York Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land Office at Tucson, Arizona, Entry 268, Lot 46, in Globe Mining District in Gila County, Arizona.

Third. The Chicago Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land Office at Tucson, Arizona, Entry 269, Lot 51, in Globe Mining District, Gila County, Arizona.

Fourth. The Keystone Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the
249 United States Land Office at Tucson, Arizona, Entry 384, Lot 54, in Globe Mining District, Gila County, of Arizona.

Fifth. A lot or parcel of land situated near the Bloody Tanks, and deeded by E. A. Saxe to the Old Dominion Copper Mining Co., deed recorded in Book 1 of Deeds to real estate at Arizona, and reference is hereby made to said record for a fuller description of said parcel of land.

New York, July 11, 1895.

LEONARD LEWISOHN.

Please issue said thirty thousand shares of stock to Mr. A. S. Bigelow and myself.

LEONARD LEWISOHN.

EXHIBIT E.

Circuit Court of the United States, Southern District of New York.

In Equity.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
v.
FREDERICK LEWISOHN et al.

Defendant's Demurrer to the Whole Bill.

The Joint and Several Demurrer of Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, as Executors of the Last Will of Leonard Lewisohn, the Defendants Above Named.

These defendants respectively by protestation, not confessing or acknowledging all or any of the matters and things in the
250 said plaintiff's bill to be true, in such manner and form as the same are therein set forth and alleged, demur thereto, and for cause of demurrer show:

1. That the complainant has not, in and by said bill, stated such a case as entitled it to any relief against the defendants.

2. That it appears by said bill that the same sets up against the defendants different and distinct causes which are inconsistent with each other and cannot properly be joined; that different reliefs, inconsistent with each other are prayed for, and that the said bill is altogether multifarious.

Wherefore and for divers other good causes of demurrer appearing in the said bill these defendants respectively demur thereto and humbly demand the judgment of this Court whether they shall be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their costs and charges in this behalf wrongfully sustained.

HOADLEY, LAUTERBACH & JOHNSON,
Solicitors for the Defendants.

STATE OF NEW YORK,
County of New York, ss:

Frederick Lewisohn makes solemn oath, and says, that he is one of the above named defendants, and that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

FREDERICK LEWISOHN.

Subscribed and sworn to before me this 5th day of May, 1905.

ERNEST W. BROWN,
Notary Public, N. Y. County.

[SEAL.]

I hereby certify that in my opinion the foregoing demurrer
251 is well founded in point of law.

EDWARD LAUTERBACH,
Of Counsel for Defendants.

EXHIBIT E'.

Circuit Court of the United States, Southern District of New York.

In Equity.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
v.
FREDERICK LEWISOHN et al.

Defendants' Demurrer to a Part of the Bill.

The defendants by protestation, not confessing or acknowledging all or any of the matters and things in the plaintiff's bill of complaint to be true in such manner and form as the same are therein set forth and alleged, and not waiving *his* demurrer to the whole bill, but insisting and relying thereon, further demur to so much of said bill as seeks to have the sale of certain parcels of real estate conveyed to the plaintiff by Leonard

Lewisohn rescinded, and to have the defendants ordered to return to the plaintiff the consideration paid by the plaintiff for said conveyance; and for causes of demurrer the defendants show:

I. That the complainant has not, in and by said bill, stated such a case as entitles it to the aforesaid relief against the defendants.

252 II. That it appears by said bill that one Albert S. Bigelow therein referred to is an indispensable party defendant to said bill so far as it seeks the rescission of the aforesaid sale, but that he has not been made a party defendant.

Wherefore, the defendants demur to so much of the complainant's bill as is above specified, and demand judgment of this court, whether *he* shall make any further or other answer to such part of said bill as is so demurred unto as aforesaid, and pray to be hence dismissed with their costs in this behalf sustained.

HOADLY, LAUTERBACH & JOHNSON,
Solicitors for the Defendants.

STATE OF NEW YORK,
County of New York, ss:

Frederick Lewisohn makes solemn oath, and says, that he is one of the above-named defendants, and that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

FREDERICK LEWISOHN.

Subscribed and sworn to before me this 5th day of May, 1905.

ERNEST W. BROWN,
[SEAL.] *Notary Public, N. Y. County.*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

EDWARD LAUTERBACH,
Of Counsel for Defendants.

EXHIBIT F.

At a Stated Term of the Circuit Court of the United States of
253 America, for the Southern District of New York, in the Second Circuit, Held at the United States Court Rooms, in the Borough of Manhattan, City of New York, on the 18th day of November, in the Year of Our Lord, One Thousand Nine Hundred and Five.

Present: Hon. George C. Holt, Judge.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY,
Complainant,
against
FREDERICK LEWISOHN et al., Defendants.

The demurrers of the defendants to a part of the amended bill of complaint, and to the whole of the amended bill of complaint, having duly come on for hearing, and after hearing Eugene Treadwell, Esq., of counsel for the defendants, in support of the demurrers,

and William H. Dunbar, Esq., and Louis D. Brandeis, Esq., of counsel for the complainant, in opposition thereto, and the premises having been duly considered, it is

Ordered by the Court, that the demurrer to the whole of said amended bill of complaint for want of equity, be, and the same is hereby, sustained, and the complainant having heretofore been permitted to amend the bill of complaint to meet the prior decision of this Court sustaining a demurrer herein and dismissing the bill of complaint, it is

Further ordered by the Court, that the said bill of complaint be, and the same hereby is dismissed; and it is further ordered that the defendants do recover against the said complainant their costs and charges by them incurred upon the said demurrer, to be taxed, and that the said defendants have execution therefor.

GEO. C. HOLT, *J.*

254 (Endorsed:) United States Circuit Court, Southern Dist. of New York. The Old Dominion Copper Mining and Smelting Company, Complainant, v. Frederick Lewisohn, et al. Def'ts. Order. Hoadly, Lauterbach & Johnson, Sol'rs for Def'ts, 22 William Street, New York City. Copy Received Nov. 13, 1905. Carter, Hughes & Dwight. U. S. Circuit Court, Southern District of New York. Filed Nov. 18, 1905. John A. Shields, Clerk.

Exhibit G.

United States Circuit Court, Southern District of New York.

The Old Dominion Copper Mining and Smelting Company, Complainant,
against
Frederick Lewisohn et al., Defendants.

This cause having been regularly brought on for trial upon the issues of law formed by complainant's amended complaint, and the demurrers of the defendant to a part of the amended bill of complaint, and to the whole of the amended bill of complaint, at a Term of this Court, held by the Hon. George C. Holt, one of the Judges of this Court, who, having heard the parties by their counsel, and after due deliberation, has duly made and filed his decision, and an order having been duly made and entered herein and filed in the office of the Clerk of this Court on the 18th day of November, 1905, directing that the demurrer to the whole of said amended bill of complaint for want of equity be sustained and that the bill of complaint herein be dismissed, the complainant having heretofore been permitted to amend the bill of complaint to

255 meet the prior decision of this Court, and further directing that the defendants recover against the complainant their costs and charges incurred upon the said demurrer, to be taxed, and that the said costs and charges having been duly adjusted by the Clerk of this Court upon notice to the complainant at the sum of Two hundred

and twenty-seven dollars (227), now, upon motion of Hoadly, Lauterbach & Johnson, attorneys for the defendants, it is

Adjudged and decreed, that the said amended bill of complaint herein be and the same hereby is dismissed, and that the defendants recover of the complainant the sum of Two hundred and twenty-seven dollars ($227); their costs and charges as taxed, and that the defendants have execution therefor.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) United States Circuit Court, Southern District of New York. The Old Dominion Copper Mining and Smelting Co., Pl'ff, v. Frederick Lewisohn, et al., Def't. Judgment. Hoadly, Lauterbach & Johnson, Attorneys for Defendants, 22 William St., New York City. U. S. Circuit Court, Southern District of New York. Filed Dec. 6, 1905. John A. Shields, Clerk.

256 EXHIBIT H.

Circuit Court of the United States, Southern District of New York.

In Equity. No. 8333.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
v.
FREDERICK LEWISOHN et al.

Petition for Appeal.

The Old Dominion Copper Mining and Smelting Company, the complainant in the above entitled cause, conceives itself to be aggrieved by the decree made and entered on the eighteenth day of November, 1905, in the above entitled cause, dismissing the amended bill of complaint therein, and hereby appeals from said decree to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

BRANDEIS, DUNBAR & NUTTER.
HUGHES, ROUNDS & SHURMAN,
Solicitors for Appellants.

Appeal allowed.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) Circuit Court of the United States, Southern District of New York. In Equity. No. 8333. Old Dominion Copper
257 Mining and Smelting Company v. Frederick Lewisohn, et al. Petition for Appeal. Brandeis, Dunbar & Nutter, 161 Devon-

shire Street, Boston, Mass., and Hughes, Rounds & Schurman, 96 Broadway, New York City, Solicitors for Complainant. A copy this day received. Jan. 3, 1906. Hoadly, Lauterbach & Johnson. U. S. Circuit Court, Southern District of New York. Filed Jan. 3, 1906. John A. Shields, Clerk.

Exhibit I.

Circuit Court of the United States, Southern District of New York.

In Equity. No. 8333.

Old Dominion Copper Mining and Smelting Company
v.
Frederick Lewisohn et al.

Assignment of Errors.

Now comes the Old Dominion Copper Mining and Smelting Company, the complainant in the above entitled cause, and says that the final decree of said court in said cause, sustaining the demurrer of the respondents to the amended bill of complaint therein, is erroneous and against the just rights of said complainant for the following reasons:

First. The court erred in holding that the amended bill of complaint did not state a case entitling the complainant to any relief in equity.

258 Second. The court erred in holding that the facts alleged in the amended bill of complaint and admitted by the demurrer did not entitle the complainant to rescind the sale complained of and recover from the respondents the consideration paid or in the alternative to recover from the respondents the damages suffered by the complainant by reason of such sale.

Third. The court erred in holding that upon the facts alleged in the amended bill of complaint and admitted by the demurrer there was any consent to the sale complained of such as to disable the complainant from rescinding the same or having other relief in respect thereof.

Fourth. The court erred in not holding that upon the facts alleged in the amended bill of complaint and admitted by the demurrer the respondents' testator Leonard Lewisohn was a promoter of the plaintiff corporation and by reason thereof upon the facts so alleged and admitted liable to account to the complainant upon a rescission or offer of rescission by it of said sale complained of for the consideration received for said sale, or to restore to the complainant the profits made by him from such sale, or compensate the complainant for the damages suffered by it by reason of such sale, and in not holding that the respondents as executors of the will of said Leonard Lewisohn are in their representative capacity in like manner liable.

Fifth. The court erred in not overruling the demurrer to the amended bill of complaint and in ordering the amended bill of complaint to be dismissed.

BRANDEIS, DUNBAR & NUTTER,
HUGHES, ROUNDS & SCHURMAN,
Solicitors for Appellants.

259 (Endorsed:) Circuit Court of the United States, Southern District of New York. In Equity. No. 8333. Old Dominion Copper Mining and Smelting Company vs. Frederick Lewisohn et al. Assignment of Errors. U. S. Circuit Court, Southern District of New York. Filed Jan. 2, 1906. John A. Shields, Clerk.

EXHIBIT J.

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
v.
FREDERICK LEWISOHN, WALTER LEWISOHN, ALBERT LEWISOHN and PHILIP S. HENRY, as Executors of the Will of Leonard Lewisohn, Late of New York, Deceased.

Bond for Damages and Costs.

Know all men by these Presents, that we, Old Dominion Copper Mining and Smelting Company, a corporation duly organized under the laws of New Jersey, as principal, and American Surety Company of New York, a corporation duly organized under the laws of New York as surety are held and firmly bound unto the above-named Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, executors of the will of Leonard Lewisohn, late of New York, deceased, obligees, in the sum of five hundred (500) dollars, to be paid to the said obligees for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our successors and assigns, jointly and severally, firmly by
260 these presents. Sealed with our seals and dated the twenty-third day of December in the year of our Lord one thousand nine hundred and five.

Whereas, the above-named Old Dominion Copper Mining and Smelting Company has prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit to reverse the decree rendered in the above-entitled suit by the Judge of the Circuit Court of the United States, for the Southern District of New York;

Now, therefore, the condition of this obligation is such, that if the above-named Old Dominion Copper Mining and Smelting Company shall prosecute said appeal to effect and answer all damages and costs, if it shall fail to make said plea good, then this obligation shall

be void, otherwise the same shall be and remain in full force and virtue.

OLD DOMINION COPPER MINING
AND SMELTING COMPANY. [SEAL.]
CHARLES S. SMITH, *Prest.*
CHARLES H. ALTMILLER, *Treas.*

[SEAL.] AMERICAN SURETY COMPANY
OF NEW YORK,
By ELIPHALET F. PHILBRICK,
Resident Vice-President.

Attest:

FRED L. ROBERTS,
Res. Asst. Secretary.

Sealed and delivered and taken and acknowledged this 22nd day of December, 1905, before me.

ROBERT W. SAWYER JR.,
Notary Public.

(Endorsed:) U. S. Circuit Court, Southern District of New York. Old Dominion Copper Mining and Smelting Company v. Frederick Lewisohn et al. Bond for Damages and Costs on Appeal.
261 We hereby approve of the form and sufficiency of the within Undertaking. Hoadly Lauterbach & Johnson, Solicitors for Defendants. Brandeis, Dunbar & Nutter, Hughes, Rounds & Schurman, Solicitors for Complainant. E. H. Lacombe, U. S. C. J. U. S. Circuit Court, Southern District of New York. Filed Jan. 3, 1906. John A. Shields, Clerk.

EXHIBIT J'.

U. S. Compiled Statutes 1901, Vol. 1, Section 1000.

Bond in Error and on Appeal.

Every justice or judge signing a citation on any writ of error shall, except in cases brought up by the United States or by direction of any Department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid.

Act Sept. 24, 1789, c. 20, sec. 22, 1 Stat. 84.
Act Dec. 12, 1794, c. 3, 1 Stat. 404.
Act Feb. 21, 1863, c. 50, 12 Stat. 657.
Act July 27, 1868, c. 255, sec. 1, 15 Stat. 226.

Section 1012.

Appeals from Circuit Courts to Supreme Court.

Appeals from the circuit courts and district courts acting as circuit courts, and from district courts in prize causes, shall be subject to the same rules, regulations, and restrictions as are or may be
262 prescribed in law in cases of writs of error.

Act March 3, 1803, c. 40, sec. 2, 2 St. 244.
Act June 30, 1864, c. 174, sec. 13, 13 Stat. 310.

263 EXHIBIT K.

United States Circuit Court of Appeals for the Second Circuit.

No. 64, October Term, 1906.

Argued November 19, 1906; Decided December 4, 1906.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY, Complainant-Appellant,

v.

FREDERICK LEWISOHN et al., Defendants-Appellees.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Before Judges Wallace, Townsend, and Coxe.

On appeal from a decree of the Circuit Court for the Southern District of New York sustaining a demurrer to an amended bill of complaint and dismissing the bill for want of equity.

The opinion of the Circuit Court sustaining the demurrer to the original bill is reported in 136 Fed. Rep. 915.

The Court held upon the hearing of the demurrer to the amended bill that there was no substantial difference between it and the original bill and followed the former decision. Final decree was thereupon entered and the complainant appeals.

The facts sufficiently appear in the opinion of the Circuit Court sustaining the demurrer to the original bill, 136 Fed. Rep. 915, and are stated in full in Old Dominion C. M. & S. Co. v. Bigelow (188 Mass. 315).

Per Curiam:

The bill prays for relief as follows:

First. That the sale of the mining claims to the complainant by Leonard Lewisohn—the defendants' testator—and Albert S.
264 Bigelow—a citizen of Massachusetts and not a party to this action, be rescinded and the real estate reconveyed to the defendants upon receipt by the complainant of the consideration paid therefor.

Second. That defendants return to the complainant the consideration paid by complainant for said property, namely, 30,000 shares of its capital stock, or account therefor.

Third. That if the court shall decide that the complainant is not entitled to rescind the sale of said real estate to it, then, and in that event, that the court ascertain the amount of damages sustained by complainant and direct the defendants as executors to pay the amount to complainant.

We are unable to perceive how this relief or any part thereof can be granted the complainant upon the facts alleged in the bill.

The fundamental difficulty with the bill is that it fails to state any facts showing that the complainant was in any way injured or defrauded by the transactions complained of. At the time of the transfer by Bigelow and Lewisohn to the company Bigelow and Lewisohn and their representatives owned the entire issue of stock of the corporation. The sale by them to the corporation was in effect a sale by them to Bigelow and Lewisohn. A corporation can only act through the human beings who compose it; it cannot be deceived or defrauded unless its stockholders and directors are deceived or defrauded. The corporation knew all that Bigelow and Lewisohn knew and no one of the original parties to the transfer was defrauded by the exchange of the stock controlled by Bigelow and Lewisohn for the real estate controlled by them.

It may be that such a large over-capitalization as is alleged in the bill might mislead and deceive careless and credulous pur-
265 chasers of the stock, but we are not now dealing with the case of a stockholder alleging concealment, fraud and misrepresentation. The stockholders, apparently, have no complaint; at least they have not propounded any.

Indeed, it is not easy how a purchaser, who paid $25 per share, could be defrauded in view of the allegation of the bill that "The shares of this corporation so issued in payment for the property sold to it as aforesaid were at the time of the fair market value of twenty-five (25) dollars each, and continued for a long time thereafter to be of such or greater value." It is enough, however, that this is not a stockholders' action.

The subscribers for the 20,000 shares subsequently issued were not deceived; they asked for no statement and received none; they got what they purchased and are not complainants here.

A protracted discussion is unnecessary for the reason that this court and the Circuit Court of the Southern District have decided the question adversely to the complainant's contention.

Foster v. Seymour (23 Fed. Rep. 65);
McCracken v. Robinson (57 id. 375).

To the same effect are the decisions of the New York Court of Appeals.

Barr v. N. Y., L. E. & W. R. Co. (125 N. Y. 263);
Blum v. Whitney (185 N. Y. 232).

It is true that the Supreme Court of Massachusetts (188 Mass. 315) has taken a different view, but we feel constrained to adhere to the prior adjudication of this circuit.

The decree is affirmed with costs.

Louis Brandeis, for the Appellant.
Eugene Treadwell for the Appellees.

266 EXHIBIT L.

At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms, in the Post-Office Building, in the City of New York, on the 14th Day of December, One Thousand Nine Hundred and Six.

Present: Hon. William J. Wallace, Hon. William K. Townsend, Hon. Alfred C. Coxe, Circuit Judges.

OLD DOMINION COPPER MINING AND SMELTING COMPANY,
Complainant-Appellant,
v.
FREDERICK LEWISOHN et al., Defendants-Appellees.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said Circuit Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

W. J. W.
W. K. T.

(Endorsed:) United States Circuit Court of Appeals, Second Circuit. Old Dominion Copper Co. v. F. Lewisohn. Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed Dec. 17, 1906. William Parkin, Clerk.

267 EXHIBIT M.

Supreme Court of the United States, October Term, 1906.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY,
Petitioner,
v.
FREDERICK LEWISOHN and Others, Executors, Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable the Justices of the Supreme Court of the United States:

Your petitioner, the Old Dominion Copper Mining and Smelting Company, respectfully represents:

First. Your petitioner is and at all times hereinafter mentioned was a corporation duly organized under the laws of the State of New Jersey.

The respondents are the executors duly appointed and qualified of one Leonard Lewisohn, late of New York, deceased.

Second. On or about October 7, 1902, the petitioner filed a bill of complaint in the Supreme Judicial Court for the County of Suffolk in the Commonwealth of Massachusetts against one Albert S. Bigelow, a citizen of Massachusetts, seeking to recover a secret profit made by him in conjunction with said Leonard Lewisohn out of a sale of property to the petitioner, while they were acting as promoters in the organization of the petitioner. The respondents were not joined in this suit owing to the impossibility of obtaining jurisdiction over them in Massachusetts. Bigelow demurred to the bill of complaint so filed against him on the ground of multifariousness and to so
268 much of the bill as asked for a rescission of the sale and return of the consideration for want of equity and want of parties.

Third. On January 6, 1903, the petitioner filed in the Circuit Court of the United States for the Southern District of New York a bill of complaint against the present respondents. The bill was upon the same cause of action set forth in the bill filed in Massachusetts against Bigelow and was identical with the latter bill except such verbal changes and additions as were made necessary by the differences in the parties defendant. Bigelow was not joined as a defendant because of the impossibility of obtaining jurisdiction over him in New York. The respondents, to the bill filed against them in the Circuit Court, interposed demurrers identical with the demurrers filed by Bigelow in the suit in Massachusetts.

Fourth. On February 20, 1905, the suit brought in the Circuit Court in New York was heard upon the demurrers; the Court treated the demurrers as general and ordered the bill dismissed for want of equity but with leave to amend (136 F. R. 915). The petitioner filed an amended bill. On December 7, 1904, the suit brought against Bigelow was heard upon demurrer before the full bench of the Supreme Judicial Court of Massachusetts, and on June 19, 1905, by a unanimous opinion, the demurrer was overruled (188 Mass. 315). A copy of this report is printed as an appendix to this petition. The Court carefully considered and disapproved the decision of the Circuit Court for the Southern District of New York in the present case. To the amended bill filed in the Circuit Court in the present case the respondents demurred as before; the suit was heard upon the demurrers; the Court held, without expressing any opinion on the merits, that the amended bill was substantially the
269 same as the original bill and that for this reason the demurrers should be sustained and the bill dismissed (Rec., p. 23). From this decision the petitioner duly appealed to the Circuit Court of Appeals.

Fifth. The appeal was heard before the Circuit Court of Appeals, and on December 4, 1906, that Court, by a decision rendered per curiam, upheld the decision of the Circuit Court on the ground that the case was governed by decisions of the Circuit Court for the South-

ern District of New York and of Circuit Court of Appeals for the Second Circuit, and by decisions of the New York Court of Appeals. Of the decision in the Massachusetts case against Bigelow, the Court said only:

"It is true that the Supreme Court of Massachusetts (188 Mass. 315) has taken a different view, but we feel constrained to adhere to the prior adjudication of this Circuit" (Rec., p. 31).

Sixth. The amended bill of complaint alleges the following material facts:

On April 30, 1895, the Old Dominion Copper Company of Baltimore (hereinafter called the Baltimore Old Dominion Company) owned and was operating a copper mine in Arizona; it had a capital stock of five hundred thousand dollars divided into twenty-five thousand twenty dollar shares, of which five-sevenths belonged to the executors of the will of Michael Simpson, of Boston, and two-sevenths belonged to William Keyser, of Baltimore.

At some time prior to May 4, 1895, Leonard Lewisohn and Albert S. Bigelow formed the plan of acquiring all the stock of the Baltimore Old Dominion Company, forming a new corporation to take over the mining property, selling the mining property to
270 the new corporation at a large profit and contemporaneously having the new corporation offer for subscription by the public enough of its stock to provide a working capital. To carry out this plan Lewisohn and Bigelow obtained an option to purchase the Simpson stock at forty dollars a share, and formed the Old Dominion Syndicate, so-called, to provide money for the purchase of this stock and the Keyser stock. The members of the Old Dominion Syndicate subscribed a fund of one million dollars, payable in instalments, upon the terms that the fund should be used to acquire the property or capital stock of the Baltimore Old Dominion Company, with a view to resale, and that the subscribers should receive the profit made in proportion to their several subscriptions.

On May 27, 1895, the first payment under the Simpson option fell due and was made from the funds of the syndicate. On June 13, 1895, Lewisohn and Bigelow secured an option on the Keyser stock, also at forty dollars per share, and on June 20 made, from the funds of the syndicate, the first payment under that option. On the same day Keyser, without the payment of any further consideration, conveyed to Lewisohn, for the benefit of the latter and Bigelow, certain mining claims, title to which stood in the name of Keyser. At this time, or shortly after, all the stock in the Baltimore Old Dominion Company was transferred to Lewisohn and Bigelow, or their nominees, the directors and other officers resigned, new directors selected by Lewisohn and Bigelow were chosen and Bigelow was chosen president.

On July 8, 1895, Lewisohn and Bigelow had the Old Dominion Copper Mining and Smelting Company, the present petitioner, organized under the laws of New Jersey, selecting for the purpose seven incorporators who subscribed for forty shares of stock, Lewisohn and Bigelow paying the subscriptions. On the following day the
271 authorized capital was increased to three million seven hundred and fifty thousand dollars, in shares of twenty-five dol-

lars each, and officers were chosen from among the incorporators. On July 11, 1895, five of the directors, and the president and treasurer resigned, by instruction of Lewisohn and Bigelow, and the vacancies were filled with their nominees. As a result the new board of directors consisted of Lewisohn, Bigelow, their attorney, Allen W. Evarts, one Edgar Buffam, employed by them for the purpose, and three other persons interested in the Old Dominion Syndicate; Bigelow was chosen president of the corporation.

Immediately after these changes a meeting of directors was held, at which were present Lewisohn, Bigelow, their attorney, Evarts, and their employee, Buffam. At this meeting Bigelow presented an offer of the Baltimore Old Dominion Company, signed by him as its president, to sell all its property, except the cash assets, to the new company for one hundred thousand shares of stock. Lewisohn and Bigelow caused this offer to be accepted. Lewisohn then presented an offer to sell to the corporation the mining claims transferred to him by Keyser for thirty thousand shares of stock. Lewisohn and Bigelow caused this offer to be accepted.

On July 18, 1895, Lewisohn and Bigelow, pursuant to their original plan, caused the directors of this corporation to offer twenty thousand shares of stock to the public in order to furnish working capital. This stock was all subscribed for at par.

The property of the Baltimore Old Dominion Company and the mining claims were subsequently conveyed to this corporation, and on September 18, 1895, Lewisohn and Bigelow caused all the stock to be issued and certificates delivered, one hundred thousand shares to their nominee for the Baltimore Old Dominion Company, on account of its property, thirty thousand shares to themselves
272 jointly on account of the mining claims, and twenty thousand shares to the subscribers on account of their cash subscriptions. Of the one hundred thousand shares, eighty thousand were distributed to the members of the Old Dominion Syndicate, and the remaining twenty thousand were held by Lewisohn and Bigelow, ostensibly for their expenses. The thirty thousand shares were divided between Lewisohn and Bigelow.

The entire transaction was pursuant to a plan formed by Lewisohn and Bigelow before they acquired any option to buy the stock of the Baltimore Old Dominion Company or acquired the mining claims, and all the steps taken were by their direction and with this plan in view. The mining claims transferred to this corporation for thirty thousand shares of its stock of the par value, and at that time and subsequently of the market value of twenty-five dollars per share, were worth not more than five thousand dollars, and they are now in the same condition as when so transferred. None of the members of the Old Dominion Syndicate, except Lewisohn and Bigelow themselves, and none of the persons who subscribed for the twenty thousand shares offered to the public had any knowledge of the profits taken by Lewisohn and Bigelow through the sale of these mining claims. The corporation remained under the control of Lewisohn and Bigelow until April, 1902; then upon a change of management the matter was investigated and shortly after this suit and the suit against Bigelow were brought.

The present bill asks relief only in respect to the transfer of the mining claims. The prayer of the bill is for a rescission of that sale and recovery of the shares issued as consideration therefor or in the alternative for an accounting by the defendants for those shares and their proceeds, or for recovery of the damage suffered.

273 Seventh. The demurrers filed to the amended bill of complaint were: first, to the whole bill for multifariousness, on the ground that the bill sets up different and inconsistent cases, and prays for different and inconsistent relief; second, to so much of the bill as seeks a rescission for want of equity and for want of parties in that Bigelow is not joined as a defendant.

Eighth. Your petitioner is advised that the decision of the Circuit Court of Appeals affirming the decree of the Circuit Court dismissing said amended bill of complaint for want of equity is erroneous, and your petitioner submits that the decision should be reviewed by this Court.

1. Because the decision of the Circuit Court of Appeals and the decision of the Supreme Judicial Court of Massachusetts are directly opposed in identical cases arising out of a single transaction.

2. Because the decision of the Circuit Court of Appeals is inconsistent with the principles laid down in the decision of Circuit Court of Appeals for the Sixth Circuit in the case of Yeiser v. United States Board and Paper Co., 107 F. R. 340.

3. Because the decision involves a question of importance and general interest, namely,—whether a corporation can recover, by rescission or by an accounting, a secret profit made by promoters in selling property to it, notwithstanding the approval of the transaction by the promoters and their agents as holders of a nominal amount of stock all at the time outstanding, given in anticipation of an issue of stock offered and intended to be offered to the public as part of the promotion of the corporation.

Your petitioner submits herewith a certified copy of the record in said Circuit Court of Appeals of the decree of reversal and
274 of the opinion of said Court and a brief in support of this petition.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court for the Second Circuit, requiring said Court to certify and send to this Honorable Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in said case, entitled therein Old Dominion Copper Mining and Smelting Company v. Frederick Lewisohn and others, No. 64, to the end that said case may be reviewed and determined by this Honorable Court as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this Honorable Court may seem meet.

OLD DOMINION COPPER MINING AND SMELTNG COMPANY,
By LOUIS D. BRANDEIS,
WILLIAM H. DUNBAR,
Its Solicitors.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

William H. Dunbar, Being duly sworn, says that he is one of the counsel for the Old Dominion Copper Mining and Smelting Company, the above named petitioner, that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

WILLIAM H. DUNBAR.

Subscribed and sworn to before me by William H. Dunbar this twelfth day of January, A. D. 1907. My commission expires September 20, A. D. 1912.

ROBERT W. SAWYER, JR.,
Notary Public.

[NOTARIAL SEAL.]

275 Appendix. (Here follows the opinion in the case of Old Dominion Copper Mining & Smelting Company v. Albert S. Bigelow as reported in 188 Mass., page 315.

EXHIBIT N.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Old Dominion Copper Mining & Smelting Company is appellant and Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn, and Philip S. Henry, Executors of Leonard Lewisohn, deceased, are appellees, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the Circuit Court of the United States for the Southern District of New York, and we be- willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 27th day of February, in the year of our Lord one thousand nine hundred and seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

276 EXHIBIT O.

Supreme Court of the United States, October Term, 1907.

No. 206.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY,
Petitioner,
v.
FREDERICK LEWISOHN et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Opinion.

(May 18, 1908.)

Mr. JUSTICE HOLMES delivered the opinion of the Court:

This is a bill in equity brought by the petitioner to rescind a sale to it of certain mining rights and land by the defendants' testator, or, in the alternative, to recover damages for the sale. The bill was demurred to, and the demurrer was sustained. (136 Fed. Rep. 915.) Then the bill was amended, and again demurred to, and again the demurrer was sustained, and the bill was dismissed. This decree was affirmed by the Circuit Court of Appeals. (148 Fed. Rep. 1020, 79 C. C. A. 534.) The ground of the petitioner's case is that Lewisohn, the deceased, and one Bigelow, as promoters, formed the petitioner that they might sell certain properties to it at a profit; that they made their sale while they owned all the stock issued, but in contemplation of a large further issue to the public, without disclosure of their profit, and that such an issue in fact was made. The Supreme Judicial Court of Massachusetts has held the plaintiff
277 entitled to recover from Bigelow upon a substantially similar bill. (188 Mass. 315.)

The facts alleged are as follows: The property embraced in the plan was the mining property of the Old Dominion Copper Company of Baltimore, and also the mining rights and land now in question, the latter being held by one Keyser, for the benefit of himself and of the executors of one Simpson, who, with Keyser, owned the stock of the Baltimore Company. Bigelow and Lewisohn, in May and June, 1895, obtained options from Simpson's executors and Keyser for the purchase of the stock and the property now in question. They also formed a syndicate to carry out their plan, with the agreement that the money subscribed by the members should be used for the purchase and the sale to a new corporation, at a large advance, and that the members, in the proportion of their subscriptions, should receive in cash, or in stock of the new corporation, the profit made by the sale. On May 28, 1895, Bigelow paid Simpson's executors for their stock on behalf of the syndicate in cash and notes of himself and Lewisohn, and in June Keyser was paid in the same way.

On July 8, 1895, Bigelow and Lewisohn started the plaintiff corporation, the seven members being their nominees and tools. The next day the stock of the company was increased to 150,000 shares of twenty-five dollars each, officers were elected, and the corporation became duly organized. July 11, pursuant to instructions, some of the officers resigned, and Bigelow and Lewisohn and three other absent members of the syndicate came in. Thereupon an offer was received from the Baltimore Company, the stock of which had been bought, as stated, by Bigelow and Lewisohn, to sell substantially all its property for 100,000 shares of the plaintiff company. The
278 offer was accepted, and then Lewisohn offered to sell the real estate now in question, obtained from Keyser, for 30,000 shares, to be issued to Bigelow and himself. This also was accepted, and possession of all the mining property was delivered the next day. The sales "were consummated" by delivery of deeds, and afterwards, on July 18, to raise working capital, it was voted to offer the remaining 20,000 shares to the public at par, and they were taken by subscribers who did not know of the profit made by Bigelow and Lewisohn and the syndicate. On September 18 the 100,000 and 30,000 shares were issued, and it was voted to issue the 20,000 when paid for. The bill alleges that the property of the Baltimore company was not worth more than $1,000,000, the sum paid for its stock, and the property here concerned not over $5,000, as Bigelow and Lewisohn knew. The market value of the petitioner's stock was not less than par, so that the price paid was $2,500,000, it is said, for the Baltimore company's property and $750,000 for that here concerned. Whether this view of the price paid is correct, it is unnecessary to decide.

Of the stock in the petitioner received by Bigelow and Lewisohn, or their Baltimore corporation, 40,000 shares went to the syndicate as profit, and the members had their choice of receiving a like additional number of shares or the repayment of their original subscription. As pretty nearly all took the stock, the syndicate received about 80,000 shares. The remaining 20,000 of the stock paid to the Baltimore company, Bigelow and Lewisohn divided, the plaintiff believes, without the knowledge of the syndicate. The 30,000 shares received for the property now in question they also divided. Thus the plans of Bigelow and Lewisohn were carried out.

The argument for the petitioner is that all would admit that the promoters (assuming the English phrase to be well applied)
279 stood in a fiduciary relation to it, if, when the transaction took place, there were members who were not informed of the profits made and who did not acquiesce, and that the same obligation of good faith extends down to the time of the later subscriptions, which it was the promoters' plan to obtain. It is an argument that has commanded the assent of at least one Court, and is stated at length in the decision. But the Courts do not agree. There is no authority binding upon us and in point. The general observations in Dickerman v. Northern Trust Co., 176 U. S. 181, were obiter, and do not dispose of the case. Without spending time upon the many dicta that were quoted to us, we shall endeavor to weigh the considerations on one side and the other afresh.

The difficulty that meets the petitioner at the outset is that it has assented to the transaction with the full knowledge of the facts. It is said, to be sure, that on September 18, when the shares were issued to the sellers, there were already subscribers to the 20,000 shares that the public took. But this does not appear from the bill, unless it should be inferred from the ambiguous statement that on that day it was voted to issue those shares "to persons who had subscribed therefor," upon receiving payment, and that the shares "were thereafter duly issued to said persons," etc. The words "had subscribed" may refer to the time of issue and be equivalent to "should have subscribed" or may refer to an already past event. But that hardly matters. The contract had been made and the property delivered on July 11 and 12, when Bigelow, Lewisohn, and some other members of the syndicate held all the outstanding stock, and it is alleged in terms that the sales were consummated before the vote of July 18 to offer stock to the public had been passed.

280 At the time of the sale to the plaintiff, then, there was no wrong done to any one. Bigelow, Lewisohn, and their syndicate were in both sides of the bargain, and they might issue to themselves as much stock in their corporation as they liked in exchange for their conveyance of their land. Salomon v. Salomon & Co. (1897), A. C. 22. Blum v. Whitney, 185 N. Y. 232. Tompkins v. Sperry, 96 Md. 560. If there was a wrong it was when the innocent public subscribed. But what one would expect to find, if a wrong happened then, would not be that the sale became a breach of duty to the corporation nunc pro tunc, but that the invitation to the public without disclosure, when acted upon, became a fraud upon the subscribers from an equitable point of view, accompanied by what they might treat as damage. For it is only by virtue of the innocent subscribers' position and the promoters' invitation that the corporation has any pretence for a standing in court. If the promoters, after starting their scheme, had sold their stock before any subscriptions were taken, and then the purchasers of their stock with notice had invited the public to come in, and it did, we do not see how the company could maintain this suit. If it could not then, we do not see how it can now.

But it is said that from a business point of view the agreement was not made merely to bind the corporation as it then was, with only 40 shares issued, but to bind the corporation when it should have a capital of $3,750,000; and the implication is that practically this was a new and different corporation. Of course, legally speaking, a corporation does not change its identity by adding a cubit to its stature. The nominal capital of the corporation was the same when the contract was made, and after the public had subscribed.

281 Therefore, what must be meant is, as we have said, that the corporation got a new right from the fact that new men, who did not know what it had done, had put in their money and had become members. It is assumed in argument that the new members had no ground for a suit in their own names, but it is assumed also that their position changed that of the corporation, and thus that the indirect effect of their acts was greater than the

direct; that facts that gave them no claim gave one to the corporation because of them, notwithstanding its assent. We shall not consider whether the new members had a personal claim of any kind, and therefore we deal with the case without prejudice to that question, and without taking advantage of what we understand the petitioner to concede.

But, if we are to leave technical law on one side and approach the case from what is supposed to be a business point of view, there are new matters to be taken into account. If the corporation recovers, all the stockholders, guilty as well as innocent, get the benefit. It is answered that the corporation is not precluded from recovering for a fraud upon it, because the party committing the fraud is a stockholder. Old Dominion Copper Mining and Smelting Co. v. Bigelow, 188 Mass. 315, 327. If there had been innocent members at the time of the sale, the fact that there were also guilty ones would not prevent a recovery, and even might not be a sufficient reason for requiring all the guilty members to be joined as defendants in order to avoid a manifest injustice. Stockton v. Anderson, 40 N. J. Eq. 486. The same principle is thought to apply when innocent members are brought in later under a scheme. But it is obvious that this answer falls back upon the technical diversity between the corporation and its members, which the business point of view is supposed to transcend, as it must, in order to avoid the objection that the corporation has as-
282 sented to the sale with full notice of the facts. It is mainly on this diversity that the answer to the objection of injustice is based in New Sombrero Phosphate Co. v. Erlanger, 5 Ch. D. 73, 114, 122.

Let us look at the business aspect alone. The syndicate was a party to the scheme to make a profit out of the corporation. Whether or not there was a subordinate fraud committed by Bigelow and Lewisohn on the agreement with them, as the petitioner believes, is immaterial to the corporation. The issue of the stock was apparent, we presume, on the books, so that it is difficult to suppose that at least some members of the syndicate, representing an adverse interest, did not know what was done. But all the members were engaged in the plan of buying for less and selling to the corporation for more, and were subject to whatever equity the corporation has against Bigelow and the estate of Lewisohn. There was some argument to the contrary, but this seems to us the fair meaning of the bill. Bigelow and Lewisohn, it is true, divided the stock received for the real estate now in question. But that was a matter between them and the syndicate. The real estate was bought from Keyser by the syndicate along with his stock in the Baltimore company, and was sold by the syndicate to the petitioner along with the Baltimore company's property, as part of the scheme. The syndicate was paid for it, whoever received the stock. And this means that two-fifteenths of the stock of the corporation, the 20,000 shares sold to the public, are to be allowed to use the name of the corporation to assert rights against Lewisohn's estate that will enure to the benefit of thirteen-fifteenths of the stock that are totally without

claim. It seems to us that the practical objection is as strong as that arising if we adhere to the law.

283 Let us take the business point of view for a moment longer. To the lay mind it would make little or no difference whether the 20,000 shares sold to the public were sold on an original subscription to the articles of incorporation or were issued under the scheme to some of the syndicate and sold by them. Yet it is admitted, in accordance with the decisions, that in the latter case the innocent purchasers would have no claim against any one. If we are to seek what is called substantial justice in disregard of even peremptory rules of law, it would seem desirable to get a rule that would cover both of the almost equally possible cases of what is deemed a wrong. It might be said that if the stock really was taken as a preliminary to selling to the public, the subscribers would show a certain confidence in the enterprise and give at least that security for good faith. But the syndicate believed in the enterprise, notwithstanding all the profits that they made it pay. They preferred to take stock at par rather than cash. Moreover, it would have been possible to issue the whole stock in payment for the property purchased, with an understanding as to 20,000 shares.

Of course it is competent for legislators, but not, we think, for judges, except by a quasi-legislative declaration, to establish that a corporation shall not be bound by its assent in a transaction of this kind, when the parties contemplate an invitation to the public to come in and join as original subscribers for any portion of the shares. It may be said that the corporation cannot be bound until the contemplated adverse interest is represented, or it may be said that promoters cannot strip themselves of the character of trustees until that moment. But it seems to us a strictly legislative determination. It is difficult, without inventing new and qualifying established doctrines, to go behind the fact that the corpo-

284 & 285 ration remains one and the same after once it really exists. When, as here, after it really exists, it consents, we, at least, shall require stronger equities than are shown by this bill, to allow it to renew its claim at a later date, because its internal constitution has changed.

To sum up: In our opinion, on the one hand, the plaintiff cannot recover without departing from the fundamental conception embodied in the law that created it; the conception that a corporation remains unchanged and unaffected in its identity by changes in its members. Donnell v. Herring-Hall-Marvin Safe Co., 208 U. S., 267, 273. Salomon v. Salomon & Co., (1897), A. C. 22, 30. On the other hand, if we should undertake to look through fiction to facts, it appears to us that substantial justice would not be accomplished, but rather a great injustice done, if the corporation were allowed to disregard its previous assent in order to charge a single member with the whole results of a transaction to which thirteen-fifteenths of its stock were parties, for the benefit of the guilty, if there was guilt in any one, and the innocent alike. We decide only what is necessary. We express no opinions as to whether the defendant properly is called a promoter, or whether the plaintiff has not been guilty of laches, or whether a remedy can be had for

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a part of a single transaction in the form in which it is sought, or whether there was any personal claim on the part of the innocent subscribers, or as to any other question than that which we have discussed.

The English case chiefly relied upon, Erlanger v. New Sombrero Phosphate Co., 3 App. Cas. 1218, affirming s. c. 5 Ch. D. 73, seems to us far from establishing a different doctrine for that jurisdiction. There, to be sure, a syndicate had made an agreement to sell, at a profit, to a company to be got up by the sellers. But the
286 company, at the first stage, was made up mainly of outsiders, some of them instruments of the sellers, but innocent instruments, and, according to Lord Cairns, the contract was provisional on the shares being taken and the company formed (p. 1239). There never was a moment when the company had assented with knowledge of the facts. The shares, with perhaps one exception, all were taken by subscribers ignorant of the facts, 5 Ch. D. 113, and the contract seems to have reached forward to the moment when they subscribed. As it is put in 2 Morawetz, Corp. (2d ed.), sec. 292, there was really no company till the shares were issued. Here thirteen-fifteenths of the stock had been taken by the syndicate, the corporation was in full life and had assented to the sale with knowledge of the facts before an outsider joined. There most of the syndicate were strangers to the corporation, yet all were joined as defendants (p. 1222). Here the members of the syndicate, although members of the corporation, are not joined, and it is sought to throw the burden of their act upon a single one. Gluckstein v. Barnes (1900), A. C. 240, certainly is no stronger for the plaintiff, and in Yeiser v. United States Board & Paper Co., 107 Fed. Rep. 340, another case that was relied upon, the transaction equally was carried through after innocent subscribers had paid for stock.

Decree affirmed.

True copy.
Attest:
[SEAL.] JAMES H. McKENNEY,
Clerk Supreme Court U. S.

287 EXHIBIT P.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Circuit Court of the United States for the Southern District of New York, Greeting:

Whereas, lately in the United States Circuit Court of Appeals for the Second Circuit, in a case between Old Dominion Copper Mining & Smelting Company, appellant, and Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, Executors of Leonard Lewisohn, deceased, appellees, wherein the decree of the said Circuit Court of Appeals, entered in said cause on the 17th day of December, A. D. 1906, is in the following words, viz:

"This cause came on to be heard on the transcripts of record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of the said Circuit Court be and it hereby is affirmed with costs.

It is further ordered that a mandate issue to the said Circuit Court in accordance with this decree.

W. J. W.
W. K. T."

as by the inspection of the transcript of the record of the said United States Circuit Court of Appeals which was brought into the Supreme Court of the United States by virtue of a writ of certiorari, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

288 And Whereas, in the present term of October, in the year of our Lord one thousand nine hundred and seven, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On Consideration Whereof, It is here ordered, adjudged and decreed by this Court that the decree of the said United States Circuit Court of Appeals in this case be, and the same is hereby, affirmed with costs; and that the said appellees, Frederick Lewisohn et al., Executors, etc., recover against the said appellant, Twenty dollars for their costs herein expended and have execution therefor.

And it is further ordered, That this cause be, and the same is hereby, remanded to the Circuit Court of the United States for the Southern District of New York.

MAY 18, 1908.

You, therefore, are hereby commanded that such execution and proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of July, in the year of our Lord one thousand nine hundred and eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Costs of Appellees:

Clerk Printing record, paid.
Attorney..... $20.00
$20.00

289 EXHIBIT Q.

United States Circuit Court, Southern District of New York.

Action No. 2.

In Equity. No. 8333.

OLD DOMINION COPPER MINING & SMELTING COMPANY, Complainant,
against
FREDERICK LEWISOHN, WALTER LEWISOHN, ALBERT LEWISOHN and Philip S. Henry, Executors of Leonard Lewisohn, Deceased, Defendants.

A judgment in this action in favor of the defendants and against the plaintiff having been rendered in this Court on the 6th day of December, 1905, adjudging that the amended bill of complaint herein be dismissed and that the defendants recover of the complainant the sum of Two hundred and twenty-seven dollars ($227) their costs and charges as taxed and that the defendants have execution therefor; and the complainant having appealed from said judgment to the United States Circuit Court of Appeals for the Second Circuit and the said judgment having been affirmed in all things by said United States Circuit Court of Appeals for the Second Circuit and a decree of the said Circuit Court of Appeals affirming said judgment was entered in this cause on the 17th day of December, 1906; and the complainant thereafter having obtained a writ of certiorari from the Supreme Court of the United States agreeably to the Act of Congress in such case made and provided; and said cause coming on to be heard before the said Supreme Court of the United States on transcript of record and the decree of the said United States Circuit Court of Appeals, after such hearing, was in all things
290 affirmed with costs by the said Supreme Court of the United States; and the mandate of said United States Supreme Court, dated May 18th, 1908, adjudged that the decree of the said United States Circuit Court of Appeals in this case be and the same hereby is affirmed with costs and that the said appellees, Frederick Lewisohn et al., Executors, etc., recover against the said appellant Twenty Dollars ($20) for their costs herein expended and have execution therefor, and further directing that the cause be remanded to the Circuit Court of the United States for the Southern District of New York, and an order having been duly entered herein, upon notice to the complainant, in the office of the Clerk of the United States Circuit Court for the Southern District of New York, on the 11th day of July, 1908, directing that the said mandate issued by the Supreme Court of the United States be filed and the decision and judgment of said Supreme Court of the United States be made the decision and judgment of said United States Circuit Court for the Southern District of New York, and that said decree of the United

States Circuit Court of Appeals for the Second Circuit in the above-mentioned cause, entered on the 17th day of December, 1906, affirming the decree of the Circuit Court of the United States for the Southern District of New York be affirmed, and that the defendants recover of the plaintiff the sum of Twenty dollars ($20) costs, as appears by said mandate, and that they have execution therefor, and further directing that judgment be entered accordingly.

Now, upon motion of Hoadley, Lauterbach & Johnson, attorneys for the defendants, it is

Adjudged and Decreed that the decision and judgment of the said Supreme Court of the United States be and the same hereby is made the decision and judgment of this Court, and that said
291 decree of the said Circuit Court of Appeals for the Second Circuit in the above entitled cause, entered on the 17th day of December, 1906, affirming the decree of the United States Circuit Court for the Southern District of New York, entered on the 6th day of December, 1905, be and the same hereby is affirmed, and that the defendants recover of the plaintiff the sum of Twenty dollars ($20), their costs of said appeal, and that said defendants have execution therefor.

Judgment signed and entered this 23rd day of July, 1908.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

"EXHIBIT R."

Præcipe for Subpœna.

Circuit Court of the United States for the Southern District of New York.

In Equity. No. 2.

OLD DOMINION COPPER MINING & SMELTING COMPANY
v.
FREDERICK LEWISOHN et al.

John A. Shields, Clerk Circuit Court U. S., Southern District of N. Y.:

You will please issue a subpœna to the defendant in the above-entitled action, returnable on the first Monday of February, 1903.

BRANDEIS, DUNBAR & NUTTER,
CARTER, HUGHES & DWIGHT,
Solicitors for Complainant.

New York, Jan. 6th, 1903.

(Endorsed:) Circuit Court U. S. Southern District of N. Y. In Equity. Old Dominion Copper Mining and Smelting Co., vs.
292 Frederick Lewisohn, et al. No. 2. Præcipe for Subpœna Brandeis, Dunbar & Nutter, Carter, Hughes & Dwight, Solicitors for Complainant. U. S. Circuit Court, Southern District of New York, Filed Jan. 6, 1903, John A. Shields, Clerk.

Subpœna.

The President of the United States of America to Frederick Lewisohn, Walter (L. S.) Lewisohn, Albert Lewisohn and Philip S. Henry, Greeting:

You are hereby commanded that you and each of you personally appear before the Judges of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, in Equity, on the first Monday of February, A. D. 1903, wherever the said Court shall then be, to answer a bill of complaint exhibited against you in the said Court by The Old Dominion Copper Mining and Smelting Company and do further and receive what the said Court shall have considered in that behalf. And this you are not to omit under the penalty on you and each of you of Two Hundred and Fifty Dollars.

Witness, The Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the City of New York, on the 6th day of January, in the year of our Lord one thousand nine hundred and three and of the Independence of the United States of America, the one hundred and twenty-seventh.

JOHN A. SHIELDS, *Clerk.*

BRANDEIS, DUNBAR & NUTTER,
CARTER, HUGHES & DWIGHT,
Solicitors for Complainant.

The Defendants are required to enter appearance in the above cause, in the Clerk's office of this Court, on or before the first Monday of February, 1903, or the bill will be taken pro confesso
293 against them.

J. A. S., *Clerk.*

(Endorsed:) I hereby certify that on the 6th day of January, 1903, at the City of New York in my District, I personally served the within Subpœna in Equity upon the within-named defendants Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, by exhibiting to each of them the within original and at the same time leaving with each of them a copy thereof. Wm. Henkel, United States Marshal, Southern District of New York. Dated, Jan. 6, 1903. U. S. Circuit Court, Southern District of New York. Filed Jan. 6, 1903, John A. Shields, Clerk.

Appearance.

Circuit Court of the United States of America, Southern District of New York.

In Equity. Action No. 2.

THE OLD DOMINION COPPER MINING & SMELTING COMPANY, Plaintiff,
against
FREDERICK LEWISOHN, WALTER LEWISOHN, ALBERT LEWISOHN and PHILIP S. HENRY.

To the Clerk:

We hereby enter our appearance as solicitors and counsel for the defendants Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, in the above entitled action. Dated N. Y., February 2nd, 1903.

Yours, etc.,
HOADLEY, LAUTERBACH & JOHNSON,
Solicitors and Counsel for Defendants.

294 Office and Post Office Address, 22 William Street, Borough of Manhattan, City of New York.

(Endorsed:) U. S. Circuit Court. The Old Dominion Copper Mining and Smelting Co., vs. Frederick Lewisohn & ors., Action No. 2. Notice of Appearance. Hoadley, Lauterbach & Johnson, Solicitors and Counsel for Deft. 22 Williams Street, New York City. U. S. Circuit Court, Southern District of New York. Filed Feb. 2, 1903, John A. Shields, Clerk.

Consent for Extension of Time for Answer, Demurrer, etc.

Circuit Court of the United States, Southern District of New York.

Action No. 2.

OLD DOMINION COPPER MINING AND SMELTING COMPANY, Plaintiff,
against
FREDERICK LEWISOHN et al., Defendants.

It is Hereby Consented that the time of the defendants in the above entitled action within which to answer, demur to the complaint herein, or make any motion, be extended to March 6th, 1903. Dated, New York City, March 2, 1903.

BRANDEIS, DUNBAR & NUTTER,
CARTER, HUGHES & DWIGHT,
Solicitors for Plaintiff.
HOADLEY, LAUTERBACH & JOHNSON,
Solicitors for Defendants.

(Endorsed:) U. S. Circuit Court. Old Dominion Copper Mining & Smelting Co. vs. Frederick Lewisohn, et al. Action No. H. Stipulation. Hoadley, Lauterbach & Johnson, 22 Williams Street, New York City. U. S. Circuit Court, Southern District of New York. Filed Mar 2, 1903, John A. Shields, Clerk.

295 *Agreement as to Time for Hearing Demurrer.*

Circuit Court of the United States, Southern District of New York.

In Equity.

OLD DOMINION COPPER MINING & SMELTING COMPANY, Plaintiff,
against
FREDERICK LEWISOHN et al., Defendants.

It is Hereby Stipulated and Agreed by and between the solicitors for the respective parties hereto that the hearing of the issues raised by the demurrer interposed herein on behalf of defendants be placed on the Calendar for the session of this Court commencing on the 20th day of February, 1905.

Dated, New York, January 14th, 1905.

BRANDEIS, DUNBAR & NUTTER,
CARTER, HUGHES & DWIGHT,
Solicitors for Complainant.
HOADLEY, LAUTERBACH & JOHNSON,
Solicitors for Defendants.

Ordered Accordingly.
WM. F. TOWNSEND,
U. S. Circuit Judge.

(Endorsed:) U. S. Circuit Court, Southern District of New York. Filed Jan. 14, 1905, John A. Shields, Clerk.

Agreement Relating to Use of Depositions and Waiver of Formal Proof as to Certain Matters.

Circuit Court of the United States, Southern District of New York.

In Equity. No. 8333.

OLD DOMINION COPPER MINING & SMELTING COMPANY
v.
FREDERICK LEWISOHN et al.

In the above-entitled cause it is stipulated and agreed be-
296 tween the parties:

That copies certified to by Willoughby L. Webb, Commissioner, of the deposition of Walter Lewisohn, Ferdinand L. Rahaeuser, Adolph Lewisohn, Frederick Lewisohn, Albert Lewisohn, Jess- Lewisohn and Edward C. Westervelt, taken in the

case of Old Dominion Copper Mining and Smelting Company v. Bigelow, No. 8099 Equity, pending in the Supreme Judicial Court of Suffolk County, Massachusetts, may when completed be filed in the above entitled cause by the complainant at any time before the taking of testimony therein is closed, and may be read and used in evidence in this cause by either party with the same effect as if the same had been regularly taken in said cause before an examiner:

And it is further stipulated and agreed that the depositions of Albert S. Bigelow, Godfrey M. Hyams, Joseph A. Coram, Caleb L. Stone, and Charles H. Altmiller, taken before Howland Twombly, Esq., Notary Public, for use in the suit of Old Dominion Copper Mining and Smelting Company v. Lewisohn et al., No. — Equity, pending in this Court, may be filed in the above entitled cause by the complainant at any time before the taking of the complainant's testimony in chief therein is closed, and may be read and used in evidence in this cause by either party with the same effect as if the same had been regularly taken in said cause before an examiner.

And the respondents hereby waive any further or formal proof of the records of the plaintiff corporation, of the entries in the books of account and check books of the plaintiff corporation testified to by Mr. Altmiller, of the contents of the stock certificate book of the corporation testified to by Mr. Altmiller, of the stock certificates of the plaintiff corporation testified to by Mr. Altmiller, and of the letters and other documents produced by Mr. Altmiller, and stipulate
297 and agree that Mr. Altmiller's deposition and the exhibits thereto annexed setting out the contents of the record book, extracts from the books of account, check book, stock certificate books, and transfer book, and certain certificates of stock, letters and other documents produced by him, may be read in evidence and used in like manner and with the same effect in all respects as if full and formal proof of the same had been made, reserving, however, to each party all rights to object to the relevancy, competency and materiality of any of said depositions, or documents, and to any of the interrogatories or answers therein contained and reserving the right of the respondent to cross-examine Charles H. Altmiller, one of said witnesses, if he be again called to testify by either party.

Said waiver being made conditionally upon the production of any and all of the original documents that the respondents shall notify complainant to produce and the complainant hereby stipulates and agrees to produce any and all of the original documents upon receiving notice requiring the production thereof.

HOADLEY, LAUTERBACH & JOHNSON,
Solicitors for Respondent.
BRANDEIS, DUNBAR & NUTTER,
Solicitors for Complainants.

(Endorsed:) U. S. Circuit Court, Southern District of New York. Filed Feb. 18, 1905. John A. Shields, Clerk.

Agreement Relating to Use of Massachusetts Depositions in the New York Case.

Circuit Court of the United States, Southern District of New York.

In Equity.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
v.
FREDERICK LEWISOHN et al.

In the above entitled cause it is stipulated and agreed between the parties:

298 That copies certified by Willoughby L. Webb, Commissioner of the depositions of Walter Lewisohn, Ferdinand L. Rahaeuser, Adolph Lewisohn, Frederick Lewisohn, Albert Lewisohn, Jesse Lewisohn and Edward C. Westervelt, taken in the case of Old Dominion Copper Mining and Smelting Company v. Bigelow, No. 8099, Equity, pending in the Supreme Judicial Court for Suffolk County, Massachusetts, may when completed be filed in the above entitled cause by the complainant at any time before the taking of testimony therein is closed, and may be read and used in evidence in this cause by either party with the same effect as if the same had been regularly taken in said cause before an examiner:

And it is further stipulated and agreed that the depositions of Albert S. Bigelow, Godfrey M. Hyams, Joseph A. Coram, Galen L. Stone and Charles H. Altmiller, taken before Howard Twombly, Esq., Notary Public, for use in the suit of Old Dominion Copper Mining & Smelting Company v. Lewisohn et al., No. — Equity, pending in this Court, may be filed in the above entitled cause by the complainant at any time before the taking of the complainant's testimony in chief therein is closed, and may be read and used in evidence in this cause by either party with the same effect as if the same had been regularly taken in said cause before an examiner. Reserving, however, to each party all rights to object to the relevancy, competency, and materiality of any of said depositions or the documents therein referred to, and to any of the interrogatories or answers therein contained and reserving the right of the respondents to cross-examine Charles H. Altmiller, one of said witnesses, if he be again called to testify by either party.

HOADLEY, LAUTERBACH & JOHNSON,
Solicitors for Respondents.

BRANDEIS, DUNBAR & NUTTER,
Solicitors for Complainants.

(Endorsed:) U. S. Circuit Court, Southern District of New
299 York. Filed Feb. 18, 1905, John A. Shields, Clerk.

Stipulation Relating to Cross-examination of Charles H. Altmiller and Use of His Deposition.

Circuit Court of the United States, Southern District of New York.

In Equity.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
v.
FREDERICK LEWISOHN et al.

Stipulation.

The respondents hereby reserve the right of cross examination of Charles H. Altmiller, if he be again called to testify, by either party, and waive any further or formal proof of the records of the plaintiff corporation, of the entries in the books of account and check books of the plaintiff corporation testified to by Mr. Altmiller, and of the letters and other documents produced by Mr. Altmiller, and stipulate and agree that Mr. Altmiller's deposition and the exhibits thereto annexed setting out the contents of the record book, extracts from the books of account, check book, stock certificate books, and stock transfer book, and certain certificates of stock, letters and other documents produced by him, may be read in evidence and used in like manner and with the same effect in all respects as if full and formal proof of the same had been made, reserving, however, all rights to object to the relevancy, competency and materiality of the interrogatories and answers and of the matters testified to by said deponent and of the said exhibits.

Said waiver being made conditionally upon the production of any and all of said original documents that the respondents shall
300 notify complainant to produce, and the complainant hereby stipulates and agrees to produce any and all of said original documents upon receiving notice requiring the production thereof.

BRANDEIS, DUNBAR & NUTTER,
Solicitors for Complainant.
HOADLEY, LAUTERBACH & JOHNSON,
Solicitors for Respondents.

(Endorsed:) U. S. Circuit Court, Southern District of New York. Filed Feb. 18, 1905, John A. Shields, Clerk.

Opinion of Circuit Court on Demurrer to Amended Bill per Holt, J.

United States Circuit Court, Southern District of New York.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY, Complainant,
against
FREDERICK LEWISOHN et al., Defendants.

Carter, Hughes & Dwight and Brandeis, Dunbar & Nutter, (Louis D. Brandeis, Charles E. Hughes and William H. Dunbar, of counsel), for plaintiff.

Hoadley, Lauterbach & Johnson, (Edward Lauterbach, Eugene Treadwell, and Henry Siegrist, Jr., of counsel), for defendants.

HOLT, *J.*:

Orderly practice requires that a decision made by a Judge in a case should be followed by another judge, upon any question arising in that case, unless the facts presented are different. Judge Lacombe having held that the original complaint in this action was bad on demurrer, the question whether the amended complaint is bad on demurrer depends upon the question whether it presents a different case. The complainant's counsel claim that a substantial change has been made in the bill by amendments alleging more clearly
301 than was alleged in the original bill that the 20,000 shares of stock sold to the subscribers for cash were sold by the corporation, and not by Bigelow and Lewisohn. But, in my opinion, the original bill clearly alleged that fact in paragraphs 15 and 21, and in other parts of the bill. Under these circumstances, I can see no substantial difference between the amended bill and the original bill, and, without expressing any opinion on the question in respect to which it is claimed that Judge Lacombe and the Supreme Court of Massachusetts differ, I think that, as the amended bill alleges substantially the same cause of action as the original bill, Judge Lacombe's decision governs the case.

My conclusion is that the demurrer should be sustained, with costs; and, as the complainant has been permitted to amend the bill to meet the precise point of objection stated in Judge Lacombe's decision, I think that final judgment should be ordered on the demurrer for the defendants.

G. C. H.

Nov. 11, 1905.

(Endorsed:) United States Circuit Court, Southern District of New York. The Old Dominion Copper Mining and Smelting Company, Complainant, against Frederick Lewisohn, et al., Defendant. Memorandum. Holt, J., U. S. Circuit Court, Southern District of New York. Filed Nov. 11, 1905. John A. Shields, Clerk.

Notice Relating to Entry of Order of the United States Circuit Court.

United States Circuit Court, Southern District of New York.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY, Complainant,
against
FREDERICK LEWISOHN et al., Defendants.

SIRS: Please take Notice, that an order, of which the within
302 is a copy, will be presented to the Hon. George C. Holt, one of the Judges of this Court, at Room 78 in the Post Office Building, Borough of Manhattan, City of New York, on the 18th day of November, 1905, at eleven o'clock in the forenoon, for settlement.

Dated, November 13th, 1905.

Yours, &c.,

HOADLEY, LAUTERBACH & JOHNSON,
Solicitors for Defendants.

Office & P. O. Address, No. 22 William Street, Borough of Manhattan, City of New York.

To Messrs. Brandeis, Dunbar & Nutter, Carter, Hughes & Dwight, Solicitors for Complainant, No. 96 Broadway, Borough of Manhattan, New York City.

Notice Relating to Costs and Bill of Costs.

United States Circuit Court, Southern District of New York.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY,
Plaintiff,
against
FREDERICK LEWISOHN et al., Defendants.

SIRS: Please take notice that the within bill of costs will be taxed by the Clerk of this Court at his office in the Post Office Building, Borough of Manhattan, City of New York, on the 25th day of November, 1905, at 10.30 o'clock in the forenoon.

303 Dated, New York, November 22nd, 1905.

Yours, &c.,
HOADLEY, LAUTERBACH & JOHNSON,
Attorneys for Defendants.

Office & Post Office Address, No. 22 William Street, Borough of Manhattan, New York City.

To Messrs. Brandeis, Dunbar & Nutter; Messrs. Carter, Hughes & Dwight, Solicitors for Complainant, 96 Broadway, New York.

United States Circuit Court, Southern District of New York.

THE OLD DOMINION COPPER MINING & SMELTING CO.,
Plaintiff,
against
FREDERICK LEWISOHN et al., Defendants.

Bill of Costs.

Costs on First Demurrer	$20.00
Costs on Second Demurrer	20.00
Disbursements.	
Printing Demurrer Book	41.75
Printing Brief on Demurrer	35.60
Printing Demurrer Book	41.50
Printing Brief on Demurrer	71.90
Filing of Note of Issue	2.00
Filing Orders and obtaining Certified copies	1.60
Clerk for Entering Judgment	32.40
	$266.75
Off	39.75
	$227.00

304 County of New York, *ss.*:

Andrew R. McLaren, being duly sworn, deposes and says: that he is the Managing Clerk in the office of Hoadley, Lauterbach & Johnson, the attorneys for the defendants; that the foregoing disbursements have been made or necessarily incurred in this action and are reasonable in amount and that the copies of documents or papers as charged herein were actually and necessarily obtained for use.

ANDREW R. McLAREN.

Sworn to before me this 23d day of November, 1905.

ISAAC A. LEVY,
Notary Public, New York County.

(Endorsed:) United States Circuit Court, Southern District of New York. The Old Dominion Copper Mining and Smelting Co., Pltf against Frederick Lewisohn, et al., Defendants. Bill of costs and notice of adjustment. Hoadley, Lauterbach & Johnson, 22 William Street, New York City. Copy received, Nov. 23d, 1905. Carter, Hughes & Dwight. U. S. Circuit Court, Southern District of New York. Filed Dec. 6, 1905. John A. Shields, Clerk.

Citation on Appeal.

Circuit Court of the United States, Southern District of New York.

In Equity. 8333.

Old Dominion Copper Mining & Smelting Company
against
Frederick Lewisohn et al.

Citation on Appeal.

United States of America, *ss.*:

To Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, Greeting:

Your are hereby cited and admonished to be and appear at a Term of the United States Circuit Court of Appeals for the Second
305 Circuit to be held at the Post Office Building, Borough of Manhattan, City of New York, on the 31st day of January, 1906, pursuant to an appeal filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York, wherein the Old Dominion Copper Mining & Smelting Company is appellant, and Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry are respondents, to show cause, if any there be, why the judgment herein as mentioned in said petition for appeal should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness, Hon. Melville W. Fuller, Chief Justice of the United States, this 29th day of December, 1905.

E. H. LACOMBE,
Circuit Judge.

(Endorsed:) Circuit Court of the United States, Southern District of New York. Old Dominion Copper Mining & Smelting Company against Frederick Lewisohn, et al. In Equity. No. 8333. Citation on Appeal—Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass. and Hughes, Rounds & Schurman, 96 Broadway, New York City, Solicitors for Complainant. A copy this day received. Jan. 3, 1906. Hoadley, Lauterbach & Johnson. U. S. Circuit Court, Southern District of New York, Filed Jan. 3, 1906, John A. Shields, Clerk.

Mandate of United States Circuit Court of Appeals.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York, Greeting:

Whereas, lately in the Circuit Court of the United States for the Southern District of New York, before you, or some of you, in
306 a cause between Old Dominion Copper Mining & Smelting Company and Frederick Lewisohn, et al., a decree was entered in the office of the Clerk of said Court on the 6th day of December, 1905, in the words and figures following, to-wit:—

"This cause having been regularly brought on for trial upon the issues of law formed by complainants amended complaint and the demurrers of the defendants to a part of the amended bill of complaint, and to the whole of the amended bill of complaint at a term of this Court, held by the Honorable George C. Holt, one of the Judges of this Court, who having heard the parties by their counsel, and after due deliberation, has duly made and filed his decision and an order having been duly made and entered herein and filed in the office of the Clerk of this Court on the 18th day of November, 1905, directing that the demurrer to the whole of said amended bill of complaint for want of equity be sustained and that the bill of complaint herein be dismissed the complainant having heretofore been permitted to amend the bill of complaint to meet the prior decision of this Court, and further directing that the defendants recover against the complainant their costs and charges incurred upon the said demurrer to be taxed and that the said costs and charges having been duly adjusted by the Clerk of this Court upon notice to the complainant at the sum of two hundred and twenty-seven dollars ($227) now upon motion of Hoadley, Lauterbach & Johnson, attorneys for defendants, it is

Adjudged and Decreed that the said amended bill of complaint herein be and the same hereby is dismissed, and that the defendants recover of the complainant the sum of two hundred and twenty-seven dollars ($227) their costs and charges as taxed, and that the defendants have execution therefor.

JOHN A. SHIELDS, *Clerk.*"

307 as by the inspection of the transcript of the record of the said court, which was brought into the United States Circuit Court of Appeals for the Second Circuit, by virtue of an appeal agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and six, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Second Circuit, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is hereby

Ordered, Adjudged and Decreed, That the decree of said Circuit Court be and it hereby is affirmed with costs taxed at the sum of $36.70.

You therefore, are hereby commanded that such further proceedings be had in said cause, in accordance with the decision of this Court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of December, in the year of our Lord one thousand nine hundred and six.

Costs of Appellee:

Clerk	$16.70
Printing Record	$ ....
Attorney	$20.00
	$36.70

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

308. Costs of Appellee in No. 64:

19–, October Term—Docketing cause and filing record, $5.00; entering appearance, .25; filing papers, —; filing motion, .25; entering order .25; cost of printing record, $—; filing copies printed record, $2.25; transfer to calendar, $1.00; filing brief, $5.00; entering order for mandate, $1.00; taxing costs and copy, .45; issuing mandate, $5.00; attorney's docket fee, $20.00	.25 10.00 6.45 20.00
	$36.70

Test:
WM. PARKIN,
Clerk U. S. Circuit Court of Appeals, Second Circuit.

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit. No. 64. October Term, 1906. Old Dominion C. M. & S. Co. v. F. Lewisohn, et al. Mandate. U. S. Circuit Court, Southern District of New York. Filed Dec. 31, 1906. John A. Shields, Clerk.

Notice Relating to Entry of Order of United States Circuit Court Pursuant to Mandate of Circuit Court of Appeals.

United States Circuit Court, Southern District of New York.

THE OLD DOMINION COPPER MINING & SMELTING COMPANY,
Complainant,
against
FREDERICK LEWISOHN et al., Defendants.

Please take Notice that the mandate of the United States Circuit Court of Appeals for the Second Circuit in the above entitled case having been issued, we shall before his Hon. —— ——, at the Court Rooms of this Court, in the Post Office Building, in the
309 Borough of Manhattan, City of New York, on the 31st day of December, 1906, at the opening of Court on that day, or as soon thereafter as counsel can be heard, move that the annexed proposed order, a copy of which is herewith served upon you, be signed and entered.

Dated, December 28th, 1906.

HOADLEY, LAUTERBACH & JOHNSON,
Solicitors for Defendants.

To Messrs. Hughes, Rounds & Schurman, Brandeis, Dunbar & Nutter, Solicitors for Complainant.

Order of United States Circuit Court Pursuant to Mandate of United States Circuit Court of Appeals.

At a Stated Term of the Circuit Court of the United States for the Southern District of New York, held in the United States Court Rooms, in the Post Office Building, Borough of Manhattan, City of New York, on the — day of ——.

Present: Hon. —— ——, Circuit Judge.

In Equity.

THE OLD DOMINION COPPER MINING & SMELTING COMPANY,
Complainant,
against
FREDERICK LEWISOHN et al., Defendants.

This cause having been brought on upon *by* the mandate herein sent down from the United States Circuit Court of Appeals for the Second Circuit, and now on file in this Court by which mandate it appears that an appeal was taken by complainant from the decree of this Court, entered herein on the 6th day of December, 1905, to the United States Circuit Court of Appeals for the Second Circuit, and that a decree has been entered by said United States Circuit Court of Appeals affirming the decree of this Court (with cost of

appeal taxed at the sum of thirty-six and 70/100 dollars), said
310 mandate also directing that such further proceedings be had in said cause in accordance with the opinion of the United States Circuit Court of Appeals for the Second Circuit, as, according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Now, Therefore, in compliance with said mandate, it is, on motion of Hoadley, Lauterbach & Johnson, defendants' solicitors,

Ordered, Adjudged and Decreed that the judgment and decree of the United States Circuit Court of Appeals for the Second Circuit be, and the same is hereby made the judgment and decree of this Court, and that the bill of complaint herein be and is hereby dismissed; and it is

Further ordered, Adjudged and Decreed that the said defendants do recover from the said complainant the further sum of Thirty-six dollars and seventy cents, the costs and disbursements of the defendants upon said appeal as taxed in said United States Circuit Court of Appeals for the Second Circuit, and that the said defendants have judgment and execution therefor.

E. HENRY LACOMBE,
U. S. Circuit Judge.

(Endorsed:) United States Circuit Court, Southern District of N. Y., The Old Dominion Copper Mining & Smelting Co., Complainant, vs. Frederick Lewisohn, et al., Defts. Notice & Order. Hoadley, Lauterbach & Johnson, Solrs. for defendants, 22 Williams Street, New York City. Copy received, Dec. 23, 1906. Hughes, Rounds & Schurman, U. S. Circuit Court, Southern District of New York, Filed Dec. 31, 1906, John A. Shields, Clerk.

311 *Notice of Petition for Stay of Execution and Petition for Stay.*

Circuit Court of the United States, Southern District of New York.

OLD DOMINION COPPER MINING & SMELTING COMPANY,
Complainant,
against
LEWISOHN et al., Defendants.

SIRS: Please take Notice that upon the annexed petition signed by Brandeis, Dunbar & Nutter, Solicitors for the complainant herein, the undersigned will move this Honorable Court on Friday the 4th day of January, 1907, at 10.30 o'clock in the forenoon or as soon thereafter as counsel can be heard, that execution in this cause be stayed for thirty days from date of such motion.

Yours, etc.,
HUGHES, ROUNDS & SCHURMAN,
Solicitors for Complainant.

Office and P. O. Address, 96 Broadway, Borough of Manhattan, New York City.

Dated, New York, December 31, 1906.

To Messrs. Hoadley, Lauterbach & Johnson, Solicitors for Defendants, 22 William Street, New York City.

312 Circuit Court of the United States, Southern District of New York.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
vs.
LEWISOHN et al.

Petition for Stay of Execution.

To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York respectfully represents the Old Dominion Copper Mining and Smelting Company:

1. On December 4, 1906, the Circuit Court of Appeals for the Second Circuit decided adversely to your petitioner on appeal taken in the above entitled cause from the decision of this Honorable Court, dismissing the bill of complaint in said cause, and on December 17th, 1906, a final order was made in said Circuit Court of Appeals sustaining the decision of this Honorable Court, and on December 26th, 1906, a mandate was issued by said Circuit Court of Appeals directing that the decree of this Honorable Court be affirmed and the bill be dismissed with costs.

2. Your petitioner is desirous of applying to the Supreme Court of the United States for a writ of certiorari to review said decision of the Circuit Court of Appeals and is diligently engaged in preparing such petition and a brief in support thereof, and expects to file such petition within the next thirty days.

Wherefore, your petitioner prays that execution may be stayed in said cause for thirty days, in order to enable it to file and present said petition.

By Its Solicitors, BRANDEIS, DUNBAR & NUTTER.

313 (Endorsed:) Old Dominion Copper Mining & Smelting Company, vs. Lewisohn, et al. Petition for Stay of Execution with Notice of Motion. Copy received Dec. 31, 1906, Hoadley, Lauterbach & Johnson. Granted, Jan. 4, 1907. E. H. Lacombe, U. S. Circuit Court, Southern District of New York. Filed Jan. 4, 1907. John A. Shields, Clerk.

Order Staying Execution.

At a Stated Term of the Circuit Court of the United States Held in and for the Second Circuit, Southern District of New York, at the Post Office Building in the Borough of Manhattan, City of New York, on the 5th Day of January, 1907.

Present: Hon. E. Henry Lacombe, Justice.

OLD DOMINION COPPER MINING & SMELTING COMPANY,
Complainant,
against
FREDERICK LEWISOHN et al., Defendants.

A motion having been duly made in this action for a stay of execution under the judgment herein, pending the application to the Supreme Court of the United States by the Solicitors for the complainant for a writ of certiorari to review the decision of the Circuit Court of Appeals herein, sustaining the decision of this Honorable Court,

Now upon reading and filing the petition for stay of execution in the above entitled action of Brandeis, Dunbar & Nutter, solicitors for the complainant, in support of said motion, and the affidavit of Eugene Treadwell, verified the 3rd day of January, 1907, in opposition thereto, and after hearing Herbert K. Stockton, Esq., in support of said motion and Eugene Treadwell in opposition
314 thereto, and due deliberation having been had, it is

Ordered that execution under the judgment in this cause be and the same hereby is stayed for thirty days.

E. H. LACOMBE,
U. S. Circuit Judge.

Approved as to form:
HOADLEY, LAUTERBACH & JOHNSON,
Sol'rs for Defendant-.

Circuit Court of the United States, Southern District of New York.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
vs.
LEWISOHN et al.

Petition for Stay of Execution.

To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York respectfully represents the Old Dominion Copper Mining and Smelting Company.

1. On December 4, 1906, the Circuit Court of Appeals for the Second Circuit decided adversely to your petitioner on appeal taken in the above entitled cause from the decision of this Honorable Court,

dismissing the bill of complaint in said cause, and on December 17th, 1906, a final order was made in said Circuit Court of Appeals sustaining the decision of this Honorable Court, and on December 26th, 1906, a mandate was issued by said Circuit Court of Appeals directing that the decree of this Honorable Court be affirmed and the bill dismissed with costs.

2. Your petitioner is desirous of applying to the Supreme
315 Court of the United States for a writ of certiorari to review said decision of the Circuit Court of Appeals and is diligently engaged in preparing such petition and a brief in support thereof, and expects to file such petition within the next thirty days.

Wherefore your petitioner prays that execution may be stayed in said cause for thirty days, in order to enable it to file and present said petition.

By Its Solicitors, BRANDEIS, DUNBAR & NUTTER.

Affidavit of Eugene Treadwell on Petition to Stay Execution.

Circuit Court of the United States, Southern District of New York.

OLD DOMINION COPPER MINING & SMELTING COMPANY,
Complainant,
against
FREDERICK LEWISOHN et al., Defendants.

UNITED STATES OF AMERICA,
State and County of New York, ss:

Eugene Treadwell, being duly sworn, says:

That he has had charge of the above entitled cause on behalf of defendants and is thoroughly familiar with the same.

That there is and has been pending in the Supreme Court of the State of Massachusetts two suits in Equity, wherein the above named complainant is complainant and Albert S. Bigelow is defendant. That the claim of the complainant therein has been secured by attachment.

Deponent further says that the cause involved in said suits against the said Bigelow is the same as involved in the present ac-
316 tion. That, therefore, the complainant, even if unsuccessful in the present action in this Court, will have full and ample remedy in the said actions in the Massachusetts Court if successful therein.

That this Court should not delay its stay of execution herein to afford the complainant an opportunity to apply to the Supreme Court for writ of certiorari to review the decision of this court, except upon condition that the complainant shall stipulate that in event of the granting of said writ of certiorari and subsequent affirmance by the Supreme Court of the United States of the judgment herein, the complainant shall forthwith discontinue the said suits in equity above mentioned against the said Bigelow now pending in the State Court of Massachusetts, as aforesaid.

EUGENE TREADWELL.

Sworn to before me this 3d day of January, 1907.

[SEAL.] GEO. T. VAN VALKENBURGH,
Notary Public, N. Y. Co.

(Endorsed:) United States Circuit Court, Southern District of New York. Old Dominion Copper Mining and Smelting Company against Frederick Lewisohn, et al. Order staying Execution. Hughes, Rounds & Schurman, Solicitors for Complainant, 96 Broadway, Borough of Manhattan, New York City. U. S. Circuit Court, Southern District of New York, Filed Jan. 5, 1907, John A. Shields, Clerk.

317 *Notice Relating to Entry of Order of United States Circuit Court.*

United States Circuit Court, Southern District of New York.

Action No. 2.

In Equity. No. 8333.

OLD DOMINION COPPER MINING & SMELTING COMPANY, Plaintiff,
against
FREDERICK LEWISOHN, WALTER LEWISOHN, ALBERT LEWISOHN, and Philip S. Henry, Executors of Leonard Lewisohn, Deceased, Defendants.

SIRS: Please take Notice, that an order of which the annexed is a copy will be presented for signature and entry to one of the Justices of the Circuit Court of the United States for the Southern District of New York, at the Court Rooms thereof, held in the Post Office Building, Borough of Manhattan, City of New York, on the 8th day of July, 1908, at 11 o'clock in the forenoon or as soon thereafter as counsel can be heard.

Dated, New York, July 6th, 1908.

Yours, etc.,
HOADLEY, LAUTERBACH & JOHNSON,
Attorneys for Defendants.

Office and Post Office address, No. 22 William Street, Borough of Manhattan, City of New York.

To Messrs. Brandeis, Dunbar & Nutter, and Messrs. Carter, Hughes & Dwight, Attorneys for Plaintiff, 96 Broadway, N. Y. City.

318 *Order of United States Circuit Court Directing that the Mandate of the Supreme Court of the United States be Filed and Judgment Entered Accordingly.*

United States Circuit Court, Southern District of New York.

OLD DOMINION COPPER MINING & SMELTING COMPANY, Plaintiff,
against
FREDERICK LEWISOHN, WALTER LEWISOHN, ALBERT LEWISOHN, and Philip S. Henry, Executors of Leonard Lewisohn, Deceased, Defendants.

The above named plaintiff having appealed to the Supreme Court of the United States from the Decree of the United States Circuit Court of Appeals for the Second Circuit entered in said cause on the 17th day of December, 1906, affirming the Decree of the Circuit Court of the United States for the Southern District of New York, entered in the above entitled cause, and said appeal having been duly argued, and the said Supreme Court of the United States having, as appeared by its mandate, duly affirmed the said decree with costs taxed by it at twenty dollars ($20.), and due notice of the application for this order having been given:

Now, on motion of Hoadley, Lauterbach & Johnson, the attorneys for the defendant, it is

Ordered that the mandate issued by the Supreme Court of the United States herein be filed, and the Decision and Judgment of the said Supreme Court of the United States be, and the same hereby is, made the Decision and Judgment of this Court, and that said Decree of the United States Circuit Court of Appeals for the Second Circuit in the above entitled cause, entered on the 17th day of December, 1906, affirming the decree of the Circuit Court of the United
319 States for the Southern District of New York, be, and the same hereby is, affirmed, and that the defendants recover of the plaintiff the sum of twenty dollars ($20) their costs on said appeal, as appeared by said mandate, and that said defendants have execution therefor.

Let judgment be entered accordingly.

Dated, New York, July 11, 1908.

E. H. LACOMBE,
U. S. C. J.

(Endorsed:) United States Circuit Court, Southern District of New York. Old Dominion Copper Mining & Smelting Co., Plff. vs. Frederick Lewisohn, et al., Executors of Leonard Lewisohn, deceased, defts. Order and notice of settlement. Hoadley, Lauterbach & Johnson, Attorneys for ——, 22 William-Street, New York City. United States Circuit Court, Southern District N. Y. Filed July 11th, 1908, John A. Shields, Clerk. Service of a copy of within is hereby admitted, dated July 6, 1908, Carter, Hughes & Dwight. W. L.

Docket Entries in United States Circuit Court.

E. 8333.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
v.
FREDERICK LEWISOHN, WALTER LEWISOHN, ALBERT LEWISOHN and PHILIP S. HENRY.

Brandeis, Dunbar & Nutter,
220 Devonshire Street, Boston, Mass.
Carter, Hughes & Dwight.

1903.
Jan'y 6. Filed bill and præcipe issued subpœna.

320

1903.
Jan'y 6. Filed subpœna personally served all def'ts.
" 23. " Amendment to Bill of Complaint.
Feb. 2. " & Entered Appearance defts. by Hoadley, Lauterbach & Johnson, Solrs.
M'ch 2. " Stipulation & rule extending time to answer to Mch. 6, 1903.
" 6. " Demurrer to a part of the Bill.
" 6. " Demurrer to the whole Bill.
1905.
Jan'y 14. " Stipulation and order placing Demurrer on Calendar commencing Feb. 20, 1905.
Feb. 18. " Stipulation as to deps. etc.
" 18. " Stipulation as to deps. etc.
" 18. " Stipulation as to cross exm. of Altmiller, etc.
" 24. " Opinion (Lacombe, J.) Bill dismissed, etc.
M'ch 24. " Order sustaining demurrer, etc.
Ap'l 20. " Amended bill of complaint.
May 11. " Demurrer to a part of the Bill.
" 11. " Demurrer to the whole Bill.
Nov. 11. " Opinion (Holt, J). Demurrer sustained.
" 18. " Order sustaining demurrer, etc.
Dec. 6. " Judgment (7318).
1906.
Dec. 31. " Mandate U. S. C. C. A. Affirmance & Order o Mandate (7614).
1907.
Jan'y 5. " Order staying Execution.
" 4. " Petition to stay Execution (Endorsed Lacombe, Jan'y 4, 1907 Granted).
1908.
July 23. " Judgment (8144).

A true copy of the Docket Entries.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

321 *Order Extending Time of Appellant to File Transcript of Record on Appeal.*

At a stated term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the Borough of Manhattan, in the City of New York, on Wednesday, the 31st day of January, in the year of our Lord one thousand nine hundred and six.

Present: The Honorable E. Henry Lacombe, Circuit Judge.

OLD DOMINION COPPER CO.
vs.
LEWISOHN et al.

Ordered that the time of the appellant in the above entitled cause in which to file the transcript of record on appeal be and the same is hereby extended to and including the 28th day of February, 1906.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) E. & A. C., 2377. Old Dominion Copper Mining & Smelting Co. vs. Frederick Lewisohn et al. Extension. United States Circuit Court of Appeals Second Circuit. Filed Feb. 19, 1906. William Parkin, Clerk.

Appearance for Appellees in United States Circuit Court of Appeals.

United States Circuit Court of Appeals for the Second Circuit.
October Term, 190—.

No. —.

OLD DOMINION COPPER MINING AND SMELTING COMPANY,
Appellant,
vs.
FREDERICK LEWISOHN et al., Appellees.

The Clerk will enter my appearance as Counsel for the Appellees.
EUGENE TREADWELL.

322 N. B.—This must be signed by a member of the Bar of this Court. Individual, and not firm names, must be signed.

(Endorsed:) United States Circuit Court of Appeals, Second Circuit. No. — October Term 190—. Old Dominion Co. vs. Lewisohn. Appearance. —— ——, Counsel for ——. United States Circuit Court of Appeals Second Circuit. Filed Oct. 25, 1906. William Parkin, Clerk.

Stipulation and Order for Substituting Briefs.

United States Circuit Court of Appeals, Second Circuit.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
vs.
FREDERICK LEWISOHN et al.

Stipulation.

It is hereby stipulated and agreed in the above entitled cause that ten corrected copies of brief filed by the appellant with the Clerk of the Court on October 20th, 1906 may be substituted for ten copies of brief filed on October 10th, 1906.

BRANDEIS, DUNBAR & NUTTER,
Counsel for Appellant.
HOADLEY, LAUTERBACH & JOHNSON,
Counsel for Appellees.

So ordered,
W. K. TOWNSEND,
U. S. C. J.

(Endorsed:) Old Dominion Co. vs. Lewisohn. Order substituting briefs. United States Circuit Court of Appeals Second Circuit. Filed Oct. 25, 1906. William Parkin, Clerk.

323 *Motion for Stay of Mandate of the United States Circuit Court of Appeals and Denials of Motion.*

United States Circuit Court of Appeals, Second Circuit.

OLD DOMINION COPPER MINING AND SMELTING COMPANY,
Appellant,
vs.
FREDERICK LEWISOHN et al., Appellees.

Motion for Stay of Mandate.

Now comes the appellant in the above entitled cause and respectfully represents that on December 4th, 1906 this Honorable Court handed down a decision, affirming the decree of the Circuit Court in the above entitled cause; that the appellant desires to petition the Supreme Court of the United States for a writ of certiorari to review the decision of this Honorable Court and is diligently engaged in preparing such petition and a brief in support thereof.

Wherefore the appellant prays that the issue of a mandate pursuant to the opinion of this Honorable Court and of the final decree to be entered in accordance therewith be stayed for a reasonable time to enable the appellant to prepare and file such petition.

By Its Attorneys, BRANDEIS, DUNBAR & NUTTER.

(Endorsed:) Old Dominion Copper Mining and Smelting Company Appellant vs. Frederick Lewisohn et al., Appellees. Motion for stay of mandate. United States Circuit Court of Appeals Second Circuit. Filed Dec. 12, 1906. William Parkin, Clerk.

324 (*Extract from the Minutes.*)

MONDAY, *Dec.* 17, 1906.

Before Wallace, Lacombe and Townsend, JJ.

W. & T.

Motions:—

OLD DOMINION COPPER CO.
vs.
LEWISOHN.

Motion to stay mandate. Denied.

Decree of the United States Circuit Court of Appeals and Order for Mandate.

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 11th Day of December, One Thousand Nine Hundred and Six.

Present: Hon. William J. Wallace, Hon. William K. Townsend, Hon. Alfred C. Coxe, Circuit Judges.

OLD DOMINION COPPER MINING AND SMELTING COMPANY,
Complainant-Appellant,
vs.
FREDERICK LEWISOHN et al., Defendants-Appellees.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged and decreed that the decree of said Circuit Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

W. J. W.
W. K. T.

325 (Endorsed:) United States Circuit Court of Appeals, Second Circuit. Old Dominion Copper Co. vs. F. Lewisohn. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 17, 1906. William Parkin, Clerk.

Bill of Costs.

Bill of Costs Taxed in Favor of Appellee in No. 64, October Term, 1906.

United States Circuit Court of Appeals, Second Circuit.

OLD DOMINION CO.
v.
LEWISOHN.

1906, October Term:

Docketing Cause and Filing Record	$5.00		
Entering Appearance	.25	.25	
Filing Papers			
Filing Motion	.25		
Entering Order	.25		
Cost of Printing Record			
Filing Copies of Printed Record	2.25		
Transfer to Calendar	1.00		
Filing Brief (2)	....	5.00	10.00
Entering Order for Mandate	1.00	1.00	
Taxing Costs and Copy	.45	.45	
Issuing Mandate	5.00	5.00	
Attorney's Docket Fee	20.00	20.00	$36.70
Taxed at the Sum of		$36.70	

WM. PARKIN, *Clerk.*

(Endorsed:) United States Circuit Court of Appeals Second Circuit. Old Dominion Co. vs. Lewisohn. Bill of Costs.
326 United States Circuit Court of Appeals, Second Circuit. Filed Dec. 17, 1906. William Parkin, Clerk.

Stipulation Relating to Transcript of Record Filed in the Supreme Court of the United States.

United States Circuit Court of Appeals for the Second Circuit.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
vs.
FREDERICK LEWISOHN et al.

It is hereby stipulated that the transcript already filed in the Clerk's office of the Supreme Court of the United States with the

petition for the writ of certiorari be taken as a return to said writ dated the twenty seventh day of February A. D. 1907.

EUGENE TREADWELL,
HOADLEY, LAUTERBACH & JOHNSON,
Solicitors for Respondent.
LOUIS D. BRANDEIS,
WILLIAM H. DUNBAR,
BRANDEIS, DUNBAR & NUTTER,
Solicitors for Appellants.

(Endorsed:) Old Dominion Copper Mining and Smelting Company v. Frederick Lewisohn. Stipulation. Brandeis, Dunbar & Nutter, counsellors at law, 161 Devonshire St., Boston. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 4, 1907. William Parkin, Clerk.

Decree of the Supreme Court of the United States and Order Remanding to the Circuit Court of the United States for the Southern District of New York.

Supreme Court of the United States.

No. 206, October Term, 1907.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY,
Petitioner,
vs.
FREDERICK LEWISOHN et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

This cause came on to be heard on the transcript of the
327 record from the United States Circuit Court of Appeals for the Second Circuit and was argued by counsel.

On consideration whereof it is now here ordered, adjudged and decreed by this Court that the decree of the said United States Circuit Court of Appeals in this cause, be and the same is hereby affirmed with costs; and that this cause be and the same is hereby remanded to the Circuit Court of the United States for the Southern District of New York.

May 18, 1908.

[SEAL.]

A true copy.
Test:
JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

(Endorsed:) File No. 20,538. Supreme Court of the United States No. 206, October Term 1907. Decree. Filed May 18, 1908. United States Circuit Court of Appeals, Second Circuit. Filed July 2, 1908. William Parkin, Clerk.

Docket Entries for Circuit Court of Appeals.

(Docket Entries.)

—— Circuit, So. N. Y.

No. 2631.

OLD DOMINION COPPER MINING & SMELTING COMPANY, Complainant-Appellant,
vs.
FREDERICK LEWISOHN et al., Defendants-Appellees.

Hughes, Rounds & Schurman.
Hoadley, Lauterbach & Johnson.

1906.
Feb. 19. Filed transcript of record.
" 19. " order extending time.
Ap'l 13. " 9 copies record.

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1906.
Oct. 10. Filed brief, appellant.
" 25. " appearance appellee by E. Treadwell.
" 25. " order substituting new brief.
Nov. 5. " brief, appellee.
" 19. " " appellant, reply.
" 19. " " appellee, do.
Dec. 4. Decree affirmed, Coxe, C. J.
" 12. Filed note of motion to stay mandate.
" 17. Motion denied.
" 17. Filed order for mandate.
" 17. " Bill of costs.
" 20. Certified copy of record to B. D. & N.
" 26. Issued mandate.
1907.
M'ch 4. Certified return to certiorari on stipulation.
1908.
July 2. Filed copy decree of Supreme Court.

And on the said sixteenth day of September, the matter of the allowance of the motion to file the supplemental answer was reported for the consideration and determination of the Full Court, said report being in the words following, to wit:

Reservation.

After rescripts from the full court, the defendant asked leave to file supplemental answers and having fully heard the parties, it seemed to me just upon the allegations of the answers and statements of counsel in support of them that the amendment should be allowed and I entered an order accordingly. The plaintiff, instead

of taking an appeal, then requested me to report my action
329 to the full court. In accordance with this request I now do so. If my action is reviewable, then if the allowance of the amendment was wrong the order is to be reversed, otherwise it is to stand.

September 16, 1908.

HENRY K. BRALEY,
Justice Supreme Judicial Court.

And on the twenty-second day of said September the defendant filed his claim of appeal from the order dated August 14, 1908, said claim of appeal being in the words following, to wit:

Defendant's Claim of Appeal.

And now comes the defendant, Albert S. Bigelow, and appeals to the Full Court from—

(1) The order denying the application of the defendant to modify the decree of August 14, 1908, and the injunction issued thereon.

(2) The order denying the application of the defendant to vacate the decree of August 14, 1908, and to dissolve the injunction issued thereon.

(3) The order denying the application of the defendant to modify the decree of August 14, 1908, and the injunction issued thereon by reason of indefiniteness.

By His Solicitors, ALFRED HEMENWAY,
J. W. FARLEY.

And on the ninth day of October, A. D. 1908, the said case was reserved for the consideration and determination of the Full Court, said reservation being in the words following, to wit:

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Reservation.

This case came on to be heard upon the evidence relating to the matters set forth in the supplemental answer filed by the defendant September 4th, 1908, and evidence introduced on behalf of the defendant and on behalf of the plaintiff, as more fully appears in the commissioner's report thereof, and after the hearing of said evidence, a decree in the form of the original decree in said case was ordered, but the question of whether or not said order should be modified or reversed by reason of said supplemental answer and the evidence in support thereof is reserved for the consideration of the full court; and this case including the entire record and the commissioner's reports of the evidence is now reserved for the consideration of the full court as if upon the original appeals from the final decree of December 10, 1907, and for such further modification, if any, as should be made therein by reason of the evidence bearing upon said supplemental answer, and also upon the reservation concerning the order permitting the filing of said supplemental answer, and also upon the appeal of the defendant from the decree entered August 14, 1908, granting an injunction; and also upon the appeals of the defendant from the

orders entered August 28th, 1908, refusing to modify or vacate said decree of August 14th, 1908; and for such final decree and order upon this reservation as justice and equity require. The foregoing is made as a reservation and not as a decree.

October 9, 1908.

JOHN W. HAMMOND,
Justice Supreme Judicial Court.

And thereafterwards on the fifteenth day of September, A. D. 1909, it was ordered by the Supreme Judicial Court for the Commonwealth, by its Rescript, that the Clerk of this Court for the County of Suffolk make the following entry under this case
331 in the docket of the Court, viz:

"The decree is to be so modified as to include the costs of appeal, with interest from Sept. 18, 1895, to this date, on the principal sum, and as so modified is affirmed."

And on the twenty sixth day of October, A. D. 1909, the following Final Decree was entered by the Court, to wit:

Final Decree.

This cause came on to be heard this twenty-sixth day of October, 1909, at this sitting, pursuant to the rescript therein, and was argued by counsel and considered by the Court, and thereupon upon consideration thereof it is

Ordered, adjudged and decreed that the complainant, Old Dominion Copper Mining & Smelting Company, recover of the respondent, Albert S. Bigelow, the sum of seven hundred thousand (700,000) dollars and interest thereon from September 18, 1895, amounting to five hundred and ninety-two thousand four hundred and thirty-three and thirty-three one-hundredths (592,433.33) dollars, being the total sum of one million two hundred ninety-two thousand four hundred and thirty-three and thirty-three one-hundredths (1,292,433.33) dollars, and the costs taxed by the clerk at sixty-six (66) dollars, and that execution issue for said total sum and costs in common form in favor of said Old Dominion Copper Mining & Smelting Company against said Albert S. Bigelow.

By the Court:

WALTER F. FREDERICK, *Clerk.*

October 26, 1909.

332 All and singular which premises, we have held good by the tenor of these presents to be exemplified.

In testimony whereof, we have caused the seal of our said Court to be hereunto affixed.

Witness, Marcus Perrin Knowlton, Esquire, Chief Justice of our said Supreme Judicial Court, at Boston in said County of Suffolk, this fourth day of November in the year of our Lord one thousand nine hundred and nine.

[Nulli Vendemus Nulli Negabimus Justitiam.]

WALTER F. FREDERICK, *Clerk.*

1 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court, Suffolk County.

No. 8098. In Equity.

OLD DOMINION COPPER MINING & SMELTING COMPANY
v.
ALBERT S. BIGELOW.

No. 8099.

SAME
v.
SAME.

Sheldon, J.

Appearances:

L. D. Brandeis, Esq., E. F. McClennen, Esq., for Complainant.
Alfred Hemenway, Esq., Eugene Treadwell, Esq., J. Wells Farley, Esq., for Defendant.

Order Appointing Commissioner.

In the above-entitled cases, at the hearing of the same before Mr. Justice Sheldon, it is ordered, under the provisions of Chancery Rules No. XXXV, at the request of both parties, that George C. Burpee be, and he hereby is, appointed commissioner to take the evidence in said cases to be reported to the full court.

By the Court:

WALTER F. FREDERICK,
Assistant Clerk.

November 6, 1907.

2 BOSTON, *November* 6, 1907.

Evidence.

[George C. Burpee was appointed and sworn as stenographer.]

Deposition of Albert S. Bigelow.

Mr. MCCLENNEN: I will offer the deposition of Albert S. Bigelow, beginning March 24, 1903.

[Reading the deposition down to the first objection.]

I will not read the objections except as you renew them, Mr. Hemenway.

Mr. HEMENWAY: I will agree, in regard to that, that unless I make objection the testimony may be admitted de bene. That will save a great deal of time.

[Mr. McClennen continued to read the deposition of Mr. Bigelow and the exhibits accompanying it until 4 P. M., at which time the court adjourned until Thursday, November 7.]

THURSDAY, *November* 7, 1907.

Deposition of Albert S. Bigelow Resumed.

[Mr. McClennen continued to read the Bigelow deposition and exhibits down to and including Exhibit 10.]

SHELDON, J.: Do those names [on Exhibit 10] include the names of persons of which you have already read a list? I mean, subscribers to the stock of the company, not subscribers to the syndicate, who were warned that their subscriptions might be cut down.

Mr. MCCLENNEN: They include those names, and they also include the names of the syndicate members who wrote that they would take stock.

Mr. HEMENWAY: The subscription is over 72,000 shares.

Mr. MCCLENNEN: The total is 72,120 shares. Perhaps this is an appropriate time to say this; it takes a good deal of mathematics to work it out, but I believe it works out. In the case of the syndicate subscribers, with very few exceptions, I think it appears that the number of shares here put against their names is just half of what they ultimately received. That is, they were put down here by reason of the sums of money which they had put in at $25 per share. Then the other half they received without its being noted on this paper, as indicating their election to take stock instead of their money back. In the case of persons who were not members of the syndicate, the number of shares appearing here is generally the same as the amount of the checks that they paid into the treasury, as will appear later by the number of shares which they received.

Mr. HEMENWAY: This is simply the statement of counsel.

SHELDON, J.: Yes, I so understand it.

Mr. HEMENWAY: Of course it is not part of the record.

Mr. MCCLENNEN: I think it might be desirable to have that list.

[Mr. Treadwell produced the original of Exhibit 10, a copy of which is attached to the Bigelow deposition.]

Mr. MCCLENNEN [referring to original Exhibit 10]: That 5000 shares does read 500 on the original,—that Albert O. Smith, we spoke of.

This I may as well call to your Honor's attention now as at any time. You will recall that the Lewisohn interest was about 18,000 shares that was to be obtained. Lewisohn Brothers, 10,000; Leonard Lewisohn, 4000; Hyams, 4000. Then A. S. Bigelow, 4000; A. S. Bigelow, again, 4000; Nelson is 12; Coram is 16, Luce is 20. Those all appear on the Boston underwriting syndicate. And the proportion that would come to Boston for the twenty-three forty-second would be 22,000. Then follow along these names.

SHELDON, J.: This is set out in the evidence, so you do not ca

names of the subscribers to the syndicate agreement and of new subscribers to the stock?

Mr. McCLENNEN: Both.

Mr. BRANDEIS: Your Honor will note at the bottom the amount in all underwritten.

SHELDON, J.: The amounts specified in the names of certain subscribers are the amounts that they took in stock instead of taking back their cash They did not include the amount of stock they were going to take anyway.

Mr. McCLENNEN: Not in that case. In some instances those same persons subscribed to the syndicate and also took some of the other stock; then the amount is set opposite their names.

Mr. HEMENWAY: This is what we call a memorandum, not a subscription list.

SHELDON, J.: This is set out in the evidence, so you do not care to have the stenographer mark it?

Mr. McCLENNEN: Yes. I assume your Honor understands that any of these originals are before your Honor, should your
4 Honor care to look at them. They have all been copied for convenience.

[Mr. McClennen continued to read the deposition of Mr. Bigelow, down to Exhibits 14 and 15.]

Mr. HEMENWAY: If your Honor please, in regard to that report [Exhibit 14] it is a report in some month for the year 1901. I specifically objected to the admission of the report. I also object to what was done at the mine later.

SHELDON, J.: It may be taken de bene, and the stenographer will minute that it is taken de bene.

[Mr. McClennen continues to read from the report Exhibit 14.]

Mr. HEMENWAY: No part of that stock [referred to in Exhibit 14] has ever been issued,—of that 50,000 shares.

Mr. BRANDEIS: No part of that had been issued up to last May.

Mr. HEMENWAY: We had nothing to do with that, so that that has nothing to do with this case,—the issuing of new stock.

Mr. BRANDEIS: The issuing of new stock raises no question. As a matter of fact, a certificate of stock was issued which stood in the name of Nelson as treasurer, but it was never issued to the public.

Mr. McCLENNEN: I do not at the moment recall anything in this second report that is of any significance, so, unless Mr. Hemenway wants me to read some part of it, I will pass that by.

Mr. HEMENWAY: It is just as important, and a little more important, than the one already read.

Mr. McCLENNEN: Then I will read it.

[Mr. McClennen read Exhibit 15 down to the statement of assets and liabilities, when the court took a recess; upon the return of the court at 2 P. M., Mr. McClennen read the schedule of assets and liabilities.]

SHELDON, J.: Do you care for the superintendent's report, Mr. Hemenway?

Mr. HEMENWAY: I do not think it is necessary.

SHELDON, J.: Unless you care for it——

Mr. HEMENWAY: Of course I have objected to both of those reports.

SHELDON, J.: Oh, yes; it is taken de bene.

5 [Mr. McClennen continued the reading of the deposition of Mr. Bigelow, summarizing Exhibits 16 and 17, showing receipts and expenditures.]

SHELDON, J.: Am I in error that the summing up of this part of it in testimony is that, disregarding for the moment the division between Bigelow and Lewisohn, and disregarding the question of whether 20,000 shares or $500,000 went to the new subscribers from Bigelow and Lewisohn, or whether it went to them from the company, the effect of the thing was that Bigelow and Lewisohn got in stock at par $3,000,000 for the $1,000,000 which they put in, and disregarding the underwriting syndicate and the members' subscription syndicate, they received $2,000,000?

Mr. McCLENNEN: They got $3,250,000.

SHELDON, J.: Oh, I should have said $3,000,000. Then it was $3,750,000; so that, to go a little further, they got $3,250,000, disregarding the underwriting they gave to the members of the syndicate, two for one?

Mr. McCLENNEN: Yes.

SHELDON, J.: They themselves paid all the expenses, however,—all the incidental expenses.

Mr. McCLENNEN: I should say that with this qualification, that there was an accounting, as will appear later, between the corporation and the syndicate on the matter of expense, incidental expenses, which would leave out any question whether they did pay all of the incidental expenses.

SHELDON, J.: I put the question so that I may be sure I understand the evidence as it goes in.

Mr. McCLENNEN: Well, that is undoubtedly an accurate statement that leaves the subdivision in this wise with 20,000 producing cash.

SHELDON, J.: I am not concerning myself with any disputed questions.

[Mr. McClennen continued the reading of the Bigelow deposition, with exhibits, up to page 206, when the court adjourned till Friday, November 8.]

FRIDAY, *November* 8, 1907.

Deposition of Albert S. Bigelow, Resumed.

[Mr. McClennen resumed the reading of the deposition of A. S. Bigelow, at page 206, and continued.]

SHELDON, J.: Is there to be any change in the testimony of Mr. Bigelow or in the exhibits that these Keyser claims were held half for the benefit of the Baltimore Company and half for the Simpson estate.

6 Mr. McCLENNEN: I had not supposed there would be until I saw in the freshly prepared answer that the claim is still maintained that they were not.

[Mr. McClennen continued reading the Bigelow deposition and exhibits, and finished at 10.30 A. M.]

Deposition of Godfrey M. Hyams.

Mr. McCLENNEN: I will offer the deposition of Godfrey M. Hyams that was taken March 27, 1903, begun that day, that is, after the first day of Mr. Bigelow's testimony.

[Mr. McClennen read the deposition of Hyams, with exhibits, down to certificate 73.]

SHELDON, J.: That is certificate 73?

Mr. McCLENNEN: Certificate 73. Those come out of Nelson. Now in that list the name, I think, of no underwriter appears, or any name of Lewisohn or Bigelow. In that list there are three entries of this kind: "Bartholomew, S. B., 100."

Mr. HEMENWAY: I think you had better read the names that are there without drawing your inferences at the present time.

SHELDON, J.: I do not think it is worth while to read all the names. I do not think there was any inference; he was reading one of the entries.

Mr. HEMENWAY: It was before that.—as to whom these people were. I do not agree to that; it is not true.

SHELDON, J.: Well, that is Mr. McClennen's statement, and it is not agreed to. But it is not worth while to read all the names.

Mr. HEMENWAY: Oh, I don't care about that, only I do not want conclusions made.

SHELDON, J.: That is a question that may have some bearing, and may have some importance.

Mr. McCLENNEN: The only way in which I can bring to your Honor's attention, in connection with putting in the evidence, that those names do not appear is to read the list.

SHELDON, J.: You say your claim is that those men——

Mr. McCLENNEN: Are not signers of the underwriters' agreement.

7 SHELDON, J.: There are some of the syndicate?

Mr. McCLENNEN: Mr. Hemenway claims that they did include some of the syndicate.

SHELDON, J.: Whichever one of you is correct, it would include the names of some of the syndicate, of course, because some of the members of the syndicate subscribed for a part of the 20,000 shares.

Mr. HEMENWAY: That is just what they did not do. They did not subscribe for any of the 20,000. They simply said they would take.

SHELDON, J.: Well, there is at present some evidence that they did; whether they took them from the company or from Bigelow and Lewisohn is another and very different question.

Mr. HEMENWAY: Well, there is no evidence that the subscription was offered as to the 20,000 certificate or the 100,000 certificate or the 30,000 certificate; that is, without subscription to any other papers. There was no subscription to any part of the 20,000

SHELDON, J.: Well, there was subscription for a larger amount

than they could get unless it was taken out of the shares represented by the 20,000 share certificate?

Mr. HEMENWAY: No, your Honor.

SHELDON, J.: Well, at any rate, if I am in error, it is not worth while to spend time on it.

Mr. HEMENWAY: I do not think it is, but it is one of the things on which I wish your Honor to keep your Honor's mind open.

SHELDON, J.: I intend to do so. I realize it is a question of some importance.

Mr. McCLENNEN: If Hemenway does not object to my drawing the inference, I should say that I think your Honor has correctly stated the evidence thus far.

SHELDON, J.: Well, you need not bother about that.

[Mr McClennen continued and finised reading the deposition of Mr. Hyams and the exhibits accompanying it.]

Deposition of J. Morris Meredith.

Mr. McCLENNEN: I offer the deposition of J. Morris Meredith, taken May 22, 1906.

[Reading the Meredith deposition, without interruption, and finishing at 2.45 P. M.]

8 *Deposition of Walter Lewisohn.*

Mr. McCLENNEN: I will offer the deposition of Walter Lewisohn taken February 4, 1903. This is the first of all the depositions.

[Mr. McClennen read the deposition of Walter Lewisohn so far as it was taken on February 4, 1903.

[Then a letter dated February 4, 1903, Brandeis to Lauterbach.

[Then the deposition of Walter Lewisohn, so far as it was taken on February 10, 1903.]

Deposition of Adolph Lewisohn.

Mr. McCLENNEN: I will read the deposition of Adolph Lewisohn

[Mr. McClennen read the deposition of Adolph Lewisohn; also the original offer of the Baltimore Company to the meeting of July 11, 1895.]

Deposition of John Stanton.

Mr. McCLENNEN: I will offer the deposition of John Stanton. This was taken on written interrogatories [reading the deposition.

Deposition of Joseph A. Coram.

Mr. McCLENNEN: I will offer the deposition of Joseph A. Coram taken on June 15, 1904 [reading the deposition.]

[Adjourned to Monday, November 11, 1907.]

Deposition of Frederick Lewisohn.

Mr. McCLENNEN: I am going to read the deposition of Frederick Lewisohn, taken February 11, 1903.

[Mr. McClennen read the deposition of Frederick Lewisohn.]

Deposition of Albert Lewisohn.

Mr. McCLENNEN: The next one here is the deposition of Albert Lewisohn. For physical reasons merely I will not read it, because I do not see that it adds anything. Unless Mr. Hemenway desires to have me read it—I will read it, if he desires.

Mr. HEMENWAY: I think Albert Lewisohn's deposition explains about this examination. If they claim there was not any such search, it should be read.

Mr. McCLENNEN: Well, we do make the claim.

[Reads deposition of Albert Lewisohn, taken February 11, 1903.]

Deposition of Ferdinand Royhauser.

Mr. McCLENNEN: I will now read the deposition of Ferdinand Royhauser, the taking of which was commenced on February 10, 1903 [reading].

That, I believe, concludes the testimony taken up to February 24.

It is noted at the end of the Albert Lewisohn deposition that the exhibits marked for identification run from 1 to 161.

Now on February 24 Mr. Lauterbach produced another batch of letters, which were marked for identification 162 to 230, both inclusive.

[Mr. McClennen then read the further deposition of Ferdinand Royhauser, taken on February 24, 1903, up to the point where the further taking of it was suspended.]

Deposition of Edward C. Westerveldt.

Mr. McCLENNEN: I will now read the deposition of Edward C. Westerveldt, taken February 24, 1903.

[Reading the deposition of Westerveldt up to the time the taking of it was suspended.]

Deposition of Jesse Lewisohn.

Mr. McCLENNEN: On the same day the deposition of Jesse Lewisohn was taken [reading the deposition].

It is noted that the last exhibit identified is No. 233.

I will now read the further deposition of Jesse Lewisohn, taken on February 25, 1903.

[Mr. McClennen proceeded to read the deposition of Jesse
10 Lewisohn, taken on February 25, 1903, and commenced to read Exhibit 231, which accompanies the deposition.]

Mr. HEMENWAY: This goes in de bene.

SHELDON, J.: Does that appear upon the face of the record?

Mr. BRANDEIS: They were introduced as evidence.

SHELDON, J.: Mr. Hemenway says they go in de bene. I asked if they did go in de bene.

Mr. HEMENWAY: I made my objection at the time.

SHELDON, J.: This is Exhibit 231?

Mr. MCCLENNEN: Exhibits 231, 232, and 233 [exhibiting and explaining to the court the exhibits, counsel being present at the bench].

[Mr. McClennen then finished reading the deposition of Jesse Lewisohn as taken on February 25, 1903, until it was suspended.]

Deposition of Edward C. Westerveldt Resumed.

[Mr. McClennen read the deposition of Edward C. Westerveldt, resumed on March 3, 1903, until the examination was suspended.]

Deposition of Ferdinand Royhauser Resumed.

[Mr. McClennen read the deposition of Ferdinand Royhauser, resumed, to the close of the deposition.]

Deposition of W. A. S. Chrimes.

Mr. MCCLENNEN: I will offer the deposition of W. A. S. Chrimes, commenced July 19, 1905, and resumed on October 27, 1905.

[Mr. McClennen read the deposition of Chrimes, also Altmiller Exhibit 6.]

Deposition of Samuel N. Brown.

Mr. MCCLENNEN: I will offer the deposition of Samuel N. Brown, taken July 19, 1905 [reading the deposition].

Mr. MCCLENNEN: I would like to put in a bit or oral testimony.

11 *Oral Testimony.*

CHARLES H. ALTMILLER sworn.

(By Mr. MCCLENNEN:)

Q. Your name is Charles H. Altmiller?

A. Yes.

Q. You are treasurer of the Old Dominion Copper Mining & Smelting Company?

A. Yes, sir.

Q. And became such in April, 1902?
A. Yes, sir.
Q. Prior to that time do you recollect the fact of a vote increasing the capital stock by 50,000 shares?
A. I do.
Q. It is a fact that up to the time of your becoming treasurer that stock had never been actually issued?
A. Yes, sir.
Q. In what way was that stock treated on the books of the company?

Mr. HEMENWAY: One moment. The books will show.

Q. Is this certificate which I show you the certificate representing that stock?
A. Yes.

Mr. HEMENWAY: I pray your Honor's judgment. I object to the testimony.
SHELDON, J.: Well, it may be taken de bene.
A. *Yes.*
Mr. MCCLENNEN: That certificate I will offer [exhibiting the certificate to Mr. Hemenway].
Mr. HEMENWAY: I think the better way would be to put the vote in evidence, first, in regard to the increase of the capital stock.
Mr. MCCLENNEN: That will appear soon in the typewritten testimony.
This certificate which is offered is No. 5070, for 50,000 shares:

"Registered. Atlas National Bank. J. L. Foster, Cashier

This certifies that William J. Ladd, Treasurer of the Old Dominion Copper Mining and Smelting Company is entitled to 50,000 shares of the capital stock of the Old Dominion Copper Mining and Smelting Co. transferable only on the books of said company by the holders hereof in person or by attorney on surrender of this certificate.

Boston, Mass., September 1, 1899.

C. H. BISSELL,
Assistant President.
P. K. DUMARESQ,
Assistant Treasurer."

The certificate recites that the capital stock is $3,750,000, in shares of $25 each, and bears the stamp upon it "Capital stock increased June 15, 1899, to 200,000 shares by $1,000,000."

12 SHELDON, J. You do not claim that this stock was issued irregularly?

Mr. MCCLENNEN: No, there is no such claim. Our only interest in this is that it is a further demonstration of what appears elsewhere in the testimony, that it was the practice of this company to carry unissued stock in the form of a certificate in the name of the treasurer.

Mr. TREADWELL: That is what I want to call your Honor's attention to. The purpose of this, it is stated now, is to show——

SHELDON, J.: I do not think it is worth while to spend time on it now. It is only admitted de bene. The objection that is made will have to be carefully considered before the evidence is received, if I were to receive it for any purpose. But it is taken only de bene. If the case should go to the full court, it may be considered or not as they deem proper.

Mr. TREADWELL: I was not making objection; I was only saying that so much evidence comes in here in this way that we may or we may not be called upon to take up your Honor's time with when we feel it is clearly irrelevant so far as the issues of this case are concerned, and I should want to have an idea how much it is proposed to receive in order that we, on our part, may know how much of the time of the court we are to take up in considering it.

[The certificate was received in evidence de bene, and marked "Exhibit 500, Nov. 14, 1907, G. C. B."]

Mr. HEMENWAY: If your Honor please, there are some questions I shall want to ask in cross-examination, but there are so many things in evidence that cross-examination will be clearer after your Honor has heard it that I should like to reserve my right then to cross-examine.

Mr. BRANDEIS: If you will let us know when you want him, we will endeavor to have Mr. Altmiller here.

Mr. HEMENWAY: Of course I have already notified Mr. Altmiller and Mr. Smith I should want all of these papers.

Mr. MCCLENNEN: I think everything is in these bundles.

Mr. BRANDEIS: Do you want the books, Mr. Hemenway?

Mr. HEMENWAY: No, I do not want the books this afternoon. Mr. Chrimes also may go. I think I may say that this testimony was taken in all four cases generally, but we have the right to put in oral testimony also; it saves a great deal of time. Of course, much of this is in reply.

13 *Deposition of Charles H. Altmiller.*

Mr. MCCLENNEN: Next is the deposition of Charles H. Altmiller, the taking of which began October 11, 1904.

[Mr. McClennen read from the Altmiller deposition and accompanying exhibits until the hour of adjournment.]

[Adjourned to Tuesday, November 12, 1907.]

TUESDAY, *November* 12, 1907.

Deposition of Charles H. Altmiller Resumed.

Mr. MCCLENNEN: I had just concluded the reading of the record of the meeting of July 9, which terminated a general adjournment.

SHELDON, J.: You are still on the deposition of Mr. Altmiller?

Mr. MCCLENNEN: I am still on the deposition of Mr. Altmiller.

[Mr. McClennen continued to read the Altmiller deposition and the accompanying exhibits, exhibiting and explaining some of them, to the end.]

Mr. McCLENNEN: Do you want to cross-examine Mr. Altmiller now?

Mr. HEMENWAY: No; I prefer to wait.

[Mr. McClennen read, without interruption, the depositions of William H. Reed, Charles R. Batt, R. F. Bolles, W. B. Mossman, C. L. Davenport, Homer V. Snow, Arthur W. Hale, Samuel B. Capen, and Henry Wood.]

New York Correspondence.

Mr. McCLENNEN: I think I will vary the character of this evidence for a while, going to something else. Of the letters marked, in connection with the New York depositions, Nos. 1 to 494, except Nos. 230, 231, and 233, I offer Exhibit 4, which is not in any record as yet [reading]:

"MAY 6TH, 1895.

Mr. G. M. Hyams, Boston, Mass.

DEAR SIR: We have today remitted two thousand dollars to J. Morris Meredith in accordance with the agreement.

Yours very truly,

LEWISOHN BROTHERS,
General Manager."

J. L.

11 Mr. McCLENNEN: No. 5, from Lewisohn Brothers to Charles C. Beaman.

Mr. HEMENWAY: This, of course, goes in de bene.

[Mr. McClennen read the following:]

"MAY 6TH, 1895.

Mr. Charles C. Beaman, c/o Evarts, Choate & Beaman, New York City.

DEAR SIR: We wish to advise you that we have today received word over the telephone that Mr. Smith, the third executor of the Simpson estate, has signed the agreement this morning. We are waiting to hear from Mr. Butler as to what the outcome of his meeting with Mr. Keyser was, which we expect to receive by tomorrow.

Yours very truly,

LEWISOHN BROTHERS,
General Manager."

J. L.

Mr. McCLENNEN. Exhibit 15, a letter from Lewisohn Brothers to G. M. Hyams [reading]:

"MAY 16TH, 1895.

Mr. G. M. Hyams, Post Office, Globe, Arizona.

DEAR SIR: We hope you received our other letters sent you yesterday with copies of different documents we received from Mr. Keyser.

The writer while at Mr. Beaman's office saw a letter from Mr. Meredith to Mr. Beaman wherein Mr. Meredith stated that his commission was to be 10 per cent and asking for Mr. Beaman's professional opinion as to the validity of his memorandum of this matter—which was from Mr. Simpson—and which he thought would be all right, but which he wanted Mr. Beaman's legal advice upon. He also stated in the letter to Mr. Beaman that the only chance of a slip up might be that Simpson might say, on presentation of our notes in payment of the property, that the endorsements were not satisfactory and stated that he thought it best for Mr. Beaman to be cautious on this point so that nothing could happen to prevent the matter going through. In other words, he was carefully looking out for his own interests, solely that he might not be done out of his beautiful commission.

15 The matter as regards the point of refusing to accept the endorsements we will arrange, as we spoke to Mr. Bigelow who will see the Old Colony Trust Company and have that matter easily settled, as they will accept endorsements which he will propose; and, any way, he will do this beforehand so that no question of this nature may arise.

As mentioned above, regarding the commission, we would like you to telegraph us to whether you think it advisable we should approach Mr. Meredith, either through Bigelow or direct, or, if you will do so, to ask him for half of the commission. We certainly think he should allow us half—$50,000—and we await your telegraphic opinion as regards this.

We would also mention that in this letter which Beaman had from Meredith it stated he should not say anything to Lewisohns about this commission matter unless they asked, but the writer happened to take this letter up with his own letters which were on Mr. Beaman's desk and therefore read the whole matter over in our office here. We have, however, returned the letter to Mr. Beaman.

In case you deem it best to ask Meredith yourself about this, you had better be cautious not to know too much about it—as to the amount of his commission—on the above grounds; as we naturally do not want to give away the fact that we saw the letter.

We await your telegraphic reply and meanwhile remain

Very truly yours,

LEWISOHN BROTHERS."

Mr. McCLENNEN: Exhibit 289, August 6, 1895, Lewisohn Brother to C. S. Henry & Company [reading]:

"AUG. 6, 1895.

Messrs. C. S. Henry & Co., London.

DEAR SIRS: If you have not already done so, we think it would be well for you to see Messrs. Long & Teutsch, and perhaps you can interest them in the Old Dominion enterprise; that is, that they buy some of the shares at about the market price ruling at the time you see them. If they think well of it and wish to know where they could get a lot of these shares, please cable us, and we will then giv

you particulars. We believe that the shares will go much higher. It is a good enterprise, as you know, and will no doubt pay dividends within a reasonable time after we commence production on
16 a larger scale. The shares are dealt in in Boston, and $34 was bid yesterday; but we would prefer not to sell any in the Boston market at present. Enclosed we hand you memorandum of some particulars which you can give to parties inquiring about Old Dominion, if you think best.

Yours very truly,

LEWISOHN BROTHERS,
General Manager."

Enc.

Mr. McCLENNEN: Now I will read the following letters already copied into the record, introduced on May 12, 1906, at page 176 (our page 1020), [reading the following described letters]:—

Ex. 18, Lewisohn Bros. to Wm. Keyser, June 3, 1895.
Ex. 20, Lewisohn Bros. to Bigelow, June 4, 1895.
Ex. 38, Wm. Keyser to Leonard Lewisohn, June 13, 1895.
Ex. 39, Leonard Lewisohn, per Jesse Lewisohn, to A. S. Bigelow, June 13, 1895.
Ex. 43, Form of agreement to form Old Dominion Syndicate, June 13, 1895.
Ex. 45, Lewisohn Bros. to A. S. Bigelow, June 17, 1895.
Ex. 67, Leonard Lewisohn to C. C. Beaman, June 28, 1895.
Ex. 81, Leonard Lewisohn to Allen W. Evarts, July 5, 1895.
Ex. 134, Simon H. Stern to Lewisohn Bros., Sept. 20, 1895.
Ex. 135, Same to same, Oct. 4, 1895.
Ex. 136, Lewisohn Bros. to John Stanton, Oct. 4, 1895.
Ex. 137, Lewisohn Bros. to Simon H. Stern, Oct. 4, 1895.
Ex. 138, Exrs. of will of A. W. Spencer, by W. A. Gaston, to Lewisohn Bros., Oct. 5, 1895.
Ex. 152, Simon H. Stern to Jesse Lewisohn, Dec. 4, 1895.
Ex. 162, Leonard Lewisohn to J. M. Meredith, April 29, 1895.
E. 174, Leonard Lewisohn to A. W. Spencer, June 21, 1895.
Ex. 187, Letter to Simon H. Stern, July 24, 1895.
Ex. 231, Already shown to court.
Ex. 232, Already shown to court.
Ex. 233, Already shown to court.
Ex. 258, Lewisohn Bros. to Charles J. Brooker, June 25, 1895.
Ex. 267, Leonard Lewisohn to Jacob Schiff, July 12, 1895.
Ex. 273, to Charles J. Brooker, July 24, 1895.
17 Ex. 276, to E. Hawley, July 25, 1895.
Ex. 288, Leonard Lewisohn to L. Berrion, Aug. 6, 1895.
Ex. 296, Lewisohn Bros. to C. S. Henry & Co., Aug. 20, 1895.
Ex. 305, Same to same, Aug. 26, 1895.
Ex. 315, Lewisohn Bros. to Sally Mains, Sept. 12, 1895.
Ex. 335, Lewisohn Bros. to W. S. Perry, Oct. 1, 1895.
Ex. 363, Lewisohn Bros. to A. Iselin & Bros., Oct. 10, 1895.

I will also read these additional letters introduced by Mr. Treadwell from the same New York files [reading]:

Ex. 22, Lewisohn Bros. to J. W. Belches, June 5, 1895.
Ex. 181, J. W. Belches & Co. to Lewisohn Bros., July 15, 1895.
Ex. 158, Account, Old Dominion Copper Co. with Baltimore Copper Smelting & R. Co.
E. 142, Wm. Keyser to Leonard Lewisohn, Nov. 2, 1895.
Ex. 143, Same to same, Nov. 6, 1895.
Ex. 60, Same to same, June 20, 1895.
Ex. 124, Lewisohn Bros. to R. Brent Keyser, Aug. 12, 1895.
Ex. 172, Lewisohn Bros. to John Stanton, June 5, 1895.
Ex. 136, Same to same, Oct. 4, 1895.
Ex. 183, Leonard Lewisohn to John Stanton, July 19, 1895.
Ex. 364, Chas. F. Brooker to Lewisohn Bros., Oct. 10, 1895.
Ex. 356, Lewisohn Bros. to Charles F. Brooker, Oct. 5, 1895.
Ex. 258, Same to same, June 25, 1895.
Ex. 273, to Charles J. Brooker, July 24, 1895.
[Adjourned to November 13, 1907.]

WEDNESDAY, *November* 13, 1907.

New York Correspondence, Resumed.

Mr. MCCLENNEN: I was reading from the New York letters introduced by Mr. Hemenway, and the last one was Ex. 273. I will now read,—

Ex. 275, Lewisohn Bros. to H. Wallerstein, July 25, 1895.
Ex. 291, Same to same, Aug. 6, 1895.
Ex. 134, Simon E. Stern to Lewisohn Bros., Sept. 20, 1895.
18 Ex. 94, A. W. Evarts to Leonard Lewisohn, July 12, 1895.
Ex. 95, to A. W. Evarts (unsigned), July 12, 1895.
Ex. 276, to E. Hawley (unsigned), July 25, 1895.
Ex. 244, Lewisohn Bros. to Adolph Lewisohn, May 24, 1895.

Mr. MCCLENNEN: I will also read Exhibit 256, which has not yet been put into the record [reading]:

"JUNE 21ST, 1895.

Mr. William Garland, President, Gila Valley, Globe & Northern Railway Co., Bowie, Arizona Territory.

DEAR SIR: We have your letter of June 14th. It is quite evident to us that you misunderstand our situation completely.

We have purchased the Old Dominion property with a view to utilizing the low grade ores by means of cheap coke and cheap freight out on copper.

To do this we must compete with similar low grade ores now mined at Bisbee and Clifton, as well as in Montana.

If it were a question of paying $28.00 per ton, or even one-half of this sum for freight, as you say your road is now willing to do, we should never have taken the properties.

Your proposition to reduce the rate 2.00 for every 20 miles of road would really mean a minimum rate of about $9.00 on your

road. This we are frank to say is utterly out of the question and would never receive a moment's consideration from us.

We do not desire at any rate to smelt our ores until the railroad is completed into Globe; and in order to assure you of our good faith in the matter, as promised you by Mr. Hyams we are perfectly willing to make any guarantee that you require, in reason, to begin smelting as soon as the road is completed.

The matter resolves itself into this: As at present constructed, your road is practically valueless, and you naturally desire to complete it in order to obtain traffic.

We on our side are naturally desirous of having it completed in order to operate our properties; and, if you will tell us what guarantees you wish in order that you may at once start work and press it to completion, we will see whether we can meet your views.

19 As far as your rates go, there would have to be a radical change in your views, otherwise we do not see how we can start work.

It does seem to us that the situation is important enough for you to have come east to settle the question; but as you do not seem disposed to regard it in that light, we of course do not care to force you or to appear anxious in the matter, as it might place us in a false position.

In conclusion we wish to repeat that with proper rates we intend to operate the property on a much larger scale than it had ever been handled on before, but that until we obtain such rates we shall be obliged to keep it closed down, or see if other arrangements cannot be made.

Very truly yours,

LEWISOHN BROTHERS.

G. M. HYAMS,
General Manager."

Additional Depositions.

Mr. McClennen read the depositions of the following-named persons:—

Stephen N. Crosby, E. M. Dodd, William A. Rust, Edwin C. Swift, David N. Anthony, George Mandell Preston, James F. Ormond, Josiah Grout, Frank E. Stocker, Fred B. Stocker, Angus H. McLoud, Walter P. Smith, John Stanton, Charles S. Smith, Joseph S. Bigelow, Clarence H. Bissell, William J. Ladd, Eugene V. R. Thayer, Henry A. Root, Simon H. Stern, Charles F. Brooker, Galen L. Stone.

[Plaintiff rests.]

WEDNESDAY, *November* 13, 1907.

CHARLES H. ALTMILLER, sworn:

(By Mr. HEMENWAY.)

Q. Will you take your certificates and your certificate stub book?

A. [The witness produces the certificates and the certificate stub book.]

(By SHELDON, J.)

Q. Is this the miscellaneous certificate book?

A. The miscellaneous certificate book.

(By Mr. HEMENWAY.)

Q. No. 1 of this certificate book issued 16 shares to Jesse Lewisohn, July 9, 1895, "For articles of association;" No. 2, A. W. Evarts, July 9, 1895, and No. 3, Edgar Buffum, July 9, 1895, "For articles of association;" No. 4, C. W. Welch, July 9, 1895, "For articles of association;" No. 5, Ferdinand Riddlesdorfer, July 9, 1895, "For articles of association;" No. 6, W. B. Rowe, July 9, 1895, "For articles of association;" No. 7, W. R. Montgomery, 4 shares, July 9, 1895 [exhibiting to court the form of certificate stub].

Q. That is 40 shares in all. Now take your check book, please.

SHELDON, J.: Is there any real question as to those 40 shares? They were issued and cash was received for them? They were issued for the purpose of carrying through the organization of the company and the amount of money so received was deposited by the treasurer in the treasury of the company, and the amount was afterwards paid back to Mr. Lewisohn, and the shares were otherwise disposed of?

Mr. HEMENWAY: No, but what I wish to show, if your Honor please, is that those shares were paid for by this check of $1000.

SHELDON, J.: Has not that already been fully brought out?

Mr. HEMENWAY: It has already appeared, but it is necessary in order to ask the next question.

SHELDON, J.: Then why not go right to the next question? It fully appears that they were paid for by this $1000 check.

Q. Now won't you turn to the record and tell us when there was a record made as to the issuing of those shares; whether before or after the payment? I want to see the first vote in regard to those.

A. The minutes of the first meeting, held at the office of the New Jersey corporation agent, at 243 Washington street, Jersey City, on the 9th day of July, 1895, at 3 o'clock: "It was voted that the amount with which the said company will commence business is one thousand dollars divided into forty shares of a par value of twenty-five dollars each."

Q. Now the next vote in regard to this specific number of shares. That does not, of course, refer to this specific number of shares; it is part of the charter.

A. That is referred to in the meeting held in the office of the New Jersey corporation agent, 243 Washington street, Jersey City, on the 9th day of July, 1895: "Resolved that certificates of stock be duly issued to the original subscribers for the amount of their subscriptions as follows; one certificate of 16 shares to Mr. Jesse Lewisohn, and one for 4 shares each to Messrs. Evarts, Buffum, Welch, Riddlesdorfer, Rowe and Montgomery."

Q. That was at what time?

A. That was July 9, 1895.

Q. They were paid for before that vote was passed, according to the records?

A. No,—July 12 they were paid for.

Q. No, but you referred to it in that meeting.

A. July 12 we received a check for them. The meeting is July 9.

21 Q. Well, don't you find a minute here in regard to Lewisohn, saying that he had the money?

A. Yes.

Q. Now read that.

A. "Mr. Lewisohn reported that he had received the sum of $100 in money each from Messrs. Evarts, Buffum, Welch, Riddlesdorfer, Rowe and Montgomery for their subscriptions to the stock of the company and had in hand the sum of $400, his own subscription thereto, and now held the total amount thereof, $1000, for the use of the company, and he was authorized and by resolution duly passed requested to turn over said amount to the treasurer of the company when elected."

Q. Now what was the date of that?

A. The 9th day of July, 1895.

Q. Well, now this $1000 was paid on the 9th for the stock of the company, and then the vote which you have read later was to issue this stock, the stock that had already been paid for?

SHELDON, J: It appears it had been paid to Mr. Lewisohn; that is, that $600 of it had been paid to Mr. Lewisohn, and he had set aside $400 more, but it does not appear it had been paid to the company. He was instructed to pay it to the treasurer of the company when elected. According to the records, he did pay it to the treasurer of the company on the 12th day of July, three days later. It had been paid for; but it had been paid for, not to the company, but to Mr. Lewisohn, and Mr. Lewisohn held it, so to speak, in escrow; but he did deliver it to the company July 12.

Mr. HEMENWAY: According to the record.

SHELDON, J: According to the record; and I understand that the witness is testifying solely from the records and without personal knowledge.

Mr. HEMENWAY: So that the vote was subsequent to the actual payment to the company.

SHELDON, J: The vote was July 9, the actual payment to the company was July 12.

Mr. HEMENWAY: No. At the organization of the corporation they had $1000; they then elected officers and turned it over to the treasurer; but it was in the company before that time.

SHELDON, J: Lewisohn was one of the intended incorporators, but the incorporation was not complete when the money was paid to him. When it left him we don't know.

Mr. HEMENWAY: I would offer this certified copy of the certificate of incorporation of the Old Dominion Copper Mining & Smelting Company, which shows it began July 8. It contains the same provision, which says:—

22 "The amount with which said company will commence business is one thousand dollars, divided into forty shares of the par value of twenty five dollars each."

SHELDON, J: That is sworn to on the 9th of July, is it?

Mr. HEMENWAY: On the 8th of July.

SHELDON, J: Sworn to the day before the meeting? The meeting was the 9th of July.

Mr. HEMENWAY: But the incorporation was before.

SHELDON, J: Oh, you mean those are the articles of association? It is not a certificate of the meeting? I thought you meant a certificate of the meeting.

Mr. HEMENWAY: Oh, no.

SHELDON, J: I see.

[Certified copy of certificate of incorporation of the Old Dominion Copper Mining & Smelting Company is marked "Exhibit 501, Nov. 13, 1907, G. C. B."]

Q. Now read on page 12.

A. "Mr. Jesse Lewisohn as treasurer reported that he had the sum of one thousand dollars heretofore received by him for account of the subscription of the original stockholders named in the certificate of organization and held the same as the treasurer for account of the company."

Q. That is on what date?

A. July 9.

Mr. HEMENWAY: It is entered here on the 12th. I wish to call attention to the fact of issuing stock when the money was already in the treasury. That is simply some evidence, although I do not think it of any consequence as to the method.

SHELDON, J: I think you can go on.

Q. Now will you turn to certificates No. 71, No. 72, No. 73, and No. 74, and also the stubs? Prior to No. 71, how many certificates were canceled?

A. Fifty-seven.

Q. That is, from 15 to 71?

A. To 70.

[Mr. Hemenway exhibited to the court the canceled certificate stubs.]

Q. Now, anywhere, have you a certificate of the whole capital stock being issued to the treasurer at any time prior to this one which stood in the name of Nelson? There is no such certificate?

A. No.

Mr. HEMENWAY: No. 71; we have already said that was for 100,000 shares, although it appears to be for 100 shares.

23 (By Mr. MCCLENNEN.)

Q. That is the Dumaresq certificate?

A. Yes.

(By Mr. HEMENWAY.)

Q. Let me see that certificate, will you?
A. [Certificate produced.]

Mr. HEMENWAY [exhibiting certificate to court]: That is dated the 18th of September.

Q. Well, now this is said to be issued to sundries?
A. Yes.
Q. Haven't you stated in your deposition somewhere that "sundries" meant that where it was issued to several people,—that that was what you meant?
A. That is correct; that is what the word "sundries" means.
Q. But it does not mean it in that instance?
A. No.
Q. That should be Dumaresq?
A. Yes.
Q. And it is for 100,000 shares instead of 100?
A. Yes.
Q. Now No. 72, to A. S. Bigelow, is canceled?
A. Yes, sir.
Q. Let me see that?
A. [Certificate produced.]
Q. Now that is canceled without any assignment, or anything of the kind?
A. Yes.
Q. Lay that one side. Now No. 73.
A. [Certificate produced.]
Mr. HEMENWAY [to the court]: No. 72, which is canceled, "For vote of Syn."—that was canceled, 20,000.
This is dated September 19, 1895. "Thomas Nelson, Treasurer." This is No. 73, for 20,000 shares, issued to Thomas Nelson, September 18, 1895, "For vote of Syn."—20,000 shares.
Q. Now No. 74, A. S. Bigelow.
A. [Certificate produced.]
Mr. HEMENWAY [to the court]: That is for 30,000 shares. "No. 74, Leonard Lewisohn 2650"—
Q. Is that a mistake? 2650; is not that 22,650?
A. No, sir; "Leonard Lewisohn, 2650."
Mr. HEMENWAY: That is right.
Q. Now after the issue of No. 74 there follow issues of stock certificates to those people that are marked "Cancelled" prior to No. 74, do there not?
A. Yes.
Q. [Producing a cardboard covered book.] On this corrected list of Old Dominion Copper Mining & Smelting Company, I wish you would look at those names.
Mr. BRANDEIS: What is this?
Mr. HEMENWAY: A corrected list.
Mr. BRANDEIS: Where did the book come from?
Mr. HEMENWAY: It came from Mr. Bigelow.

24 Mr. BRANDEIS: Has it just come?

Mr. HEMENWAY: Not now. It was down in your office for days; it is one of the books Mr. Hyams presented.

Mr. BRANDEIS: I never saw it before.

Mr. HEMENWAY: It has been there time and again.

Mr. BRANDEIS: It does not appear in the evidence.

Q. Didn't you produce that book?

A. I don't remember.

Q. Just look at the book, and see if you haven't seen it before.

A. I have seen it at Mr. Bigelow's office; not since then.

Q. Didn't you see it a long time ago?

A. I do not remember.

Q. You would not say that you did not?

A. No, not if I did; I don't remember, really; I saw so many things at that time.

Q. Now won't you look at that list—they are all arranged alphabetically—and tell me if the 60,000 shares of stock that were allotted were not issued in pursuance of this list? And if you cannot tell offhand, just look at the stockholders' list of certificates.

Mr. MCCLENNEN: If we can have an opportunity to look at this, we can tell whether we desire any identification of it, or not.

Mr. HEMENWAY: You may look at it.

SHELDON, J: If I understand the question, however, I think it does already appear, if this list is what he states it is, a list of subscribers to the issue of stock, it includes 60,000 shares,—40,000 of shares for the syndicate, and 20,000 being not issued.

Mr. MCCLENNEN: If I correctly gather the question, I think there is no difference between us in any way.

Mr. HEMENWAY: This is the allotment made out of a subscription of over 70,000 shares.

[Mr. McClennen and Mr. Brandeis examined the book; the question is read and is not objected to.]

A. Yes, sir.

Q. And that was a book that was in the office at the time this allotment was made?

A. Yes, sir.

Mr. HEMENWAY: I produce the book, if your Honor please.

SHELDON, J: Do you put the book in evidence?

25 Mr. HEMENWAY: Yes.

[Book marked "Exhibit 502, Nov. 13, 1907, G. C. B."]

Q. Now the records have been read, and there is nothing in the records—I wish you would notice this question—there is nothing in the records to show any order to pay these different sums to Luce and others, amounting to $19,500? That is correct?

A. No.

Q. What?

A. That is correct.

Q. Now is there any paper in your possession, or anything showing authority on the part of the company to pay out that money?

A. I do not know, I am sure. I did not have charge of that part of the transaction.

Q. Well, you don't know of any authority?

A. No, I do not.

Q. You don't know of any authority in the votes; it simply was paid?

A. That is all, yes.

Q. Are there any votes, to your knowledge, other than those that have been recorded in the books of the company,—any that had not been recorded?

A. No.

Q. You don't know of any such?

A. I don't know of any such.

Q. Now, prior to the 18th day of September, is there any paper in your office—and by "your office" I mean the office of the company—from the beginning—authorizing in any way the opening of a subscription for the stock of the company?

A. Not that I know of.

Q. There is none? Do you know of any subscription list, other than that which has been put in here and called the subscription list of July 18, that was ever sent out by the company?

A. No.

Q. In whose possession have these books been since April, 1902?

A. In mine.

Q. So far as you know, that stock certificate book—stubs—is in the condition it was always?

A. Yes, sir.

Q. And that "For vote of Syn." has always been there, so far as you know, from the day when it was entered?

A. Yes.

Q. In both cases?

A. Yes.

Mr. HEMENWAY: That is all. One moment. I will offer one of those letters that was produced by you or to you.

[Mr. Hemenway confers with Mr. Brandeis.]

Mr. HEMENWAY: I state this: That it is one of the papers that Mr. Hyams produced for you to read and you read it and you
26 did not put it in. Now Mr. Hyams will testify that, you can take my word for it.

Mr. MCCLENNEN: If it may be assumed that he would so testify, then we have no objection to its going in.

SHELDON, J.: It goes in on the ground it was produced by Mr. Hyams, at your request, and examined by you.

Mr. BRANDEIS: We have no objection. If it is such a letter, we do not object to its competency.

SHELDON, J.: I understand that statement is accepted?

Mr. MCCLENNEN: Yes, your Honor.

SHELDON, J.: Then you may put it in.

Mr. HEMENWAY (reading):

"SEARS BUILDING, BOSTON, MASS., *Aug.* 23, 1895.

You are hereby notified that at the request of Mr. Matthew Luce [crossed out in pencil] you have been allotted 100 shares of Old Dominion Copper Mining & Smelting Company at $25 per share. Notice will be sent in due course when payment for this shall be made and also time when stock will be ready for delivery.

A. S. BIGELOW."

Mr. BRANDEIS: It does not appear to be addressed.

Mr. HEMENWAY: What do you mean?

Mr. BRANDEIS: There is no form of address on it.

[Letter marked "Exhibit 503, Nov. 13, 1907, G. C. B."]

Mr. HEMENWAY: I do not think it will be necessary to make a formal opening in this case, because the opening would be substantially a repetition of the testimony. I shall require some considerable time for argument, because the testimony has been brought out in an irregular way by the plaintiffs. By "irregular" I mean not consecutively, as you would put in a case for yourself.

ALLEN W. EVARTS, sworn:

By Mr. TREADWELL:

Q. What is your full name?
A. Allen W. Evarts.
Q. Your residence?
A. The city of New York.
Q. Your occupation?
A. Lawyer.
Q. What is your present firm, if any?
A. Evarts, Tracy & Sherman.
27 Q. In the year 1895 what was your firm?
A. I was a member of the firm of Evarts, Choate & Beaman
Q. How was that firm then constituted?
A. There were seven members of the firm. Do you wish me to give you the names of them all?
Q. If you please.
A. Mr. William M. Evarts, Joseph H. Choate, Mr. Charles C. Beaman, Mr. J. Evarts Tracy, Mr. Treadwell of Cleveland, Mr. Prescott Hall Butler, and myself
Q. In the year 1895 were you—was your firm—professionally employed as counsel for the Lewisohns, or Lewisohn Brothers, in New York?
A. They were clients of the firm at that time.
Q. Do you recollect having any business with Lewisohn Brothers in that year in connection with the company known as the Baltimore Old Dominion Company?
A. I do.
Q. About what time in the year?
A. In June.
Q. What business—what came under your knowledge in that con-

nection? What transactions did you take part in with the Messrs. Lewisohn, or either of them?

A. With respect only to the Baltimore Company?

Q. I refer to the Baltimore Company?

A. Personally I went over to Baltimore with Mr. Leonard Lewisohn to take over the control of the Baltimore Company, the stock of which had been acquired by him and his associates.

Q. Can you fix the date when you went over with Mr. Lewisohn?

A. I went over on the 19th of June, and was present in Baltimore on the 20th.

Q. Was there a meeting of the Baltimore Company at that time, on the 20th?

A. There was a meeting of the board of directors of the Baltimore Company on the 20th of June.

Q. At that time was the control taken in the interest of the Messrs. Lewisohn and their associates?

A. It was.

Q. Do you know whether or not, prior to that time, the Messrs. Lewisohn and their associates had acquired the capital stock of that company; and do you recollect what the division was in fractions of the amount they acquired, and the form of the interests they acquired?

A. I knew that they did acquire a certain interest from the Simpson estate and a certain interest from Mr. Keyser of Baltimore.

Q. Do you remember the ratio of the interests?

A. The Simpson estate, I recall, owned five sevenths, and Mr. Keyser two sevenths, of the Baltimore Company.

Q. Prior to going to Baltimore had you heard anything about any outside claims which were not vested in the Baltimore Old Dominion Company?

28 A. Yes, I had been informed that there were certain claims supposed to be in the interest of the Baltimore Company to which the Baltimore Company had not the title.

Q. Who had title to those claims?

A. William—I think his name was William—William Keyser.

Q. Had that property been acquired by the Lewisohns and others in their interest at the time you went over to Baltimore?

A. I should state that it had been acquired, but that the deed, as I recall, was given on the 20th of June; I am very sure of that.

Q. The contract or agreement with Mr. Keyser had been completed?

A. It had been completed before; and the deed was executed, I think, that day in Baltimore.

Q. The date of your going to Baltimore you fix as June 20. At or about that time had you in mind, or before going to Baltimore, the formation of any new company on behalf of Lewisohn Brothers?

Mr. McClennen: Just one moment. That particular question seems to be objectionable.

Sheldon, J.: I think I will have to receive it.

Q. [Question repeated.]

A. At or about that time.

Q. Are you able to fix the date?

Mr. McCLENNEN: Just a moment. He has not completed his answer.

The WITNESS: No, I had not finished. I had not, as I now recall, any knowledge of the formation of a company at the time I was employed to go over to Baltimore to take over this company. That is the best answer I can give.

Q. A letter has been put in evidence by the plaintiff, dated June 28, 1895, which reads as follows:

"C. C. BEAMAN, Esq., Messrs. Evarts, Choate & Beaman, 52 Wall Street.

DEAR SIR: We merely desire to confirm our messages both by wire and on the telephone this afternoon that Mr. Leonard Lewisohn would like to hear from you at your convenience whether it would be best to reorganize the Old Dominion Copper Company under the laws of Arizona or whether it would be more advantageous to do so under the laws of some other State.

Very truly yours,
LEWISOHN BROTHERS."

Now does that letter in any way refresh your mind as to when, if ever, the question of forming a new corporation arose?

A. What is the date of the letter?

29 Q. June 28, 1895.

A. I should say that I had information of the intention to form a new corporation after my visit to Baltimore and after the time of that letter; yes, that is my impression.

Q. Did you make any investigation into the laws of Arizona?

A. I did examine the laws of Arizona.

Q. What was the result of that investigation?

A. The result of that examination was that our clients were advised that there was no special advantage, in our opinion, in forming a corporation under the laws of the state of Arizona over that of forming a corporation under the laws of the state of New Jersey.

Q. Was it then contemplated to form a corporation under the laws of the state of New Jersey?

A. We were instructed to incorporate under the laws of the state of New Jersey after that.

Q. And for what amount of capital?

A. 150,000 shares at $25 each, equivalent to $3,750,000 capital.

Q. For what was capital to be issued?

A. For the property of the——

Mr. McCLENNEN: It appears definitely for what it was issued.

Mr. TREADWELL: Perhaps I will withdraw the question in that form.

Q. For what was that amount of capital fixed?

Mr. McCLENNEN: Again it seems that involves practically the same objection. What was done speaks for itself.

SHELDON, J.: What you wish for is what information he received from Mr. Lewisohn or Mr. Lewisohn's associates, and the conclusions to which they came. If you desire to put that directly, you may.

Mr. TREADWELL: Well, that is what I am getting at. Of course, Mr. Lewisohn is dead and Mr. Beaman is dead.

Mr. HEMENWAY: The court rules you may ask it.

SHELDON, J.: What took place between the witness, Mr. Lewisohn, Mr. Bigelow, and their associates?

The WITNESS: May I go on in my own way and state my instructions and what was done?

Mr. HEMENWAY: Certainly, if your way is within the rules of the court.

Mr. MCCLENNEN: I should be glad to have Mr. Evarts do it in that way, if I may ask to have it stricken out if it is objectionable.

SHELDON, J.: I should not allow it to be stricken out if I allow it to be taken de bene, as the other testimony has been.

30 Mr. MCCLENNEN: But the only way to save this de bene objection is by calling your Honor's attention.

SHELDON, J.: I realize that, and you may save it in that way.

The WITNESS: Our instructions were——

(By SHELDON, J.:)

Q. That is, instructions from Mr. Lewisohn?

A. From Mr. Lewisohn. If I may preface this, as it is taken in this way, as I have never been a witness before, and as I know the difficulties of being a witness—Mr. Beaman was the responsible counsel in charge of this matter. What I did, I did under instructions from Mr. Beaman and Mr. Lewisohn. And the instructions received were to form a corporation in New Jersey under the New Jersey law for the purpose of taking over from Mr. Lewisohn and his associates the properties relating to the Old Dominion Company of Baltimore which they had acquired, and the sum of $500,000 cash which was paid in for working capital.

(By Mr. TREADWELL:)

Q. Did those properties include not only the Baltimore Old Dominion Company of which they held title, but also the so-called Keyser claims?

A. They did.

Q. Was there any distinction made in those properties, or were they then considered as alike?

SHELDON, J.: You were to ask what was said.

Mr. TREADWELL: I will withdraw the question.

Q. Subsequently, and after the formation of that corporation, did you attend to the meetings and the organization?

A. I attended to all the detail work of organizing the corporation, of attending the corporation organization meeting and the subsequent meeting of July 11, when the book was written up and sent on to Boston; I also attended afterwards to the preparation of the deeds and other papers necessary to carry out the contracts which were made at those meetings.

Q. The minutes of the corporation which are in evidence show the holding of a meeting at 243 Washington street in Jersey City on the 9th day of July, 1895, and you were present at that meeting?

A. I was.

Q. The minutes of the meeting of July 11, which are in evidence, recite yourself as being present. That meeting appears to have been held at 81 Fulton street in the city of New York. You were present on that occasion?

A. I was.

Q. Mr. Montgomery appears to have been one of the directors at that meeting who was not then present. Who was Mr. Montgomery, or what was he at that time, as you remember?

A. He was a clerk in the office of my firm.

Q. Had he been notified by you to attend that meeting?

A. He had.

31 Q. Have you any recollection whether Mr. Bigelow was present at that meeting?

A. I think Mr. Bigelow was present, but I was not personally acquainted with Mr. Bigelow, and I could not at this late day swear to any independent recollection of his presence. I think he was there.

Q. And it is your present recollection that the statement in these minutes that he was present, and, being present, took his seat, was correct?

A. I have no doubt of it.

Q. At that time it is recited in these minutes that two offers were submitted. I hand you plaintiff's Exhibits 1 and 2, and ask whether they bear your signature?

A. Exhibit 2 is signed by me as secretary of the Old Dominion Company of Baltimore.

Q. In whose handwriting is the interlineation, or are the words written in, in the first blank, "one hundred thousand"?

A. The blank filled in with the words "one hundred thousand" is in my handwriting.

Q. And the blank filled in on the last line, the date?

A. The word "first" is in my handwriting.

Q. Referring to plaintiff's Exhibit No. 1, being the offer of the Keyser claims, state in whose handwriting the blanks, if any, are filled in, in there.

A. The blank filled in with the words "thirty thousand" is filled in by me, in my handwriting, and the date "11th" is in my handwriting.

Q. What can you say of the words "Please issue said stock, thirty thousand shares of stock, to Mr. A. S. Bigelow, and myself"?

A. Those words at the foot of the offer marked "Exhibit 1" were written by me.

Q. And signed by whom?

A. Signed by Mr. Leonard Lewisohn.

Q. Mr. Lewisohn was present on that day, was he not?

A. He was.

Q. You have stated that the entire property of the Baltimore

Old Dominion Company was to be turned over to the New Jersey corporation; for how much stock,—the entire property of the old company was to be turned over to the New Jersey company for how much of its stock?

A. I thought I had stated that; 130,000 shares. The stock of the company was to be 150,000 shares at $25. It was to receive the Baltimore Company's property and $500,000 cash from Mr. Lewisohn and his associates. That would make 130,000 shares for the Baltimore Company's property, and 20,000 shares for the cash.

Q. These properties seem to have been offered in two parcels: can you explain why those offers were made separately?

Mr. McCLENNEN: I wish to save an objection to this.

SHELDON, J.: This is taken de bene. Of course the question involves what was said between him and Mr. Lewisohn.

32 Mr. TREADWELL: Both their own ideas as counsel and the ideas of the parties.

SHELDON, J.: The ideas of counsel, so far as they were spoken to Mr. Lewisohn,—anything that was said to Mr. Lewisohn.

A. I cannot recall at this date exact conversations, but I had conferences with Mr. Beaman and with Mr. Leonard Lewisohn, at which this question of the Baltimore Company's properties was considered, and with reference to these two propositions. As the result of those conferences those two propositions were drawn by me and presented—executed and presented.

Q. Was the title at that time in such a position that it could have been transferred by the Baltimore Company?

SHELDON, J.: Do you care to put that question? It already appears that it had been in the Keysers and was now in the Lewisohns.

Mr. TREADWELL: I only wanted to cut out the possibility that it had been transferred. I did not want to leave any misunderstanding on that subject.

Q. How was the amount fixed in those offers as to the number of shares which each parcel was offered for?

A. It was an arbitrary division of the 130,000 shares.

Q. Were the properties known as the Keyser claims supposed to have absolute value at that time, or was there any doubt at that time as to their exact value?

A. I can only testify as to what I learned at those conferences between my partner and our client.

Q. That is all I am referring to.

A. The outlying properties, as I call them, the title to which was in Mr. Keyser, were then to us represented, or by Mr. Keyser, to be of little or no value, and were always represented to us, as I learned at that time, to be held by him for the beneficial interest of himself and the Simpson estate. They were turned over, as I think must appear, without any consideration further than the purchase of the stock, and were regarded by Mr. Lewisohn, by himself, and his associates, as a part of the acquisition of the property of the Baltimore Company. They were not admittedly, as I was informed at the time, of no value; they were old mining claims, I am sure, at

least one, and mining claims, one that had not been worked for some years, and its real, actual value in any state uncertain, but they were regarded as one property. The titles, the legal titles, were in different hands. The Baltimore Company had title to this main property, and Mr. Lewisohn had acquired for himself and his associates the legal title from Mr. Keyser of the outlying property, all of which we were instructed to put into this corporation, and it was a matter of indifference as to what valuations should be put upon them, but it was, as I have said, an arbitrary distribution of the amount of shares.

Q. Mr. Evarts, had you become interested or had you rather taken an interest in the so-called Old Dominion Syndicate?

A. Well, had I? I do not remember I had. Yes, I did have an interest before the company was—I don't know when—I did have a subscription to the syndicate.

Q. Do you remember the amount of that interest?

A. $2000.

Q. From whom did you take that interest?

A. From Leonard Lewisohn.

Q. At the time you took that interest was there any agreement made as to any particular profit that you were to receive therefrom?

A. No.

Q. Was anything said as to whether you should receive more or less stock therefrom?

A. No, nothing was said on that subject.

Q. How much stock did you ultimately receive?

A. Well, I suppose it was,—a $2000 interest, that was 40 shares,—I don't really remember.

[Recess until 2 p. m. and resumed.]

Q. I was asking you just before recess how many shares of stock you received under your agreement with Lewisohn Brothers?

A. 160 shares.

Q. Now, Mr. Evarts, I understand you to have testified that the Old Dominion Company of New Jersey, the present corporation,—that you were instructed to form the Old Dominion Company, the present corporation, with a capital of 150,000 shares or $3,750,000, all of which was to be issued to Lewisohn and Bigelow, for all the properties of the Old Dominion Company and $500,000 in cash.

Mr. McClennen: Just a moment. The witness' own version, I think should not be affected by such a leading form of question.

Mr. Treadwell: This is simply a preliminary question.

Sheldon, J.: I do not see how I can admit it, even as a preliminary question.

Q. Well, whom were you told were to pay that cash?

A. Mr. Lewisohn and Mr. Bigelow.

Q. What were you told they were to do?

A. I cannot remember the exact words, but I was told by Mr. Lewisohn that he and Mr. Bigelow would assume the obligation of that payment.

Cross-examined.

(By Mr. McCLENNEN:)

Q. It has appeared, Mr. Evarts, that the firm of Evarts, Choate & Beaman, or perhaps Mr. Beaman of that firm, had been consulted with reference to the option on this matter as early as or prior to the 4th of May, 1895, and in some various matters concerning it thereafter. What was the first part of the service of the firm that was performed by you, personally?

34

A. Going to Baltimore.

Q. How long before your going to Baltimore had the matter first been called to your attention as requiring any consideration by you?

A. Not at all. I assume you mean professional consideration, because I knew that Mr. Beaman was employed, but I was not called upon for any professional service.

Q. But prior to that time you may have known that that matter was in the office?

A. I may or may not; I presume I did.

Q. When you were asked to go to Baltimore, by whom specifically were you asked, if you recall?

A. By Mr. Beaman. I remember of being asked by Mrs. Beaman.

Q. Did you personally make the investigation or supervise the making of the investigation of the Arizona law, made in consequence of the letter of June 28?

A. I looked up the Arizona statutes and conferred with Mr. Beaman on the subject.

Q. Was that as the result of receiving that letter or of a conference with Mr. Beaman after he had received that letter?

A. Well, I do not remember, but I should suppose after conference with Mr. Beaman, but I have no independent recollection. I think the letter speaks something about telephonic communication, doesn't it? I don't remember.

SHELDON, J.: Previous communication by telephone.

Q. Have you any recollection or any means of being of assistance in determining whether this letter or telephonic conversation that that letter referred to was the first that had been said by Mr. Lewisohn with reference to the possibility of using Arizona as the state for incorporating?

A. No, I think not.

Q. Have you any recollection that would assist you in saying whether or not your investigations of the law of Arizona had, in fact, gone before or after that particular?

A. No. What was the date of it?

Q. June 28.

A. No, not absolutely. There is a circumstance which, perhaps, might fix it in my mind, if you want that.

Q. If you will refer to that circumstance and let me have your statement.

A. Well, it could not have been many days before; it must have been almost immediately before.

Q. Almost immediately before the 28th?

A. If it was not after, it must have been immediately before; I have a reason for fixing that.

Q. After you had completed the work of the Baltimore
35 meeting on June 20, do you recall whether there was anything pending requiring your personal attention?

A. I do not quite understand the purport of your question.

Q. I mean, do you recall when you had concluded the specific work of seeing that the transfer of June 20 was made properly in Baltimore; was there then anything for you to do in the matter?

A. No.

Q. Or did you then await further instructions?

A. I should say no, from the same circumstance.

Q. Do you recall whether or not you personally had heard of the question of the new corporation before the question of the Arizona law was called to your attention?

A. I do not recall.

Q. Do you keep a diary?

A. I keep a personal diary.

Q. Have you that handy?

A. I have not brought it here.

Q. Have you consulted it at all?

A. Yes, I have looked at it.

Q. Were you continuously in the office at about this time?

A. I found—is that what you want me to say?

Q. Yes, I want to find out just what your career was at that time.

A. I wanted to see if I could find anything. I do not keep a complete diary, by any means, but when I leave town I usually put it in. I found, on consulting this diary, that I left on the 19th for Baltimore on the 3:20 train and came back the next day at 5 o'clock, and that I went to Vermont the next day or the day following, and was there for about a week, so I did not get back to New York until about this time.

Q. Up to the time of your return from Vermont had your connection with the matter been such that the question of what was to be done next would naturally have come to your attention?

A. I don't know whether to say no or yes.

Q. [Question read.]

A. I should say no.

Q. Then, to put it in another form, is it accurate to say that, barring the one matter of attention to the Baltimore meeting, your first connection with this matter was with reference to the formation of a new corporation?

A. Yes, that is right.

Q. Was the division of labor in your office such that the formation of a corporation in Mr. Beaman's larger matters would have come to you personally to attend to?

A. It was.

Q. Have you in your office any papers relating to this matter?

A. I have.

Q. Have you consulted them recently?

A. I have.

Q. Have you brought them with you?

A. I have brought some.

Q. Is there among them any that sheds any light upon
36 the date when the subject of the reorganization of this company first came to the attention of the office?

A. Not any definite date.

Q. Have you the correspondence from Mr. Lewisohn to Mr. Beaman?

A. I have not looked at it. We have it in the office, but I have not looked it up in connection with this matter at all.

Q. What, in general, are the papers that you have inspected recently in connection with this matter?

A. Why, they are mostly drafts; there is scarcely anything else except drafts. There is a letter, I think that same letter that is here, I think I have that letter; there are one or two letters and the drafts of this incorporation and minutes.

Q. Did the subject of a corporation with a capital stock of $2,500,000 or 100,000 shares of $25 each ever come to your attention in connection with this matter?

A. $2,500,000?

Q. $2,500,000.

A. I think not.

Q. Who gave you the information as to who was to contribute the $500,000 cash?

A. Mr. Lewisohn and Mr. Beaman.

Q. Was it in conference?

A. It was in conference with them.

Q. Was your attention called to the fact that stock was to be put upon the market?

A. No.

Q. That stock of the new company was to be put upon the market?

A. No.

Q. You personally were not aware of the existence of the intention, if it did exist, of obtaining $500,000 from outsiders?

A. On the contrary, I understood it was not to be obtained from outsiders.

Q. That is, you acted at this time supposing or understanding that the corporation was to remain held by Mr. Lewisohn and Mr. Bigelow and his associates?

A. Not forever.

Q. Well, as far as anything——

A. As far as the formation was concerned, yes.

Q. As far as the formation was concerned?

A. Yes, I did so understand.

Q. You were not apprised of the intention to open or prepare a subscription list substantially immediately?

A. No, I understood that was not the intention. That was my understanding.

Q. You spoke of the property having been acquired by Mr. Lewi-

sohn, Mr. Bigelow, and his associates—their associates, as I understood you?

A. No, I think I said Mr. Lewisohn and his associates. I was not personally acquainted with Mr. Bigelow at that time.

37 Q. Pardon me. Whom did you intend by the term "associates"?

A. I meant Mr. Bigelow, whom I had met at that time.

Q. Were you sufficiently informed of the details of the matter so that you knew that, as far as the payments had been made up to, we will say, the 1st of July, the major part of the money had been furnished by persons other than Mr. Lewisohn and Mr. Bigelow?

A. I did not know it.

Mr. HEMENWAY: That is not in evidence, nor understood to be the fact.

SHELDON, J.: I think there is evidence from which that fact might be inferred, that the greater part of what money had been furnished had been furnished by others.

Mr. MCCLENNEN: Now I will put my question again, or if the stenographer will read it——

[Question read.]

Mr. MCCLENNEN: Perhaps I will reframe it. I did not understand there was any difference between us.

Q. Were you sufficiently familiar with the details of this matter to have been informed of the fact, if it was a fact, that up to the first of July such payments as had been made for this property had been with money the major part of which had been furnished by persons other than Mr. Bigelow and Mr. Lewisohn?

A. I think not.

Q. Had you been informed by Mr. Lewisohn or Mr. Bigelow, up to the 11th of July, that you were in fact acting as attorneys for the Old Dominion Syndicate, if such was the fact?

A. I do not recall.

Q. Did you have anything to do with the preparation of the bill for services in this matter rendered by Evarts, Choate & Beaman?

A. No, I don't think I ever saw it until within the last two or three days.

Q. Do you know whose was the selection of the name "Old Dominion Syndicate," as the person or combination of persons who were charged for your services?

A. I can only say it must have been Mr. Beaman.

Q. And Mr. Beaman's connection with the matter, as you have already indicated, was very much more intimate than your own?

A. Yes.

Q. Would it be a fair characterization of your connection with the matter to say that it was at all times confined to the carrying out of specific portions of the matter called to your attention by Mr. Beaman, either alone or in conjunction with Mr. Lewisohn?

A. It would, except so far as I might be called upon in carrying those out, to give some advice as to some detail.

38 Mr. MCCLENNEN: I am very much obliged to you.

Redirect examination.

(By Mr. TREADWELL:)

Q. One question, Mr. Evarts. Was the matter of the existence of the outside claims which Keyser held known to you when you went to Baltimore with Mr. Lewisohn?

A. Yes. The deed, I think, was executed there that day.

Q. Well, had the existence of those claims been discussed, or had the matter been brought to your attention, that there was an effort to get those claims into the ownership of Bigelow and Lewisohn?

A. Yes. I knew there were those claims. The deed, I think, was drawn by me, and executed in Baltimore on the 20th, if I am right in my recollection.

Q. The deeds from the Baltimore Old Dominion Company of the property that was sold: were they prepared by you?

A. The deeds from——

Q. The Baltimore Old Dominion Company.

A. To the new?

Q. Yes,

A. Yes.

Q. How long was it, if you remember, before they were completed?

A. Oh, it took some months. There was a great deal of detail work, and it took a great deal of time—I think December or January.

EDWARD C. PERKINS, sworn.

(By Mr. FARLEY:)

Q. Your full name is Edward C. Perkins?

A. Edward C. Perkins.

Q. You live in Milton?

A. In Milton.

Q. Your are a counsellor at law, practicing in Boston?

A. Yes.

Q. With an office in the Sears building?

A. In the Sears building.

Q. What, in 1895 and prior thereto and thereafter, was the general character of your practice?

A. Well, from the beginning, mainly, I began as a clerk and student with George S. Hale and afterwards was his partner, and his business was largely corporations. He was counsel for the Boston & Albany and for the Western Union here in Boston. Then, I was with him until 1879,—with General Walcott, we had a partnership; then I went to Colorado on account of my deafness. Before I went I was for two years attorney for the Bell Telephone Company at the beginning of their starting here, that is, their local attorney, not their patent attorney, but their local attorney. I gave that up and had to go West in the latter part of 1878. I was West for about five years; then I came back in 1883, and I took an office
39 in the spring of 1884 in the Sears building, and then the first practice that I had after that was that I was attorney for the Chicago, Burlington & Northern when that was organized, and

I was also attorney for the Chicago, Burlington & Quincy. Then after that I had a good many corporations, mainly those that Mr. Bigelow was president of, besides the two railroad corporations, so that my practice has been substantially, outside of trust matters, a corporation lawyer, as I have never been able to go to court on account of my deafness.

Q. Were you, in 1895, consulted about the Baltimore Old Dominion Company, the Old Dominion Copper Company of New Jersey?

A. Well, I was consulted about the Old Dominion Company, the one that was organized, I think, in New York, by Evarts, Choate & Beaman, if my memory serves me. I was local attorney here.

Mr. FARLEY: Now if you will produce that bill.

Mr. MCCLENNEN: It is not here.

Mr. HEMENWAY: Of course the original would be preferable to help a man's memory.

Mr. BRANDEIS: It will be here shortly.

Q. Do you recollect whether or not you sent a bill for services rendered to that company, or for that company?

A. Yes, I sent a bill for the year 1895.

Mr. FARLEY: Understanding that the original will be here later, I will ask him to refer to his letterpress copy.

Q. Have you a copy of that bill?

A. I have a press copy here in my book.

Q. Will you find it, please?

A. This is rendered the 1st of January, 1896, for the year from the 1st of January, 1895.

Mr. FARLEY: I will later call your Honor's attention to this, but merely state that is one of the plaintiff's exhibits, the original of which will be here.

SHELDON, J.: Yes. I think it was read.

Q. In connection with the matters for which this bill was rendered, were you consulted with regard to the status of certain stock; and, if so, by whom?

A. I was consulted by Mr. Nelson in regard to stock that stood in his name.

Q. And, if you recollect, about when?

A. I could not fix anything except by—in a very general way, it was during that year.

Q. Will you read from this copy of your bill the next to the last item?

A. "Consultation with Mr. Nelson in regard to stock standing in his name on the company's books and advice in regard thereto."

Q. Will you read the item preceding that?

40 A. "Consultation with Mr. Nelson and Mr. Bissell in regard to meeting of directors and meeting of stockholders in regard to what votes should be passed at such meeting and preparation of votes to be passed."

Q. As I understand, that bill was rendered January 1, 1896?
A. Yes. I will not swear it was turned in that day.
Q. But somewhere thereabouts?
A. It covered until that date.
Q. Now it appears from the records of the company that a meeting was held of the Old Dominion Copper Company's directors September 18, and that subsequent to that meeting a general approval of the stockholders of the company was appended to the records, and that the next meeting thereafter was not until November 24, 1897. Refreshing your recollection by referring to those records, and noticing that Thomas Nelson, "Treas." signed the approval of stockholders, can you state what Nelson consulted you about, what he said, and, so far as you can, what you advised?

Mr. McClennen: I object.
Sheldon, J.: This is taken de bene. Go on.

A. I can say this: I was consulted in a general way about all of the affairs of the company and prepared papers for them, and either drew or redrew by-laws; I do not remember whether I drew the original set or whether they were afterwards changed by me. Mr. Nelson consulted me about stock standing in his name as treasurer, and he told me that that was not treasury of the Old Dominion Company, and on that I advised him that he could vote it.
Q. Did he state anything further in regard to the stock?
A. Not that I can remember. He did say that it was not treasury stock of the Old Dominion Company, and on that I told him he could vote it. It was held by him as an outside party, just as if he had been treasurer of the Boston & Albany Railroad, or anything else.
Q. Well, beyond that, do you remember whether he stated anything as to whether or not the Old Dominion Copper Mining & Smelting Company had any interest in the stock?
A. He said it was distinctly outside of the Old Dominion Company.
Q. Was it on that statement of Mr. Nelson's that you based the advice?
A. Certainly.
Q. Now if you will again state what that advice was?
A. My advice was to him that he could vote that stock, as it did not belong to the Old Dominion Company, but that if it was Old Dominion Company's stock, and stood in his name as treasurer, then they could not vote it. That is, that an officer could not vote treasury stock.
Q. Was it pursuant to that advice, if you know, that these records were made?
41 A. I have not a shadow of doubt, although I will not say I remember absolutely, but seeing them here and knowing from our bill that this whole thing was prepared by me, supervised from the beginning, because my bill shows a charge for it.
Q. Will you now read the last paragraph of those records aloud, and see if that further refreshes your recollection?

A. "The undersigned stockholders of the Old Dominion Copper Mining & Smelting Company do hereby approve the action of the directors shown by the above record of meeting held on the 18th day of September, 1895: Leonard Lewisohn, A. S. Bigelow, Thomas Nelson, Philip A. Dumaresq." No, it does not refresh it in any way.

Q. Do you know who Leonard Lewisohn was?

A. Yes, very well.

Q. Who was he?

A. He was a New York merchant who dealt very largely in coppers of all kinds. I met him a good many times.

Q. Had he, if you know, been associated with Mr. Bigelow?

A. Oh, yes, I had seen him with Mr. Bigelow, and they called me down when Mr. Lewisohn — there about several things.

Q. Mr. Bigelow, as you understand, is president of different companies?

A. Yes, I am told so.

Q. Thomas Nelson, did you know?

A. I knew him very well indeed.

Q. And Mr. Dumaresq?

A. Yes, for fifty years.

Q. Who was Mr. Dumaresq?

A. Who was he? He was the son-in-law of Captain——

Q. No, I mean what was his position with Mr. Bigelow?

A. That I would not say from memory, but he was transfer agent for a good many of the companies for a long time; I would not say from memory whether he was at that time particularly. The way he came into it at first was because he was a connection of Tom Nelson's.

Q. Mr. Perkins, it appears by the stub of certificate No. 73, which was a certificate issued to Thomas Nelson, treasurer, for 20,000 shares, as expressed by the stub, that that was for the vote of the syndicate?

A. Yes.

Q. Will you state whether or not that was in accordance with what Mr. Nelson told you?

[Objected to.]

A. That I cannot say.

SHELDON, J.: I do not think I could take it even to put it on the record.

Mr. FARLEY: In that case I think I will ask no more questions.

Q. Have you that bill yet?

Mr. BRANDEIS: No, it has not come.

42 Cross-examination.

(By Mr. McCLENNEN:)

Q. Have you any way of stating, Mr. Perkins, when this conversation with Mr. Nelson occurred?

A. No, there was no conversation.

Q. Have you any way of stating when the particular interview occurred in which he told you that he did not hold that stock in his name as treasurer of the company?

A. You mean the date?

Q. Yes.

A. No, not the slightest.

Q. Could you by reference to these records in any way fix the date on which that conversation took place?

A. I could not any more than I see the date of the record, that is all. I could say it was probably some time before that.

Q. That is, it was before the meeting at which those votes were to be passed that you gave him this advice?

A. Let me understand what meeting it is. Yes, probably where the by-laws came in; yes, because I prepared the by-laws.

Q. It was in connection with preparing those by-laws that you had this conversation?

A. No, sir; I had general consultation about all that kind of thing, especially about that one particular thing of the stock. I remember that, you see. That stood "treasurer," and that brought up the question because I had an opinion that he could not vote the treasury stock if it belonged to the company. That brought up the whole discussion.

Q. Was this discussion as to his right to vote treasury stock at the time that you were discussing the passing of these new by-laws?

A. Well, probably that went over lots of days. I didn't make by-laws in an hour. We were at this thing for days.

Q. What was the vote which you advised him that he could vote upon if he did not hold for the company, and could not vote upon if he did hold for the company?

A. Any vote that was presented.

Q. Do you now recall what votes were under consideration?

A. Nothing more than by reference back to the things; I see what is there.

Q. Well, will you read through those records, beginning, if you please, with the record of the meeting of the 11th of July, and going through all those of September?

A. Read them to myself?

Q. Read them to yourself, if you will.

A. Is this the one?

Q. This is the meeting of July 11. If you will, read that and the one of July 24 and the one of September 18 that run along together, and see if they will refresh your recollection as to the votes about which there was a question.

A. You don't want me to read this schedule of mining properties out in the West, do you?

Q. I don't think that would do you any good at all.

A. [Having perused the record.] No I don't. My advice was simply that he could vote that stock like any other stock-
43 holder; that is all.

Q. And that reading of the record does not enable you

to state when that advice was given, on what particular vote, or anything else?

A. He simply wanted to know if he could vote that stock, and he had told me it was not the property of the Old Dominion Company; and I said certainly he could vote it, as any other stockholder could.

Q. Do you recall anything about how much stock there was standing in his name at the time of this advice?

A. No, I could not remember that from memory at all, only that there was stock standing in his name as treasurer, and he explained the matter to me that it was not as treasurer of that company. Dealing, as I was, with that question all the time with corporations, I had told them, time and again, they could not vote treasury stock; and that brought up the question instantly.

Q. Did you inspect the records at the time you gave him that advice?

A. The previous records? I cannot say.

Q. Were you aware whether or not, at the time of that advice, the corporation had passed any vote authorizing the issue of any stock to Thomas Nelson?

A. I cannot say; my memory will not let me.

Mr. FARLEY: At what time?

Mr. MCCLENNEN: At the time that he gave that advice.

Q. Was this a directors' or a stockholders' meeting about which he was asking your advice?

A. He was not asking specially about any meeting; he was asking my advice all along the line. These by-laws and everything were coming up all the time; we were weeks on it.

Q. Was there more than one occasion on which he asked your advice on this particular subject?

A. That I could not answer you certainly, but I think so.

Q. You think there was more than one?

A. I think so. I talked it over with him; I talked with him—I think with Mr. Bigelow; I think also with Mr. Bigelow, but I am not absolutely certain.

Q. And on each of those occasions he informed you that this stock stood in his name as treasurer?

A. I don't think he took the trouble to tell me that; he told me once, and he thought I would understand.

Q. I am trying to get it as specifically as I can.

A. Of course it was twelve years ago and what not; and as for dates, I do not pretend to remember them. I know I looked over my office papers I have got, and things come back to me; and I remember it distinctly, because it was a curious case, that I advised him to vote stock which apparently stood in his name as treasurer.

41 Q. He was treasurer of a number of Mr. Bigelow's companies?

A. Oh, lots of companies.

Q. And held stock in his name as treasurer in those various companies?

A. I do not remember.

Q. You don't know about that?

A. No, I don't remember whether he did or not. Whether he owned any treasury stock or not, I do not know.

Q. And the curious thing about that case at that time was that stock standing in the name of a man as treasurer on the books of the company should not belong to the company?

A. Not on the books of the company; I did not say that. When I saw the certificate of the treasurer I inquired, I think, of Bissell first, and then I talked with Nelson, and I was informed that it was not treasury stock of the Old Dominion; that the Old Dominion had nothing to do with it.

Q. Would this certificate No. 73 bring back anything to your mind?

A. Not the slightest; not the remotest.

Q. But when he advised with you there was a certificate already in his name?

A. That is my impression.

Q. Then would the fact that the certificate is dated the 18th of September, and that the stock went out of his name on the 19th of September, assist you at all in fixing the time of the conference?

A. No; the stock must have been, the certificate must have been made out. I cannot remember about that.

Q. Then I think I misunderstood you on that. Didn't you say that he showed you the certificate?

A. I don't know that. I said he told me he had stock. He may have showed me a certificate. I don't think I said anything of that kind, because I am not intending to tie myself down to that statement. I understood he had stock simply in his name as treasurer.

Q. You were counsel for Mr. Nelson in other companies, were you?

A. Yes, I was acting for most all of the companies at that time.

Q. Acting for Mr. Bigelow?

A. Well, Mr. Bigelow was president and Mr. Nelson was treasurer. I was acting for most of the companies.

(By Mr. FARLEY:)

Q. Have you any doubt, in spite of the fact that Mr. Nelson consulted you on other matters and so forth, that this advice for which you have charged, about which you have testified, was in relation to the Old Dominion Copper Company?

A. No, not the slightest.

45 [Following is a copy of the book called the corrected list, referred to in the testimony of Altmiller, and marked "Exhibit 502."]

[Outside cover:]

CORRECTED LIST.

OLD DOMINION COPPER MINING AND SMELTING COMPANY.

EXHIBIT 502, NOV. 13, 1907, G. C. B.

46 [Inside cover:]

OLD DOMINION COPPER MINING AND SMELTING COMPANY.

40,000
40,000

80,000
20,000

100,000

	Shs. Total.	$ Orig.	$ July 18.	Shs. List.	Bonus. Rights.	Scaled.	Allot.	Cash.
A	1,225	11,000	22,500	900	240	680	545	5,000
			305,500	12,240	4,900	1,560	1,460	.....
B	11,220	122,500	306,500	12,260	4,860	1,600	1,500	.....
C	6,170	54,000	168,500	6,740	2,160	2,140	1,850	.....
D	970	10,000	4,250	170	400	170	170	.....
E	500	5,000	2,500	100	200	100	100	.....
F	800	7,500	7,500	300	300	200	200	.....
G	2,110	2,000	51,250	2,050	80	2,050	1,950	.....
H	6,905	52,619	222,500	8,900	2,025	3,235	2,775	2,000
J	700	10,000	10,000	400	300	.....	.....	.....
K	600	10,000	5,000	200	200	.....	.....	5,000
L	36,850	458,881	450,000	18,360	18,355	100	100	.....
M	8,000	82,500	67,500	2,700	3,300	2,000	1,400	.....
N	150	.....	103,750	4,150	.....	150	150	.....
O	210	2,000	3,250	130	80	50	50	.....
P	2,980	21,000	52,500	2,100	840	1,500	1,300	.....
R	3,030	21,000	58,500	2,340	840	1,500	1,350	.....
S	7,040	40,500	154,250	6,170	1,620	4,450	3,800	.....
T	1,100	2,500	37,500	1,500	100	900	900	.....
W	9,440	88,000	75,000	3,000	3,520	2,400	2,400	.....
	99,960	1,001,000	1,811,750	72,470	39,520	23,225	20,440	12,000
N. Y. D.	40		1,810,750	72,450	39,420	23,185	20,540	480
	100,000				39,460		20,500	
				100,000				
Allotted		20,440		20,540				20,500
N. Y. Directors		40		40	20,000 a 25			40
		20,480		20,580	40,000 "			20,540
		39,520		39,420	60,000			39,460
		60,000		60,000				60,000

Headings in ink; rest in pencil.

48

15.

c/o E. C. Swift, Ames Bldg. Boston
New Bedford, Mass.
99 Bedford St.
Fall River, Mass.

16.
17.

A. 1
18.

A. 2. B. 1. 19 for 20, 65 for 10.

40 State St.
19 Kilby St.
40 State St.
36 India St.
66 Franklin St.
Traveller Office
79 Milk St.
92 State St.
Springfield, Mass.
Boston News Bureau
Nat. Security Bank
Second Nat. Bank

20
21

22

A. 3. 110
A. 4
23

24
25

Equitable Bldg.
92 State St.
350 Washington St.
557 Boylston St.

26

27
28

18 P. O. Square

			Sub. Orig.	List.	July 18.	Rights.	To be Scaled.	Allotment*	Cash.
Altmiller, Chas. H.	O	185	8500	85,000	200	20	180	145	.....
Anthony, D. M.	O	600	5,000	12,500	500	200	300	200	.....
Abbe, Edw. P.	O	200	.....	5,000	200	.....	200	200	.....
Alline, Jno. W.	O	40	500	.....	.....	20	.....	.....	.....
Anthony, H. H.	O	200	5,000	.....	.....	.....	.....	.....	$5,000
		1,225	11,000	22,500	900	240	680	545	.....
Bissell, Clarence H.		100	.....	2,500	100	.....	100	100	.....
Beal, Jos. S.		200	.....	5,000	200	.....	200	200	.....
Bazeley, Wm. A. L.		220	500	5,000	200	20	180	180	.....
Ball, Geo. H.		1,000	20,000	20,000	800	800	.....	.....	.....
Bolles, Richard F.		740	6,000	12,500	500	240	260	260	.....
Belches & Co., J. W.		1,300	10,000	22,500	900	400	500	500	.....
Burnett, Harry		*800	10,000	10,000	400	400	.....	.....	.....
Billings, Robt. C.		800	10,000	12,500	500	400	100	.....	.....
Bond, Chas. P.		20	.....	500	20	.....	20	20	.....
Brown, Sam'l N.		800	10,000	10,000	400	400	.....	.....	.....
Bradley, Peter B.		100	.....	2,500	100	.....	100	100	.....
Bartholomew, S. B.		100	.....	2,500	100	.....	100	100	.....
Barron, C. W.		40	1,000	[1,000]†	[40]†	40	[40]†	[40]†	.....
Bigelow, A. S.		4,000	50,000	200,000	8,000	2,000	.....	.....	.....
Batt, Chas. R.		200	2,500	.....	.....	100	.....	.....	.....
Beal, Thos. P.		200	2,500	.....	.....	100	.....	.....	.....
		11,220	121,500	306,500	12,260	4,860	1,600	1,500	.....
			122,500	305,500	12,240	4,900	1,560	1,460	.....
Chrimes, W. A. S.		180	500	5,000	200	20	180	140	.....
Cole, Jr., Chas. H.		200	1,500	5,000	200	60	140	140	.....
Clark, Ward & Co.		1,250	.....	37,500	1,500	.....	1,500	1,250	.....
Cole, Chas. H.		400	5,000	5,000	200	200	.....	.....	.....
Coe, Henry T.		920	8,000	15,000	600	320	280	280	Paid
			600	.....	.....	.....	.....	.....	.....
Cheever, David W.		25	.....	625	25	.....	25	25	Paid
Coram, Jos. A.		1,520	19,000	100,000	4,000	760	.....	.....	.....
Crosby, Stephen M.		1,600	20,000	.....	.....	800	.....	.....	.....

* Wanted in ctf. of 100 shs. ea.

[† Figures enclosed in brackets erased in copy.]

50

24 State St., New York, N. Y. 29
620 Atlantic Ave. B. 2.
170 State St. 30
19 Congress St.
A. 5.

11 Oak Grove Terrace, Roxbury. Notices c/o Price & Co.
35 Congress St.
A. 6.
A. 7.

48 Congress St.
c/o Chas. H. Cole
Summer St.

31.
Houghton, Mich. 32.
St. Johnsbury, Vt. 33
41 Devonshire St. 34
Houghton, Mich. B. 3.
20 North St.

53 State St. 35.
" " A. 8
87 Milk St. 36
Daniellsonville, Conn. also $6.00 37
Houghton, Mich.
Springfield, Mass. A. 9
c/o Leland, Towle & Co. 38

28 High St.
301 Congress St.

		Orig. Sub.	List.	July 18.	Rights.	Scaled.	Allotment.	Cash.
Cammann	.....	.....	.....	.....	.....	.....	.....	.....
Cousman, Oswald N.	15	.....	8375	15	.....	15	15	Paid
	6,170	$54,000	168,500	6,740	2,160	2,140	1,850	.....
Dodd, Edw. M.	50	.....	1,250	50	.....	50	50	.....
Davenport, C. L.	120	.....	3,000	120	.....	120	120	.....
Demmon, Dan'l L.	800	10,000	.....	.....	400	.....	.....	*[$10,000]
	970	10,000	4,250	170	400	170	170	.....
Eldredge, A.	100	.....	2,500	100	.....	100	100	.....
Ely & Co.	400	5,000	.....	.....	200	.....	.....	.....
	500	5,000	2,500	100	200	100	100	.....
Fitzgerald, Wm. F.	100	.....	2,500	100	.....	100	100	.....
Foote & French	100	.....	2,500	100	.....	100	100	2,500
Field, R. M.	200	2,500	2,500	100	100	.....	.....	.....
Fenno, Isaac	400	5,000	.....	.....	200	.....	.....	.....
	800	7,500	7,500	300	300	200	200	.....
Gray, Dewey & Co.	400	.....	12,500	500	.....	500	400	.....
Goodell, Ropes R.	300	.....	7,500	300	.....	300	300	.....
Grout, W. W.	1,000	.....	25,000	1,000	.....	1,000	1,000	.....
Greenleaf, E. D.	200	.....	5,000	200	.....	200	200	.....
Goodell, H. S.	50	.....	1,250	50	.....	50	50	.....
Goodenough, H. B.	160	2,000	.....	.....	80	.....	.....	.....
	2,110	2,000	51,250	2,050	80	2,050	1,950	.....
Head & Co., Chas.	1,080	3,500	27,500	1,100	140	960	800	.....
Head, Chas.	900	10,000	12,500	500	400	100	100	.....
Hayden, Stone & Co.	2,100	10,000	50,000	2,000	400	1,600	1,300	.....
Hopkins, Timothy E.	825	8,119	12,500	500	325	175	175	4,384
Hodge, Chas. J.	†800	10,000	10,000	400	400	.....	.....	.....
Herrick, Jos. T.	100	.....	2,500	100	.....	100	100	.....
Howe, Jno. L.	300	.....	7,500	300	.....	300	300	.....
Hyams, Godfrey M.	.....	.....	100,000	4,000	.....	.....	.....	.....
Hollingsworth, Z. T.	400	5,000	.....	.....	200	.....	.....	.....
Harding, Albt. E.	80	2,000	.....	.....	.....	.....	.....	2,000

* Figures enclosed in brackets erased in copy.
† Make in 100 sh. ctf. & hold subject to his order.

52

20 North St.
20 North St.

66 Franklin St.
50 State St. A. 10.
53 State St.

39
Exchange Place 40
138 Federal St.
c/o C. H. Cole
c/o R. H. Stearns & Co. A. 11. 41
Franklin, Mass.
15 Congress St.
813 Ashland Block, Chicago
138 Federal St.
112 Federal St.
Providence, R. I.
40 State St.
130 Summer St.

Columbian Nat. Bank B 4.
262 Purchase St. A. 12.

		Orig. Sub.	List.	July 18.	Rights.	Sealed.	Allotment.	Cash.
Hollis, N. E.	160	2,000	.....	.....	80	.....	.....	.....
Hollis, Geo. W.	160	2,000	.....	.....	80	.....	.....	.....
	6,905	52,619	222,500	8,000	2,025	3,235	2,775	.....
	.....	.....	.....	.....	100	.....	.....	.....
	500	.....	.....	.....	[300]*	.....	.....	.....
Jones, Mrs. Mary L.	[800]*	10,000	10,000	400	[400]*	.....	.....	.....
Sawyer	100	deducted.						
Miss Anthony	100							
...iss Manning	100							
Kendall, J. S.	600	10,000	5,000	200	200	.....	.....	5,000
Lewisohn Bros.	.....	.....	250,000	10,000	.....	.....	.....	.....
Leland, Towle & Co.	320	4,000	4,000	160	160	.....	.....	.....
Lyman, Geo. H.	200	2,500	2,500	100	100	.....	.....	.....
Lundberg, Gustav	100	.....	2,500	100	.....	100	100	.....
Lewisohn, Leonard	36,190	452,381	100,000	4,000	18,095	.....	.....	.....
Luce, Matthew	.....	.....	100,000	4,000	.....	.....	.....	.....
	36,810	460,881	459,000	18,360	18,355	100	100	.....
Mead & Co., F. S.	1,200	10,000	25,000	1,000	400	600	400	.....
Manning, Mrs. Abby H.	900	5,000	25,000	1,000	200	800	500	.....
Messervy, Benj. F.	200	2,500	2,500	100	100	.....	.....	.....
Mosman, Walter B.	100	.....	2,500	100	.....	100	100	.....
Makenzie, Chas. J.	400	.....	12,500	500	.....	500	400	.....
Meredith, J. Morris	2,000	25,000	.....	.....	1,000	.....	.....	.....
Maltman, A. S.	800	10,000	.....	.....	400	.....	.....	.....
Manning, F. H.	800	10,000	.....	.....	400	.....	.....	.....
Moses, H. C.	240	3,000	.....	.....	120	.....	.....	.....
Metcalf, Stephen O.	400	5,000	.....	.....	200	.....	.....	.....
Moseley, ...nas. W.	800	†10,000	.....	.....	400	.....	.....	.....
Mawhinney, H. H.	160	2,000	.....	.....	80	.....	.....	.....
	8,000	82,500	67,500	2,700	3,300	2,000	1,400	.....
Newhall, Horatio	50	.....	1,250	50	.....	50	50	1,250
Newhall, Geo. E.	100	.....	2,500	100	.....	100	100	.....

* Figures enclosed in brackets erased in copy.
† Wanted in ctf. of 100 shs.

54

31 Bromfield St.
Tremont House Carriage Stand — B. 5.

Lincoln, Mass. — 42, 43, 44

66 Franklin St. — 45
56 State St. — A. 13
New Bedford, Mass.
54 Devonshire St.
68 Devonshire St.

40 Water St.
Kidder, Peabody & Co. — 46
305 Beacon St. — 47
157 Federal St. — 48
Franklin, Mass. — 49
c/o Leland, Towle & Co.

20 Davis St., Providence, R. I. — 50
Ames Bldg. — 51
40 State St. — 52

Lincoln, Mass. — A. 14, 53
Houghton, Mich. — 66
Providence, R. I. — 55

No. Andover, Mass.
55 High St.
5 Park St.

		Orig. Sub.	List.	July 18.	Rights.	Scaled.	Allotment.	Cash.
Nelson, Thos.	.....	.....	100,000	4,000	.....	.....	.....	.....
	150	.....	103,750	4,150	.....	150	150	.....
O'Connor, John	160	2,000	2,000	80	80	.....	.....	.....
Ormond, James	50	.....	1,250	50	.....	50	50	.....
	210	2,000	3,250	130	80	50	50	.....
Pierce, John H.	1,000	10,000	15,000	600	400	200	200	.....
Putnam & Co., C. A.	400	.....	12,500	500	.....	500	400	.....
Price & Co.	400	.....	12,500	500	.....	500	400	.....
Preston, Geo. M.	400	5,000	5,000	200	200	.....	.....	.....
Prendergast, Jas. M.	200	.....	5,000	200	.....	200	200	.....
Pierce, Otis N.	100	.....	2,500	100	.....	100	100	.....
Prince, Gordon	400	5,000	.....	.....	200	.....	.....	.....
Perkins, Thos. H.	80	1,000	.....	.....	40	.....	.....	.....
	2,980	21,000	52,500	2,100	840	1,500	1,300	.....
Richardson, Agt., S. W.	800	10,000	10,000	400	400	.....	.....	.....
Remick, F. W.	200	.....	5,000	200	.....	200	200	.....
Rust, Nancy E.	80	1,000	1,000	40	40	.....	.....	.....
Reed, Wm. H.	660	5,000	10,000	400	200	200	200	.....
Ray, Jos. G.	1,100	5,000	25,000	1,000	200	800	700	.....
Richards, J. J.	250	.....	7,500	300	.....	300	250	.....
	3,030	21,000	58,500	2,340	840	1,500	1,350	.....
Smith, Albt. W.	500	.....	12,500	500	.....	500	500	.....
Swift, E. C.	1,800	10,000	50,000	2,000	400	1,600	1,000	.....
Stevens, Horace H.	400	5,000	5,000	200	200	.....	.....	.....
Sears, Geo. O.	200	.....	5,000	200	.....	200	200	.....
Smith, F. & C. S.	100	.....	2,500	100	.....	100	100	.....
Sturgis, Jas. B.	1,000	.....	26,250	1,050	.....	1,050	1,000	.....
Sack, A. Albert	200	.....	5,000	200	.....	200	200	.....
			.....	.....	.....	.....	500	.....
Snow, Homer N.	500	.....	12,500	500	.....	500	.....	.....
Stevens, Moses T.	800	10,000	25,000	1,000	400	.....	.....	.....
Smith, Albt. O.	400	5,000	3,000	120	200	.....	.....	.....
Somers, F. D.	400	5,000	.....	.....	200	.....	.....	.....

56

40 State St.
472 Delaware Ave., Buffalo, N. Y. 56

c/o Tower, Giddings & Co. 57
50 State St. 58
c/o Leland, Towle & Co. 59
c/o Leland, Towle & Co. 60

A. 15.
40 State St. A. 16.
81 Milk St. 61
2033 G St., Washington, D. C.
ctf. 5 of 200 ea. & 2 of 100 ea. A. 17
"The Warren," Roxbury 62.
105 Federal St. 63
Kidder, Peabody & Co. 64
33 Summer St. B. 6.
Nat. Union Bank B. 7.
A. 18

528 Beacon St.
130 Main St., Worcester.
87 Milk St.

		Orig. Sub.	List.	July 18.	Rights.	Scaled.	Allotment.	Cash.
Stevens, Sam'l S.	200	2,500	.....	.....	100	.....	.....	.....
Spaulding, S. S.	240	3,000	.....	.....	120	.....	.....	.....
Stackpole, Henry	300	.....	7,500	300	.....	300	300	.....
	7,040	40,500	154,250	6,170	1,620	4,450	3,700	.....
			.....	.....	.....	.....	3,800	.....
Tower, Wm. A.	300	.....	7,500	300	.....	300	200	.....
Thayer, E. V. R.	500	.....	25,000	1,000	.....	500	500	.....
Towle, John F.	200	2,500	2,500	100	100	.....	.....	.....
Towle, B. N.	60	.....	1,500	60	.....	60	60	.....
Towle, Amos	40	.....	1,000	40	.....	40	40	.....
	1,100	2,500	37,500	1,500	100	900	900	.....
Wainwright & Co., H. V.	100	.....	2,500	100	.....	100	100	.....
Woods, Henry F.	100	.....	2,500	100	.....	100	100	.....
Woodhull, Max.	1,800	15,000	15,000	600	600	600	600	.....
Wood, Henry	100	.....	2,500	100	.....	100	100	.....
Williams, Jere	800	5,000	15,000	600	200	400	400	.....
Webster, F. G.	300	.....	7,500	300	.....	300	300	.....
Woods, Henry	1,400	10,000	**25,000**	**1,000**	**400**	**600**	**600**	.....
Whitney, Geo.	50	.....	1,250	50	.....	50	50	.....
Winsor, W. P.	50	.....	1,250	50	.....	50	50	.....
Wetherbee, J. Otis	100	.....	2,500	100	.....	100	100	.....
Williams, Harold	400	5,000	.....	.....	200	.....	.....	.....
Wheeler, Leonard	240	3,000	.....	.....	120	.....	.....	.....
Whitney, Henry M.	4,000	50,000	.....	.....	2,000	.....	.....	.....
	9,440	88,000	75,000	3,000	3,520	2,400	2,400	.....

58 *Deposition of Cleveland H. Dodge.*

Mr. FARLEY: I will read the deposition of Cleveland H. Dodge, taken in behalf of the defendant, under the same conditions as the others [reading down to the first objection].

Mr. MCCLENNEN: We should like to save an objection from now on.

SHELDON, J.: Very well, the rest of the deposition is taken de bene.

[Mr. Farley finished reading the deposition.]

Deposition of Joseph F. Costello.

Mr. FARLEY: This is another deposition taken on behalf of the defendant, pursuant to the same stipulation and agreement [reading down to the first quotation].

Mr. MCCLENNEN: I should like to make objection to the admission of these articles from the "News Bureau."

SHELDON, J.: I think I ought to follow the usual course, Mr. McClennen. They are all spread out on the deposition. If I exclude them, in case of an appeal they might not go up. I think it is better I should receive them de bene as I have the rest, even if it does protract the hearing.

Mr. FARLEY: Mr. Hemenway suggests that the evidence is offered for the purpose of showing the publicity of this transaction.

SHELDON, J.: It does not make any difference what the purpose is.

[Mr. Farley completed the reading of the deposition.]

Deposition of Thomas H. O'Neil.

Mr. FARLEY: I will read the deposition of Thomas H. O'Neil, taken under the same conditions.

Mr. MCCLENNEN: I would like to save the same objection.

SHELDON, J.: This is taken de bene.

Mr. FARLEY: This evidence is offered simply for the sake of showing the publicity of the transaction [reading the deposition].

Mr. HEMENWAY: Does that complete the reading of the testimony that was taken?

Mr. MCCLENNEN: Yes, I believe that is everything.

Mr. HEMENWAY: Of course I could not check it off.

59 *Statutes and Citations.*

Mr. TREADWELL: We offer in evidence the record of the Court of Appeals in the state of New York in the case of Blum v. Whitney et al., which may be found reported on page 232, volume 185, of the New York reports, together with the printed copy of the papers on appeal.

Mr. HEMENWAY: I do not think it is necessary to go into those.

Mr. MCCLENNEN: I object generally to the New York law.

SHELDON, J.: The New York law is taken de bene.

Mr. MCCLENNEN: I had supposed, anyway, that the particular

record of a case that is not carried forward into the printed reports was in no way admissible. I should like to make further objection to that.

Mr. HEMENWAY: It is my impression that the record of a case may be read, any part that is admissible, in order to understand the opinion.

SHELDON, J.: The record of a case, so far as reported in the volume of reports, is competent, of course. I suppose a printed copy of the papers of appeal does not go in, but it may be put in de bene.

Mr. TREADWELL: There is a printed report of the Circuit Court of Appeals in many of the large libraries of the various states, which contains the whole record of the decision, and that is sent out by the Court of Appeals, and in that form I have cited it on my brief. But we have here for convenience what I have offered, a printed copy of the record which I happened to have, and which I assumed the other side would permit the use of for the purpose of saving the trouble of going to the volume.

SHELDON, J.: And as that is not available, as I understand it, in any law library, it had better be marked as an exhibit.

Mr. TREADWELL: I think it is available. There is certainly one in New York, one at Washington, and, I think, one in Boston.

SHELDON, J.: I think it will be safer to put it in. If I have to pass upon the law I shall want everything there is put in evidence.

Mr. TREADWELL: I will state, if I may, that there were no questions of fact. It went up to the Court of Appeals purely on questions of law.

SHELDON, J.: Well, you may have it marked as an exhibit if you desire.

[The pamphlet "Papers on Appeal," in Blum v. Whitney et al., was marked "Exhibit 504, Nov. 13, 1907, G. C. B."]

Mr. TREADWELL: I wish also to offer in evidence the two cases in the federal court for the circuit of New York——

60 SHELDON, J.: Are those, being under the law of New York, admissible under our statutes?

Mr. TREADWELL: We contend that as adjudications in New York they are admissible.

SHELDON, J.: It is a foreign court, of course.

Mr. FARLEY: Just as to their effect upon the determination we make no contention; as to the fact that they do represent the law in that jurisdiction, whatever its effect——

SHELDON, J.: Well, they may come in de bene; the two cases being——

Mr. TREADWELL: Old Dominion Copper Mining & Smelting Co. v. Lewisohn, in the 148th Federal Reporter, 136, one being the case in the Circuit Court and the other being the case on appeal.

SHELDON, J.: May I consider it agreed, as stated by the plaintiff, that an appeal from the last decision is now pending at Washington?

Mr. TREADWELL: Not an appeal, but a certiorari.

Mr. FARLEY: I would also offer—I will not put in the volumes—

McCracken v. Robinson, 57 Fed. Rep. 375.

Barr et al. v. N. Y. & C. R. R., 125 N. Y. 263.

Seymour v. Spring Forest Assoc., 144 N. Y. 333.

Mr. HEMENWAY: Our evidence is somewhat more brief than we expected. We expected to occupy the time until adjournment. It is possible that in the morning I may want to put on another witness.

SHELDON, J.: Have you any other witness here, or any other testimony?

Mr. HEMENWAY: No, your Honor.

SHELDON, J.: Will there be anything in rebuttal?

Mr. MCCLENNEN: There are two or three things we can put right in now without asking Mr. Hemenway to rest.

SHELDON, J.: Very well.

Mr. MCCLENNEN: I should like to put in evidence, without waiving my objection to the New York law, the following:—

Gettey v. Devlin, 54 N. Y. 403.
Brewster v. Hatch, 122 N. Y. 349.
Sage v. Culver, 147 N. Y. 241.
Coulton Improvement Co. v. Richter, 55 N. Y. Supp. 486.

61 SHELDON, J.: That, I suppose, might be open to the same objection as some of the other citations put in.

Mr. MCCLENNEN: I had assumed that the decision of any court of the state of New York, however inferior in character, was admissible——

SHELDON, J.: Well, that may be.

Mr. MCCLENNEN: —and that the objection went merely to its weight rather than to its admissibility. But I did think the federal decisions were not admissible in any respect.

SHELDON, J.: I must confess my own opinion is that a decision of the federal court, it being entirely a foreign court, is not competent, but I prefer to take them de bene.

Mr. MCCLENNEN: I should like to offer from the files of the Old Dominion Company a letter from C. W. Barron to Thomas Nelson, dated October 22, 1895.

Mr. HEMENWAY: Note my exception.

SHELDON, J.: It is taken de bene.

Mr. MCCLENNEN: [Reading:]

"C. W. Barron, Manager Boston News Bureau, 13 Exchange Place.
P. O. Box 231.

BOSTON, *Oct.* 22, 1895.

Thomas Nelson, Sears Building, Boston.

MY DEAR MR. NELSON: Can you not arrange in the matter of my Old Dominion subscription now? I want to put those 80 shares away in the bottom of a new security box and see what will grow atop of it.

Very truly yours,

C. W. BARRON.

[In pencil:]

Bigelow	10 shares
Nelson	10 shares
Luce	10 shares
Coram	10 shares
	—
	40 shares

C. T. F. 40 shares mailed Barron Jan. 20, 1896."

62 I should also like to have the fact appear in evidence, which shows entirely from an inspection of the files, that the file from which letters appear removed, as stated in the correspondence of Mr. Altmiller and Mr. Bigelow, is the file of 1895, terminating with January 6, 1896, or thereabouts; and that letter to Mr. Barron, although dated October 22, 1895, appears in the file of 1896, between a letter of January 15 and a letter of January 20, 1896. I think it has already appeared to your Honor that other 40 shares came out of the treasury, making up the 80.

Mr. FARLEY: If your Honor please, that 40 shares which Mr. McClennen says came out of the treasury, came out of the much-discussed stock which we contend did not come out of the treasury, and we do not wish to accede to his statement.

Mr. MCCLENNEN: From the transfer book of the company I will offer transfer No. 352 which shows a transfer on January 11, 1896, by J. A. Coram to C. W. Barron of 10 shares.

SHELDON, J.: This is also taken de bene.

Mr. MCCLENNEN: Transfer No. 353, a transfer by Thomas Nelson to C. W. Barron, January 11, 1896, of 10 shares; transfer No. 354, a transfer by A. S. Bigelow to C. W. Barron of 10 shares, January 11, *1906:* transfer No. 351, a transfer by Matthew Luce on January 11, 1896, to C. W. Barron of 10 shares. It appears from the margin of these transfers that the 40 shares made up from those four are in the certificate No. 573. The 40 shares that were referred to as coming from the treasury, to be more specific, were in certificate 93, September 19, 1895, coming out of certificate No. 73 of Thomas Nelson, treasurer.

I think that is all we have at the moment to fill up the time.

SHELDON, J.: Well, you ought not to be called upon to rest, of course, until the defendant does, and the defendant has in mind one more witness. Well, I think I can let you go now, gentlemen, and as I have two habeas corpus cases assigned for to-morrow morning, which of course you will not be interested in, I will not hold any of you until half past 10 o'clock to-morrow forenoon.

Mr. HEMENWAY: The case will be argued at that time?

SHELDON, J.: You will be ready, will you not? The testimony so much of it has been in writing that you are all familiar with it.

Mr. MCCLENNEN: I can see no better time than while the testimony is fresh in your Honor's mind.

SHELDON, J.: It will be of material assistance to me now to hear

the arguments, of course. We will commence the case, and if we can we will finish it to-morrow.

[Adjourned to Thursday, November 14, 1907.]

63 THURSDAY, *November* 14, 1907.

SHELDON, J.: I suppose, Mr. Hemenway, if you have further evidence, that would come first.

Mr. HEMENWAY: I will simply put in the statute of New Jersey, the corporation act of 1875, par. 55 of section 4; also the Public Laws of 1889, p. 414, and Public Laws of 1893, p. 444. I do not think it is necessary to read that. It is simply that stock issued for property purchased shall so state on the certificate, and for cash if it is for cash.

Mr. TREADWELL: Those two sections were the law in force just before the incorporation in 1895.

SHELDON, J.: If you have the statutes here, Mr. Hemenway, perhaps you had better read them.

Mr. HEMENWAY: Mr. Farley has them.

Mr. TREADWELL: I have a copy here of one of the sections, if your Honor please.

SHELDON, J.: Of the act of 1895?

Mr. TREADWELL: Yes. It reads—

"That section fifty-five of the same act be and hereby is amended so as to read as follows:

"55. And be it enacted, That the directors of any company incorporated under this act may purchase mines, manufactories, or other property necessary for their business, or the stock of any company or companies owning, mining, manufacturing or producing materials or other property necessary for their business and issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be declared and be taken to be full paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payment under any of the provisions of this act; and said stock shall have legibly stamped upon the face thereof 'issued for property purchased' and in all statements and reports of the company to be published, this stock shall not be stated, &c., reported as being issued for cash paid into the company, but shall be reported in this respect according to the fact."

Then came the following section that operated and applied only where straight stock was issued, then the section applying where there was stock and cash paid for property. In that case it was not required to be stamped, but was considered as full payment for property.

64 I do not like to have your Honor take my statement, but I presume it will be conceded by the other side that Mr C. C. Beaman was dead before this suit was begun.

SHELDON, J.: That is agreed?

Mr. BRANDEIS: Yes.

Mr. TREADWELL: Relative to Mr. Evarts' testimony, I do not

know exactly what the statute is in this state. The statute with us is that counsel cannot testify as to communications from his clients unless and after a deliberate waiver by the client; and if that may be considered to be any objection——

SHELDON, J.: There is no such statute in this state. Mr. Evarts was called and testified.

Mr. HEMENWAY: If your Honor please, one moment. As I stated, the matter has nothing to do with the evidence here, but inasmuch as the evidence is to be used in New York, he thought it would be safer to put in a waiver.

SHELDON, J.: Well, you may do it.

Mr. HEMENWAY: The stipulation, if your Honor please, I understand is confined to depositions taken out of court.

Mr. TREADWELL: I understand it extends to all the testimony here given.

SHELDON, J.: In this case, Mr. Evarts having been called by the party in whose interest he acted in this suit, I should have held, if the occasion had arisen, that Mr. Bigelow could not object to Mr. Evarts testifying as fully as the other side might desire on cross-examination. Of course in this case no such question could have arisen. The mere calling of him by Mr. Bigelow, so far as Mr. Bigelow could have made that objection, was a waiver of any such objection.

Mr. TREADWELL: Under the stipulation I understand the testimony which is adduced here can be filed and stipulated into the record in the federal court in the case against Lewisohn, therefore I thought a waiver as far as that is concerned might be made.

SHELDON, J.: You can file such a waiver. I thought perhaps a statement would be sufficient.

That closes the testimony for the defence?

Mr. HEMENWAY: Yes.

SHELDON, J.: Have you anything further, Mr. McClennen?

Mr. McCLENNEN: I want to add one of the New York cases I did not mention yesterday, namely, Campbell v. Cypress Hills Cemetery Co., 41 N. Y. 34. That is the only further testimony.

65 SHELDON, J.: This closes, then, the testimony.

Mr. McCLENNEN: Now, if your Honor please, the testimony being closed, I move you, with respect to each one of the pieces of evidence, interrogatories and answers that have been introduced over our objection, and admitted de bene, be stricken out.

SHELDON, J.: Well, you may minute the fact that the request is made——

Mr. HEMENWAY: The defendant makes a like motion.

SHELDON, J.:—and that the defendant makes a like motion, and that each motion is denied.

Mr. McCLENNEN: We save our exception.

Mr. HEMENWAY: Yes, and we save an exception.

[Mr. McClennen handed up requests for rulings.]

SHELDON, J.: You have considered, I suppose, whether you want to make regular requests for rulings? As, in case of appeal, the

whole case will go up on appeal, you might be found to have hampered yourselves, perhaps. But you have considered that?

Mr. McCLENNEN: I have considered that.

SHELDON, J.: And as Mr. McClennen has spoken of the length of the argument, although I had not intended to do so, I ought to ask, before you begin the arguments, whether you are content with the usual time of an hour apiece?

Mr. HEMENWAY: I shall ask to have my time extended.

SHELDON, J.: What time do you think you would like?

Mr. HEMENWAY: A reasonable length of time.

SHELDON, J.: Well, there is certainly a good deal of ground to cover, and I think that while I will not give you unlimited time for argument on each side, I will not feel myself called upon to interfere unless I think I ought to. In view of that, do you wish to look over these requests of the plaintiff before argument, Mr. Hemenway?

Mr. HEMENWAY: If your Honor please, it would take some little time to look them over as to the findings. I think we could more profitably spend the time in making my argument, and then subsequently let me except to them, or except to them now without reading.

SHELDON, J.: Well, I will allow either one of you, if you desire, as to whatever rulings I make, to save an exception. But whether you would not prefer to save all your rights, whatever my findings may be, would be for the full court to consider. I do not
66 want to restrict your rights on either side at all. You can proceed, then, with the argument, Mr. Hemenway.

[Arguments omitted.]

Stipulation.

In the above-entitled cases it is stipulated and agreed that copies, duly certified by the notaries before whom they were taken, of the testimony hereinafter set out, and the exhibits thereto, taken in the above-entitled cases or in the case of the Old Dominion Copper Mining & Smelting Company v. Lewisohn, pending in the Circuit Court of the United States for the Southern District of New York, may be filed in the above-entitled cases by either party at any time before the hearing, and may be read and used as evidence in these cases; reserving, however, to each party all rights to object to the relevancy, competency, and materiality of any of said depositions or documents, and to any interrogatories or answers therein contained, and reserving the right of the respondent to cross-examine. Signatures waived.

The evidence, together with the exhibits, covered by this agreement is as follows:

Name of witness.	Date of taking.	Name of notary.
F. L. Rauhauser	Feb. 4, 10, 11, 1903	W. L. Webb.
Walter Lewisohn		
Adolph Lewisohn		
Frederick Lewisohn		
Albert Lewisohn		
—— Rahaeuser	Feb. 24 & 25, 1903	W. L. Webb.
—— Westervelt		
Jesse Lewisohn		
—— Rahaeuser	March 5, 1903	W. L. Webb.
—— Westervelt		
A. S. Bigelow	Mar. 24, Apr. 16, 23, May 5, 1903	Howland Twombly.
—— Hyams	Mar. 27, May 5, '03	" "
G. L. Stone	June 15, 1904	" "
J. A. Coram		
C. H. Altmiller	Oct. 11, 18, 1904	" "
W. R. Reed	July 19, 20, 1905	" "
S. N. Brown		
67		
R. F. Bolles		
C. R. Batt		
W. B. Mossman		
C. L. Davenport		
H. V. Snow		
A. W. Hale		
S. B. Capen		
W. A. S. Chrimes		
W. A. S. Chrimes	Oct. 27, 1905	Howland Twombly.
—— Wood		
S. M. Crosby		
W. A. Rust		
E. C. Swift		
E. M. Dodd		
D. M. Anthony		
G. M. Preston		
J. F. Ormand		
J. Grout	Dec. 14, 1905	George S. Frye.
F. D. Stocker		
F. D. Stocker		
A. H. McLeod		
W. P. Smith		
H. A. Root	May 12, 1906	W. L. Webb.
C. F. Brooker		
J. S. Bigelow	May 22, 1906	Howland Twombly.
C. H. Bissell		
J. M. Meredith		
A. S. Bigelow		
S. H. Stern	May 23, 1906	W. L. Webb.

W. J. Ladd.....	July 24, 1906	E. F. McClennen.
C. S. Altmiller.....		
C. S. Smith.....		
John Stanton.....		(Written interrogatories)
E. V. R. Thayer.....	Feb. 16, 1907	Howland Twombly.
—— Hyams		

BRANDEIS, DUNBAR & NUTTER,
Attorneys for Complainant.
ALFRED HEMENWAY,
Attorney for Respondents.

April 1, 1907.

68 Circuit Court of the United States, Southern District of New York.

No. 1.

OLD DOMINION COPPER MINING AND SMELTING CO.
v.
FREDERICK LEWISOHN et al.

Taken before Howland Twombly, Esq., Notary Public, at 220 Devonshire Street, Boston, Mass., March 24 et seq., 1903.

Appearances:

Louis D. Brandeis, Esq., for the Plaintiff.
Edward Lauterbach, Esq., Alfred Hemenway, Esq., for Defendants.
George C. Durpee, Stenographer.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
220 DEVONSHIRE ST.,
BOSTON, *March* 24, 1903.

Deposition of Albert S. Bigelow.

ALBERT S. BIGELOW, Esq., being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by L. D. Brandeis, Esq., counsel for plaintiff, deposes and says:

Q. 1. State your full name, age, residence, and occupation.
A. Albert S. Bigelow; fifty-seven years old; president of mining companies; residence in Cohasset, Mass.

Q. 2. State how long prior to April 30, 1895, you first considered purchasing an interest in the Old Dominion Copper Company of Baltimore City.

A. I could not say.

Q. 3. Have you the original option given by the Simpson estate to J. M. Meredith, for the purchase of their stock in the
69 Old Dominion Copper Company of Baltimore City, which option was dated April 30, 1895, as stated in your answer in the suit of the Old Dominion Copper Mining & Smelting Company v. A. S. Bigelow in the Supreme Judicial Court for the county of Suffolk? (A copy produced.)

Mr. LAUTERBACH: It is my impression that I have the original option in my possession. The copy now produced by the witness is admitted, subject to possible correction; if the original is in my possession, it may be inspected by plaintiff's counsel and substituted, if desired.

[Copy of option from Simpson estate to Meredith, dated April 30, 1895, marked "Exhibit 1, G. C. B., March 24, 1903."]

Q. 4. What communication did you have with Leonard Lewisohn concerning this option of April 30, 1895, before that date?

A. It is impossible for me to remember.

Q. 5. Do you have any recollection of any communication with Mr. Lewisohn?

Mr. LAUTERBACH: I want to note an objection that, Mr. Leonard Lewisohn being deceased, any conversation with him is not admissible under our New York statute.

A. Do you mean with respect to my getting an interest in it?

Q. 6. In respect to that, yes, partly.

A. Well, so far as I can remember, the first thing I heard of it was through the telephone from Mr. Leonard Lewisohn, in which he said that he would give me half of this option that he had secured on the Old Dominion Copper Company of Baltimore City on the shares of the Simpson estate.

Q. 7. Did not you have some communication with Mr. Lewisohn or with Mr. Meredith before any option had been secured at all?

A. I do not remember whether I did or not; it was probably before; I should think so; it would be before the option was secured.

Q. 8. Did not Mr. Lewisohn talk with you about having Mr. Meredith get an option?

A. Not that I remember.

Q. 9. Did not Mr. Lewisohn talk with you about that fact that Mr. Meredith was going to try to get an option?

Mr. LAUTERBACH: My objection applies to all conversations with Lewisohn.

A. It is impossible for me to remember so far back.

Q. 10. Will you examine your letter book, "Letters to," and see whether there is not, prior to April 30, 1895, some letter-press copy to Leonard Lewisohn or Lewisohn Brothers, or some one connected

with that concern, or to you from Leonard Lewisohn or Lewisohn Brothers, to you or Mr. Hyams, some letter or telegram relating to the proposed option on the Simpson stock in the Old Dominion Copper Company of Baltimore City?

70 A. I have looked these all through myself; so I have put my marks in, and I know how far back they go. The first letter I find is dated May 16, I think [shown to Mr. Brandeis]. Shall I read it?

Q. 11. No; if you will not read that just at present, we will come to it a little later. That is the first letter from you to Mr. Leonard Lewisohn or to Lewisohn Brothers?

A. That is the first.

Q. 12. Now what is the date of the earliest letter which you received from Leonard Lewisohn or Lewisohn Brothers, or any one connected with them, in relation to this matter?

A. May 15.

Q. 13. Do you not recall that, prior to the obtaining of this option on April 30, 1895, Mr. J. Morris Meredith came into your office and telephoned from your office to Mr. Leonard Lewisohn relating to this proposed purchase?

A. It would be impossible for me to recall anything like that.

Q. 14. How soon after April 30, 1895, did you have any communication with Leonard Lewisohn regarding that option?

A. It is impossible for me to say.

Q. 15. Have you in your possession the revised option, dated May 4, 1895, from the Simpson estate to J. Morris Meredith for the purchase of the Simpson stock in the Old Dominion Copper Company of Baltimore City?

A. [Copy produced; original will be exhibited.]

Mr. LAUTERBACH: It is my impression that I have the original in my possession. The copy now produced by the witness is admitted, subject to possible correction; if the original is in my possession, it may be inspected by plaintiff's counsel, if desired.

[Copy of revised option, dated May 4, 1895, marked "Exhibit 2, G. C. B., March 24, 1903."]

Q. 16. Do you recall whether you had any communication with Leonard Lewisohn in regard to the proposed purchase of the stock of the Old Dominion Copper Company of Baltimore City before this revised option of May 4 was executed?

A. I could not recall that.

Q. 17. Have you any recollection of being in New York at the time this revised option was drawn up?

A. I do not think I was there.

Q. 18. You have no recollection whatever about it?

A. No, sir.

Mr. LAUTERBACH: I understand my objection is intended to cover all this, and that it will be fully entered.

Mr. BRANDEIS: When we get through you can dictate the objection in exact form, so that the stenographer will have it.

71 Q. 19. What is the earliest date that you can recall as to your agreement with Leonard Lewisohn to take the half interest in the option for the purchase of the stock of the Simpson estate in the Old Dominion Copper Company of Baltimore City?

A. I shall have to refer to my letter from Mr. Leonard Lewisohn of May 15. Shall I read the letter?

Q. 20. Yes.

A. This was addressed to me:

"DEAR SIR: Enclosed please find statement. I suppose you understand I paid Mr. Meredith two thousand dollars for the option on the Old Dominion property. At your convenience at any time, will you kindly send us your half, as I understand you are going to take a half interest in this matter. Yours truly."

Q. 21. I would like to ask this question before we leave the option of May 4: Will you state in whose handwriting the memorandum in pencil at the bottom of the copy of the May 4 option is: "Are any contracts out with Keyser for selling, smelting, refining, or other contracts; are any liabilities, mortgages, liens, etc., against the company? Want twenty days instead of fourteen."

A. I cannot make out. I do not know whose writing it is. It looks like Leonard Lewisohn's writing; I think it is Leonard Lewisohn's writing.

Q. 22. Have you the statement enclosed in Mr. Lewisohn's letter of May 15, 1895?

A. I am sure I don't know. I have been unable to find it.

Q. 23. Have you any recollection of what the statement was?

A. I have not any recollection except that I received it; that is all. If you will hear this letter, I will read this letter to Leonard Lewisohn, May 16:

"Herewith find my check for $1000, being one-half of the $2000 which you paid to Mr. Meredith for the option on the Old Dominion property. Your understanding that I am going to take a one-half interest in the matter is correct. Please receipt your statement and return it to

Yours very truly."

Q. 24. But you have no recollection as to what statement it was?

A. No.

Q. 25. What, at that time, was the relation of Mr. Godfrey M. Hyams to you and Mr. Lewisohn; what business relation?

A. The same as it is now.

Q. 26. State what it was please.

A. Well, I do not know; it is impossible for me to say.

Q. 17. Will you state?

A. He never had a title, I might say; he acted as consulting engineer.

72 Q. 28. And what else?

A. Well, I don't know.

Q. 29. Secretary?

A. Private secretary? Almost everything.

Q. 30. I asked whether he was private secretary?

A. No.

Q. 31. If you will, state as fully as you can what Mr. Hyams' duties were. I want to have it appear what his relations were to you at that time. Just state it in your own way.

A. He was in our employ, by the different companies.

Q. 32. What were his relations to Mr. Leonard Lewisohn or Lewisohn Brothers?

A. I do not know of any, beyond that of being a friend.

Q. 33. What was the relation to the companies which you were then managing of Lewisohn Brothers?

A. Lewisohn Brothers acted as our selling agents.

Q. 34. And were largely interested as stockholders in the companies?

A. Yes.

Q. 35. And as officers?

A. In some of the companies.

Q. 36. In which companies were you and Leonard Lewisohn, or Lewisohn Brothers, both interested as stockholders and officers?

A. You mean back at that time?

Q. 37. At that time.

A. Tamarack, Osceola,—I am not sure that Mr. Lewisohn was director in these companies at that time, he was not director in all of them, at any rate,—Boston & Montana, Butte & Boston; I believe that is all.

Q. 38. Merced?

A. I do not think he had any official relations with that company.

Q. 39. Lewisohn Brothers were the selling agents?

A. No, sir, not of that company.

Mr. SMITH: That is a gold company.

The WITNESS: It did not need any selling agent.

Q. 40. As a matter of fact, Mr. Hyams went, at your request and at the request of Leonard Lewisohn, to examine this Old Dominion property shortly after the option was obtained?

A. Do you put that as a question? Yes, sir.

Q. 41. Are you able to fix the date when Mr. Hyams left Boston to make that investigation?

A. No, sir.

Q. 42. Have you not some letters to Mr. Hyams relating to this matter which will enable you to refresh your recollection in this respect?

A. No, I have not.

Q. 43. Have you with you the letter-press copy book which would contain any letters addressed to Mr. Hyams on this subject, assuming that there were such, after he left Boston?

A. Yes. These are the only books that I have here.

Q. 44. Have you made search in that book to see whether there was any letter written to Mr. Hymans about that time?

A. I have.

73 Q. 45. During what period has your search covered?

A. I have really looked through this whole book. It begins May 29, 1893, and the last date is October, 1896.

Q. 46. How is that letter book designated?

A. "A. S. B., Private."

Q. 47. Is there not some other letter book covering the period of April and May, 1895, which may contain letters from you to Mr. Hyams or to Mr. Lewisohn?

A. [Referring to another letter-press book.] This book is designated "A. S. B."

Q. 48. What period does that cover?

A. 1892, to February, 1897.

Q. 49. Have you examined that book also to see whether there is any letter to Mr. Hyams in April or May?

A. Yes, sir, I have.

Q. 50. What is the earliest letter that you find there?

A. There is not any.

Q. 51. None whatever?

A. None that I know of. I do not find any.

Q. 52. You had, in May, 1895, certain interests in Great Falls, Mont., did you not?

A. At what time?

Q. 53. In May, 1895.

A. Yes, sir.

Q. 54. And, assuming that Mr. Hyams was at Great Falls, Mont., in May, 1895, in what letter book would copies of letters to him be contained?

A. They would doubtless be in the companies' letter books.

Q. 55. The Great Falls Manufacturing Company?

A. There was no manufacturing company. The Boston & Montana did its smelting.

Q. 56. Is that book in your possession?

A. No, sir.

Q. 57. Is the letter of May 15, 1895, from Leonard Lewisohn, which you have read, the earliest letter or written communication of any kind from any person relating to the acquisition of the option on the Simpson interest in the Old Dominion Copper Company of Baltimore City, or the formation or proposed formation of a syndicate to take over that interest?

A. It is the earliest I can find.

Q. 58. What is the date of the earliest paper of any kind which you have relating to the organization of the Old Dominion Syndicate?

A. May 21, 1895.

Q. 59. Will you let me see the paper?

[Witness produces a subscription paper dated May 21, 1895, which is marked "Exhibit 3, G. C. B., March 24, 1903."]

Q. 60. Will you kindly produce the other subscription papers bearing date later than May 21?

[Witness produces a subscription paper dated May 24, 1895, which

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is marked "Exhibit 4, G. C. B., March 24, 1903;" also another subscription paper dated June 14, 1895, which is marked "Exhibit 5, G. C. B., March 24, 1903."]

74 Q. 61. Was there not some paper prior to May 21, 1895, embodying some agreement in regard to the Old Dominion Syndicate, between yourself and J. A. Coram, Matthew Luce, Henry M. Whitney, J. Morris Meredith, Thomas Nelson, or some of them?

A. I have been unable to find any paper.

Q. 62. Was there not, prior to May 21, some agreement with those gentlemen, or some of them, in relation to the Old Dominion Syndicate?

A. It would be impossible for me to say what the date was.

Q. 63. Was not there some such agreement at some date prior to this earliest subscription paper, dated May 21?

A. I think there was.

Q. 64. Will you state what that agreement was?

A. I do not remember.

Q. 65. Have you no recollection whatever in regard to it?

A. No.

Q. 66. You have been unable to find anything in any of your books and papers relating to that agreement?

A. Yes, sir.

Q. 67. Do you find any copy of any letter from you or Hyams, or to you or to Mr. Hyams, or any other paper relating to Old Dominion matters prior to May 21, 1895, except the letter from Leonard Lewisohn to you dated May 15, and your reply under date of May 16, quoted above?

A. No, sir, I do not.

Q. 68. Were Mr. Hyams' letters in matters relating to Old Dominion Syndicate copied in your letter book, or letters to him from Leonard Lewisohn, or Lewisohn Brothers, relating to the matter, kept among your letter files?

A. No, sir. Mine are private. These are my private letter books; absolutely private.

Q. 69. Are those three subscription papers, dated, respectively, May 21, May 24, and June 14, 1895, being Exhibits 3, 4, and 5, the only papers of any kind which were ever executed between you and the members, or any of the members, of the Old Dominion Syndicate?

A. There were undoubtedly other subscription papers which I believe to be of the same tenor, as the papers submitted do not figure up to the full amount of the subscription. I find, also, one additional paper without date or day of the month, in the year 1895, in precisely the same form.

[Subscription paper, no date, 1895, marked "Exhibit 6, G. C. B., March 24, 1903."]

Q. 70. Were there no other papers of any kind besides such additional subscription papers in the same form as Exhibits 3, 4, and 5, relating to the Old Dominion Syndicate?

A. Not unless they are here. I do not remember of any. [In-

specting a bunch of papers.] I do not find any. There may have been a prior agreement with Coram and others referred to.

75 Q. 71. I call your attention to the fact that on the Exhibits 3, 4, 5, and 6, neither you nor Messrs. Nelson, Whitney, Meredith, Luce, or Hyams appear as subscribers. Does not that fact refresh your recollection so that you are able to testify definitely that there was some other agreement between yourself and them relating to the Old Dominion Syndicate?

A. Certainly it does, if that is the fact. I have not looked over it. [Inspecting.] I find that is the fact.

Q. 72. Are you able to recall now what that agreement was between yourself and Messrs. Nelson and the others?

A. You mean the wording of it?

Q. 73. The substance of it.

A. I really cannot, but I think it is very similar to one of these [referring to Exhibits 3, 4, 5, and 6]; I think the wording was very similar to it, if I remember.

Q. 74. What is the earliest communication from you to Leonard Lewisohn, or Lewisohn Brothers, or Hyams, or from any of them to you, after May 16?

A. June 11, 1895.

Q. 75. June 11, 1895, is the earliest letter from yourself to Leonard Lewisonn?

A. Yes.

Q. 76. In your private letter book?

A. Yes.

Q. 77. Now in the other letter books?

A. Well, just the same. This [book] is what you might call one of these detail books; there would not probably be anything here to Lewisohn. June 11, 1895, is the earliest letter to Leonard Lewisohn, or Lewisohn Brothers, or to Mr. Hyams in my letter book marked "Private;" in my other letter book, marked "A. S. B.," there is none earlier than June 11.

Q. 78. Now in regard to letters from any of them.

A. A letter from Mr. Hyams; impossible to say where it was written from; I think it is "Granite,"—dated May 14.

[Mr. Hyams en route.]

Q. 79. What is the earliest date of any communication to or from any of the subscribers to the syndicate agreement, Exhibits 3, 4, 5, and 6?

A. May 27, 1895.

Q. 80. What was that communication?

A. It was addressed to D. M. Anthony, Esq.

Q. 81. Just read that, will you?

A.—

"DEAR SIR: Enclosed herewith you should find receipt of your favor for $700, being the first payment of 14 per cent of your subscription of $5000 to the Old Dominion syndicate."

Q. 82. Were letters in that form sent to all of the sub-
76 scribers on Exhibits 3, 4, 5, and 6?

A. I could not say they were sent to all; some might have come in and paid, and got their receipt over the counter, or in my office, probably; there were quite a number here on May 27, as you will see.

Q. 83. Have you not some copy of some letters or receipts given to Messrs. Coram, Nelson, Whitney, Meredith, and Luce for the payment of the first instalment, called May 27?

A. Yes, I find two receipts.

Q. 84. Now will you read those?

A.—

"BOSTON, MASS., *May* 27, 1895.

Received of Henry M. Whitney the sum of $7000, being first payment of his subscription of $50,000 towards the purchase of stock in the Old Dominion Copper Company according to the terms set forth in a certain paper which said Whitney has signed, and a copy of which he has."

"BOSTON, MASS., *May* 27, 1895.

Received of J. Morris Meredith the sum of $3500, being first payment of his subscription of $25,000 towards the purchase of stock in the Old Dominion Copper Company according to the terms set forth in a certain paper which said Meredith has signed, and a copy of which he has."

Q. 84½. Have you not also a letter from J. Morris Meredith dated May 25; and if so, will you read it?

A.—

"BOSTON, *May* 25, 1895.

A. S. Bigelow, Esq.

DEAR SIR: Enclosed you have check for $3500 on account of my share in the Old Dominion Copper Mining purchase.

Yours very truly, J. MORRIS MEREDITH."

Q. 85. How long prior to May 27 had you and Mr. Lewisohn decided to accept the option for the Simpson stock?

A. It is impossible for me to remember the date.

Q. 86. I show you a copy of a letter from Leonard Lewisohn to you dated May 28, 1895, with a copy of an agreement annexed, and now marked for identification 7, and ask you whether you have not the original letter of which that is a copy?

A. I have not.

[STIPULATION.—It is stipulated that the original is believed to be in the possession of Mr. Lauterbach, and will be produced.]

77 Q. 87. Are you able, after reading the letter of Leonard Lewisohn to you on May 28, to recall whether or not you were in New York on that day?

A. On May 28?

Q. 88. Yes. Or whether Mr. Leonard Lewisohn was in Boston on that day? I refer specifically to the reference in the letter to the fact that you had endorsed notes of Leonard Lewisohn.

A. I do not remember. It does not say what the notes are, or the amount, does it? You want to know whether I remember that Mr. Lewisohn was here or in New York?

Q. 89. Yes.

A. I do not remember.

Q. 90. The letter of Lewisohn to you of May 28, 1895, Exhibit 7, refers to your having paid—you and Mr. Lewisohn having each paid—to the executors of Simpson on that day, $50,000 in part payment for the purchase of the Simpson estate's stock. What further sum or sums did you personally pay in carrying out the agreement to purchase the Simpson stock?

A. I do not remember. You ask, "What further sums?" It is impossible for me to remember.

Q. 91. Have you any books which will enable you to determine?

A. I have not any books except a check book.

Q. 92. Have you not any book of account in which your transactions in connection with the Old Dominion stock are entered?

A. Only in a check book.

Q. 93. The stub of the check book?

A. That is all. I keep no books.

Q. 94. I mean you have not at any time since 1895?

A. No.

Q. 95. Did you before 1895?

A. No.

Q. 96. You never have?

A. Never have kept any books, no, except a check book.

Q. 97. In what books have your large or great transactions been recorded?

A. My check books.

Q. 98. You mean on the stub of the check book?

A. Yes, sir.

Q. 99. And those check books or stubs have been preserved?

A. Yes, sir, so far as I know.

Q. 100. Has any book been kept showing the operations of this Old Dominion Syndicate? I mean the receipts of the money by the Old Dominion Syndicate and the disbursements.

A. I would not keep those books. It would not be in my province to keep them. There were no account books kept for the Old Dominion Syndicate. All the transactions can be determined by the deposits and checks drawn in my several individual bank accounts; all of the funds were received and paid out, out of my indi-
78 vidual bank account. No separate account was kept in which the Old Dominion Syndicate funds were deposited and from which they were drawn.

[Recess until 2 p. m., and resumed.]

Q. 101. Can you not, by reference to the Old Dominion Syndicate receipt book, which is produced by you, determine the amount of

money that you had received from the Old Dominion Syndicate subscribers on or before May 28, 1895?

A. There was received on May 27 and 28, $30,450 on Old Dominion Syndicate, as the first instalment of 14 per cent on Old Dominion Syndicate there was also received on May 27, $10,500, as appears by the receipts of Henry M. Whitney and J. Morris Meredith, quoted above in answer to Int. 84; there was also received on May 29, $3640, as first subscription of 14 per cent on Old Dominion Syndicate; making an aggregate of $44,590.

Q. 102. Will you please examine the Old Dominion Syndicate receipt book and state whether or not it is not a fact that in the receipts of the first instalment of Old Dominion subscriptions for the purchase of Old Dominion stock, aggregating $44,500, there is not included any subscription from Thomas Nelson, Matthey Luce, or Mr. Volkman?

A. I have examined the book, and find there is no receipt given to either of them.

Q. 103. There was produced by Mr. Lauterbach, in the taking of the depositions in New York, in the suit of the Old Dominion Copper Mining & Smelting Co. v. Bigelow, a copy of a letter of June 4, from Lewisohn Brothers to you: "We today received the Old Dominion syndicate blanks, for which we are obliged. Kindly send us bill and we will remit." Are you able to find that letter?

A. Yes, sir.

Q. 104. What is the date of the earliest letter after May 15 received by you from Leonard Lewisohn or Lewisohn Brothers?

A. That I have, you mean? June 3. A. S. Bigelow.

Q. 105. You stated, in answer to Int. 104, that the earliest letter that you find you received from Lewisohn Brothers, or Leonard Lewisohn, after May 28 is June 3: will you please read that letter?

A.—

"NEW YORK, *June* 3, 1895.

A. S. Bigelow, Esq., Boston, Mass.

DEAR SIR: In going over the Old Dominion matter, the undersigned finds the due dates of the notes given to the trust company to be 60, 90 and 120 days, which would make the due dates of
79 those notes July 27, August 26 and September 25, respectively. Now, in the syndicate form we find payments noted down as one day earlier than the notes are due. Has this been done on purpose or were the notes dated May 27 instead of May 28, as the writer thinks? Kindly enlighten me on this subject.

Yours truly, By J. BECKERT."

Q. 106. Also read the reply thereto, under date of June 4.

A. "Replying to your letter of June 4, the payments on Old Dominion syndicate subscriptions were fixed one day earlier than the due dates of the notes on purpose so as to get more money in to pay them when they mature. Yours truly."

Q. 107. Have you among your files a letter from Leonard Lewisohn dated June 10, 1895, of which a copy was produced by Mr. Lauterbach at the deposition taken in New York in the suit of Old Dominion

Copper Mining & Smelting Co. v. Bigelow? Will you produce a letter from Leonard Lewisohn to you dated June 10, 1895, and will you read the letter of Leonard Lewisohn to you dated June 10, 1895, and your reply thereto, under date of June 11, 1895?

A.—

"NEW YORK, *June* 10, 1895.

A. S. Bigelow, Esq., Boston, Mass.

DEAR SIR: As per telephonic conversation with Mr. Meredith, I have communicated by telephone with Mr. Keyser, accepting his two-sevenths 'net,' and expect to get an answer sometime tomorrow.

Mr. Meredith also stated that you had proposed we should give him (Mr. Meredith) 14/453rds of the interest in profits which our share derives ultimately in the Old Dominion matter—after the principal and interest actually paid in have been repaid. I have informed Mr. Meredith, that I will accept anything you say in the matter, but I wish to state that in reality, as I am getting only one-third of the Keyser purchase and you two-thirds, I am paying Mr. Meredith pro-rata actually more than you are, considerably. However, I am perfectly satisfied, and only hope I will have to pay him a lot of money!!

Please confirm that this understanding is correct.

Very truly yours. LEONARD LEWISOHN."

Q. And the answer?

A. My reply?

80 Q. 109. Yes.

A.—

"BOSTON, MASS., *June* 11, 1895.

Leonard Lewisohn, Esq.

MY DEAR SIR: Your favor of the 10th referring to Mr. Keyser's interest in the 2/7 of the Old Dominion is received. Your understanding that we should give Mr. Meredith 14/453rds of the interest in profits which our share derives ultimately in the Old Dominion matter after the principal and interest actually paid in have been repaid is in accordance with our understanding. This demand of Mr. Meredith does not relate simply to the 2/7ths of Keyser's, but it has a bearing on the whole question. You were very anxious we should pay Mr. Meredith something rather than have him stick out for his commission and thus imperil the trade with Keyser; and I think it has as close a connection with the whole business as it has with the 2/7ths. It was on that account therefore that we made this arrangement with Mr. Meredith. Unfortunately, as you know, you will have a much greater share in the profits than any other one person, but the manifest difference is that you obtain this by taking one-half of the 5/7ths and by putting up the money for it, but not only were we willing but anxious to take any part of this from you. You will understand that this 14/453rds which you are to pay Mr. Meredith is to come out of the whole of the interest which you subscribed for, or in other words is a charge against your one half of the 5/7ths and one third of the 2/7ths. Not that you alone shall pay

it out of profits which you keep to yourself but that others associated with you shall bear their share of it.

Yours very truly."

Q. 110. Is that the only letter under that date of June 11, 1895, which you have?

A. Yes. This other letter is out of place as June 11.

Q. 111. Will you now read the letter of Lewisohn Brothers to you, dated June 11, 1895, and the copy of the telegram from William Keyser therein referred to?

A.—

"JUNE 11, 1895.

A. S. Bigelow, Esq., Boston, Mass.

DEAR SIR: Please find enclosed herewith copy of telegram received today from Mr. William Keyser, addressed to our Mr. Leonard Lewisohn, which explains itself.

Yours very truly,

LEWISOHN BROTHERS.
—— ——, *General Manager.*"

81 [*Telegram.*]

"BALTIMORE, MD., *June* 11, 1895.

To Leonard Lewisohn, 81 Fulton St., New York.

I confirm sale Baltimore stock terms your letter yesterday. Am prepared to deliver at once also to surrender control of corporation. Have telegraphed stoppage all work. Will advise about Ladenburg matter in few days. Will turn over my interest, which is one-half, in Old Dominion and other claims.

WILLIAM KEYSER."

Q. 112. Will you now read in chronological order the further correspondence which passed between you and Leonard Lewisohn, or Lewisohn Brothers, between June 12 and June 17, both dates inclusive?

A.—

"JUNE 12, 1895.

A. S. Bigelow, Esq., Boston, Mass.,

DEAR SIR: Your letter of the 11th instant received, which is perfectly in accordance with our understanding.

Very truly yours,

LEWISOHN BROTHERS.
L. LEWISOHN,
General Manager."

"JUNE 12, 1895.

A. S. Bigelow, Esq., Boston, Mass.,

DEAR SIR: This morning I spent fully two hours with Mr. Keyser and Mr. Beaman, and some hours again this afternoon in the matter; and even remained in the city on this account, instead of going

to my home in the country; but I have not been able to get Keyser to sign the paper—after having agreed everything with Mr. Beaman. This afternoon he made some few small objections and on that account said he would rather not sign until he had showed his father, which he expected to do tomorrow; and he will then telegraph us if his father signs.

82 I hope to send you the papers tomorrow after I hear that Mr. Keyser has signed. Meanwhile I hold his telegram of yesterday that he confirms the sale.

Very truly yours,

L. LEWISOHN.

"Copper looks well again, and we have reason to believe Europe will advance again."

This is a copy of a letter addressed to A. S. Bigelow, Esq., Boston, Mass.:

"JUNE 13, 1895.

DEAR SIR: After a long telephonic communication between Messrs. Beaman, Keyser and myself this afternoon, we have arranged as per enclosed copy of agreement, which Mr. Keyser has signed in Baltimore today and is sending me, and which I have signed at Mr. Beaman's office and am sending him.

Besides, please find enclosed plan of procedure for meeting of the directors of the Old Dominion Copper Company next Thursday, June 20th, when transfer is to be made.

Mr. Allen W. Evarts and I will be in Baltimore on that day, and I should be very pleased if you could make arrangements to be there also.

Very truly yours,

LEONARD LEWISOHN,
Per JESSE LEWISOHN."

[The original Keyser agreement is introduced in evidence and marked "Exhibit 8, G.C.B., March 25, 1903," and the plan of procedure is marked "Exhibit 9, G.C.B., March 25, 1903."]

"NEW YORK, *June* 14, 1895.

A. S. Bigelow, Esq., Boston, Mass.,

To avoid any delay and to facilitate the transfer of the Old Dominion Copper Company, I propose that you see the Old Colony Trust Company and arrange with them that Mr. Keyser shall have the notification before 10.30 a. m. on Thursday, June 20, that the money has been paid and the notes given for the Simpson and Keyser shares, so that when I have a meeting with Mr. Keyser in Baltimore on Thursday morning, matters may progress without delay, as otherwise Mr. Keyser might decline to finish the transaction, saying that we had not paid the money over, &c.

83 To do this it will probably be best to deposit the money on Wednesday afternoon or else arrange with the trust company that they will take your word that the money shall be paid

on Thursday. But what we specially want is that Mr. Keyser shall have received notification by 10.30 a. m., Thursday, of the deposit of the money and notes, and also that the Old Colony Trust Company shall notify us of the deposit of Keyser's and Simpson's stock. It would be well if you would see either Mr. Simpson or Mr. Butler and obtain from them in writing their agreement to deliver us their half of the interest in the Old Dominion, Keystone, New York and Chicago claims and whatever others there may be, as Mr. Keyser has transferred to us the other half interest which he has in those claims. Mr. Butler stated to Mr. Leonard Lewisohn when the matter was closed with the Old Colony Trust Company on the 28th of May in the presence of Mr. Beaman that the estate of Simpson would certainly transfer whatever interest it had in those claims.

All we want is to be sure that everything will go in perfect order, as we believe it will; but it is better to be fully prepared.

Very truly yours,

LEONARD LEWISOHN.

Please telephone Saturday regarding this."

"JUNE 15, 1895.

Lewisohn Brothers, New York.

GENTLEMEN: Your favors of the 13th and 14th were duly received, the former enclosing an agreement with Keyser and a plan of procedure for meeting of the directors of the Old Dominion Copper Company, both of which seem to be all right. It will be impossible for me to be at Baltimore on Thursday, but as our Mr. Altmiller from this office and Mr. Hyams will be there on that day, you will probably get along just as well.

In the matter of the directors, I see that you propose to allow three of the present Baltimore directors to remain, but that they shall place their resignations in your hands. There is one point in this which I wish to call your attention to, though it may not matter at all. If for any reason they should desire to kick up a row, would it not require a majority of the board present to accept their resignations? It might be well for you to see Mr. Beaman about this. I see that you did not make your point with Keyser that they should pay expenses due to the 20th day of June. I have been telephoning you about the amount which it will be necessary for us to pay in to the Old Colony Trust Company which we will have there in time so that the trust company will be able to certify early Thursday morning that it has been paid. We make the amount here for us to pay $183,650.89, plus interest $501.48, making a total of $184,152.37; leaving for you to pay, including interest ——, which I suppose you will remit so that we will have it here Wednesday. I have figured the interest 23 days, carrying it up to Thursday, although we request payments to be made on Wednesday. I do not see how this can be avoided. I called upon the Old Colony Trust Company today and saw 2475 shares of stock there in their hands, which leaves 25 shares for qualification of directors. I have telephoned to Mr. Simpson and he and Mr. Butler

84

are both coming here today between one and two o'clock about their agreement to deliver us their half interest in the Old Dominion, Keystone, New York and Chicago claims and whatever else they have. Like you, I believe in making everything sure so that there will be no hitch.

I have regretted very much to learn that your Mr. Leonard was not to be present with us at the Osceola meeting on Tuesday next. I had looked forward with pleasure to having him with me at my house.

Yours truly,

A. S. BIGELOW."

I do not think the postscript to that letter ought to go in.

Here is a letter of June 15, 1895:

"JUNE 15, 1895.

A. S. Bigelow, Esq., Boston, Mass.,

DEAR SIR: Confirming conversation with Mr. Bissell over telephone today, we agree with him in the amount that has been paid in the Old Dominion Copper Company matter, viz:—$184,152.37.

Very truly yours,

LEWISOHN BROTHERS,
LEONARD LEWISOHN,
General Manager;
By JOSEPH RECHERT."

My next letter would be June 16. Shall I read this of mine of the 16th?

Mr. BRANDEIS: You read only one letter of yours of the 15th to Mr. Lewisohn.

The WITNESS: This is June 15, "Second letter."

85 "OLD DOMINION SYNDICATE, Sears Building.

Second Letter.

BOSTON, MASS., *June* 15, 1895.

Leonard Lewisohn, Esq., Box 1247 New York.

DEAR SIR: I have just returned from an interview with Mr. Simpson. He tells me that he saw young Mr. Keyser and gave him authority to transfer their one-half interest in the Old Dominion, Keystone, New York and Chicago claims and whatever others there may be to us. Mr. Simpson also tells me that he proposes to be in Baltimore Thursday morning at the meeting; consequently this will render all chance of any misunderstanding impossible. Mr. Simpson and Mr. Butler seemed to think that Mr. Keyser expected his payment to be made in Baltimore. I do not see how I can do this now, as I have made all the arrangements for the money to be paid in here on Saturday. I shall be over to the Old Colony Trust Co. on Wednesday and show them that I propose paying in that money to them the first thing Monday morning so

that they will be able to wire the first thing Thursday morning to Mr. Keyser that the money has been paid. This should surely satisfy all parties.

Yours very truly,

A. S. BIGELOW.

Mr. Keyser has the receipt of the Old Colony Trust Co. for his stock which he can assign to you."

"JUNE 17TH, 1905.

A. S. Bigelow, Esq., Boston, Mass.,

DEAR SIR: In answer to your second letter of June 15th; we wish to say that we have had a conversation over the telephone this morning with Mr. Keyser regarding the way in which payments are to be made; and Mr. Keyser understands fully, and wishes us to make the payment in Boston—so that all the payments will be made in Boston at the office of the Old Colony Trust Company.

We also hear from Mr. Keyser that Mr. Bigelow has arranged with the Old Colony Trust Company that the money will be paid on Thursday. Mr. Abbott has written to this effect to Mr. Keyser.

Mr. Keyser is writing a letter to Mr. Abbott to-day telling him on payment of this money, to hold the shares to the order of Mr. Lewisohn—although we understand that the shares will have to be retained by the Old Colony Trust Company until the last note is paid.

86 Mr. Keyser is sending copies of the letters he is writing, of which we will send you copies.

In regard to the 25 shares of stock which Mr. Keyser is holding over; he is doing this as each Director needs 5 shares to qualify, and he thought it best to have these on hand in case they are needed at the Meeting, so that the Directors are qualified. Mr. Beaman also says this is necessary. We saw Mr. Beaman this afternoon and this gentleman says he believes that as regards the three Directors who, they promise, will resign, this will go quite in order; but he says he understood Mr. Bigelow had some relative or friend residing in Maryland who could be a Director—that if Mr. Bigelow desired this and that gentleman could be present, he could act as a director. Please telephone regarding this, if you desire your friend to act.

If there is anything further you wish us to do, please let us know over the telephone and we will be glad to attend to it.

Very truly yours,

LEWISOHN BROTHERS.
L. LEWISOHN,
General Manager;
Per JESSE LEWISOHN.

P. S.—Mr. Leonard Lewisohn was not at office today but will be here tomorrow."

Q. 113. Have you any letter from, or copy of letters to, any of the subscribers to the Old Dominion Syndicate prior to June 11, 1895, other than the copies of letters dated on or about May 27, 28, or 29

to subscribers acknowledging the receipt of the first payment of 14 per cent, about which you have testified?

A. The first letter I find, except mere acknowledgments of credited receipts and a letter acknowledging payment from Mr. Belches, who was a subscriber through the Lewisohn syndicate in New York, is a letter dated Boston, Mass., June 8, 1895, to Albert O. Smith, Esq., of Boston, Mass. [reading]:

"JUNE 8, 1895.

Albert O. Smith, Esq., 55 High St., Boston, Mass.

DEAR SIR: By accident your favor of May 27 was overlooked for a few days. I will do what I can for Mr. Mawhinney, but will tell you frankly that the subscription is already very largely over-subscribed. We may be able to obtain the other 2/7ths of
87 the property, and in that case Mr. Mawhinney can come in with the others who wish to subscribe. No interest will be allowed on anticipated payments.

Yours truly,

A. S. BIGELOW
W. A. S. CHRIMES."

Q. 114. Have you any letter from, or copy of letters to, any of the subscribers to the Old Dominion Syndicate prior to June 11, 1895, other than the copies of letters dated on or about May 27, 28, or 29, to subscribers acknowledging the receipt of the first payment of 14 per cent, about which you have testified?

A. I find in my letter books no other letter to any subscriber prior to June 11; I find no letter from any of the subscribers prior to June 11, other than letters enclosing payment of first instalment, except the letters of May 24 and May 27, from A. O. Smith, those letters being referred to in the letter quoted above. These letters are as follows:

"MAY 24, 1895.

Mr. Albert S. Bigelow, Boston, Mass.

DEAR SIR: My friend Mr. Hugh H. Mawhinney would like $2000 of the Dominion syndicate stock, and I hope you will arrange to let him have it, for in my opinion it will aid very much in making him a good client for you. When we called together week before last, you told him that you would let him in when you had any new scheme, and I hope you will be able to do it in this one.

Truly yours,

ALBERT O. SMITH."

"BOSTON, *May* 27, 1895.

Mr. Albert S. Bigelow, Boston, Mass.

DEAR SIR: Please inform me when you will probably know if the Dominion project is to be carried through and what interest will be allowed on anticipated payments of future assessments. I do not

wish to be importunate, but hope you will be able to let H. H. Mawhinney have the $2000, about which I wrote you on the 24th instant.

Respectfully yours,

ALBERT O. SMITH."

88 Q. 115. Now, Mr. Bigelow, will you read the letter to Maxwell Woodhull, Esq., of June 11, 1895?

A. There is something about other matters to begin with in that letter, but I will read this:

"JUNE 11, 1895.

Maxwell Woodhull, Esq., 2033 G St., Washington, D. C.

DEAR SIR: * * * In the letter which you wrote to me some days ago you said you heard that I had become interested in an Arizona property. This is true. Some time since we bought 5 7ths of the stock of the Old Dominion Copper Company which was owned by an estate here, for $714,285. The reason I did not write to you about this at that time was that on account of Mr. Lewisohn of New York insisting upon taking one-half of this purchase, we had but a small portion here for our friends. Since then we have been negotiating for the other 2 7ths on the same terms, and I think we shall get them. The terms of sale were $1,000,000 for the whole property. We have already made the first payment on our contract for the 5 7ths which was $100,000 and given three notes for the balance due upon the following dates, viz:—

$204,761.66, July 27, 1895.
204,761.66, August 26, 1895.
204,761.66, Sept. 25, 1895.

Mr. Lewisohn having taken one-half of this, of course left only one-half to be taken here, but in taking the 2/7ths which I think we may be able to secure—we shall know about it positively today or tomorrow—Mr. Lewisohn takes only one-third, leaving two-thirds for us here. Out of this 2/3rds I can offer you an interest. The terms of payment for the 2/7ths will be practically the same as that for the 5/7ths. I enclose you a paper which you can sign, if you please, which is the same as others have signed, and which tells you the dates of payment and so forth. All this interest is to be held as a syndicate until the reorganization of the company is effected.

The Old Dominion is a company of many years' standing and has been a considerable copper producer in the past. It has an efficient plant and is today capable of producing from 1,500,000 to 2,000,000 pounds of copper per month. Mr. Hyams examined the property for us carefully, and he reports that there are four years' ground opened ahead, and that he sees a profit in working the mine of from $350,000 to $500,000 a year. I firmly believe that

89 we shall make a great deal of money out of the purchase; but this was not the incentive that induced us to go into it. Our reason for securing it was, as I have often expressed to you, to secure yet more control of the copper market than we now have; in other words, to place our office first in the world as a copper producer; and we feel bound, when we have a chance to buy well known

and developed copper properties, to take hold of them largely and protect ourselves.

We have not yet decided what plan we shall pursue in regard to the Old Dominion. It will however be something like this, viz: The present company is organized with a share capital of 25,000 shares. We shall doubtless reorganize on a basis of 100,000 shares, and our present idea is to place somewhat less than half of this in Europe at a price that will pay back to the subscribers their money and give them their stock in the new company for nothing. These are the terms on which the other subscribers have come in.

Please let me know as soon as you can whether you wish to take any, and how much, for I have many applicants on my list and there really is not a great deal of it to go around.

Perhaps you had better wire me your answer about this.

Very truly yours,

A. S. BIGELOW."

Q. 116. Will you now read the telegram received by you from Mr. Woodhull in answer to your letter of June 13? It is annexed to a long slip of paper.

A.—

"WASHINGTON, D. C., *June* 13, 1895.

A. S. Bigelow, Sears Building, Boston:

I will subscribe $15,000 to Old Dominion Copper syndicate. See letter.

M. WOODHULL."

Q. 117. Also the letter or letters?

A.—

"2033 G STREET,
WASHINGTON, D. C., *June* 13, 1895.

A. S. Bigelow, Esq., Sears Building, Boston, Mass.,

DEAR Mr. BIGELOW: I received by the last mail Saturday afternoon your letter of the 11 instant, in which you offer me a chance to subscribe to the syndicate which has just bought the stock
90 of the Old Dominion Copper Company, for which letter and the chance offered I beg you to accept my thanks. I have just telegraphed you in reply thereto as follows:

"WASHINGTON, *June* 13—10.30 a. m., 1895.

A. S. Bigelow, Sears Building, Boston, Massachusetts:

I will subscribe $15,000 to Old Dominion Copper syndicate. See Letter.

M. WOODHULL."

As I understand it, subscriptions are made to the capital of the syndicate and not for a given number of shares. My subscription is therefore $15,000 to the capital of the syndicate. I can make the first payment of 14 per cent whenever you call upon me for the same. The balance of the subscription will, I infer from your let-

ter, be due and payable at the same time as the other payments to the syndicate are due, viz:

July 26, 1895, 28 2/3 per cent; interest 5 per cent from date of last payment (or what date exactly?)
August 25, 1895, 28 2/3 per cent, do
Sept. 24, 1895, 28 2/3 per cent do

Is this a correct statement?

I shall be in Boston either Monday or Tuesday morning. Is not Monday, the 17th, a holiday? Will you kindly acknowledge receipt hereof under special delivery stamp as it is now Thursday, and I should like to get your answer this week.

Very truly yours,

M. WOODHULL."

"2033 G STREET.
WASHINGTON, D. C., *June* 13, 1895—Afternoon.

Albert S. Bigelow, Esq., Boston, Mass.,

DEAR MR. BIGELOW: Your letter of June 12, 1895, in re subscription to Old Dominion Copper syndicate has just been received. In it, in the postscript, you say:

'Since writing you the foregoing I find that there may be some change made in payments as outlined, and that the 14 per 91 cent cash and the 28 2/3 per cent of July may have to be paid next week. I will duly notify you as soon as I know myself.'

I wrote you this morning subscribing for $15,000 of the syndicate subscription.

14 per cent upon that subscription equals	$2,100
Second payment, 28 2/3 per cent	4,300
	$6,400
Third payment, 28 2/3 per cent	4,300
Fourth payment, 28 2/3 per cent	4,300
Total	$15,000

I assume from your letter of the 12th instant now under consideration that my subscription of $15,000 will be accepted. I therefore sign the subscription paper enclosed in your letter of June 11, 1895, in the sum of $15,000, and return the same enclosed herewith.

As you say that the cash payments will be due next week and that you will duly notify me in respect to said payment, I shall not send you my check herein for the first payment, but shall await your promised notification. Please write under a special delivery stamp, as I shall go over to Boston Monday and shall want to hear from you before leaving Washington. I shall hope to see you Tuesday morning. I beg to refer to my letter of this morning as a part hereof.

Very truly yours,

M. WOODHULL.

One enclosure as stated above."

Q. 118. What is the next communication from Mr. Woodhull?
A. A telegram.

"WASHINGTON, D. C., *June* 14, 1895.

A. S. Bigelow, Sears Building, Boston, Mass.:

Will you allow rebate if I will pay Old Dominion Copper subscription in cash. Telegraph in reply.

M. WOODHULL."

Q. 119. What next?
A. A letter.

92 "JUNE 15, 1895.

Maxwell Woodhull, Esq., 2033 G St., Washington, D. C.

DEAR SIR: I have various communications from you to acknowledge; two letters on the 15th, telegram on the same day, another telegram on the 14th, all referring to Old Dominion syndicate matter. I have wired you today as follows:

'Have entered your Old Dominion subscription of $15,000. Have 42 2/3 per cent payment here Wednesday which we understand amounts to $6413.74. No rebate allowed on anticipated payments.' which I now confirm. Your understanding of the subscription is correct; they are made to the capital of the syndicate, not for a given number of shares. In figuring the interest on the different payments at 5 per cent they are figured from the 23rd of May up to the time when the notes on the contract are due. I call in the money from the different subscribers on the day before so as to be sure to have it in time. In this way they lose one day's interest, but I do not see how it can be avoided. For instance, in sending you the figures of your remittance, which I wish to have here on Wednesday, namely, $6413.74, I have figured 23 days' interest on $4300. You will have to excuse this brief note, as I am so busy and particularly as I am to have the pleasure of seeing you so soon. I will see you here on Tuesday when we can talk over the matter very fully.

Yours very truly,

A. S. BIGELOW."

Q. 120. Was there any other letter written to or received from any member of the Old Dominion Syndicate to June 11; if not, what was the earliest date of any such letter or copy of letter in your list?

A. [Read by Mr. Brandeis.] A telegram under date of June 12, 1895, to Leonard Wheeler of Worcester, asking him as follows:—

"Have obtained other two-sevenths Old Dominion. How many dollars interest do you want?

A. S. BIGELOW."

Mr. HEMENWAY: The admission of this letter [following] is objected to for the reasons stated as to other similar letters. [See page 94.]

93 "BOSTON, MASS., *June* 12, 1895.

Maxwell Woodhull, Esq., 2033 G Street, Washington, D. C.

DEAR SIR: Looking over my letter to you of yesterday you may have observed an apparent discrepancy between the paper which you were asked to sign and my letter giving the time when the notes are due. The reason for this is that I must have the money here the day before the notes are due so as to be prepared to take them up on the following day. Since writing my letter I learn from Mr. Lewisohn of New York that they have actually secured the 2/7ths, therefore the first payment by you of 14 per cent is now due. I do not see anything else that my yesterday's letter does not contain.

Yours truly,

A. S. BIGELOW.

P. S.—Since writing the foregoing I find that there may be some change made in the payments as outlined and that the 14 per cent cash and the 28⅔ per cent of July may have to be paid next week. I will duly notify you as soon as I know myself. The reason for this change is that our contract for purchase says that in order to have the control of the management of the company turned over to us, we must take up the payments due in July with a cash payment. You of course see that by prepaying you save 5 per cent interest any way.

Yours truly,

A. S. BIGELOW."

Q. 121. What is the next?

A. That was a telegram. Here is a letter: [Read by Mr. Brandeis.] On the same day, a letter to Joseph A. Brown as follows:

"DEAR SIR: Mr. Bigelow is extremely busy today and requested the writer to inform you that he had obtained the other two-sevenths of the Old Dominion. Mr. Bigelow would like to know immediately how much of an interest you would like.

Yours respectfully,

W. A. S. CHRIMES.
For A. S. BIGELOW."

Q. 122. Mr. Chrimes was a clerk of yours?

A. Yes, sir.

Mr. LAUTERBACH: I move to strike out all testimony of all transactions affecting the syndicating of the Bigelow interest in
94 the matter in Boston as having no reference and as being irrelevant, impertinent, and immaterial to the issue in this action, and as not affecting in any respect the transactions of Mr. Leonard Lewisohn or Lewisohn Brothers in the matter.

[Adjourned to Wednesday, March 25, and resumed.]

The WITNESS: Shall I read this [showing letter to Mr. Hemenway]?

Mr. HEMENWAY: The defendants object to the admission of the letter of June 12, 1895, from A. S. Bigelow to Moses T. Stevens, it being immaterial, irrelevant, and incompetent, and as being res inter alios.

The WITNESS: [Reading.]

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *June* 12, 1895.

Moses T. Stevens, Esq., North Andover, Mass.

DEAR SIR: Mr. Luce was in the office yesterday and told me that he had reserved a $10,000 subscription in the Old Dominion syndicate for you. I enclose paper which please sign and return. Some little time since we bought the Old Dominion property for $1,000,000, and have already made the first payment which was 14 per cent. There will therefore be due from you to be returned with the enclosed paper signed, your check for $1400; then there will be 28⅝ per cent of your subscription payable on July 26; 28⅝ per cent payable August 25, and 28⅝ per cent payable Sept. 24, these last three payments bearing interest at the rate of 5 per cent. It is proposed to reorganize this company, and the scheme as at present outlined is to float a little less than one-half of the new stock in Europe, which we have reason to believe we can do successfully, and then to pay back to subscribers their subscriptions, leaving their stock in the new company costing them nothing. The Old Dominion is a company of many years' standing, and has been a considerable copper producer in the past. It has an efficient plant and is today capable of producing from 1,500,000 to 2,000,000 pounds of copper per month. Our expert examined the property very carefully, and reports that there are four years' ground opened ahead, and that he can see a profit in working the mine of from $350,000 to $500,000 a year on a 10-cent copper market, and I firmly believe we shall make a good deal of money out of the purchase.

Yours truly,

A. S. BIGELOW.

95 P. S.—Since writing you the foregoing I find there may be some change made in the payments as outlined, and that the 14 per cent cash and the 28⅝ per cent of July may have to be paid next week. I will duly notify you as soon as I know myself. The reason for this change is that our contract for purchase says that in order to have the control of the management of the company turned over to us we must take up the payment due in July with a cash payment. You will of course see that by prepaying you will save 5 per cent interest any way."

Next is a letter to Mr. Charles S. Randall.

Mr. HEMENWAY: This is objected to for the reasons above stated.

The WITNESS: [Reading.]

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *June* 12, 1895.

Charles S. Randall, Esq.

DEAR SIR: Mr. Luce was in the office yesterday and told me that he had reserved a $5000 subscription in the Old Dominion syndicate for you. I enclose a paper which please sign and return. Some little time since we bought the Old Dominion property for $1,000,000, and have already made the first payment, which was 14 per cent. There will therefore be due from you, to be returned with the enclosed paper signed, your check for $700; then there will be 28⅔ per cent of your subscription payable on July 26; 28⅔ per cent payable August 25 and 28⅔ per cent payable Sept. 24, these last three payments bearing interest at the rate of 5 per cent. It is proposed to reorganize this company, and the scheme as at present outlined is to float a little less than one-half of the new stock in Europe, which we have reason to believe we can do successfully and then to pay back to subscribers their subscriptions leaving them their stock in the new company costing them nothing. The Old Dominion is a company of many years' standing and has been a considerable copper producer in the past. It has an efficient plant and is today capable of producing from 1,500,000 to 2,000,000 pounds of copper per month. Our expert examined the property very carefully and reports that there are four years' ground opened ahead, and that he can see a profit in working the mine of from $350,000 to $500,000 a year on a 10-cent copper market, and I firmly believe we shall make a good deal of money out of the purchase.

Yours truly,

A. S. BIGELOW.

96 P. S.—Since writing you the foregoing I find there may be some change in the payments as outlined, and that the 14 per cent cash and the 28⅔ per cent of July may have to be paid next week. I will duly notify you as soon as I know myself. The reason for this change is that our contract for purchase says that in order to have control of the management of the company turned over to us we must take up the payment due in July with a cash payment. You will of course see that by prepaying you will save 5 per cent interest any way."

These are all I know of, excepting these, my receipts.

Mr. BRANDEIS: Suppose we run through them, and we will make one general statement about those when we get through.

Q. 123. Is this a correct statement? I find no copy of any letter to any of the Old Dominion subscribers between this date and July 1 except letters acknowledging receipt of the first and second payments and the receipts given therefor, and the letter to A. O. Smith of the 15th, in which I say that the subscriptions are all taken up.

A. Yes. That is all in that book. Now would you like those in the other book?

Q. 124. Now let us see the letters of the 18th.
A.—

"JUNE 18TH, 1895.

A. S. Bigelow, Esq., Boston, Mass.

Old Dominion Syndicate—Simpson.

DEAR SIR: Enclosed I hand you Certificate of Deposit with the New York Guarantee & Indemnity Company, of $102,708.07, which I understand you will use with the $102,708.07 more to be paid by yourself—to anticipate Note due July 28th, given to the Simpson Estate for $204,761.66, with interest.

When you have paid this Note, you will kindly get from the Old Colony Trust Company the Note which I have given, May 28th, for the above amount; and, after cancelling your endorsement thereon, please return this Note to me by registered mail—and also see that the Simpson Estate give a letter to the Old Colony Trust Company requesting them to transfer the stock over to us on the payment of the last Note.

We enclose also the original agreement between the Simpson Estate and Meredith, which is assigned to me, with the receipt for the $100,000, in cash thereon. We think that the Executors of the Simpson Estate should either give a receipt for the above Note on this paper, or give us a special receipt.

97 Kindly return the Memorandum of Agreement, together with the Note, by registered mail, and oblige,

Very truly yours,

L. L."

"JUNE 18TH, 1895.

A. S. Bigelow, Esq., Boston, Mass.

DEAR SIR: We have this afternoon written Mr. Keyser asking him to instruct the Old Colony Trust Company to give you a letter stating that they hold all the Old Dominion shares which they will deliver over to Leonard Lewisohn upon the payment of the last note due to Simpson and Keyser. We think it would be well for you to get the Simpson estate also to ask the trust company to give you a similar letter for the shares we bought from Simpson.

Very truly yours,

LEWISOHN BROTHERS,
L. LEWISOHN,
General Manager."

"JUNE 18TH, 1895.

A. S. Bigelow, Esq., Boston, Mass.

DEAR SIR: Enclosed herewith please find copies of letters received from Mr. William Keyser this morning.

Yours very truly,

LEWISOHN BROTHERS,
L. LEWISOHN,
General Manager."

"BALTIMORE, *June* 17*th*, 1895.

Mr. Leonard Lewisohn, New York City.

DEAR SIR: I enclose herewith copy of letter sent to Mr. Gordon Abbott, vice-president of the Old Colony Trust Company, also copy of an order given him in regard to the payments by you on the 20th and the details connected therewith, which explain themselves and which I trust you will find in order. If there is anything further you can suggest, please let us hear from you.

Yours truly,

WILLIAM KEYSER."

98 "BALTIMORE, *June* 17*th*, 1895.

Mr. Gordon Abbott, Vice-President Old Colony Trust Company, Boston, Mass.

DEAR SIR: I have your favor of the 15th instant and have wired you that the understanding in regard to the payment for the stock of the Old Dominion Copper Company is correct and I enclose herewith a form of order which I trust you will find satisfactory. If anything further is needed, please wire me immediately upon receipt of this. It is proposed to hold a meeting here on Thursday the 20th instant, and it is necessary that we know as early as possibly on that date that the payments as arranged in the enclosed order have been made. Will you kindly, therefore, wire us as early as possible just what has been done both in connection with payment on account of the 2/7ths, also on account of the notes heretofore given for the 5/7th interest in the stock of the Old Dominion Copper Company.

Yours truly,

WILLIAM KEYSER.
Per R. BRENT KEYSER."

"BALTIMORE, *June* 17*th*, 1895.

Old Colony Trust Company, Boston, Mass.

GENTLEMEN: I enclose herewith copy of agreement between Mr. Lewisohn and myself, dated June 13, 1895, which gives the details of the sale of the 2 7ths of the stock of the Old Dominion Copper Company. In accordance with this agreement, cash and notes specified, hold the 7118 shares of the stock of the above company deposited with you by me on the 14th instant as collateral security for the payment of the notes as therein provided, the notes to be drawn by Leonard Lewisohn and endorsed by A. S. Bigelow and Lewisohn Brothers. You will note a difference of 25 shares between the number of shares of stock mentioned in the enclosed agreement and the number left with you. Those 25 shares are held to qualify directors and will be given to Mr. Lewisohn personally on the 20th instant. Upon receiving settlement of the above, will you please telegraph me at once, forwarding the cash and notes to me here in due course?

Yours truly,

WILLIAM KEYSER.
Per R. BRENT KEYSER."

99 "JUNE 18TH, 1895.

A. S. Bigelow, Esq., Boston, Mass.

Old Dominion Syndicate—Keyser Matter.

DEAR SIR: As I understand, the two-sevenths interest which we have bought from Mr. William Keyser in the Old Dominion matter is to be divided differently from the Simpson five-sevenths, viz:

You and your associates are to have two-thirds of the Keyser shares and I am to have one-third.

I send herewith Cashier's check on the Importers & Traders National Bank for $40,722.22, which will be in payment of the one-third of the $40,000. cash and also in payment of the one-third of the first note to be given of $81,905.—which makes $40,722.22.

I understand that you will add to this your two-thirds, so as to make the full cash payment and the payment of the first note—which is to be anticipated in order to get the control now.

In addition to this I send you my note, endorsed by Lewisohn Brothers, for $81,905, payable August 26th at the office of the Old Colony Trust Company in Boston—with interest at 5 per cent. per annum from May 28th; and also my note for $81,905., endorsed by Lewisohn Brothers, payable September 25th, at the office of the Old Colony Trust Company in Boston, with interest at the rate of five per cent. per annum from May 28th.

The above-mentioned check and two notes—together with the payment of the two-thirds of the cash which you will add—constitute the settlement for the purchase of the two-sevenths interest from Mr. William Keyser.

As soon as this is all arranged, you will kindly see that the Old Colony Trust Company telegraph or telephone to Mr. William Keyser that these payments and notes have all been arranged for, so that Mr. William Keyser will transfer, on Thursday, June 20th, in Baltimore, the control of the Company over to us—which will really be transferring to us the three Directorships. You will also please get from the Old Colony Trust Company a letter stating that they hold the 7143 shares subject to the conditions of the agreement—which conditions are that they will transfer these shares to Leonard Lewisohn or his order on receipt of the payment of the last Note.

I will have Mr. Beaman draw up a little paper in this two-
100 sevenths agreement; as the division of these two-sevenths is two-thirds and one-third between us, as against half and half for the Simpson share.

Trusting this will be satisfactory, I remain

Very truly yours,

LEONARD LEWISOHN.

P. S.—The two notes above mentioned are in a registered letter together with the original agreement.

LEONARD LEWISOHN.

P. S.—You will understand that you will have to endorse the two notes over to the order of William Keyser."

Q. 125. Now there is one other letter of June 18.

A. Those are all the letters of June 18 which I can find.

Q. 126. Have you not a letter dated June 18, 1895, which is the original of the copy produced in connection with the deposition of Ferdinand Royhauser, taken in New York in the suit of Old Dominion Copper Mining & Smelting Co. v. A. S. Bigelow, marked "Exhibit 59," and reading as follows:

"JUNE 18TH, 1895.

A. S. Bigelow, Esq., Boston, Mass.

DEAR SIR: I wish to inform you that we have today received a telegram from Mr. Hyams reading:

'Your telegram today. I have deed in Boston,' referring to the deed from Keyser to the Old Dominion.

You telephoned today that Mr. Butler said that deed from Keyser to Old Dominion was in Baltimore; but what Mr. Butler refers to are the deeds to these properties which they claim are not worth anything and which Mr. Keyser will transfer to Mr. Leonard Lewisohn in Baltimore.

The other deeds were sent to us by Mr. Keyser and were taken to Arizona to be looked over out there, and Mr. Hyams no doubt has these as he telegraphs. If he has not them in your office no doubt he has them at home.

Yours very truly,

LEWISOHN BROTHERS,

J. L. ——— ———, *General Manager.*"

101 A. I cannot find it.

Q. 127. Do you recall the conversation with Mr. Butler referred to in that letter?

A. No, sir.

Q. 128. Have you any recollection whatsoever in regard to the matter except so far as stated in that letter?

A. None whatever.

Q. 129. Is there any letter from you to Leonard Lewisohn on the 18th,—if not on the 19th,—of June?

A.—

JUNE 19, 1895.

Lewisohn Brothers, New York.

GENTLEMEN: I have several favors of yours of the 18th to acknowledge: First, enclosing two notes for $81,905 each, and also your original agreement with the Simpson estate; second, enclosing cashier's check on the Importers & Traders Bank, New York, for $40,722.22 in payment of one-third of the $40,000 cash, and I suppose one-third of the payment on the first note to be given of $81,905; third, enclosing certificate of deposit of the New York Guarantee & Indemnity Company for $102,708.07 in payment of your one-half of note given to the Simpson estate for $204,761.66 with interest.

I have today been over to the Old Colony Trust Company and have left with them the above enclosures which you sent me and have also left with them a Boston bank check for $184,152.37, which is my one-

half of the payment due on account of the Simpson contract and two-thirds of the amount due on the Keyser contract.

I enclose you copy of a letter which I got from the Old Colony Trust Company which is practically a receipt from them with explanations of what they hold for our account to be used by them tomorrow in fulfillment of the arrangement, which is to take up the first note on both the Simpson and Keyser interests and the cash payment to the Keyser interest. I thought it was just as well to do this today so that there would be as little delay as possible tomorrow at the office of the Old Colony Trust Company and to enable them to telegraph Keyser in Baltimore very soon after ten o'clock that everything on our part had been done.

Yours very truly,

A. S. BIGELOW."

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"JUNE 20, 1895.

Leonard Lewisohn, Esq.,

MY DEAR SIR: I have just come from the Old Colony Trust Company, where I have closed up everything, I think satisfactorily, with regard to the agreements made with the Simpson estate and William Keyser for the purchase of all the shares of the Old Dominion Copper Company, less the 25 shares which were kept in Baltimore for the qualification of directors. I enclose with this, marked duly paid, your note for $204,761.66, dated May 28, 60 days, given to the Simpson estate and endorsed by me. This should be carefully preserved by you for the reason that when you come to ask for the stock when the last note is paid under the agreement made with the Simpson estate you will have to present all the paid notes given to the estate before you can get the stock from the Old Colony Trust Company. In my yesterday's letter I enclosed a copy of a letter received from the Old Colony Trust Company of yesterday's date, and now enclose copy of letter which I gave today to the Old Colony Trust Company, with instructions as to what use they should make of the funds in their hands which I left with them yesterday. I also enclose a letter addressed to you by the Old Colony Trust Company stating that they hold 7118 shares of the stock of the Old Dominion Copper Company to be kept by them and eventually delivered to you in accordance with the terms of the agreement between you and Mr. Keyser. I presume everything has gone through satisfactorily at Baltimore. I have been trying to get you over the telephone, without success thus far. (11.25 A. M.). There is one little thing to which I wish to call your attention. The notes that were made to Mr. Keyser were a little different from those given to the Simpson estate. Those to the Simpson estate were so drawn up that they had to be held by that estate until paid, thereby giving us the power, should we choose to exercise it, of anticipating them at any time. Those to Keyser are so drawn that he can use them if he chooses; and, naturally, if they should fall into other hands we would not be able to anticipate the payment of them. If I can get you on the telephone I shall explain this matter to you while you are in Baltimore so that you may have a chance to arrange with Mr. Keyser that he will hold them.

I also enclose you your original agreement with the Simpson estate showing the receipt of Mr. Butler as one of the executors of the estate, of the payment of the note of $204,761.66.

Then in one of your letters of the 18th I see that you ask the Simpson estate to give a letter to the Old Colony Trust Company
103 requesting them to transfer the stock over to you on payment of the last note. I spoke to the counsel of the Old Colony Trust Company about this, and he said that was all expressed in the agreement; the Simpson estate would have to transfer the stock on payment of the last note, and that asking the estate for a letter to that intent was in his opinion superfluous and might lead them to think that we thought we were weak in the agreement.

Yours very truly,

A. S. BIGELOW."

Q. 130. Now what is the next one that you have?

A. Under date of June 21, Lewisohn Brothers, by Adolph Lewisohn, acknowledge receipt of the letter of the 19th, and there is also the following letter on the 21st:

"JUNE 21, 1895.

A. S. Bigelow, Esq., Boston, Mass.

DEAR SIR: I have today received your favor of yesterday covering original agreement with the Simpson estate, and also note for $204,761.66 paid on the 19th inst.

Yours very truly,

LEONARD LEWISOHN.

P. S.—You will receive all papers next week."

Q. 131. Now what is the next letter you have, either to or from Leonard Lewisohn? Let us see whether this is correct: the next letter of mine to Lewisohn Brothers, of which I find a copy in either of my letter books, is dated July 12, and the next date of a letter received from Lewisohn Brothers is July 15; is that correct?

A. Yes.

Q. 132. Do you find any copy of a letter or telegram to any of the subscribers to the Old Dominion Syndicate, or from any of the subscribers to the Old Dominion Syndicate, between July 1 and July 12, both dates inclusive?

Mr. HEMENWAY: As to all these letters to and from third parties, our objection is saved as above, as in all other cases.

A. I find no copy of any letter or telegram to any Old Dominion subscriber except a telegram to A. J. Coram, in which appears "Old Dominion subscription 75 per cent premium bid."

Q. 133. Is there not a telegram to Henry M. Whitney? If so, please read it.

A. There is a telegram to Henry M. Whitney [reading]:

104 "BOSTON, *July* 5, 1895.

Henry M. Whitney, Sydney Hotel, Cape Breton, Nova Scotia.

Want you to be a director in reorganized Old Dominion with Lewisohn, Nelson, Moses T. Stevens, Joseph G. Ray and myself.

A. S. BIGELOW."

Q. 134. Do you find among your papers any answer to that telegram to Mr. Whitney?

A. No, I do not seem to find any at all.

Q. 135. I call your attention to the following copy of a letter, being Exhibit No. 1 produced in connection with the deposition of Frederick Roxhauser in New York in the case of the Old Dominion Copper Mining & Smelting Co. v. A. S. Bigelow; viz:

"JULY 5, 1895.

Allen W. Evarts, Esq., New York City.

DEAR SIR: Since this morning I have communicated with Mr. A. S. Bigelow, who desires me to have for the first year the following seven directors of the Old Dominion Copper Mining & Smelting Company namely, Mr. A. S. Bigelow, Mr. Thomas Nelson, Mr. Leonard Lewisohn, Mr. Edgar Buffum, Mr. Moses T. Stevens, Mr. Joseph G. Ray and Mr. J. A. Coram.

Yours very truly,

L. L."

Was the communication with Mr. Lewisohn, there referred to, in writing?

A. Probably not. I should say it was by telephone, as we had a private telephone with Mr. Lewisohn's office at that time.

Q. 136. I call your attention to the record of the directors' meeting of the Old Dominion Copper Mining & Smelting Company on July 11, 1895, in which it appears that Mr. Henry M. Whitney of Boston was elected a director; are you able to recall whether or not you received any reply from him to the telegram of July 5, between that date and July 11, when he was so elected?

A. I do not recollect of having received any communication from Mr. Whitney.

Q. 137. Have you any further answer to make in reply to Int. 132, which is: "Do you find any copy of a letter or telegram to any of the subscribers to the Old Dominion Syndicate or from any of the subscribers to the Old Dominion Syndicate between July 1 and July 12, both dates inclusive?"

105 A. A letter from Charles J. Hodge, dated July 8, 1895, addressed to me.

"When do you expect to reorganize Old Dominion Copper Company and place it on the market? Lake people are hungry for it."

This is a quotation from my letter to Charles J. Hodge, dated July 12, 1895.

"I was over in New York yesterday for the very purpose of getting Old Dominion Copper Company into shape, and I should think

some time in the course of a couple of weeks we should open the bag just a little to the public. Lake people are not the only ones who are hungry for it; in Boston they seem to be starving for it."

Mr. BRANDEIS: If there is anything else we will put it in to-morrow.

Q. 138. I call your attention to a copy of the record of the minutes of the meeting of the directors of the Old Dominion Copper Mining & Smelting Company, at the office of Lewisohn Brothers, 81 Fulton street, New York, July 11, at 12 o'clock noon. This is merely a copy, but we will have here in the morning the original record. I will put this question now and we will assume that the original is here, and ask whether that is the meeting of the directors referred to by you in your letter to Mr. Hodge?

A. I do not know.

Q. 139. Whether that meeting was the visit in New York to which you referred?

A. That I do not know; I should suppose it was, from the letter which has been presented.

Q. 140. Have you no recollection? I wish you would just look over the records there.

A. I have looked over the original.

Q. 141. Have you no recollection other than what appears by the correspondence which has been put in evidence in connection with your deposition and the records of the directors' meeting of July 11, 1895, now shown you, as to what took place in connection with the organization of the company, or any conversations with Leonard Lewisohn, or any other person in relation thereto?

A. No, sir.

Q. 142. I call your attention to the offer made by the Old Dominion Copper Company of Baltimore City, A. S. Bigelow, president, for the sale of all its property to the Old Dominion Copper Mining & Smelting Company for 100,000 shares of its capital stock, and which is embodied in the record of the minutes of the directors' meeting of the Old Dominion Copper Mining & Smelting Company on July 11, now shown you, and ask you whether you have any recollection in regard to the making of that offer, or of the action taken thereunder or in relation thereto, except so far as appears by the record of that meeting?

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A. No, sir.

Q. 143. I call your attention also to the offer made by Leonard Lewisohn for the sale of the Old Dominion mine, the New York mine, the Chicago mine, the Keystone mine, a certain lot of land near Bloody Tanks to the Old Dominion Copper Mining & Smelting Company for 30,000 shares of its capital stock, a copy of which offer is embodied in the records of the meeting of the Old Dominion Copper Mining & Smelting Company on July 11, 1895, now shown you, and ask you whether you have any recollection in regard to that offer or the action taken thereunder, or any transaction in relation thereto, except as appears by the record of that meeting?

A. I have not.

Q. 144. Do you mean by your answers to the last two questions

that your recollection upon that matter is a blank except so far as refreshed by the records of the meeting?

A. Entirely; I do not remember being present at the meeting.

Q. 145. In your letter to Mr. Woodhull of June 15 you stated that you expected to see Mr. Woodhull on the following Tuesday, which appears to be June 18; do you recall whether or not you did see Mr. Woodhull, during that day or soon thereafter?

A. No, sir; I could not possibly tell.

Q. 146. Do you recall any conversation which you had about that time with Mr. Woodhull about this matter?

A. No, sir.

Q. 147. Or whether you had any at all?

A. I do not, no, sir.

Q. 148. Have you any recollection of talking with Mr. Woodhull within the next few months after that?

A. No, sir.

Q. 149. Are you able, by reference to the Old Dominion Syndicate receipt book, produced by you, to determine whether or not this subscription list, Exhibit 6, on which the month and day is left blank, should actually bear date before June 1?

A. Undoubtedly it should.

Q. 150. Is it not a fact that the subscriptions on Exhibit 5, which is dated the 13th day of June, were subscriptions taken on or after that date?

A. Undoubtedly.

Q. 151. Were the subscriptions which appear on Exhibits 3, 4, 6, and 5 taken or signed wholly in your presence and at your office, or were they signed elsewhere, in part?

A. I do not remember.

Q. 152. Have you any recollection in regard to whether those subscriptions were signed in your presence?

A. No, sir.

Q. 153. Have you any recollection except so far as appears by the correspondence already introduced, as to whether the subscrip-
107 tions appearing on Exhibits 3, 4, 6, and 5 were obtained by you personally or by some one of your associates?

A. I cannot remember.

Q. 154. You have no recollection whatsoever in regard to that?

A. No.

Q. 155. Have you any recollection in regard to any of the circumstances as to any of these subscriptions other than that which appears by the correspondence?

A. None at all.

Q. 156. Then your mind is a complete blank as to anything which may have occurred in connection with any of these subscriptions, except so far as appears by the correspondence, or so far as has been testified to by you?

A. It is.

Q. 157. Did you personally conduct any negotiations with the Simpson estate, or any one representing the Simpson estate, with a view to the purchase or transfer of any of this property?

A. I think not.

Q. 158. You have no recollection whatever in regard to the matter?

A. No.

Q. 159. You mean either in writing or orally?

A. I do not remember.

Q. 160. That is, you do not remember that you did anything?

A. No.

Q. 161. Did you personally, either orally or in writing, conduct any negotiations whatsoever in connection with the Keyser interest, or purchase of the Keyser interest, or transfer of any of the property?

A. I did not, no, sir.

Q. 162. Did you personally, so far as you recall, conduct any negotiations with the Simpson or Keyser interests, indirectly through Mr. Meredith?

A. I do not remember.

Q. 163. Have you any recollection other than that which is shown by the copies of letters and other papers which have been introduced in connection with your testimony, what has been testified to by you, concerning any conferences, negotiations, consultations or interviews with Mr. Leonard Lewisohn or Lewisohn Brothers in regard to the purchase of either the Simpson or the Keyser interest, or in regard to the formation of a syndicate or the operation of a syndicate?

A. No, sir.

Q. 164. Do you mean, by your answer to that last question, that you have no recollection whatsoever as to what passed between you and Mr. Lewisohn or Lewisohn Brothers in regard to the matter, except so far as already appears by what has gone in evidence, in regard to the matters that I have mentioned?

A. Yes, sir.

Q. 165. Will you now state, after examining the Old Dominion Syndicate receipt books, what amount was received from the subscribers between June 1 and June 18, both dates inclusive?

A. $27,848.12, E. & O. E.

Q. 166. Will you kindly give also, separately, the amount of money received from the subscribers on June 19, June 20, June 21, and June 22?

A. Separately or in the aggregate?

108 Q. 167. Separately.

A.—

On the 19th	$103,018 32
June 20	14,303 32
June 21	15,817 05
June 22	10,027 19
Being a total of	$142,166 18

[Adjourned to March 26, 1903.]

THURSDAY, *March* 26, 1903.

Q. 168. Are there any other letters from subscribers between July 1 and July 12?

A.—

"Houghton, Michigan, *July* 12, 1895.

A. S. Bigelow, Esq., Boston, Mass.,

Dear Sir: I presume the subscription for the Old Dominion has been closed; if not, I would like to take some of it. Can you tell me where it will be listed, and about what price? * * *

Yours truly,

J. B. STURGIS."

Q. 169. Will you now give us the correspondence between you and Leonard Lewisohn, or Lewisohn Brothers, between July 12 and August 1, 1895, in regard to the Old Dominion Syndicate or the Old Dominion Copper Mining & Smelting Company,—the correspondence from and to Lewisohn?

A. The first I find after July 12 is July 24.

Aside from the letters transmitting checks to Lewisohn Brothers to be credited on account of notes given by me in the Old Dominion matter, the first letter I find is one of July 14, to Leonard Lewisohn:

"Dear Sir: Referring to conversation with Mr. Hyams yesterday, your proportion of the 50,000 shares referred to will be 453/1000ths. These will be turned over to you personally, to be disposed of as you see fit. I think this will answer your question.

Yours very truly,

A. S. BIGELOW."

109 Q. 170. What is the next one after that, Mr. Bigelow?

A. The only letter I find from Leonard Lewisohn, or Lewisohn Brothers, between July 12 and July 31, except the letter of July 15, enclosing a check for $175, being one half of the amount paid to the Old Colony Trust Company, and the letters acknowledging receipts of my remittances, is a letter of July 31, 1895, which is as follows:—

"New York, *July* 31, 1895.

A. S. Bigelow, Esq., Boston, Mass.,

Dear Sir: According to your circular received on July 19, I beg to state that I shall take the entire 18,120 shares which will come to me in the new company of the Old Dominion Company in lieu of the money which was originally advanced and which was to be repaid from the proceeds of the sale of the new stock. Please confirm and oblige.

Very truly yours,

LEONARD LEWISOHN,
Per JESSE LEWISOHN.

P. S.—As telephoned yesterday.

L. L."

My letters to Lewisohn Brothers, sending remittances between July 12 and August 1 were as follows:—

July 15, 1895	$43,003 90
July 16, 1895	55,999 14
July 17, 1895	25,474 26
July 18, 1895	10,105 79
July 19, 1895	4,333 25
July 20, 1895	2,888 57
July 22, 1895	28,889 63
July 24, 1895	44,936 43
July 25, 1895	8,670 47
July 29, 1895	4,337 51
July 31, 1895	7,520 86

Q. 171. Now please turn to the Old Dominion Syndicate receipt book, and see what amounts were received by you from the Old Dominion Syndicate subscribers between July 12 and August 1, giving the amounts received by you each day.

A.—

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July 15, 1895	$42,568 39
July 16, 1895	50,225 99
July 17, 1895	31,247 41
July 18, 1895	10,105 79
July 19, 1895	4,333 25
July 20, 1895	2,888 57
July 22, 1895	28,889 63
July 24, 1895	44,936 43
July 25, 1895	8,670 47
July 26, 1895	289 06
July 29, 1895	4,048 45
July 31, 1895	7,520 86

being a total of $236,189.81, or $235,724.30, subject to correction.

Q. 172. Is there not among the receipts on these dates which you have read a receipt of a payment by J. Morris Meredith? If so, kindly read the receipt.

A. $14,432.88.

"BOSTON, *July* 16, 1895.

Received from J. Morris Meredith fourteen thousand four hundred and thirty-two dollars and eighty-eight cents, being bal. payment and interest of subscription of twenty-five thousand dollars to the Old Dominion syndicate, second payment of 28 2/3 per cent and 5 per cent interest, due July 26, 1895, third payment of 28 2/3 per cent and 5 per cent interest due August 25, 1895, fourth and last payment of 28 2/3 per cent and 5 per cent interest due Sept. 24, 1895.

No. 179. A. S. BIGELOW."

Q. 173. Have you not in the same Old Dominion Syndicate book a receipt from J. Morris Meredith, under date of June 21, No. 155, for $7189.56, being the second payment on account of subscription of $25,000 to Old Dominion Syndicate? And if so, state whether

or not that receipt is in all respects the same in form as No. 179, except as to the amount and the number of the subscription, and that it is for the second instalment instead of the third or final, and the words "and interest."

A. Yes.

Q. 174. Are not those two receipts that were given to J. Morris Meredith on the same printed form of receipt, and in substantially the same form, as the receipts given to all the syndicate subscribers whose names appear on Exhibits 3, 4, 6, and 5?

A. Yes, where the payments were made in a similar number of instalments.

111 Q. 175. Will you now please produce the correspondence between yourself and the several syndicate subscribers from July 12 to July 31, inclusive?

Mr. HEMENWAY: Of course all this is objected to.

A.—

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *July* 16, 1895.

Harold Williams, Esq., Nantucket, Mass.,

DEAR SIR: Your favor of July 14 has been received and contents noted. Mr. Bigelow was so very busy today that he has requested me to answer your letter for him. Your original subscription to the Old Dominion syndicate was $5000, and the balance due is 28 2/3 per cent, plus 28 2/3 per cent, equals 57 1/3 per cent, equals $2866.67; interest on this amount from May 28 to July 24, say 57 days, at 5 per cent, equals $22.70; which, added to the $2866.67 makes the total amount due $2889.37. If we do not receive your check for this amount until July 24, you should add 40 cents extra for another day's interest, as we have to send the money to New York and do not get credit for it until it is received there. Mr. Bigelow says you could not have a better writing outfit.

Yours truly,

C. H. BISSELL,
For A. S. BIGELOW."

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *July* 26, 1895.

Harold Williams, Esq., Nantucket, Mass.,

DEAR SIR: Mr. Bigelow being very busy today has requested the writer to answer your letter to him of July 24. You are correct in your supposition that by taking the bonus on your original subscription to the Old Dominion syndicate in stock instead of cash, you will receive 400 shares in all.

Yours respectfully,

W. A. S. CHRIMES,
For A. S. BIGELOW."

112 "OLD DOMINION SYNDICATE,
BOSTON, MASS., *July* 17, 1895.

F. S. Mead, Esq., 7 Exchange Place, Boston, Mass.,

MY DEAR MR. MEAD: Your favor of the 16th is received and contents noted. You of course know that all transactions in Old Dominion subscriptions must be of a private nature between buyer and seller as the receipts are not negotiable and thus recognize no trade at all of this kind; but it is perfectly immaterial to me whether you sell your interest or not.

Yours truly,

A. S. BIGELOW."

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *July* 17, 1895.

Isaac Fenno, Esq., Lake Dunmore House, Salisbury, Vt.,

DEAR SIR: Replying to your favor of July 16, the amount due on balance of your subscription of $5000 to the Old Dominion (presuming your check will reach here on Friday the 19th instant is $2887.75.

Yours truly,

A. S. BIGELOW,
By W. A. S. CHRIMES."

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *July* 18, 1895.

R. M. Field, Esq., Poland Spring House, South Poland, Me.,

DEAR SIR: Your favor of July 17 has been received and contents noted. The subscription to the Old Dominion Copper Mining & Smelting Company's stock has not yet been opened, but I am putting down the names of those of my friends who ask for it and already most of the 60,000 shares to be offered has been applied for. I have entered your subscription upon my list for 100 shares on the same basis as those of the others. It may be, however, that the amounts applied for will have to be pro rated as subscriptions bid fair to be considerably in excess of the amount of stock that can be offered.

Yours truly,

A. S. BIGELOW."

113 "SOUTH POLAND, ME., 17 *July*, 1895.

MY DEAR MR. BIGELOW: Possibly a loser of some exceptional opportunities through an enforced absence from Boston during the current summer, I take the opportunity of asking you if it would not be possible for me to secure the allotment of 100 shares of the Old Dominion stock in the new subscription. Any favor you may consistently be able to render me in this direction will be most heartily appreciated by

Yours sincerely,

R. M. FIELD.

A. S. Bigelow, Esq."

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *July* 19, 1895.

Joseph T. Herrick, Esq., 684 State St., Springfield, Mass.

DEAR SIR: Your letter of July 17 has been received and contents noted. Replying to your inquiries about the Old Dominion property, I enclose an article which will give you the information you wish. As to the subscription to the new stock, it is already over-written, and there will doubtless have to be some scaling down of the subscriptions; I will, however, put your name down on the same basis as the others, but you had better wire me on receipt of this, confirming your subscription, as there is not much time to lose. The price of the stock to subscribers is $25 per share, payable at one time on or before Oct. 1, 1895.

Yours very truly,

A. S. BIGELOW."

"684 STATE STREET,
SPRINGFIELD, MASS., *July* 17, 1895.

A. S. Bigelow, Esq.

DEAR SIR: Will it be possible to get 100 shares in the Old Dominion Copper Company, and about what would I have to pay? What are the prospects for this property, and can you give me some facts about it? If you are not too busy I should be glad to hear.

Very truly yours,

JOSEPH T. HERRICK."

[*Telegram.*]

"SPRINGFIELD, *July* 20, 1895.

A. S. Bigelow, Esq., 199 Washington St., Boston.

Put me down for 100 shares of Old Dominion.

J. T. HERRICK."

114

"BOSTON, *July* 19, 1895.

Henry F. Woods, Esq., 81 Milk St., Boston, Mass.

DEAR SIR: I am in receipt of your favor of July 18. The subscription to the new stock of the Old Dominion Copper Mining and Smelting Co. is already over-written. There will doubtless have to be some scaling down of subscriptions. I will, however, put your name down on the same basis as the others and notify you in due course of the amount allotted to you. The price to stock subscribers is $25 per share, payable at one time on or before October 1st, 1895.

Yours very truly,

A. S. BIGELOW."

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *July* 26, 1895.

S. S. Spaulding, Esq., Jerusalem Road, Cohasset, Mass.

DEAR SIR: Mr. Bigelow being very busy today has requested the writer to answer your letter to him of July 24. You are correct in your supposition that by taking the bonus of your original subscription to the Old Dominion syndicate in stock instead of cash, you will receive 240 shares in all. The balance due, including interest on your original subscription to the Old Dominion syndicate, if check is received at this office August 1st, will be $1735.77.

Yours respectfully,

W. A. S. CHRIMES,
For A. S. BIGELOW."

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *July* 26, 1895.

Harold Williams, Esq., Nantucket, Mass.

DEAR SIR: Mr. Bigelow, being very busy today, has requested the writer to answer your letter to him of July 24. You are correct in your supposition that by taking the bonus of your original subscription to the Old Dominion syndicate in stock instead of cash you will receive 400 shares in all.

Yours respectfully,

W. A. S. CHRIMES,
For A. S. BIGELOW."

115

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *July* 26, 1895.

Hon. William W. Grout, St. Johnsbury, East, Vt.

DEAR SIR: Mr. Bigelow, being very busy today, has requested me to answer your letter to him of the 25th instant. It has not yet been decided when Old Dominion Copper Mining & Smelting Company stock will be issued, but due notice will be sent to each subscriber. Mr. Bigelow has already written you asking that you confirm by letter your subscription of 1000 shares of the subscription stock.

Yours respectfully,

W. A. S. CHRIMES,
For A. S. BIGELOW."

"ST. JOHNSBURY, EAST, VT., *July* 25, 1895.

MY DEAR MR. BIGELOW: What about Old Dominion? The papers seem to speak as though the stock was issued, though I have seen no substantial statement to that effect, and I infer that such cannot be the case, as have had no notice from you, and you will remember I was to have notice. I thought when I heard from you, would go down to see about it.

Very truly,

WILLIAM W. GROUT."

"JULY 29, 1895.

DEAR SIR: Mr. Bigelow is very busy today and therefore requested the writer to acknowledge the receipt of your favor of the 24th instant and to say that he is perfectly willing that you should take 500 shares of Old Dominion instead of 1000, but he wishes you would allow the 1000 shares to remain in your name. The whole issue is largely oversubscribed, and calls are continually being made on Mr. Bigelow for additional subscriptions. He knows of a gentleman who wants 500 shares, and as the subscription list is full, your letter gives him an opportunity to do a favor for his friend.

Yours respectfully,

W. A. S. CHRIMES,
For A. S. BIGELOW."

E. V. R. Thayer, Esq., Isles of Shoals, N. H."

116 "BOSTON, *July* 23, 1895.

A. S. Bigelow, Esq.

DEAR SIR: I authorize you to sign for me for 1000 shares in the Old Dominion Mining & Smelting Co.

Yours truly,

E. V. R. THAYER."

"APPLEDORE HOUSE,
ISLES OF SHOALS, N. H., *July* 24, 1895.

DEAR BERT: As you said the other day the Old Dominion was oversubscribed, would you mind making my subscription 500 instead of 1000 shares? I promised to let a friend have 500 shares who since has decided that he cannot take it. If it makes any difference to you, do not hesitate to say so and let it stand.

Sincerely yours, EUGENE V. R. THAYER."

"OLD DOMINION SYNDICATE.
BOSTON, MASS., *July* 31, 1895.

Maxwell Woodhull, Esq., The Aldine, Springlake Beach, N. J.

DEAR SIR: Your favor of July 20 has been received and contents noted. I have only time today to write a few lines and regret that I am compelled to say that there will be no chance of your securing any more of the subscription stock than that to which you are entitled as a member of the original Old Dominion syndicate. We shall tell F. S. Moseley & Co. this if they apply to us to enter any increase of your subscription. In haste.

Yours very truly, A. S. BIGELOW."

"OLD DOMINION SYNDICATE.
BOSTON, MASS., *July* 15, 1895.

Maxwell Woodhull, Esq., The Aldine, Springlake Beach, N. J.

DEAR SIR: Your favor of July 13 has been received. * * * The balance of your subscription to the Old Dominion syndicate is due as follows:

28 2/3 per cent, say, $4300, Aug. 25, 1895.
28 2/3 per cent, say, $4300, due Sept. 24, 1895.
Interest at 5 per cent from May 28, 1895, should be added to each payment.

117 Making the total amount due Aug. 25, $4352.56, and the total amount due Sept. 24, $4369.88.

Yours very truly,

A. S. BIGELOW."

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *July* 22, 1895.

Maxwell Woodhull, Esq., 2033 G Street, Washington, D. C.

DEAR SIR: Your letter of July 19 has been received and contents noted. I am very busy today and cannot write you at length, but will only say that instead of taking payment for my original subscription in the Old Dominion syndicate in cash, I shall take it in subscription stock of the new company at $25 a share. If you desire to follow my example, please write me a letter confirming your intention of so doing.

Yours very truly,

A. S. BIGELOW."

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *July* 24, 1895.

Maxwell Woodhull, Esq., The Aldine, Springlake Beach, N. J.

DEAR SIR: Your favor of the 22nd instant has been received and contents noted. As I had already written you on the same date that I intended to take my proportion of subscription stock to the Old Dominion Copper Mining & Smelting Co. at $25 a share in lieu of cash, I did not think it necessary to telegraph you. The original members of that syndicate will not have any special right to subscribe to the balance of the subscription stock above their pro rata share. Your subscription of $15,000 to the original syndicate and $15,000 of subscription stock will entitle you to 1200 shares; that is, you put in no more money, but receive stock instead of cash for your bonus as a member of the original syndicate. The original stock of the new company is 150,000 shares of the par value of $25 each. 60,000 shares are issued for subscription at $25 a share cash; the proceeds of 40,000 shares, or the shares themselves, going to the original members of the syndicate as a bonus, and the proceeds of 20,000 shares, or, say, $500,000, going to the company as a working capital.

Yours very truly,

A. S. BIGELOW,
By BISSELL.

118 Mr. Bigelow, who was called away shortly after dictating the above letter, requested the writer to sign it for him."

"2033 G St., Washington, D. C., *July* 19, 1895.

A. S. Bigelow, Esq., Sears Building, Boston, Mass.

Dear Mr. Bigelow: The papers are writing so much about the proposed reorganization of the Old Dominion syndicate and its conversion into a company that I write to ask you what you propose to do about subscribing to the stock of the new company. I propose to do, within the range of my operations, what you do yourself; that is to say, under the suggested plan of reorganization of the company, as outlined in your letter to me, informing me of the syndicate, you said substantially that your purpose was to organize a new company on the basis of returning the cash paid by the syndicate plus a proportion of the stock equal to the amount subscribed to the syndicate. Now, do you propose to subscribe this cash to the capital of the new company or not? Whatever you do, I shall do. My subscription was, as you know, $15,000. If you subscribe to the stock of the company instead of drawing down your cash, I also will subscribe this $15,000 to the stock of the new company. I congratulate you on the advance in coppers, but go slow. It is time enough to push prices up after the first of October. We are not yet out of the woods. Patience, just now, is better than almost any other quality. If we have good crops this fall (and the crops are not yet assured) and without future heavy gold exports, then the time for a bull campaign will have come; now it is premature.

Sincerely yours,

MAXWELL WOODHULL."

"The Aldine.
Springlake Beach, N. J., *July* 22, 1895.

A. S. Bigelow, Esq., Sears Building.

Dear Mr. Bigelow: Your circular of July 19 as to the Old Dominion Copper syndicate has just been received. Of course your letter to me had crossed my letter to you of July 19, the same date. If you subscribe to the stock of the new company instead of drawing out your cash subscription to the syndicate, I shall of course do what you do as to my syndicate subscription. Please telegraph me at my address as to what you propose to do in the premises in order that I may send forward a proper reply to the syndicate circular of July 19, 1895. I have received no copy of project of the new com-
119 pany. Will you kindly let me have the points of the proposed organization, capital stock, terms of subscription, etc.? Will the members of the syndicate have any special right to subscribe to the balance of the stock of the new company? I mean beyond their syndicate cash subscription. I mean by sending in such additional subscriptions before August 1st? How much stock will my subscription of $15,000 to the syndicate and the subscription of $15,000 syndicate cash to the new company entitle me to?

Very truly yours,

MAXWELL WOODHULL.

My address for the next three weeks will be as given above."

"NEW YORK, *July* 26, 1895.

A. S. Bigelow, Esq., Sears Building, Boston, Mass.

DEAR SIR: Write today care Chesebrough, 24 State St., terms payment additional subscription Old Dominion.

M. WOODHULL."

"JULY 27, 1895.

Thomas Nelson, Esq., 119 Washington St., Boston, Mass.

In re Old Dominion Syndicate.

DEAR MR. NELSON: I have advised a young cousin here in New York to subscribe for some Old Dominion Copper stock. He tells me that he does not care to take more than he can pay for and therefore only wants to take 15 of the shares. Will you kindly put his name down on the subscription list for 15 shares and see that he gets according to allotment? If so, I will be much obliged. His name and address are as follows:

Oswald N. Cammann,
24 State St., New York,
Care Chesebrough Mfg. Co.

Please acknowledge this note to my address at The Aldine, Springlake Beach, N. J. I shall go down to the seashore this afternoon. Of course I told my cousin he should lose nothing by following my advice.

Sincerely yours,

M. WOODHULL."

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"THE ALDINE,
SPRINGLAKE BEACH, N. J., *July* 29, 1895.

A. S. Bigelow, Esq.

DEAR MR. BIGELOW: I have just written to F. S. Moseley & Co. of your city, note brokers, that if they can arrange a satisfactory loan for me, they can subscribe for me in my name for 600 additional shares of Old Dominion stock. Should they be able to carry through this negotiation, this subscription would give me 1800 shares. I now hold under my syndicate subscription and the 600 shares, instead of drawing down the $15,000 of my syndicate subscription for 1200 shares. I do not know when this subscription closes. Presumably, August 1st. But I have instructed F. S. Moseley & Co. to send to your office to ascertain. Please inform me of the action taken thereunder and if F. S. Moseley & Co. call upon you to subscribe for 600 shares additional, explain to them just how to make such subscription.

Sincerely yours,

M. WOODHULL."

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *July* 17, 1895.

James P. Sturgis, Esq., Houlton, Michigan.

MY DEAR SIR: Your favor of the 12th is received. The Old Dominion Company was reorganized last week with a capital of

150,000 shares, par value $25 each. 60,000 of those shares are to be sold at $25 a share: 40,000 of them for account of the original syndicate subscribers and 20,000 for a working capital. The subscription for those has not really been opened yet, but my friends have come in and told me what they want to pay for this, and asked me to put their names on the list. These foot up over 30,000 shares, and while I stand ready to take the balance, I am willing to let my friends in if they will signify what they wish. It may be that these subscriptions will have to be pro rated, as it looks as if the amount might be oversubscribed. You had better, therefore, wire, on receipt of this, what you would like to take. We cannot at present say just when we will ask for the money from the subscribers; we shall probably require it in one payment, but it is not likely that it will be wanted before the 1st of October. If it is not too much trouble, will you kindly notify those whom you know are my friends in your region, so that they may have an opportunity to subscribe?

Yours truly, A. S. BIGELOW."

121 [*Telegram.*]

"HOULTON, MICHIGAN, *July* 20, 1895.

A. S. Bigelow, Boston, Mass.

Letter received. Please enter my subscription for 550 shares of Old Dominion stock.

J. B. STURGIS."

[*Telegram.*]

"HOULTON, MICHIGAN, *July* 21, 1895.

A. S. Bigelow, Boston.

Please enter my subscription for 500 shares old Dominion in addition to former subscription.

J. B. STURGIS."

"BOSTON, MASS., *July* 22, 1895.

James B. Sturgis, Esq., Houlton, Michigan.

DEAR SIR: Your telegrams of July 20 and 21 have been received, and I have noted your subscription for 1050 shares of the stock of the Old Dominion Copper Mining and Smelting Co. on the terms as noted in my previous letter to you. You understand of course that in all probability the subscriptions will have to be scaled down somewhat, as the amount that can be issued is already oversubscribed for.

Yours truly, A. S. BIGELOW."

"BOSTON, MASS., *July* 17, 1895.

W. B. Mossman, Esq., Care R. H. Stearns & Co., Cor. Tremont St. and Temple Place, Boston, Mass.

DEAR SIR: I have received your letter of the 17th instant. There are no circulars on the Old Dominion, and all that we can do is to

put down the names of people who apply with the amount of shares that they wish to take and assume that we shall have to pro rate them and reduce their subscriptions somewhat. If you wish any, please let me know by tomorrow morning just how much, and I will put your name down on the list with the others. The price will be $25 per share and the money will probably be called not earlier
122 than Oct. 1st. There have been so many applications for the stock that it is necessary for us to know at once.

Yours truly,

THOMAS NELSON."

"BOSTON, MASS., *July* 17, 1895.

Gustaf Lundberg, Esq., P. O. Box 280, Boston, Mass.

DEAR SIR: Your favor of July 16 has been received and contents noted. The subscription to Old Dominion Copper Mining & Smelting Company's stock has not really been opened yet, but I am putting down the names of those of my friends who ask for it, and already most of the 60,000 shares to be issued has been applied for. I have entered your subscription on my list on the same basis as those of the others. It may be however that the amount applied for will have to be pro rated, as subscriptions bid fair to be considerably in excess of the amount of stock that can be offered.

Yours truly,

A. S. BIGELOW."

"ROOM 604, 19 KILBY STREET, BOSTON, *July* 16, 1895.

Thomas Nelson, Esq.

DEAR SIR: I beg to make application for subscription to 100 shares of Old Dominion Copper Co. of Arizona.

Respectfully yours,

GUSTAF LUNDBERG."

"BOSTON, *July* 22, 1895.

R. R. Goodale, Esq., Houlton, Michigan.

DEAR SIR: In accordance with your telegram of the 20th instant, I have entered your subscription for 100 shares of the new stock of the Old Dominion Copper Mining & Smelting Co. at $25 per share payable in one instalment on or before Oct. 1st, 1895. You understand, of course, that your subscription is liable to be scaled down somewhat, as the amount which can be offered is already subscribed for.

Yours truly,

A. S. BIGELOW."

123 "JULY 22, 1895.

H. Wallerstein, Esq., P. O. Box 2737, New York.

MY DEAR SIR: Your favor of the 20th instant is received and contents have been fully noted. I do not in any way consider you a bore or peculiar, you simply try to do what all the rest of us are

striving for, and that is to make a few dollars. The original subscription to the Old Dominion was not offered freely to brokers in Boston, and I have no idea how it was offered to Mr. Stanton. In the first purchase at 5 7ths of the property, Messrs. Lewisohn Brothers took one-half and allowed me to take the other half, though I think they would have preferred to have me take only such portion as I absolutely wanted for myself. Then when we afterward bought the 2 7ths completing the entire purchase, I rather insisted I should have two-thirds of that. You will therefore see that I had very little to offer even to my immediate friends. One particular friend of mine who lives out of town said to me the other day, 'How was it I did not get any Old Dominion originally?' I told him it was simply because he was not here right under my nose where I could see him. I then told him we had built a little ladder, and he could come in on the third round, which he was very glad to do. But even this third round is now all filled up, and there is no room for anybody else. I am informed that you were told the middle of last week that you had better get in on this basis rather than not at all, but until today I have heard nothing from you. I did not tell Lewisohn Brothers originally to offer you any Old Dominion. So far as I know they simply took one-half of the 5 7ths and one-third of the 2 7ths, and I know nothing as to what they have done with their friends in the matter. * * * You have done nothing to forfeit my esteem or friendship in any way, and I am very sorry you did not have a chance to get into the Old Dominion at the start, but you have no idea how fast these things go when they begin, and a day's delay often leaves a man outside. * * *

Yours very truly,

A. S. BIGELOW."

"NEW YORK, *July* 20, 1895.

A. S. Bigelow, Esq., Boston.

MY DEAR SIR: I do not want you to consider me a bore or peculiar, and I only write these lines to say that accidentally I heard
121 this week for the first time about the Old Dominion Copper mine. I understand that the original subscription to the first syndicate had been offered freely to brokers in Boston as well as to people like John Stanton here, and surprise was expressed to me that I, as one of your past particular friends had not been taken in also. When I applied to Mr. Lewisohn a few days ago, he was going to the Mountains and referred me to his son; and when I went to see him, Mr. A. L. he said he would give me 500 shares in the present subscription at $25. I then asked him if, as I had learned, there had been a previous subscription with certain rights attached. He replied that was ancient history and that he could do nothing for me in that direction. Now, to me it was not ancient but perfectly modern history, and I hope I have not done anything to forfeit your esteem or friendship, as out-side of any money considerations. I have always had the best of regards for you and could only believe that you cherished similar feelings for me. Of course I should have liked to have had a little participation in the first

syndicate, and would have been satisfied to take 200 shares of the old subscription and 200 shares of the new subscription; and I would like to know from you, if not presuming too much upon your time, whether you told Lewisohn to offer me originally any participation in the Old Dominion. Of course, consider this confidential, as I shall also consider any answer which you wish to give me. I am sorry that I could not invest largely in Montana. I have had to use a good deal of money in my business, but still could and would have gone moderately into Old Dominion had it been offered to me. * * *

Yours truly,

H. WALLERSTEIN."

"BOSTON, *July* 25, 1895.

A. S. Bigelow, Esq.

DEAR SIR: Referring to your circular of July 24, this letter is to confirm my subscription for 200 shares of Old Dominion Copper Mining & Smelting Company made through Mr. Matthew Luce. I trust my subscription will not be cut down, as I understand from Mr. Luce that I was to have the whole of 200 shares.

Yours truly,

JAMES M. PRENDERGAST."

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"BOSTON, *July* 26, 1895.

A. S. Bigelow, Esq.

DEAR SIR: I wish to subscribe for 80 shares of the Old Dominion Copper Mining Company. If you cannot give me 80 shares, please see that I get my share, and oblige

Respectfully,

JOHN O. CONNER."

"BOSTON, *July* 26, 1895.

A. S. Bigelow, Esq., Sears Building.

DEAR SIR: I have yours of the 24th notifying me that I am down as subscriber for 300 shares of Old Dominion Copper Mining & Smelting Co. and that it is oversubscribed and will doubtless have to be scaled down. I desire to confirm my subscription for 300 shares and trust that I may escape much pruning.

Very truly yours,

F. G. WEBSTER."

Q. 176. Will you now read a copy of the circular letter of July 19, referred to in a letter of Maxwell Woodhull to you, dated July 19, 1905?

A.—

"303 SEARS BUILDING.
P. O. BOX 5104.

A number of the largest subscribers to the Old Dominion syndicate have requested that they be allowed to take shares in the new

company at a par value of $25 in lieu of the money which they originally advanced and which was to be repaid to them from the proceeds of the new stock. As a subscriber to the syndicate, you are hereby informed that it has been decided to grant this request. If you wish to avail yourself of the opportunity, you must notify me in writing on or before August 1, 1895, after which date this option will positively expire.

A. S. BIGELOW."

That appears to be all the letters received except letters relating merely to the payment of subscriptions.

Q. 177. The letter to F. G. Webster, dated July 26, refers to your letter to him of the 24th: will you see whether you have that letter, or a copy of that letter?

A. I cannot find any.

126 Q. 178. Are you able to recall anything in regard to that letter to Mr. Webster?

A. No, I cannot.

Q. 179. Will you now produce the correspondence between yourself and Lewisohn Brothers, or Leonard Lewisohn, or one of that concern, during the period from August 1, 1895, to October 1, 1895?

A. The correspondence in relation to Old Dominion matters other than that consisting merely of the transmission and receipt of checks, is as follows:

"SEARS BUILDING,
"BOSTON, MASS., *August* 2, 1895.

Leonard Lewisohn, Esq., Box 1247, New York.

DEAR SIR: Answering yours of July 31, we have entered your subscription for the entire shares which will come to you in the new company in lieu of the money originally advanced. The shares will not be exactly 18,120, as we do not take the fractions into account. Your proportion however will be for some few shares less than that. Of course we will notify you of the number later.

Yours truly,

A. S. BIGELOW."

"AUG. 29, 1895.

Leonard Lewisohn, Esq., Box 1247, New York.

DEAR SIR: I take pleasure in forwarding a copy of the report of Messrs. Hyams and Colquhon on this company's mine at Globe, Arizona. I am glad to say that this report more than confirms all that was originally claimed for the property.

Yours truly,

A. S. BIGELOW."

"SEPT. 18, 1895.

Adolph Lewisohn, Esq., Box 1247, New York.

DEAR SIR: You should find herein certificate No. 74 covering the 30,000 shares of the capital stock of this company to A. S. Bigelow

and Leonard Lewisohn for property purchased in accordance with the vote of the directors of the company. Please endorse said certificate on the back as attorney for Leonard Lewisohn and return it to me.

Yours very truly,

A. S. BIGELOW."

127 Now the letters relating to payments, remitting checks to Bigelow, show the following:

August 3	$3,183.48
August 19	8,988.79
August 21	19,581.06
August 23	13,926.26
August 23	4,787.80
August 26	17,707.79
August 30	2,903.70
September 16	2,328.03
September 16	1,456.25
September 24	5,651.25

Q. 180. Let us have now the syndicate receipts. We had them before through July.

A.—

August 2	$289.34
August 3	2,894.14
August 5	578.90
August 16	1,449.46
August 19	6,960.43
August 20	435.08
August 21	19,145.98
August 22	13,926.26
August 23	4,787.80
August 26	17,707.79
August 26	2,903.70
September 13	2,328.03
September 23	1,456.25
September 24	5,828.89
September —	21,333.33
Footing (to be verified)	$100,625.37

Q. 181. Now let us go back to the 1st of August for the private letters. We are now bringing up the subscribers' letters from August to October 1.

A.—

128 "AUGUST 5, 1895.

R. R. Goodell, Esq., Houghton, Michigan.

DEAR SIR: Your favor of the 31st ultimo is at hand. We duly received your wire for another 200 shares of Old Dominion stock,

but it came too late for you to get any additional. In fact, we are oversubscribed as it is, and I do not know how much of your first lot you will get. You will get something any how. Please say nothing to anyone else, but the insiders themselves who took 20,000 shares of the subscription have given up their rights in those to accommodate subscribers. * * *

Yours truly,

A. S. BIGELOW."

"BOSTON, *August* 7, 1895.

MY DEAR MR. GROUT: Your two letters of August 5 have been received and contents noted. In all probability you will get 1000 shares; that is, I do not think there is much doubt about it. Please do not say anything about this, however, as it will be a special favor to you if you do get that amount of stock. I am glad to be able to say that the copper market is very strong and the outlook for the future promising. In haste.

Yours very truly,

A. S. BIGELOW."

"Hon. W. W. Grout, Barton National Bank, Barton, Vt.

BARTON, VERMONT, *Aug.* 5, 1895.

A. S. Bigelow, Esq.

MY DEAR SIR: I notice that the papers are telling about the subscriptions to the Old Dominion Company being scaled down. That will not, of course, affect my 1000 shares, taken, as you will remember, immediately after the formation of the first syndicate and which really ought to have included me in that. You will not of course forget that my relation to the office is such that no question arises about my subscription.

Very truly yours,

WILLIAM W. GROUT."

"BARTON, VERMONT, *Aug.* 5, 1895.

MY DEAR MR. BIGELOW: It occurred to me that possibly you might want a letter with which to suitably explain my re-
129 lation to the Old Dominion subscription and that I did not leave it in the best possible shape by simply signing the paper I did the other day, and that your letter to me suggesting that I confirm my subscription for 1000 shares, &c., when replied to by me would put you in possession of material with which to satisfy any one who might be dissatisfied with the assignment of stock, that I was entitled to my stock without any scaling down. Hence I wrote a letter to enclose with this which will furnish an explanation of the situation is such as to make it necessary, though I presume it is not. I know, in fact, that the whole matter is in your hands and expect you will take care of my 1000 shares any way. I want it not to sell but to keep, and I am in shape to carry it, and shall, except a little I wish to have to spare to some friends to whom I have promised

participation. If this letter will not help, as I presume to be the case, throw it aside, but do not fail to save the 1000 shares.

Very truly yours,

WILLIAM W. GROUT."

"BOSTON, MASS., *Aug.* 7, 1895.

Henry Wood, Esq., Green Acre Inn, Eliot, Me.

DEAR SIR: Your favor of Aug. 6th has been received and contents noted. It is probable that you will get the whole amount of Old Dominion Copper Mining & Smelting Company stock for which you subscribed."

[No signature.]

"AUG. 6TH, 1895,
GREEN ACRE INN, ELIOT, MAINE.

A. S. Bigelow, Esq., President Old Dominion Company.

DEAR SIR: Please kindly inform me if the allotment of Old Dominion Mining stock is yet made, and if my small subscription of 100 shares is to be cut down.

Yours truly,

HENRY WOOD.

Present temporary address as above."

"AUG. 7, 1895.

J. B. Sturgis, Esq., National Bank of Houlton, Michigan.

DEAR SIR: I am in receipt of your favor of Aug. 3rd. It is probable you will get the full amount of Old Dominion Copper Mining & Smelting Company stock for which you subscribed.

Yours truly,

A. S. BIGELOW."

130 "OLD DOMINION SYNDICATE,
BOSTON, MASS., *Aug.*, 22, 1895.

J. B. Sturgis, Esq., Houlton, Michigan.

DEAR SIR: Replying to your favor of Aug. 17 anent Old Dominion subscription, it is true that you subscribed for 1050 shares, but you were allotted 1000 shares.

Yours very truly,

A. S. BIGELOW,
By W. A. S. CHRIMES."

"HOULTON, MICHIGAN, *Aug.* 3, 1895.

A. S. Bigelow.

DEAR SIR: Referring to my subscription for 1050 shares of Old Dominion stock for myself and friends, can you give me some idea of the number of shares we shall be able to get? It would be of some advantage to me to know, on account of holding the money for an investment. The newspapers state the stock has been oversubscribed. A reply will oblige.

Yours truly, J. B. STURGIS."

"HOULTON, MICHIGAN, *Aug.* 17, 1895.

A. S. Bigelow, Esq.

DEAR SIR: Your favor of the 13th instant notifying me 1000 shares of Old Dominion stock had been allotted on my subscription is received. My subscription was for 1050 shares. Did you make an error in the allotment or was there a scaling of the subscription?

Yours truly,

J. B. STURGIS."

"OLD DOMINION SYNDICATE,
BOSTON, MASS., *Aug.* 21, 1895.

S. N. Brown, Esq., 77 Milk St., Boston.

DEAR SIR: Replying to your favor of August 19, the notices to which you refer were sent only to those subscribers of Old Dominion stock at $25 per share to whom stock was allotted.

Yours truly,

W. A. S. CHRIMES,
For A. S. BIGELOW."

131 "BOSTON, *Aug.* 19, 1895.

DEAR MR. BIGELOW: Mr. Williams tells me he has received a notice as to award of Old Dominion Copper stock. I have not heard from mine. Did the notice to me miscarry?

Very truly yours,

SAMUEL N. BROWN."

"BOSTON, *Aug.* 22, 1895.

DEAR MR. BIGELOW: Thank you for yours of the 21st relative to distribution of Old Dominion copper stock.

Very truly yours,

SAMUEL N. BROWN."

"SEPT. 12, 1895.

W. B. Mosman, Esq., Boston, Mass.

DEAR SIR: Your letter of Sept. 11 is at hand. Your first question was answered by notice in regard to payment on Old Dominion Copper Mining & Smelting Company stock, mailed you yesterday.

Yours truly,

A. S. BIGELOW."

"AUGUST 17, 1895.

Old Dominion Copper Mining & Smelting Company, Boston, Mass.

DEAR SIRS: Your favor of the 13th instant notifying me that 15 shares of the stock of your company had been allotted to me at $25 per share is received. Please address all notices or other communications hereafter to me at 24 State St., New York City, N. Y., and oblige,

Yours truly,

OSWALD CAMMANN."

"Aug. 15, 1895.

A. S. Bigelow, Esq., Sears Building.

Dear Sir: We note that we are awarded 100 shares Old Dominion at $25 a share as per your favor of the 13th.

Yours truly, FOOTE & FRENCH.
Per FOGG."

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"Aug. 20, 1895.

My Dear Mr. Bigelow: In answer to your circular letter of the 17th, I shall be very glad to pay both the August and September payments to the $8000 Old Dominion syndicate in the name of Henry T. Coe. If you will kindly have the account made up with interest I will plan to call Thursday and hand you check.

Very sincerely yours,

SAMUEL B. CAPEN."

"Franklin, Mass., *Aug.* 24, 1895.

Mr. A. S. Bigelow.

Dear Sir: Your notice of August 13 saying I have been allotted 400 shares Old Dominion copper stock was received through Mr. Matthew Luce. My address is Franklin, Mass. Will you please send all future notices there and greatly oblige,

Yours very truly,

CHARLES J. McKENZIE."

"Maplewood Hotel,
"Maplewood, N. H., *August* 25, 1895.

My Dear Mr. Bigelow: Pursuant to your notice of the 17th, I enclose my check for present instalment of subscription to Old Dominion syndicate made up with interest to the 28th instant, which will cover remittance to New York $5805. You may send receipt to my office in usual course. * * *

STEPHEN M. CROSBY."

"South Poland, Me., 22 *July*, 1895.

A. S. Bigelow, Esq.

Dear Sir: In reply to your communication of the 19th instant, I beg leave to say that it is my wish to avail myself of the opportunity offered thereby to take the shares in the new company formed by the Old Dominion syndicate at their par value of $25 in lieu of the money originally advanced which was to be repaid from proceeds of the sale of the new stock.

Very respectfully,

R. M. FIELD."

"Bethlehem, N. H., *July* 27, 1895.

My Dear Mr. Bigelow: I hereby confirm my subscription for 400 shares of the Old Dominion Copper Mining & Smelting Company.

Very truly yours, SAMUEL N. BROWN."

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"JULY 24, 1895.

A. S. Bigelow, Esq.

DEAR SIR: Your notice to the subscribers of the Old Dominion syndicate was duly received. As I understand it, having $3000 in the syndicate which was to be paid back to me, I can put that amount into new stock if I so desire. If I am correct about it, you will please put me down for that much stock, which would be 120 shares, giving me 240 shares in all. Please let me know if I am correct in the matter and oblige. I would like to pay my subscription in full on Aug. 1st. Please let me know the amount due, and I will see that it is paid on that day.

S. S. SPAULDING."

"NANTUCKET, MASS., *July* 24, 1895.

DEAR BERT: Your circular letter of July 19 in re Old Dominion mine was duly received. In reply I would say that I will take all my subscription in stock. Will you kindly let me know how many shares in the mine I shall thus receive when the certificates are issued? Thanking you again for your kindness, and with my sincerest regards, I am

Ever yours,

HAROLD WILLIAMS.

POSTSCRIPT.—My subscription was $5000. Shall I receive 400 shares or what?"

"BOSTON, *July* 29, 1895.

A. S. Bigelow, Esq., Boston, Mass.

DEAR SIR: Please take notice I do accept the option lately offered by you. I will take the bonus on my original subscription to the Old Dominion syndicate in subscription stock at $25 a share instead of in cash.

Yours truly,

JOHN H. PIERCE."

"BOSTON, *July* 29, 1895.

Mr. A. S. Bigelow, 303 Sears Building.

MY DEAR SIR: Will you please add my name to the number who subscribed for the Old Dominion stock in the new company at the par value of $25 a share in lieu of the money which I advanced and which was to be repaid to me? I am

Yours very truly,

N. E. HOLLIS."

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"JULY 30, 1895.

Mr. A. S. Bigelow, Boston.

As per your letter of the 19th instant please enter my subscription to be taken in the shares of the new company at their par value of $25 per share.

STEPHEN O. METCALF."

"BOSTON, *July* 31, 1895.

A. S. Bigelow, Esq., Sears Building.

DEAR SIR: At the request of Mr. Luce, I wrote to say that he would like to have you include the following names in the list of those who wish additional shares in the Old Dominion in place of their original subscription: Moses T. Stevens, Timothy E. Hopkins, Isaac Fenno.

Respectfully yours,

F. H. MANNING."

The others are simply notices.

Q. 182. Does that include all the letters?

A. Yes.

Q. 183. You mean up to that date of October 1?

A. That is everything in there.

Q. 184. From subscribers?

A. Yes.

Q. 185. Have you not, in your letter book marked "A. S. B.," on pages 385 and 386, copies of forms of allotment of subscriptions to Old Dominion Copper Mining & Smelting Company stock? If so, will you now read the same, giving the page on which each appears?

Mr. HEMENWAY: The defendants object to the admission of forms on pages 385 and 386, which do not appear to have been sent to anybody by Mr. Bigelow or by anybody else.

A.—

"SEARS BUILDING, BOSTON, MASS., *August* 13, 1895.

Referring to your subscription to the stock of the Old Dominion Copper Mining & Smelting Company, you are hereby notified that — shares have been allotted to you at $25 per share. Notice will be sent in due course when payment for this should be made. Besides this you will receive — shares on subscription of — dollars to the Old Dominion syndicate, being the stock taken by you in accordance with the circular of July 19, 1895, and of course, in addition, the — shares to which you are entitled under your original subscription to the Old Dominion syndicate, in other words on the further payment by you of — dollars, you will be entitled to — shares of the stock of the Old Dominion Copper Mining & Smelting Company. When the stock is ready for delivery you will be notified.

A. S. BIGELOW."

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"SEARS BUILDING, *August* 13, 1895.

Referring to your subscription to the stock of the Old Dominion Copper Mining & Smelting Company, you are hereby notified that — shares have been allotted to you at $25 per share. Notice will be sent in due course when payment for this should be made. Besides this you will receive — shares on your subscription of — dollars to the Old Dominion syndicate, being the stock taken by you in accordance with the circular of July 19, 1895. Of course, in ad-

dition to the — shares to which you are entitled under your original subscription to the Old Dominion syndicate, in other words, on the further payment by you of — dollars, and together with balance due by you on your original subscription to the Old Dominion syndicate, you will be entitled to — shares in the Old Dominion Copper Mining & Smelting Company. When the stock is ready for delivery you will be notified.

A. S. BIGELOW."

[Adjourned to Friday, March 27, and resumed.]

Q. 186. Your letter dated July 19, 1895, to Herrick refers to your enclosing an article to him about the Old Dominion: do you recall what that article was?

A. I do not.

Q. 187. Have you no recollection whatever in regard to it?

A. I should suppose it was a newspaper article, from the reading of the letter.

Q. 188. Is there not a subscription list containing the names of the subscribers to the Old Dominion Copper Mining & Smelting Company stock?

A. Yes, sir.

Q. 189. Will you kindly produce it?

A. Yes, sir. I now produce it.

Mr. HEMENWAY: The admission of this list is objected to as being incompetent, irrelevant, and immaterial, and as a matter between others than the plaintiff and defendants in this action.

[The witness produces a subscription list dated Boston, July 18, 1895, which reads:]

136 "We the undersigned, each for himself and not for the others, hereby subscribe for and agree to take and pay for stock of the Old Dominion Copper Mining & Smelting Company, organized under the laws of the State of New Jersey, to the number of shares set opposite our names respectively, at twenty-five dollars ($25) a share on or before October 1st, 1895."

[This paper is marked "Exhibit 10, G. C. B., March 27, 1903."]

Q. 190. Is that the only list of subscriptions for stock in the Old Dominion Copper Mining & Smelting Company? In other words, does that list include all the subscriptions taken referred to in the letters which have been introduced in evidence and include, as stated in the letter to Maxwell Woodhull of July 24, in the clause "60,000 shares are offered for subscription at $25 cash; the proceeds of 10,000 shares or the shares themselves going to the original members of the syndicate as a bonus and the proceeds of 20,000 shares, say $500,000, going to the company as a working capital"?

Mr. HEMENWAY: The question is objected to as immaterial, irrelevant, and incompetent, and res inter alios, and also as being a declaration subsequent to the transactions complained of.

A. That is the only one I have ever seen.

Q. 191. Is there any other subscription list that you have had anything to do with or know of?

A. I cannot recollect of any now.

Q. 192. I ask you to examine the subscription list [Exhibit 10] and state whether it does not appear to be the fact that all of the subscriptions up to the subscription of Ben F. Meservy, 100 shares, are in the handwriting of the party subscribing or in the handwriting of some person purporting to act as attorney for the subscriber?

Mr. HEMENWAY: That is objected to as immaterial, incompetent, and irrelevant.

A. It would appear so.

Q. 193. I will ask you whether the signatures commencing with George H. Lyman and ending with H. S. Goodwell do not appear to be all in the same handwriting, and whether you are able to state in whose handwriting those signatures are?

A. I would not want to answer that question; I would not dare to say.

Q. 194. Are you able to recall any correspondence with any of these subscribers which has not already been introduced in evidence,—any of these subscribers, prior to October 1, 1895, which has not been already introduced in evidence by you?

A. In relation to the Old Dominion matter?

Q. 195. Any correspondence, letters, telegrams, or other written communications.

A. No, sir, I cannot.

137 Q. 196. Are you able to recall, prior to October 1, 1895, any conversations with any of these subscribers except so far as such conversations may have been referred to or embodied in the correspondence which you have produced, in relation to the Old Dominion matter?

A. The only recollection of any conversations that I have, in a general way, is that they set forth the plan as outlined in that letter to Woodhull.

Q. 197. Do you recall any person with whom you had such a conversation?

A. I cannot.

Q. 198. You mean you cannot recall any person?

A. Any specific conversation, no.

Q. 199. Do you recall distinctly that you had any conversation with any one of these subscribers?

A. I think that question has been answered before. It is only in a general way that I recall conversations, if I had any.

Q. 200. What was the total amount of subscriptions to the Old Dominion Copper Mining & Smelting Company stock at $25 a share which was actually allotted?

Mr. HEMENWAY: That is objected to as immaterial, incompetent, and irrelevant, and as res inter alios.

A. 60,000 shares.

Q. 201. I call your attention to the fact that, according to Mr. Hyams' footing, the aggregate number of shares subscribed for, as per Exhibit 10, was 77,120. Can you state how the allotment of the 60,000 shares was distributed against those 77,120 shares subscribed for?

Mr. HEMENWAY: Objected to as immaterial, incompetent, and irrelevant.

A. To the best of my recollection, I do not think there was any general rule for doing it; to the best of my recollection, it was left discretionary with me.

Q. 202. Do you recall in what way you exercised your discretion?

A. I cannot, beyond, of course, what is stated in any letters that have been read.

Q. 203. Do you recall whether Lewisohn Brothers, or Mr. Lewisohn, were allotted any of this stock at $25 a share?

A. Judging from Mr. Lewisohn's letter of July 31, I should say that he did take some stock. I have no recollection beyond what is contained in that letter of July 31 to me, which has been already read in evidence.

Q. 204. In what way was this allotment of 60,000 shares distributed between the 20,000 shares that were sold for the purpose of providing a working capital for the company and the 40,000 shares that were sold to repay the members of the syndicate their original investments?

A. I do not remember now.

Q. 205. What was your cash contribution to the Old Dominion Syndicate?

138 Mr. HEMENWAY: That is objected to as immaterial, incompetent, and irrelevant.

A. I could not tell without reference to my check book.

Q. 206. I call your attention to a certificate in the Old Dominion receipt book produced by you, certificate No. 218; also to the stub of certificate No. 254, the stub and certificate being as follows:—

"Not Negotiable.
$30,487.60
A. S. Bigelow
July 24, 1895.
Balance instalment on 50,000
No. 218."

"Receipt.

$30,487.60. BOSTON, *July* 24, 1895.

Received from A. S. Bigelow thirty thousand four hundred and eighty-seven dollars and sixty cents, being balance payment and interest on subscription of fifty thousand dollars to the Old Dominion syndicate; second payment of 28 2/3 and 5 per cent interest due July 26, 1895; third payment 28 2/3 and 5 per cent interest due

August 25, 1895; fourth and last payment 28 2/3 and 5 per cent interest due Sept. 24, 1895.
No. 218.
A. S. BIGELOW."

[Stamped] "Not negotiable."
[Stub:]
"Not Negotiable.
$21,333.33.
A. S. Bigelow.
42 2/3 per cent instalment on $50,000
No. 254."

Then, written over it, "14 per cent, 28 2/3 per cent, [added] 42 2/3 per cent;" underneath the 42 2/3 per cent is "(57 1/3 per cent);" "paid, July 24. Receipt 218; [added up] 100 per cent."

I will ask you whether by reference to those stubs you do not recall that the total amount contributed by you was $50,000?

A. Yes.

Q. 207. The total amount paid by you, $51,820.93, being a $50,000 contribution to the syndicate, with interest at 5 per
139 cent to the time of the payment?

A. So it appears, by the receipts.

Q. 208. Will you now state what you received from the operation of the syndicate in stock and in money?

A. I should have to look over my private memoranda and check books before I could answer.

[Examination of the witness suspended.]

FRIDAY, *April* 10, 1903.

[The taking of the deposition of Albert S. Bigelow was resumed at 10 a. m. at the office of Messrs. Brandeis, Dunbar & Nutter, 220 Devonshire street, Boston, Mass.]

Q. 209. Mr. Bigelow, have you since the adjournment of the taking of your deposition found any other papers of any kind which bear upon the matter of your examination?

A. No, sir.

Q. 210. Have you been able to recall any facts which bear upon the matter?

A. No, sir.

Q. 211. Your memory has not in any way been refreshed by reading over the depositions or by looking over the papers as to the transactions?

A. Only so far as I have stated.

Q. 212. Is it not a fact that up to the annual meeting of April 4, 1902, when Mr. Charles Smith and his associates were elected directors of the Old Dominion Copper Mining & Smelting Company, you and Mr. Lewisohn, through your own stock and that of other persons whose proxies you held, retained control of the company?

Mr. LAUTERBACH: That is objected to as to substance, because

it has no bearing upon the issues in this action; and as irrelevant to the issues, incompetent, and immaterial.

A. The only evidence I have of that is what is contained in the records of the company at the annual meetings which were held.

Q. 213. As a matter of fact, you remained president of the company up to April 4, 1902?

A. If that is the date, yes.

Q. 214. You mean if that is the date of the meeting at which Mr. Smith came in?

A. That I was kicked out.

Q. 215. And all of the persons who were elected directors prior to the meeting of April, 1902, were either selected by you or Mr. Lewisohn or with your or his approval, were they not?

140 Mr. LAUTERBACH: The same objection as stated above.

A. I really cannot remember about all those things.

Q. 216. Is it not a fact that you did select the directors?

A. I think Mr. Lewisohn and I together did.

Q. 217. Will you state whether or not up to the time of the acquisition by the Old Dominion Copper Mining & Smelting Company of the properties in Globe, Ariz., formerly belonging to the Old Dominion Mining Company of Baltimore City, or to Simpson and Keyser, you had any knowledge of those mines except that furnished of the report of Messrs. Hyams and Colquhoun?

A. Only in a general way. I had heard of them.

Q. 218. [Presenting a report.] Do you recognize that as a copy of the report of Messrs. Hyams and Colquhoun?

A. I think it is. I have not the original.

[It is stipulated that this copy of report may be treated as a copy, subject to correction by comparison with the original; and the copy is marked "Exhibit 13, G. C. B., April 10, 1903."]

[For text, see page 237.]

Q. 219. Mr. Bigelow, you called my attention, on the last day of the taking of your deposition, to certain pages in your letter book which had been cut out; will you give the numbers of the pages that are cut out and the date before and after such pages? Just read the memorandum, if any, in the margin of the book at that point.

A. "June 15, 1895. Pages 309 to 313, inclusive, were spoiled." The date before is "June 15, 1895," and the date after is "June 15, 1895."

Q. 220. Can you state in whose handwriting the lead pencil memorandum "June 15, 1895, pages 309 to 313, inclusive, were spoiled" is? I want to know in whose handwriting that is.

A. I could not say as to that. It is not in my handwriting.

Q. 221. I call your attention to a printed report dated Boston, April 3, 1901, entitled, "To the stockholders of the Old Dominion Copper Mining & Smelting Company," and to a printed report entitled, "Report of the directors to the stockholders—report of the Old Dominion Copper Mining & Smelting Company for the year

ending December 31, 1901," and ask you whether it is not a fact that these two reports, of which these are copies, were issued by the company and were the only reports issued by the company to the stockholders of the company prior to April 4, 1902?

Mr. LAUTERBACH: That is objected to on the ground that whether the reports were or were not issued is of no relevancy to this action against Leonard Lewisohn, there being no evidence of any
141 duty devolving upon him to issue or cause to be issued any report, and on the general ground of the irrelevancy, immateriality, and incompetency of the question.

A. I cannot remember; these reports were doubtless sent out, but whether they are the only ones ever sent out, I cannot say.

Mr. LAUTERBACH: I move that the answer be stricken out in regard to the sending out and circulation of the reports, on the ground that Leonard Lewisohn is not shown to have had any connection with the making or preparation of the report, or any knowledge of its having been communicated to the stockholders.

Q. 222. You have no recollection, have you, of any other reports than the two exhibited to you having been sent out?

A. No, sir.

Mr. BRANDEIS [to the stenographer]: Now if you will mark those as exhibits; you need not copy them.

Mr. LAUTERBACH: I object to their introduction.

Mr. BRANDEIS: I want them marked as exhibits.

Mr. LAUTERBACH: I object to their introduction as exhibits, as being irrelevant, immaterial, and incompetent; that they are not shown to have been authorized by Mr. Leonard Lewisohn, or that he had any knowledge of them, and that they are reports concerning the company long subsequent to the time of the transactions set forth in the bill of complaint; and have no bearing upon the issues presented.

Mr. BRANDEIS: I think that is all I want to ask Mr. Bigelow until I get that account from Mr. Hyams.

[The two reports referred to in Int. 221 were respectively marked "Exhibit 14, G. C. B., April 10, 1903," and "Exhibit 15, G. C. B., April 10, 1903."]

[The further taking of this deposition was suspended until Thursday, April 16, 1903, at 10 A. M.]

THURSDAY, *April* 16, 1903.

[The further taking of the deposition of ALBERT S. BIGELOW, Esq., was resumed at the office of Messrs. Brandeis, Dunbar & Nutter, No. 220 Devonshire street, Boston.]

(By Mr. BRANDEIS:)

Q. 223. I hand you an account entitled "Old Dominion Syndicate" which has been furnished by Mr. G. M. Hyams, as being an account made up from the stub of your check

book, showing the amounts received from subscribers, and
142 the amounts paid out, and showing a balance on the whole transaction of $50,464.15 contributed by you to the syndicate, which will be marked Exhibit 16; I also hand you an account entitled "A. S. Bigelow Old Dominion Investment Account," also furnished me by Mr. Hyams as being the result of the entries on your check book showing the amounts of Old Dominion Copper Mining & Smelting Company stock received by you, the disposition of that stock by sale, and the portion of stock retained by you, and I ask you whether or not these statements prepared by Mr. Hyams are correct?

A. To the best of my knowledge and belief they are.

[The account entitled "Old Dominion Syndicate" is marked "Exhibit 16, April 16, 1903, G. C. B." and the account entitled "A. S. Bigelow Old Dominion Investment Account" is marked "Exhibit 17, April 16, 1903, G. C. B."]

[For text, see B Exhibit 46 and B Exhibit 47.]

Q. 224. Is it not a fact that from the time of the first meeting of the Old Dominion Copper Mining & Smelting Company, held July 9, 1895, by the incorporators and stockholders for the purpose of organization, up to April 3, 1901, no meeting whatever of the stockholders was held, with the exception of the annual meeting held April 5, 1899, and the special meeting held June 15, 1899?

A. On examining the minute book of the Old Dominion Copper Mining & Smelting Company, I find that only such meetings of stockholders took place as stated in your question, but I find *that* on the 18th of September, 1895, as appears on page 27, the following minute or record which immediately follows the record of the meeting of the directors on that date:—

"All action taken by directors at above meeting is fully confirmed and approved of in all respects.

A. S. BIGELOW.
THOMAS NELSON.
M. T. STEVENS.
LEONARD LEWISOHN.
HENRY M. WHITNEY.
JOSEPH G. RAY.
EDGAR BUFFUM.

143 The undersigned common stockholders of the Old Dominion Copper Mining & Smelting Company do hereby approve of the action of the directors shown by the above record of meeting held on the 18th day of September, 1895.

[In pencil]

30,000 shs. LEONARD LEWISOHN.
A. S. BIGELOW.
20,000 shs. THOMAS NELSON, *Treas.*
100,000 shs. PHILIP A. DUMARESQ.

150,000 shs."

Q. 225. Are you able to state in whose handwriting the pencil figures of the number of shares on page 27, to which you have referred, are?

A. No; I could not say. I do not think I ever wrote "shares" in that way.

Q. 226. Have you, since the last adjournment, found any papers of any kind relating to the subject under consideration, or relating to the Old Dominion matters, in addition to those which you have already produced or which have been produced by Mr. Hyams at the taking of his deposition?

A. No, I have not.

Q. 227. Have you, since the last adjournment, seen any papers other than those of which you and Mr. Hyams had possession of, relating to this matter?

A. I do not think so.

Q. 228. Have you, since the last adjournment, in any way refreshed your recollection so that you are able to give any testimony on the matters inquired about in addition to that which you have already given?

A. You mean with regard to the whole subject?

Q. 229. With regard to the whole, or any part.

A. Why, certainly.

Q. 230. How have you refreshed your recollection?

A. By looking over the letters that have been submitted.

Q. 231. You mean by looking over the record of the testimony?

A. Yes, sir.

Q. 232. Now will you state fully all that you have been able to recall, in addition to that which has been testified to by you?

A. Well, I can recall the matter of the purchase of the Simpson 5/7ths; I can recall as to that; and I can recall as to what led us to go into it; and I can recall what ideas we had regarding it.

Q. 233. Is that all?

A. I think it is, yes.

Q. 234. Now will you state fully what you have been able to recall as to the Simpson 5/7ths interest?

A. The letters that have been submitted show that I was interested in the purchase of that Simpson interest to the extent of one half.

144 Q. 235. I do not want to ask questions, but you may just go on and state as fully as you can what you remember in regard to the matter.

A. My recollection of the matter is that we considered it of great value. There was nothing fully determined, as I recollect, at that time, as to what should be done with the property. As I remember it, we decided to keep on working the property as it was, in the shape that it was. Then I recollect afterwards—I could not say exactly whether it was afterwards or not—when we got the Keyser interest, that it was thought Mr. Lewisohn could float a minority interest in Europe, which I think is also stated in some of the letters which have been submitted, for a price that would reimburse us for what we had paid for the property. There was nothing, to my

recollection, entered into as to forming a new company under New Jersey laws until the last part of June, 1895. Up to that time, the matters in connection with the property were left, pretty much, in charge of Mr. Lewisohn. After the New Jersey company was formed I assumed more or less charge. My recollection is that the plan to be adopted was that a New Jersey corporation should be formed with 150,000 shares of stock; then that, as Mr. Lewisohn and I owned the entire property, we should turn over that entire property as a whole, with $500,000 in money, as a whole, to the company for its entire capital stock; the details to be carried out by the counsel who had been employed by Mr. Lewisohn, Mr. Beaman, of Evarts, Choate & Beaman. That, in a nutshell, is as I recollect the matter.

Q. 236. Is there anything else that you recollect in regard to the matter?

A. I do not now remember.

Q. 237. You have, I presume, refreshed your recollection by conference with counsel since the last adjournment, as well as by reading the record, have you not?

A. I do not see how counsel could refresh my memory.

Q. 238. You have conferred with them?

A. Certainly.

Q. 239. And you recall nothing additional to what you have testified beyond what you testified at the previous sessions and beyond what you have now given?

A. I could not recall anything more, unless some specific question were asked me as to details.

Q. 240. You stated, in answer to Int. 235, that "There was nothing fully determined, as I recollect, at that time, as to what should be done with the property:" what time did you refer to?

A. At the time we first got the option from Simpson.

Q. 241. You say "nothing was fully determined:" what was discussed?

A. There were no plans discussed at that time beyond getting Mr. Hyams' and Mr. Colquhoun's report on the property. Soon after it was discussed as to placing the property in Europe.

145 Q. 242. And forming a new company to take that over?

A. No, sir.

Q. 243. I do not mean there was discussion of forming a particular company, but there was talk, was there not, of a reorganization?

A. There was talk of a reorganization of the old company,—of the Baltimore Company.

Q. 244. Was not there talk of transferring the interest to the new company?

A. Not that I remember.

Q. 245. I mean shortly after the taking of the option?

A. Not that I remember. As I say, these details were left largely to Mr. Lewisohn, and he was the party in interest who was going to negotiate to see whether he could place the property in Europe upon certain terms which I do not remember; if the negotiations had been

carried out in Europe of course then I should have heard what the terms would be.

Q. 246. And that came up almost immediately after the option was taken?

A. I do not think that came up for some little time afterwards.

Q. 247. Well, at this time, when you first discussed the matter, who were interested in the property besides yourself and Mr. Lewisohn?

A. The parties who had signed these syndicate papers.

Q. 248. Not all of them, were they? When did Mr. Coram, Mr. Nelson, Mr. Luce, and Mr. Meredith become parties and get their interest in the Simpson option?

A. Not later than May 16, 1895.

Q. 249. I call your attention to Int. 8 of your deposition and the answer thereto, viz.,—

"Q. 8. Did not Mr. Lewisohn talk with you about having Mr. Meredith get an option? A. Not that I remember."

Have you been able to recall anything in regard to that matter?

A. I do not remember any special talk with Mr. Lewisohn about that, as I have already testified in answer to that interrogatory, but I think it is more than possible that he did talk it over with me. We were apt to meet together pretty nearly every morning on the telephone and discuss matters in general.

Q. 250. I will also ask you about Int. 13 and the answer thereto, viz.,—

"Q. 13. Do you not recall that prior to the obtaining of this option of April 30, 1895, Mr. J. Morris Meredith came into your office and telephoned from your office to Mr. Leonard Lewisohn relating to this proposed purchase? A. It would be impossible for me to recall anything like that."

Have you been able to recall anything further?

A. No, sir.

146 Q. 251. I call your attention also to Int. 14 and the answer thereto, viz.,—

"Q. 14. How soon after April 30, 1895, did you have any communication with Leonard Lewisohn regarding that option? A. It is impossible for me to say."

Have you been able to recall anything further in regard to that?

A. Nothing definite.

Q. 252. Anything further at all?

A. I could not change my answer to that. It is impossible for me to say.

Q. 253. I call your attention also to Int. 16 and the answer thereto, viz.,—

"Q. 16. Do you recall whether you had any communication with Leonard Lewisohn in regard to the proposed purchase of the stock of the Old Dominion Copper Company of Baltimore City before this revised option of May 4 was executed? A. I could not recall that."

Do you recall anything further in regard to that?

A. I could not recall anything now. There is no doubt but what I had communication with Lewisohn all the time.

Q. 254. I also call your attention to Ints. 62, 63, 64, 65, and 66, inclusive, inquiring whether you have not some recollection of some subscription paper prior to the paper of May 21, which you produced, and to your answer that you had no recollection, that you thought there was such a paper, but you had no recollection as to what the agreement was: have you any recollection now as to what that paper provided?

A. What the wording of it was? No.

Q. 255. I do not mean the exact wording, but what the purport of it was?

A. I do not recollect. Mr. Hyams has, however, just handed me the following, which he says is a copy of an agreement which was signed by Messrs. Coram, Lewisohn, Nelson, Whitney, Meredith, and myself. Mr. Hyams recollects that he last remembers of seeing the original in Mr. Lauterbach's possession some time after the demand was first made upon me and upon Mr. Leonard Lewisohn for the syndicate in this matter by the Old Dominion Copper Mining & Smelting Company:

"Whereas, A. S. Bigelow has contracted to purchase eight thousand nine hundred and twenty eight (8928) shares of the Old Dominion Copper Company, a corporation organized under the laws of Maryland and owning property in Arizona, at forty (40) dollars per share, or thereabouts, the undersigned hereby agree to take the number of shares set opposite their respective names and pay for the same at the rate of forty (40) dollars per share; the said stock to remain in the hands of A. S. Bigelow and the management of the property to be left with him. Payments to be made as follows:

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May 27, 1895, fourteen per cent (14%).

July 26, 1895, twenty eight and two thirds per cent (28 2/3%) with interest at five per cent (5%) from the date of the first payment.

August 25, 1895, twenty eight and two thirds per cent (28 2/3%) with interest at five per cent (5%) from the date of the first payment.

September 24, 1895, twenty eight and two thirds per cent (28 2/3%) with interest at five (5%) from the date of the first payment.

The stock to be delivered on final payment.

The conditions, covenants and agreements herein contained shall be binding on the substitutes, successors, heirs representatives and assignees of the respective subscribers hereto.

In witness whereof we have hereunto set our hands and opposite thereto the amount of our subscription respectively this twenty second day of May, 1895."

Q. 256. My question asked whether you did not have some agreement earlier in date than the first Old Dominion subscription introduced by you in connection with your deposition, which was marked "Exhibit 3," and which was dated May 21, 1895? The paper you

have just read is dated May 22. Was there not some paper earlier than May 21; in other words, some paper as early or earlier than May 15, when it appears that Messrs. Coram, Nelson, Meredith, and Luce, made their first payment to you towards the one half of the $2000 for the Simpson-estate option?

A. I do not believe there is any earlier paper than that which the stenographer has just taken a copy of [referring to the paper of May 22]. I believe that is the earliest paper that there was.

Q. 257. Do you have any recollection as to what the agreement with Messrs. Meredith, Whitney, Coram, and Nelson was on which they paid you the $720 on May 16?

A. I do not believe there was any agreement.

Q. 258. Well, if they paid you $720 on that date, it must have been upon some agreement or understanding, must it not?

A. That I cannot recollect. I cannot recollect anything more than that account shows.

Q. 259. Well, you do not mean to testify that there was no agreement or understanding, but you do not recall what it was?

A. I do not recall what it was or whether there was any agreement.

148 Q. 260. I call your attention to Ints. 87, 88, and 89, inquiring as to whether Mr. Leonard Lewisohn was in New York or Boston on May 28, and your answers thereto, and ask you whether you now have any recollection on that subject?

A. No, sir.

Q. 261. I call your attention to Ints. 127 and 128, inquiring whether you have any recollection as to the conversation with Mr. Butler, referred to in the letter of Lewisohn Brothers to you on June 18, 1895, and ask you whether you have now any recollection on that subject?

A. I do not recall anything further.

Q. 262. I call your attention to Int. No. 141, viz.,—

"Q. 141. Have you any recollection other than what appears by the correspondence which has been put in evidence in connection with your deposition and the record of the directors' meeting on July 11, 1895, now shown you as to what took place in connection with the organization of the company or any conversation with Leonard Lewisohn or any other person in relation thereto? A. No, sir."

You have to-day testified to some fact, you have given some testimony in addition to that previously testified to, have you not?

A. What I understood by that question was, at the time of the meeting; as to what took place at the meeting, of the organization. I do not believe I took in the question fully. Was not the organization meeting held in New Jersey?

Mr. HEMENWAY: Yes, the records say so.

The WITNESS: And I was not there.

Mr. BRANDEIS: But the meeting of July 11 was held at the office of Lewisohn Brothers.

The WITNESS: That was not the organization meeting.

Q. 263. But the meeting of July 11, about which you were inquired of and the record of which you looked over before answering,

was the meeting held July 11, 1895, at which you and the others voted to purchase the property of the Old Dominion Copper Company of Baltimore City for 100,000 shares and certain mining claims standing in the name of Keyser for 30,000 shares. Now what has refreshed your recollection in regard to what took place? What, if anything, has refreshed your recollection as to what took place at that meeting?

A. Nothing has refreshed my recollection there except what is contained in the records. As I said, I do not remember of being present at that meeting. But I want to state here, Mr. Brandeis, that there is nothing I have heard since the last hearing, or since
149 the adjournment of the taking of my deposition, that has refreshed my memory as to the fundamental facts that are in my mind as to the organization of the New Jersey Company, what was to be done by that company and by Mr. Lewisohn and myself.

Q. 264. I call your attention to Int's. 145, 146, 147, and 148, inquiring about any interview with Mr. Woodhull, and your answers thereto, and ask you whether you have been able to refresh your recollection in regard to that?

A. No, sir.

Q. 265. I call your attention to Int's. 151, 152, 153, 154, 155, and 156, in which I inquired as to your recollection in regard to the subscriptions taken to the Old Dominion Syndicate, Exhibits 3, 4, 6, and 5, and ask you whether you have any further recollection in regard to any of the matters therein inquired about.

A. If you ask me if I have any recollection, I have no recollection.

Q. 266. I call your attention to Int's. 157, 158, 159, 160, 161, 162, 163, and 164, in which I inquire as to what part you had, if any, in conducting negotiations in connection with the purchase of the Simpson and Keyser interests, and ask you whether you have any recollection in regard to the matter other than what you have already testified to?

A. I remember nothing additional, and I can recall nothing except what appears by the letter of Lewisohn Brothers to me, dated June 18, which has been put in evidence. I have no recollection, but there were doubtless consultations had by me with Lewisohn Brothers or with Mr. Leonard Lewisohn.

Q. 267. I call your attention to Int. 191 and the answer thereto, in which I asked whether there was any subscription list to the Old Dominion Copper Mining & Smelting Company stock other than the list introduced and marked "Exhibit 10;" you stated that you could recollect no other. Have you any further recollection on that subject?

A. That is the only list I know of.

Q. 268. I call your attention to Int's. 194, 195, 196, 197, 198, and 199, inquiring in regard to correspondence and conversations with subscribers to the stock of the Old Dominion Copper Mining & Smelting Company, and ask you whether you have been able to recall anything further than what you have already testified to on that subject?

A. I testified before, didn't I, that I could not recall any specific

conversation? I doubtless had conversation with many of them.

Q. 269. Have you any recollection other than that which you have already given?

A. No, I have not.

Q. 270. I call your attention to Ints. 201 and 202, in which I inquired as to your recollection concerning the way you exercised your discretion in allotting the 60,000 shares of Old Dominion Copper Mining & Smelting Company stock to subscribers, and ask you whether you have now any recollection on that subject?

A. I do not change my answers to Ints. 201 and 202.

[Recess until 2.15 P. M., and resumed.]

Mr. BRANDEIS: I believe that is all that I have to ask Mr. Bigelow at present.

Cross-examination:

[In answer to cross-interrogatories propounded by Edward Lauterbach, Esq., counsel for the defendants, the witness further deposes and says:]

X 271. Mr. Bigelow, you have been all through your adult life, as far as business is concerned, dealing in metals, mining stocks, and mining properties?

A. Yes, sir; I began when I was seventeen, and with the exception of about two years' interlude, when I was in Chicago,—I went through the great fire there,—I have been in the copper-mining business all my days since.

X 272. You succeeded your father in the business?

A. Yes, my father was in the business before me.

X 273. So that before, and during the transactions which are being considered here, you were familiar with mining properties and their values, and the values of stocks?

A. Yes, sir.

X 274. Your business relations with Leonard Lewisohn, and the firm of Lewisohn Brothers, were very intimate in 1895, and prior to that time?

A. Very intimate indeed, yes.

X 275. And transactions, other than the one in question, had been carried on between you?

A. Yes, sir.

X 276. The firm of Lewisohn Brothers were largely engaged in dealing in metals and mining properties?

A. Yes, sir.

X 277. Your business relations with them were so close that, as you have testified, you had connection with them by private telephone?

A. By private telephone, yes.

X 278. And such that you had daily conversation with them over the wire?

A. Yes, sir.

X 279. Had you known by repute the Old Dominion properties prior to 1895?

A. Yes, sir.

X 280. You knew of the mine by reputation?

A. Yes, sir.

X 281. It was a dividend-paying concern?

A. I believe it was, yes sir.

X 282. And you believed it to be a valuable property?

A. Very.

151 X 283. From your relation with the Lewisohns, and in the course of business that was transacted between you, can you tell me what, according to your best recollection, was the first intimation that some negotiation in respect to the Old Dominion property was on foot?

Mr. BRANDEIS: That is objected to as calling for an inference, and not a recollection?

X 284. State your best recollection.

A. According to my best recollection we had conversations, doubtless, before the option on the Simpson interest was obtained.

X 285. You did not communicate in the first instance, so far as you recollect, to Mr. Lewisohn that the property could be acquired?

A. No, sir.

X 286. Your best recollection is that the first intimation came from him to you?

A. Yes, sir.

X 287. Judging from the correspondence that took place, and the options, and the records generally, do you know at about what time your attention was first called to the matter?

A. I should say it was probably some time in April, 1895.

X 288. And your recollection is that the possibility of the acquisition of the Simpson interest in the mine was called to your attention?

A. Yes, sir.

X 289. On the basis of a million dollars for the whole property?

A. Yes, sir.

X 290. And what was your judgment of that price, as to the reasonableness of that price?

A. We thought it was very cheap at that price.

X 291. You had been engaged in other similar transactions with Lewisohn Brothers, in the purchase of mining properties?

A. Yes, sir.

X 292. And in this transaction Mr. Beaman acted as counsel, did he not?

A. Yes.

X 293. He had your full confidence?

A. Yes, sir.

X 294. You knew that at about the time the first option, for the five sevenths, was obtained, Mr. Beaman was advising Mr. Lewisohn?

A. Yes, sir.

X 295. Before the Keyser option was obtained, what, if you recol-

lect, was the policy pursued, or intended to be pursued, in respect t
the management of the mine?

A. It was to run the mine as it was in its then condition, having the Keyser interest as a minority interest.

X 296. And it was not until the acquisition of the Keyser option that any change in the policy could have been made?

A. No, sir, I do not think so.

X 297. You gathered from the record, and you state the fact to be that upon obtaining the option on the five sevenths you were to be interested one half and Mr. Lewisohn one half?

A. Yes, sir.

152 X 298. And you knew that that would necessitate the contribution by you of one half of the purchase price of the Simpson interest?

A. Yes, sir.

X 299. And you immediately made arrangements for raising the money?

A. Yes, sir.

X 300. By associating with yourself whom?

A. By associating with myself Mr. Henry M. Whitney, Mr. Matthew Luce, Mr. J. A. Coram, Mr. Thomas Nelson, and Mr. J. Morris Meredith.

X 301. It is in evidence that you received from certain subscribers on the 16th of May a contribution towards the first payment that you were called upon to make of $1000 towards the $2000 paid by Mr. Lewisohn for that option; and it is also in evidence that on the 22d of May a formal subscription was made by these gentlemen, as you have testified?

A. Yes, sir.

X 302. And it appears that shortly thereafter, that is, on May 28, you repaid to these gentlemen the amounts that they had contributed towards the $1000?

A. Yes, sir.

X 303. From those facts do you not gather that some arrangement, either oral or in writing, was entered into between you and them before the 22d of May?

A. Doubtless there was.

X 304. And that the contribution made by them on the 16th of May was in the proportion it was contemplated they should enter into the arrangement with you?

A. Yes, sir.

X 305. And it is fair to assume that the repayment of money to them was based upon the same proportion?

A. Yes.

X 306. And is the proportion that was afterwards carried out, under the terms of the agreement of May 22?

A. I believe it is, yes, sir.

X 307. Do you happen to recall what the subscriptions of the respective parties were to the agreement of May 22, as a matter of memory?

A. I would not dare to swear to that.

X 308. Mr. Bigelow, I call your attention to a letter of June 28, 1895, from Lewisohn Brothers to C. C. Beaman, as follows:

"DEAR SIR: We merely desire to confirm our message to your clerk on the telephone this afternoon that Mr. Leonard Lewisohn would like to hear from you at your convenience whether you would consider it would be best to reorganize the Old Dominion Copper Company under the laws of Arizona, or whether it would be more advantageous to do so under the laws of some other State.

Very truly yours,

LEWISOHN BROTHERS."

153 Bearing that letter in mind, can you recollect whether you had any intimation at any date earlier than June 28 of any intention to organize a New Jersey corporation?

A. No, sir, I do not.

X 309. You do not recall anything prior to that date? Does the reading of that letter refresh your memory as to when the subject of the organization of a corporation other than under the laws of Arizona was called to your attention?

A. It was probably some little time after that.

X 310. The old corporation was really a Maryland corporation, and it was an error to speak of it as a corporation under the laws of Arizona?

A. Yes, sir.

X 311. Had you conceived of the policy of organizing a New Jersey corporation, or any corporation other than a Maryland corporation, at any time prior to June 28?

A. No, sir.

X 312. Or for several days thereafter?

A. No, sir, not according to my recollection.

X 313. Have you any recollection of being consulted by Mr. Lewisohn in reference to the extent of the capitalization of the New Jersey corporation when it was about to be formed?

A. Why, certainly we discussed it together.

X 314. What was the nature of that discussion?

A. The nature of the discussion was that it should be a company formed with 150,000 shares of stock, with a par value of $25 a share.

X 315. And this discussion was after the exercise of the option?

A. So I understand.

X 316. Can you recall any discussion as to the distribution of the stock of the company when formed?

A. Why, certainly; that is the fundamental thing of the whole business, as I understand.

X 317. What was it?

A. It was that we should receive all the stock of the new company for the entire property of the Old Dominion Company of Baltimore, located in Arizona, and $500,000 in money.

X 318. Which you were to furnish?

A. Yes, sir.

X 319. Were you aware at any time of having a change in that policy; if so, when?

A. No, sir, I am not aware of any change.

X 320. It appears in evidence that in form the property of the Old Dominion Company of Baltimore, other than the mines and mining claims conveyed to Mr. Lewisohn by Mr. Keyser, was conveyed for a separate consideration of 100,000 shares of the new company, and those mining claims for a separate consideration of 300,-
000 shares of the new company: was there an arrangement
154 or agreement or understanding at any time that separate values should be placed on the two classes of property?

A. No, sir.

X 321. Did any discussion ever take place in your presence in which the relative values of the Old Dominion property and the mining claims spoken of was considered or canvassed?

A. No, sir; to the best of my recollection.

X 322. Under whose direction was the organization of the new company, the transfer of property to it, and the issue of the stock of the new company conducted?

A. By Mr. Beaman, of the firm of Evarts, Choate & Beaman.

X 323. And you relied upon his advice in the matter?

A. Entirely and absolutely.

X 324. Do you know of any reason why a separation in the issuance of the stock was made?

A. No, sir; I cannot understand why it was done.

X 325. Was your attention ever called to the separation referred to?

A. I do not think it was called to my attention until Mr. Brandeis came into the office, at the time I read the record to Mr. Brandeis.

X 326. Is the same statement true of the separation of the 20,000 shares from the 130,000 shares?

A. Yes, sir, absolutely.

X 327. And you assumed up to that time that 20,000 shares with the 130,000 shares had come into your possession as owners of the property in bulk?

A. Entirely into my possession and Mr. Lewisohn's.

X 328. Was that the first occasion on which you read the letters?

A. I think so, to the best of my knowledge.

X 329. Did you personally make any of the records of the company except as your signature may appear upon the records in your own handwriting?

A. No, sir, I do not think so.

X 330. In providing moneys through the stock-subscription agreement of July 18, how much money did you contemplate raising by the sale of stock under that agreement? I am speaking now of the agreement that resulted in the subscription for 72,000 shares that was scaled down to 60,000 shares.

A. A million and a half of money.

X 331. Which was to repay the million dollars, the purchase price of the Old Dominion of Baltimore stock, and to provide a working capital for the new company?

A. The Old Dominion stock and the other properties.

X 332. And to provide a working capital for the new company?

A. Yes, sir.

X 333. The subscribers to the agreement of May 22 were not called upon to take up the eight thousand and odd shares of stock to which they had subscribed, were they, at any time?

A. No, sir.

155 X 334. That agreement referred to your one half interest in the stock that you were to acquire?

A. That agreement referred to my one half interest in the stock I acquired in the Old Dominion of Baltimore, Md.

X 335. And the money was raised by subscriptions to the Old Dominion Syndicate agreement, Exhibits 3, 4, 6, and 5?

A. Yes, sir.

X 336. To which agreement some of the subscribers to the agreement of May 22 became parties?

A. Yes, sir.

X 337. In securing subscriptions, either to the original subscription of May 22, or to the Old Dominion Syndicate, or to the stock-subscription syndicate of July 18, did you at any time solicit any one to make subscriptions?

A. No, sir, not one.

X 338. Did you at any time refrain from giving any information to any one of the subscribers to any of the papers referred to upon request?

A. No, sir.

X 339. Or did you ever withhold any information that was requested of you by any subscriber?

A. No, sir.

X 340. Did you ever make any statement or representation to any subscriber, or to any one, that was not truthful?

A. No, sir.

X 341. Did you at any time suppress any information?

A. No, sir.

X 342. In the letters which you addressed to those who became subscribers, did you state truthfully the situation as you believed it to be at the time the letter was written?

A. Why, certainly.

X 343. I call your attention to a letter of June 11, written by you to Maxwell Woodhull of Washington, D. C., in which you wrote that you had become interested in an Arizona property. That was true, was it not?

A. Yes, sir.

X 344. That you "had bought five-sevenths of the stock of the Old Dominion Copper Company, which was owned by an estate here, for $714,285." That was true?

A. I said we had.

X 345. That was true?

A. Yes, sir.

X 346. "Since then we have been negotiating for the other two-

sevenths on the same terms, and I think we shall get them." That was true?

A. Yes.

X 347. "The terms of the sale were $1,000,000 for the whole property." That was true?

A. Yes, sir.

X 348. "We have already made the first payment on our contract for the five-sevenths, which was $100,000, and given three notes for the balance, due upon the following dates," and the dates follow. That was true?

A. Yes, sir.

X 349. "But in taking the two-sevenths, which I think
156 we may be able to secure—we shall know about it positively today or tomorrow—Mr. Lewisohn takes only one-third, leaving two-thirds for us here." That was true?

A. Yes, sir.

X 350. "The terms of payment for the two-sevenths will be practically the same as that for the five-sevenths." That was true?

A. Yes, sir.

X 351. "All this interest is to be held as a syndicate until a reorganization of the company is effected." That is true?

A. Yes, sir.

X 352. "The Old Dominion is a company of many years' standing, and has been a considerable copper producer in the past." That was true?

A. Yes, sir.

X 353. "It has an efficient plant, and is today capable of producing from 1,500,000 to 2,000,000 pounds of copper per month. Mr. Hyams examined the property for us carefully, and he reports that there are four years' ground opened ahead and that he sees a profit in working the mine of from $350,000 to $500,000 a year. I firmly believe that we shall make a great deal of money out of the purchase, but this was not the incentive that induced us to go into it. Our reason for securing it was, as I have often expressed to you, to secure yet more control of the copper market than we now have, in other words, to place our office first in the world as a copper producer, and we feel bound when we have a chance to buy well known and developed copper properties to take hold of them largely to protect ourselves." All those statements are true?

A. True, to the best of my knowledge and belief.

X 354. And your statement in respect to Mr. Hyams' examination of the property—you knew that he had examined it?

A. Yes.

X 355. And you believed his report?

A. Oh, yes.

X 356. And your statement in regard to his report was based upon his report?

A. Yes, sir.

X 357. "We have not yet decided what plan we shall pursue in regard to the Old Dominion." That was on June 11. And that was true?

A. Yes, sir.

X 358. "It will have to be something like this, viz: The present company is organized with a share capital of 25,000 shares. We shall doubtless reorganize on a basis of 100,000 shares." That was of the existing company?

A. Yes, sir.

X 359. An increase of the stock of the existing company?

A. It refers to that company.

X 360. "Our present idea is to place somewhat less than half of this in Europe at a price that will pay back to the subscribers their money and give them their stock in the new company for nothing. Those are the terms on which the other subscribers have come in." You believed that to be entirely true?

A. Yes, sir.

157 X 361. And in all statements in all letters written to subscribers, or intending subscribers, you stated what you believed to be true?

A. Certainly.

X 362. On the 24th of July, 1895, the new corporation had been formed?

A. It had been.

X 363. And when the stock-subscription agreement of July 18 was subscribed to, the company had been formed?

A. Yes.

X 364. And a new policy had been adopted?

A. Yes, sir.

X 365. After that period, at any time when subscriptions to the stock-subscription agreement of July 18 were made, did you answer fully and truthfully any questions that were propounded at any time?

A. Yes, sir.

X 366. By any subscriber?

A. Yes, sir.

X 367. And in your letters to subscribers you endeavored to state what was truthful and correct?

A. Yes, sir.

X 368. I refer to your letter to Mr. Woodhull of July 24, in which you say, "Your favor of the 22nd has been received and contents noted. As I had already written you on the same day that I intended to take my proportion of the subscription stock of the Old Dominion Copper Mining & Smelting Company at $25 per share in lieu of cash, I did not think it necessary to telegraph you. The original members of the syndicate will not have any special right to subscribe to the balance of the subscription stock above their pro rate share." That was correct?

A. Yes, sir.

X 369. "Your subscription of $15,000 to the original syndicate and $15,000 to the subscription stock will entitle you to 1200 shares." That was correct?

A. Yes.

X 370. "That is, you put in no more money, but receive stock in-

stead of cash for your bonus as a member of the original syndicate. The original stock of the new company is 150,000 shares of the par value of $25 each."

A. Yes.

X 371. "60,000 shares are issued for subscription at $25 a share cash; the proceeds of 40,000 shares or the shares themselves going to the original members, of the syndicate as a bonus and the proceeds of 20,000 shares, or, say $500,000, going to the company as a working capital." That was a truthful statement?

A. Yes, sir.

X 372. And, so far as you know, in all other correspondence to subscribers or others you stated what was truthful concerning the stock?

A. Yes.

Mr. BRANDEIS: Whatever he stated was truthful.

Mr. LAUTERBACH: Yes; I understand the distinction.

X 373. In availing of the options of the Simpson estate and of the Keyser, was any one interested in the purchase except Lewisohn, or Lewisohn Brothers, and yourself and your associates, under the agreement of May 22?

A. I do not think so.

158 X 374. And no one else was interested in the purchase at the time of its consummation?

A. Not that I know of.

X 375. And the interest of those mentioned in the agreement of May 22 extended only to the purchase, to furnishing funds for the purchase of your one half of the stock?

A. That is all.

X 376. And, as you have stated, that agreement was never availed of?

A. No; I knew it could be availed of very well.

X 377. You knew nothing of the details of any syndicate which Mr. Lewisohn might have formed in order to furnish the money for the purchase of his share of the stock?

A. No.

X 378. You had nothing whatever to do with that?

A. Nothing at all.

X 379. And he had nothing to do originally with the raising of your share of the purchase money?

A. No, sir.

X 380. And the subscribers to the agreement of May 22 had no connection with the share of stock that Mr. Lewisohn was to purchase?

A. Not that I know of.

X 381. And no relation of partnership or otherwise existed between you and the subscribers to that agreement except as termed by the agreement itself?

A. No, sir.

X 382. You had no general partnership relation with Mr. Leonard Lewisohn?

A. No, sir.

X 383. No interest in the firm of Lewisohn Brothers?

A. No, sir; not that I know of.

X 384. No relation with them in this purchase except that you were to acquire a half interest in the five sevenths and a two thirds interest in the two sevenths, and that they were to acquire an interest of one half in the five sevenths and one third in the two sevenths?

A. That was all.

X 385. And no partnership relation existed between you?

A. No, sir.

X 386. In exercising the option, did you rely upon the report of Mr. Colquhoun and Mr. Hyams?

A. I relied on the report of Mr. Hyams mostly.

X 387. Had you ever any intention, or did Mr. Lewisohn ever express to you any intention, of keeping apart from the transactions the mining claims conveyed by Keyser to him, Leonard Lewisohn?

A. No, sir.

X 388. They were to form a part of the whole transaction?

A. Why, surely.

X 389. Had you ever any intention, or did Mr. Lewisohn ever express to you his intention, of keeping from the syndicate, or from the transaction, or out of the transaction in which the syndicate would be interested, these mining claims or their proceeds?

A. No, sir.

159 X 390. It was intended that they should form part of the whole transaction?

A. Surely.

X 391. Were the mining claims kept out of the original underwriting or syndicate of May 22, or out of any of the subsequent agreements?

A. They were not supposed to be.

X 392. And not in fact, so far as you know?

A. No, sir.

X 393. Mr. Bigelow, let me see if I understand the general scheme properly. In order to provide funds for your share of the seventeen thousand and odd shares acquired from the Simpson estate, you may have orally, and you did in writing, on May 22, provide for the underwriting of those shares?

A. Yes, sir.

X 394. With Mr. Lewisohn's purchase money you had no connection?

A. Nothing to do with it at all.

X 395. Instead of relying upon the underwriting, you received subscriptions to Exhibits 3, 4, 6, and 5 in order to raise the amount necessary to acquire the Simpson interest—your share of the Simpson interest?

A. Yes, sir.

X 396. And you subscribed yourself whatever was necessary to make up that amount?

A. Yes, sir.

X 397. Fifty thousand dollars?

A. Yes.

X 398. Which rendered it unnecessary for the underwriters to furnish the money?

A. Yes, sir.

X 399. And that applied, as well, to the money necessary for the payment for the Keyser interest?

A. Yes, sir.

X 400. So that the additional subscriptions were taken after the Keyser option had been obtained, in order to raise the whole of the money?

A. Yes, sir.

X 401. After the incorporation of the new company, the stock subscription of July 18 was opened, and subscriptions were received thereto?

A. Yes, sir.

X 402. With the intention of raising a million and a half of dollars,—a million to pay back the whole of the purchase money, and $500,000 as a working capital for the new company?

A. Yes, sir.

X 403. And that became oversubscribed?

A. Yes, sir.

X 404. The subscriptions amounting to 72,000 shares and more?

A. Yes, sir.

X 405. It required, then, 60,000 shares for the purposes mentioned?

A. Yes, sir.

X 406. And an allotment was made, so that 60,000 shares only were issued to subscribers?

A. Yes, sir.

X 407. Those who had subscribed to the Old Dominion
160 Syndicate were notified that in lieu of the return of the money to which they were entitled they could receive shares?

A. Yes, sir.

X 408. And in most instances the selection was made to receive the shares?

A. Yes, they were given the option.

X 409. And that was exercised generally?

A. Yes, sir; an option to take the shares or to take the money.

X 410. And in very few instances the money was taken?

A. Yes, sir.

X 411. And they became subscribers to the stock subscription of July 18?

A. Yes, sir.

[The further taking of this deposition was postponed until Thursday, April 23, at 10 a. m.]

BOSTON, *April* 23, 1903.

[The taking of this deposition was resumed at the office of Messrs. Brandeis, Dunbar & Nutter, at 220 Devonshire street, Boston, Mass., at 10 a. m., on Thursday, April 23, 1903, when, in answer to cross-interrogatories by Edward Lauterbach, Esq., counsel for the defendants, the witness further deposes and says,—]

X 412. Mr. Bigelow, I show you a copy of a letter of Lewisohn Brothers to the Old Colony Trust Company dated July 8, 1895, being Exhibit 82 in the suit of the Old Dominion Copper Mining & Smelting Company v. A. S. Bigelow, pending in the Supreme Judicial Court of Massachusetts, which reads as follows:—

"JULY 8th, 1895.

The Old Colony Trust Company, Boston Mass.

GENTLEMEN: In accordance with our telephonic conversation, I am sending you, under separate cover, registered:

$50,000.00, draft on Boston National Bank, Boston,
155,956.11, cashier's check N. Y. Guaranty & Indemnity Company

Total $205,956.11

This is in payment of my note due Sept. 25th, for $204,761.67, endorsed by Lewisohn Bros. and A. S. Bigelow, and interest from May 28th, to July 9th, 42 days, at 5 per cent; amounting to $1194.44. Total as above, $205,956.11.

Kindly strike out my signature on this note, and hold the note there. And, as stated to you by telephone, you will receive
161 from Mr. Wm. Keyser, Baltimore, on Wednesday morning another note endorsed as above, for $81,905.00, due Sept. 25th. I shall tomorrow send you the following three notes from here:

$204,761.66, due July 27th,
204,761.67, " Aug. 26th,
81,905.00, " " "

So that on Wednesday morning you will have on hand the following five notes in the Old Dominion matter, $204,761.66, due July 27th; $204,761.67, due Aug. 27th, $204,761.67, due Sept. 25th, $81,905.00, due Aug. 26th and $81,905.00, due Sept. 25th.

I will also send you from here tomorrow, the 9th, two receipts for the following cash payments which we made to you in this matter, namely, May 28th, $100,000.00 and June 20th, $121,905.00.

After you have had these notes and receipts in your possession you will kindly send to me by express, the total stock certificates of the Old Dominion Copper Company, namely 24,975 shares; also the five notes as stated above, and the agreement which contains the two receipts above mentioned.

Please telegraph me, at my expense, as soon as you receive the two checks above mentioned.

Very truly yours."

Does the reading of that letter refresh your recollection as to the time when the final payment to be made by the Lewisohns and yourself for the Keyser and Simpson stock was made?

A. Yes, sir.

X 413. That date would be the 9th of July?

A. The 9th of July, 1895.

X 414. And that letter was written prior to the incorporation of the Old Dominion Copper Mining & Smelting Company, which took place on the 9th of July?

A. Yes, sir.

X 415. And the first meeting of the board of directors of that company, as appears from the records, took place on the 11th of July?

A. Yes, sir.

X 416. So that on the 10th of July you and Mr. Lewisohn had become the owners of all the stock of the Old Dominion Company of Baltimore, and of the Keyser mining claims, and were in a position to make a disposition of the property of the Old Dominion Company of Baltimore and of those mining claims; and such disposition was made, was it, at the first meeting of the company?

A. Yes, sir.

X 417. And you and Mr. Lewisohn received, therefore, what?

A. We received all the stock of that company.

162 X 418. The 150,000 shares?

A. Yes, sir.

X 419. And left you obligated at the time of the transfer to furnish a capital to the new company of $500,000?

A. As a working capital, yes, sir.

X 420. The subscription to stock under the subscription agreement of July 18 referred to what stock?

A. It referred to stock belonging to Mr. Lewisohn and me.

X 421. To a part of the 150,000 shares?

A. Yes, sir.

X 422. And the 60,000 shares allotted under that subscription agreement was part of that stock?

A. Yes, sir.

X 423. In fact the company had no other stock except that 150,000 shares?

A. No, sir.

X 424. Out of the 60,000 shares allotted, 20,000 shares were distributed by Mr. Nelson, were they not?

A. Yes, sir.

X 425. In accordance with your directions?

A. In accordance with the directions of Mr. Lewisohn and myself.

X 426. Mr. Lewisohn and yourself acting as the syndicate?

A. For the syndicate.

X 427. And to the subscribers named on the agreement of July 18?

A. Yes, sir.

X 428. Was there, so far as you know, any subscription to any stock to the company directly?

A. Not at all.

X 429. I am referring to the 20,000 shares.

A. Yes, sir.

X 430. And your answer is that no part of that was subscribed directly to the company?

A. No, sir.

X 431. So far as you know, had the company solicited any subscription?

A. No, sir, it had not.

X 432. Or had it issued any prospectus?

A. No, sir, it had not.

X 433. And none was in fact ever issued?

A. No, sir.

X 434. I refer to paragraph third of the bill of complaint in this action, Mr. Bigelow, in which it is alleged that at some time prior to May 24, 1895, you and Leonard Lewisohn formed the plan of acquiring all the stock of the said Baltimore Old Dominion Company, and certain real estate which then stood in the name of Keyser, with a view to organizing a new corporation to acquire, and of selling to such new corporation, all the property of the Baltimore Old Dominion Company, and the real estate held by said Keyser. Did you at that time or at any time, prior to July 1, contemplate the creation of any company to which the property referred to was to be conveyed?

A. No, sir.

163 X 435. It is alleged in that paragraph that at that time you intended to incorporate such new company for the purpose of putting its shares upon the market and selling them to such of the public as might be induced to buy the same a large number of said shares in order to provide the same with a working capital and make necessary improvements in the plant and acquire additional mining claims, and thereby securing to yourselves and such persons as they might associate with you a large profit from the purchase and resale to said new corporation to be organized by you of said property. Had you any such intention at that or at any other time?

A. No, sir.

X 436. It is further alleged in that paragraph of the complaint that you and Leonard Lewisohn conspired together to carry out said plan. Had you any such intention?

A. No, sir.

X 437. Or any intention to injure the corporation to be formed and its future stockholders?

A. No, sir.

X 438. Or to secure for yourselves, as promoters and organizers thereof, a large secret, or any profit?

A. No, sir.

X 439. Had you any other plan or purpose at the time of availing of the options of Keyser and Simpson than to become the purchasers of the stock of the Old Dominion Company and the mining claims of Keyser, to which I have referred, for yourselves?

A. No, sir.

X 440. In the fourth paragraph of the bill of complaint it is alleged that you caused to be organized the Old Dominion Syndicate pursuant to the plan or conspiracy referred to in the third paragraph of the complaint. Had you any such purpose?

A. No, sir.

X 441. You have already stated the only purpose for which the Old Dominion Syndicate was formed?

A. Yes, sir.

X 442. At the time that the subscriptions to the Old Dominion Syndicate were taken, was it known what the interest of the subscribers would be, or was that matter left to your discretion?

A. It was left entirely to me.

X 443. So that the allegation that at the time of that subscription it was intended to distribute $2,000,000 of the stock of the company to the subscribers to the syndicate is incorrect?

A. Yes, sir.

X 444. It is alleged that the first payment made under the syndicate was made on the 24th of May. So far as the record shows, it appears to have been made on the 27th of May?

A. Yes, sir.

X 445. It is alleged in the fifth paragraph of the bill of complaint that on or about the 2d of May, 1895, you made an agree
164 ment with the executors of the will of said Michael H. Simpson for the purchase of 17,857 shares of the capital stock of the Baltimore Old Dominion Company, being five sevenths of the total capital stock of said corporation for the purpose of carrying out the plan and conspiracy referred to. Had you any such purpose at that time?

A. No, sir.

X 446. Had you any purpose at that time other than acquiring the interest of Simpson?

A. None other.

X 447. And of continuing the affairs of the corporation in conjunction with the minority stockholders?

A. No, sir.

X 448. The price stated for the five sevenths in the bill of complaint is $613,137.39. In fact, the payment made was $714,285.70?

A. Yes, sir.

X 449. It is alleged in that paragraph of the complaint that the agreement with the executors of Simpson was in the form of an option, for which a sum not exceeding $100,000 was paid. The fact is that for the option only $2000 was paid, is it not, and that the $100,000 was the first payment on account, after its acceptance?

A. Yes, sir.

X 450. In the sixth paragraph of the complaint the price to be paid for the Keyser interest is stated to be $175,182.41; the correct price is $356,145, is it not?

—. Yes, sir.

X 451. In the seventh paragraph of the complaint it is alleged that you and Lewisohn, for your common benefit, acquired from Keyser certain parcels of real estate in Arizona, the title to which then stood in the name of said Keyser, as above set forth, to wit, the four mining claims known as said Old Dominion mine, said New York mine, said Keystone mine, and said Chicago mine, and said parcel of land near the Bloody Tanks. Did you differentiate, in the acquisition of those Keyser claims, in any respect from the trans-

action involving the purchase of the stock of the Old Dominion Company of Baltimore?

A. No, sir.

X 452. It was an entirety?

A. Yes, sir.

X 453. And you purchased those as you did the rest?

A. Certainly.

X 454. And with the same intent and purpose?

A. Yes, sir.

X 455. And they were purchased absolutely, as was the stock of the Old Dominion Company, for Mr. Lewisohn and yourself?

A. Yes.

X 456. And not in pursuance of any plan or conspiracy?

A. No, sir.

X 457. It is alleged that for the purpose of carrying out the plan or conspiracy referred to in the third paragraph of the complaint, and in other portions of the complaint, that on or about July 8, 1895, you caused the Old Dominion Copper Mining & Smelting Company, the complainant herein, to be organized under the
165 general corporation laws of the state of New Jersey. Did you cause such organization to be made for any such plan or conspiracy, such as is set forth, or any other plan or conspiracy?

A. No, sir.

X 458. It was incorporated only for the purposes that you have testified to?

A. Yes, sir.

X 459. In the eleventh paragraph of the complaint it is alleged that you completed the purchase of the shares of stock of the Baltimore Old Dominion Company in pursuance of the plan and conspiracy referred to in the third paragraph of the bill of complaint. Such purchase was not made in pursuance of such plan or conspiracy, or any plan or conspiracy, was it?

A. No, sir.

X 460. Referring to the twelfth paragraph of the complaint, as to what transpired at the meeting of the directors on the 11th of July, it is stated that those proceedings were had as part of the plan and conspiracy referred to. Such is not the fact?

A. No, sir.

X 461. In the thirteenth and fourteenth paragraphs of the bill of complaint, the separation of the offer for the sale of the property of the Baltimore Old Dominion Company for 100,000 shares, and of the claims and mines referred to as the Keyser claims, the one to be conveyed for 100,000 shares and the other for 30,000 shares, is referred to. Was your attention at the time of the meeting called to the fact of the separate offers for each?

A. Not that I remember.

X 462. I think that you have stated that your first knowledge of that was when your attention was called to it when the record was read in the presence of Mr. Brandeis and yourself about a year ago?

A. Yes.

X 463. In the fifteenth paragraph of the complaint it is alleged that you and Mr. Lewisohn caused to be offered 20,000 shares of the capital stock of the Old Dominion Copper Mining & Smelting Company for public subscription and sale at the price of $25 per share. Was that 20,000 shares offered by you for subscription or sale in any respect except as you have already testified to as being made under the subscription agreement of July 18?

A. No, sir.

X 464. And it is alleged that such subscription was pursuant to the original plan and conspiracy. Had you any plan or conspiracy in contemplation in disposing of any of the shares?

A. No, sir.

X 465. And it is alleged in the fifteenth paragraph that the shares were subscribed for and sold, and the price therefor paid by the subscribers to the Old Dominion Copper Mining & Smelting
166 Company. Is that true, except that the subscriptions were paid in by nominees whom you designated to Mr. Nelson?

A. That is the way in which it was done.

X 466. And in no other way?

A. In no other way.

X 467. The 20,000 shares referred to in the fifteenth paragraph of the bill of complaint are alleged to have belonged to the complainant corporation. Did they, in fact, belong to that corporation, or did they belong to you?

A. They belonged to Mr. Lewisohn and me.

X 468. In the seventeenth paragraph of the complaint it is alleged that the property conveyed to the complainant by the Baltimore Old Dominion Company was, at the time of such conveyance, fairly worth not more than $1,000,000, and that said parcels of real estate sold and conveyed by Leonard Lewisohn to the complainant as aforesaid were not fairly worth more than $5000. Mr. Bigelow, having in mind the report of Mr. Hyams to yourself and your knowledge of the Old Dominion property, and the condition of the copper market and its prospects, what can you say of the value of the whole property conveyed to the Old Dominion Copper Mining & Smelting Company?

A. Well, we thought it was worth much more than we paid for it.

X 469. Judging from its probable earning capacity, as stated in the report of Mr. Colquhoun and Mr. Hyams, and from its past history as you understood it, and from the condition of the copper market at that time and its prospective condition as you believed it to be, did you believe that the capitalization of the Old Dominion Copper Mining & Smelting Company at $3,750,000 was in any respect excessive?

A. No, sir.

X 470. Or that the disposition of its stock at $25 per share was in any way excessive?

A. No, sir.

X 471. It is alleged in the seventeenth paragraph of the complaint that you knew, and that Leonard Lewisohn knew, when you acquired the stock of the Baltimore Old Dominion Company, and

when Leonard Lewisohn acquired the title to said parcels of real estate, and when offers to sell to the complainant were made by said Baltimore Old Dominion Company and by said Leonard Lewisohn, that the value of the property referred to in the offers was not in excess of $1,000,000 for the property of the Old Dominion Company, and of $5000 for the other property referred to in that paragraph of the complaint. So far as your knowledge extended had you any such knowledge as that?

A. No, sir.

X 472. It is alleged in that same paragraph that the stock of the Baltimore Old Dominion Company and the said parcels of real estate were acquired by you in the manner already stated, with intent, on your part and that of Lewisohn, to sell the said property of the Baltimore Old Dominion Company and said parcels of
167 real estate for a large price. At the time of the acquisition of that property had you any such intent?

A. No, sir.

X 473. Of course, when you sold the property to the new company, you intended to sell it for all its stock?

A. Yes.

X 474. And did so sell it?

A. Yes.

X 475. And thought it a reasonable price for it?

A. Yes, sir.

X 476. At the time of that sale you were the sole stockholders of the new company?

A. Yes, sir.

X 477. Except what was needed to qualify directors?

A. That is all.

X 478. And that was your stock, in point of fact?

A. Yes, sir.

X 479. The allegation is made in the same paragraph that you made no disclosure to the corporation of the fact that the value of the property was less than that for which it was sold to the corporation. The fact is that the corporation knew of the whole transaction?

A. Yes, sir.

X 480. And you were really the corporation?

A. Yes.

X 481. You and Mr. Lewisohn?

A. Yes, sir.

X 482. It is alleged that no disclosure was ever made by you to any of the persons who subscribed for, or who afterwards purchased stock in the complainant corporation, or to any other persons of the facts as to the purchase of said properties, or as to the reasonable value thereof. Did you ever fail to disclose, upon request, any fact connected with the transaction?

A. No, sir.

X 483. Was not the whole transaction a matter of public knowledge?

A. Yes, sir.

X 484. So far as the members of the Old Dominion Syndicate were concerned, the whole transaction was left to your discretion?

A. Yes, sir.

X 485. In the eighteenth paragraph it is stated that by the transactions set forth in the complaint you carried out the plan and conspiracy referred to. There was, as you say, no plan or conspiracy?

A. No, sir.

X 486. There was none to carry out?

A. No.

X 487. It is alleged that you acquired all the capital stock of the Baltimore Old Dominion Company for a sum less than $800,000. There is no foundation for that at all?

A. No; no truth in that.

X 488. And that you acquired it without making any further payment than the $800,000. That is not true?

A. No, sir.

X 489. You and Mr. Leonard Lewisohn acquired it by the payment of $1,000,000?

A. Yes, sir.

168 Redirect examination:

[Upon redirect examination, in answer to questions propounded by Louis D. Brandeis, Esq., counsel for the plaintiff, the witness further deposes and says,—]

R. 490. Referring to Cross-Int. 295 and the answer thereto:

"Before the Keyser option was obtained, what, if you recollect, was the policy pursued, or intended to be pursued, in respect to the management of the mine? A. It was to run the mine as it was in its then condition——"

You mean by that answer to say that that was the intention?

A. At the beginning, yes, sir.

R. 491. Well, up to the time the Keyser option was obtained?

A. I cannot say the exact date, but of course we recognized that Keyser still had an interest in it.

R. 492. Well, is it not a fact that you did not intend to run that mine with Keyser as a minority interest, but that your intention was to acquire that minority interest?

A. Why, certainly, if we possibly could.

R. 493. And you made an effort at once to do so?

A. So I understand.

R. 494. And further than that, as soon as you acquired the majority interest,—I mean the Simpson interest,—you gave directions to shut down the mine, did you not?

A. I do not remember as to that.

R. 495. Has not your counsel, when refreshing your recollection of the testimony at the beginning of the cross-examination, called your attention to the letter of June 3, 1898, produced as Exhibit 18, in connection with the testimony of Frederick Royhauser in the suit of Old Dominion Copper Mining & Smelting Co. v. A. S. Bigelow, viz.,—

"JUNE 3RD, 1895.

William Keyser, Esq., President, Old Dominion Copper Co., Baltimore, Md.

DEAR SIR: The expert has returned from the Old Dominion Copper Company and—as you were doubtless advised by Mr. Butler—the first payment was duly made and good and sufficient notes given for balance.

The new owner would be obliged to you if under the circumstances you would send directions to the line to stop all work of every kind except pumping and such other work as is necessary for the protection of the property.

Very truly yours,

LEWISOHN BROTHERS,
General Manager."

169 A. I do not remember that. These matters were left with Mr. Lewisohn at that time.

R. 496. In answer to Cross-Int. 311, "Had you conceived of the policy of organizing a New Jersey corporation, or any corporation other than a Maryland corporation, at any time prior to June 28," you answered, "No, sir." And in answer to Cross-Int. 434, "Did you at that time or at any time prior to July 1 contemplate the creation of any company to which the property referred to was to be conveyed," you answered, "No, sir." Are those answers correct?

A. To the best of my knowledge and belief, yes, sir.

R. 497. Did not your counsel in conferring with you, preparatory to your cross-examination, call your attention to the letter of Lewisohn Brothers, by Jesse Lewisohn, General Manager, to Adolph Lewisohn, dated May 24, 1895, which was produced in connection with the deposition of Frederick Royhauser, in the suit of Old Dominion Copper Mining & Smelting Co. v. A. S. Bigelow, viz.,—

"NEW YORK, *May 24th*, 1895.

Adolph Lewisohn, Esq., London.

DEAR SIR: Mr. Meredith got back from Baltimore yesterday and had a conference of a couple of hours' duration with Mr. Keyser, but is none the wiser as to whether this gentleman intends to let us have his two-sevenths of the Old Dominion or not. He intimates that if we make it a different company with a higher capitalization, he would probably not remain in; but he had not decided and is not compelled to decide for sixty days. Having three directors out of five, they control; and we would have to get one of those directors to our side—otherwise they would have the running of the company until next February when a meeting will be held and new directors appointed.

We will have to take our chances on this matter, and we hope he will act fairly.

Mr. Lieberman of Arizona is one of the directors, we understand, and Mr. Leonard Lewisohn believes we will be able to win him over, and Mr. Simpson also promised to help us in gaining our point there, and it is probable that this matter will right itself in course of time

as it is not likely that Keyser will be very mean when there is not much for him to gain thereby.

Very truly yours,

LEWISOHN BROTHERS.
LEWISOHN, *General Manager.*"

170 A. No, sir, he did not.

R. 498. Having this letter now called to your attention, and particularly the sentence that "He intimates that if we make it a different company with a higher capitalization, he would probably not remain in;" and the further fact that the letter states that "Mr. Meredith got back from Baltimore yesterday."—which would have been May 23,—do you not recall that the subject of forming a different company with a higher capitalization was considered by you and Mr. Lewisohn at some time prior to May 23?

A. No, sir, it was not.

R. 499. That is, you do not recall the fact?

A. I am very positive such was not the fact.

R. 500. Are you equally positive that there was no discussion of a new company before June 28, or July 1, as you have answered in answer to your counsel's question?

A. To the best of my knowledge and belief, there was not.

R. 501. I call your attention to the following passage in your letter of June 11, 1895, to Maxwell Woodhull: "We shall doubtless reorganize on a basis of 100,000 shares, and our present idea is to place somewhat less than half of this in Europe at a price that will pay back the subscribers their money, and give them their stock in the new company for nothing," and I call your attention specifically to the expression "their stock in the new company," and I ask you whether you do not now recall that there was at some time, on or prior to June 11, some discussion between you and Mr. Lewisohn as to the formation of a new company?

A. I do not think there was, sir.

R. 502. Do you mean by your last answer to say that you made the statement which you did to Mr. Woodhull without consultation with Mr. Lewisohn, and upon your own individual initiative wholly?

A. It would be very likely to be the case.

R. 503. And therefore you wish to have it understood, and wish the court to understand, that, according to your best recollection, while you considered the question of a new company, you did not discuss that with Mr. Lewisohn?

A. I do not admit it was a question of a new company.

R. 504. You admit that in your letter you said you were going to give to the stockholders stock in the new company for nothing, do you not?

A. I meant by that letter that the old company was to be reorganized; if I used the words "new company," it meant a reorganization of the old Baltimore Company.

R. 505. Well, will you kindly look through that letter, and point out to me anything in that letter which enables you to refresh your recollection so as to testify that you meant by the words "new company" the old company?

A. This one of June 11, do you mean?

R. 506. The letter of June 11 to Maxwell Woodhull.

171 A. Simply this paragraph: "The present company is organized with a share capital of 25,000 shares. We shall doubtless reorganize on a basis of 100,000 shares."

R. 507. That is all that you can point out?

A. That is what I think refers to the old company, and there was no other idea in my mind at the time.

R. 508. I ask you to point to anything and everything in that letter which enables you to testify now, as a matter of recollection, that when you used the words "new company," you meant the old company.

Mr. HEMENWAY: "The old company reorganized," is what he said.

A. I have pointed it out.

R. 509. And that is all, is it?

A. That is all that I can see.

R. 510. I call your attention also to your letter of June 12, 1895, to Moses T. Stevens, as follows: "It is proposed to reorganize this company, and the scheme, as at present outlined, is to float a little less than one-half of the new stock in Europe, which we have reason to believe we can do successfully, and then pay back to subscribers their subscription, leaving their stock in the new company costing them nothing." Did you, in that letter to Stevens, of June 12, when you used the words "new company," also mean the old company?

A. Yes, sir.

R. 511. Now will you point out to me anything in that letter which enables you to refresh your recollection so that you can testify that when you used the words "new company," you meant old company?

A. "It is proposed to reorganize this company."

R. 512. Is that all?

A. Yes, that is what I meant.

R. 513. I call your attention also to another letter of yours, to Charles S. Randall, dated June 12, 1895, in which you use the expression: "It is proposed to reorganize this company, and the scheme as at present outlined is to float a little less than one-half of the new stock in Europe, which we have reason to believe we can do successfully, and then pay back to subscribers their subscription, leaving them their stock in the new company costing them nothing." When you used the words "new company," in this letter did you also mean the old company?

A. Yes, sir.

R. 514. Are you able to point to anything in that letter which enables you to refresh your recollection to the extent that you can testify that when you used the words "new company" you meant old company?

A. Except for the words "It is proposed to reorganize this company."

R. 515. And you think if any one uses the words "to reorganize this company," or "the company," it must necessarily mean to simply make a change in that company under the laws of the same
172 state, and not to transfer the property to another company to be organized under the laws of a different state?

A. That was the intention, and that is what I recognized by these letters. It was to increase the stock of the old company.

R. 516. And is that what you mean—what you understand as the meaning of that language?

A. The meaning of those letters, yes, sir.

R. 517. I mean the meaning of the words "to reorganize the company."

A. "To reorganize this company," it is said there.

R. 518. Well, "to reorganize this company," to use that term generally?

A. That is what I mean to convey.

R. 519. Now is it not a fact, Mr. Bigelow, that, according to the ordinary parlance, in every, or nearly every, reorganization which has taken place about which you have knowledge, the expression "to reorganize the company" does not mean merely making a change in the organization of that particular company as it stands, but making such a change as may involve a new company to take over the property, as in the case of a number of railroad and other reorganizations with which you have been familiar?

A. It did in this case, to the best of my recollection.

(By Mr. LAUTERBACH:)

Q. What did it mean in this case? Your answer is not very clear. What did you suppose in this case it meant?

A. It meant to increase the capital stock of this company.

R. 520. What do you find in these letters to indicate that this particular reference to this company, which is used in one or two of the letters, was used in that narrow, that contracted, sense by you?

Mr. LAUTERBACH: That is objected to, as it is by no means a narrow and contracted sense, but a very justifiable method of construction.

A. I find enough to refresh my memory enough to remember that that was the intent at that time.

R. 521. Now I call your attention to the letter of Lewisohn Brothers to C. C. Beaman, which your counsel incorporated in Cross-Int. 308, viz.,—

"DEAR SIR: We merely desire to confirm our message to your clerk on the telephone this afternoon that Mr. Leonard Lewisohn would like to hear from you at your convenience whether you would consider it would be best to reorganize the Old Dominion Copper Company under the laws of Arizona, or whether it would be more advantageous to do so under the laws of some other State.

Very truly yours,

LEWISOHN BROTHERS."

173 Now will you note the use of the expression "to reorganize the Old Dominion Copper Company under the laws of Arizona, or whether it would be more advantageous to do so under the laws of some other State?" Do you not see that there the term "to reorganize the old company" was applied to the reorganization of the corporation under the laws of a different state to which the company was to be transferred,—a different company?

Mr. LAUTERBACH: That question is objected to on the ground that the letter bears its own interpretation, and on the further ground, as suggested by Mr. Hemenway, that the letters before referred to were the letters of Mr. Bigelow himself, and that this is a letter of Mr. Lewisohn, and the witness' interpretation of the letter is not properly called for, and the letter is not binding upon him.

A. If it calls attention to other states,—of course, I am trying to interpret what he did mean, whether he meant to form a new company in another state under some other state law.

R. 522. That is, under the law of Arizona, or under the law of some other state?

A. Yes, at that time.

R. 523. Now to a leading question by your counsel, "The old corporation was really a Maryland corporation, and it was an error to speak of it as a corporation under the laws of Arizona," you answered "Yes." Who committed that error?

A. Well, sir, I do not know.

R. 524. What did you mean by answering "Yes" to that question?

Mr. LAUTERBACH: That is objected to on the ground that the question referred to the attitude of the Old Dominion Company being incorporated in Maryland, and the reference was to its being incorporated under the laws of Arizona, which was evidently an error. That was my question and his answer.

A. I do not know.

R. 525. Why did you answer "Yes" to that question of your counsel?

A. Because it was an error to speak of it in that way.

R. 526. Who spoke of it as a corporation organized under the laws of Arizona?

A. I do not remember.

R. 527. Why did you answer "Yes, sir," to that question of your counsel?

A. Simply it was in answer to his question.

R. 528. Point out any error that any one committed with reference to that use of the word "Arizona" in connection with the Old Dominion Copper Company.

Mr. LAUTERBACH: That is objected to because the question referred to was simply that if the company was referred to as the Old Dominion Company of Arizona, it was an error, because it was
174 the Old Dominion Company of Baltimore, incorporated under the laws of Maryland, and that was the only question that was asked, and to that the witness answered that if the existing company

was referred to as a company under the laws of Arizona it was an error.

A. I do not find, I cannot see, where there is any error.

R. 529. Now is not the fact, Mr. Bigelow, this: that that letter of Lewisohn Brothers to Mr. Beaman shows that, prior to the writing of that letter, the question of reorganization by forming a new company had been discussed, and the question was whether a new company should be organzied under the laws of Arizona, where the property was situated, and under whose laws many mining companies are organized, or whether it would be more advantageous to organize a new company under the laws of some other state than Arizona?

A. I do not remember.

R. 530. You stated that, according to your recollection, the intention was, prior to July 1, not to organize the company under the laws of any other state, but to increase the capital of the Old Dominion Copper Company of Baltimore City, a Maryland corporation: is that correct?

A. That is as I understand it.

R. 531. Now will you explain to me in what way, according to your recollection, this old company, this Maryland corporation, could be reorganized with the result of having a capital of 100,000 shares, of which all but a majority would be sold abroad and the money raised to pay back to the syndicate subscribers their $1,000,000, and let them get the other half of the stock in the Baltimore Company for nothing?

Mr. LAUTERBACH: That question is objected to, as it is a matter of legal procedure not within the ken of the witness.

A. I do not recollect.

R. 532. You have no explanation to give?

A. None.

R. 533. Now it was a fact, was it not, that when you took over the Baltimore Company, the Simpson and Keyser interests, in pursuance of an agreement with Mr. Lewisohn and yourself, you stripped it of all the cash assets or working capital, turning over the company only with merely its mining property, plant, and a small quantity of supplies?

Mr. LAUTERBACH: That is objected to on the ground that the agreements speak for themselves.

Mr. BRANDEIS: No, I am not asking for the agreements, I am asking whether it was not practically done.

Mr. LAUTERBACH: Well, the objection is that the agreements speak for themselves as to what was to be done.

175 A. I do not remember outside of what is in here.

R. 534. Do not you remember that the company was turned over without any working capital, even copper on hand?

A. I should say by the agreement that it was.

R. 535. Now it was necessary, was it not, to raise a working capital with which to operate that mine?

A. To operate which mine?

R. 536. The Old Dominion mine.

A. — of Maryland, do you mean?

R. 537. I am not talking of the company, but of carrying on the mining operations of the property which you purchased, and which was vested in the Old Dominion Copper Company of Baltimore City. You have to have a working capital, and a large one, too.

A. You have to have money to carry on the work, of course.

R. 538. Well, how large an amount of money did you need?

A. I do not recollect as to that.

R. 539. Now how did you propose to raise that money which was required for a working capital?

A. At what time do you mean?

R. 540. At the time when it was arranged that you should take over the mine without any working capital.

Mr. LAUTERBACH: The question is objected to on the ground that working capital is not essential to the conduct and operations of a mine; that there are other methods of securing that operation.

A. I do not recollect.

R. 541. I call your attention again to the clause in your letter to Mr. Woodhull of June 14, "We shall doubtless reorganize on a basis of 100,000 shares, and our present idea is to place somewhat less than half of this in Europe at a price that will pay back to subscribers their money and give them their stock in the new company for nothing," and particularly to the following: "These are the terms on which the other subscribers have come in." Now I ask you if it was a fact that when you used the words, "new company," you meant new company; whether it does not appear from the very expression, "These are the terms on which the other subscribers have come in," that you had that same new company and reorganization in contemplation at the time that the subscribers to the several papers of May 21 and May 23 subscribed their names thereto?

A. No, sir.

R. 542. Why not?

A. That refers to the syndicate subscription, in my opinion, on reading the letter.

R. 543. You mean that it does not refer to that which immediately precedes it?

A. No, sir; I do not think so.

R. 544. What do you find in that letter to indicate that "These are the terms upon which the other subscribers have come in"
176 does not refer to what it would naturally appear to refer, namely, the clause immediately preceding it in the same paragraph?

A. I think it refers to the whole letter and to the syndicate subscription, and that there was no decision made as to the plans, as I say, "We have not yet decided;" but if there were any profits in it, why, they were to share in any profits the same as all other syndicate subscribers.

R. 545. Your counsel examined you in relation to the fourth paragraph of the bill of complaint, called your attention to the allegation,

namely, that the amount so subscribed, the $1,000,000, and paid in, should be used, so far as required, for the purpose of acquiring the property and all the capital stock of said Baltimore Old Dominion Company, and that the subscribers to said syndicate should receive, in cash or in stock of the new corporation to be formed to purchase said property from said company, $2,000,000, to be distributed pro rata according to their several subscriptions; and your counsel asked you, in Cross-Int. 443: "So that the allegation that at the time of that subscription is was intended to distribute $2,000,000 of the stock of the company to the subscribers to the syndicate is incorrect?" And you answer, "Yes, sir." Now I ask you whether, refreshing your recollection from the statements, from the clauses read to you from the letter to Maxwell Woodhull of June 11, from the letter to Moses T. Stevens of June 12, and from the letter to Charles S. Randall of June 12, you do not recall that at that time it was the intention to get for the syndicate subscribers $2,000,000 in stock and cash for what they had paid $1,000,000?

A. I cannot change my answer to that.

R. 546. Is it not a fact that at the time of the writing of those letters it was your intention and expectation that the syndicate subscribers who contributed $1,000,000 in cash should receive $2,000,000 in stock or cash, or partly in stock, $1,000,000 in stock and $1,000,000 in cash?

A. I did not know what they were going to receive at that time.

R. 547. I asked you whether it was not your intention and expectation, at the time of the writing of those letters, that the syndicate subscribers who contributed $1,000,000 in cash would receive $2,000,000, $1,000,000 in stock and the other $1,000,000 in cash?

A. I do not recollect.

R. 548. Are not you able by reading the letters and those passages in the letters to refresh your recollection in that respect?

A. I do not think anything was specified, or anything definite in my mind.

R. 549. Do you wish to be understood as testifying that when you used in the letter of Maxwell Woodhull of June 11 the expression,

"We shall doubtless reorganize on a basis of 100,000 shares,
177 and our present idea is to place somewhat less than half of this in Europe at a price that will pay back to subscribers their money and give them their stock in the new company for nothing. These are the terms on which the other subscribers have come in;"

and when you stated in the letter to Moses T. Stevens of June 12, 1895, "It is proposed to reorganize this company, and the scheme as at present outlined is to float a little less than one-half of the new stock in Europe, which we have reason to believe we can do successfully, and then to pay back to subscribers their subscription, leaving their stock in the new company costing them nothing;" and when you used in the letter of June 12, 1895, to Charles S. Randall, the expression, "It is proposed to reorganize this company, and the scheme as at present outlined is to float a little less than one-half of the new stock in Europe, which we have reason to believe we can do successfully, and then pay back to subscribers their subscription, leaving

them their stock in the new company costing them nothing," it was your intention and expectation to make such a disposition of the stock in the Old Dominion Copper Company of Baltimore City, or of the property owned by that company, so that you should give to the syndicate subscribers who contributed $1,000,000 their money back and stock to the amount of $1,000,000 without the payment of any other compensation?

A. I do not see where it says so in the letters. It says "give them their money back and their stock in the new company for nothing;" it does not say how much stock. That was left entirely discretionary with me under the syndicate papers.

R. 550. You wish now to be understood as testifying that it was not your intention to give them stock of the par value of $1,000,000 do you?

A. That I could not say. The thing was quite indefinite at that time. I intended to try to get them their money back and show them a profit.

R. 551. Well, I call your attention to the fact that you speak in your letter to Woodhull of June 11 of the present company being organized with a share capital of 25,000 shares which were of the par value of $20, and that it was proposed to reorganize on a basis of 100,000 shares. Does not that fact enable you to recall that it was then your intention to give back to stockholders their money in cash and shares of an equal par value to the amount which they had contributed?

A. No, sir, it does not. There is no par value mentioned in that letter.

R. 552. It was your intention, was it not, at the time you took subscriptions to the syndicate, to reorganize the company?

A. I cannot remember.

R. 553. Well, what is your best recollection; that it was or was not?

A. My intention to reorganize the company?

178 R. 554. At the time when you took subscriptions to the syndicate.

A. I do not think anything definite was settled then when they signed that paper.

R. 555. I am not asking you whether anything definite was settled; I am asking whether it was your intention at the time you took subscriptions to reorganize the company.

Mr. HEMENWAY: His answer is complete on that. He says there was nothing definite settled then.

A. I do not think it was definitely settled in my mind then.

R. 556. Were you considering, at the time when you took subscriptions, the reorganization of the company?

Mr. LAUTERBACH: The question is objected to unless the term "reorganization" is more fully defined, because there has been some parrying about that word for some time.

A. I cannot remember.

R. 557. Is it your best recollection that you were or were not?

A. The subscriptions were taken at so many different times, when that matter was settled I do not know.

R. 558. Were not subscriptions taken at the time when you were considering the reorganization of the company, or after you had begun to consider the reorganization of the company?

A. That I do not remember.

R. 559. Have you no recollection whatever upon that?

A. I do not remember about that.

R. 560. I call your attention again to the letters of June 11, 1895, to Woodhull, of June 12, 1895, to Stevens, and of June 12, 1895, to Randall, and ask you whether, at the time of writing those letters, the question of reorganization was not under consideration?

Mr. LAUTERBACH: Do you include in that term "reorganization" an increase of the capital stock? Otherwise, I think it is confusing to the witness.

Mr. BRANDEIS: He can state what he wishes.

Mr. LAUTERBACH: I am trying to make it clear.

Mr. HEMENWAY: He can answer only as questions are put to him.

A. I simply say in the letter to Mr. Woodhull, "We have not yet decided what plan we shall pursue in regard to the Old Dominion. It will, however, be something like this."

R. 561. What I ask you is whether, at that time, you were not considering the question of the reorganization of the company?

A. Reorganizing the old company under the Maryland laws.

179 R. 562. I ask whether you were not considering the reorganization? It is a perfectly definite expression.

A. To the best of my knowledge and belief, on reading that letter, we were considering the reorganization of the Old Dominion Company under the laws of Maryland, with increased capital.

R. 563. When, according to your best recollection, did that idea of increasing the capital of the Maryland Company enter your mind?

A. What time?

R. 564. Yes, with reference to the taking of subscriptions.

A. I cannot recollect what time.

R. 565. Well, it did enter your mind before June 11, didn't it?

A. Probably it did.

R. 566. And it was, was it not, your settled purpose at some time before June 11 to effect in some way a reorganization?

A. I do not think it was a fixed purpose.

R. 567. I call your attention to the following passage in the letter of June 11 to Maxwell Woodhull. After stating the purchase of the five sevenths, or the Simpson interest, and the proposed purchase of the two sevenths, or the Keyser interest, you say, "I enclose you a paper which you can sign if you please, which is the same as others have signed, and which tells you the dates of payments, &c. All this interest is to be held as a syndicate until the reorganization of the company is effected." Does not the reading of those words "all

this interest is to be held as a syndicate until the reorganization of the company is effected," refresh your recollection that it was then a settled purpose to effect the reorganization of the company?

A. To effect the reorganization of the company at some time, certainly; it was not going to be held as a syndicate forever.

R. 568. Now it is a fact, is it not, that after June 11 a large number of subscriptions were taken to the syndicate?

A. Does not that appear by the records that have been submitted?

R. 569. Well, does it not so appear in the subscription paper, Exhibit 5, which is dated June 14, and covers $179,119 of subscriptions?

A. It does so appear.

R. 570. I call your attention to the questions put by your counsel, viz., Cross-int. 316 [p. 153]:

"Can you recall any discussion as to the disposition of the stock of the company when formed?

"A. Why, certainly; that is the fundamental thing of the whole business, as I understand.

"X 317. What was it?

"A. It was that we should receive all the stock of the new company for the entire property of the Old Dominion Company of Baltimore located in Arizona and $500,000 in money.

180 "X 318. Which you were to furnish?

"A. Yes, sir.

"X 319. Were you aware at any time of having a change in that policy; if so, when?

"A. No, sir, I am not aware of any change."

I call your attention to the passages in the letter to Woodhull of June 11, 1895, in the letter to Stevens of June 12, 1895, and in the letter to Randall of June 12, 1895, above quoted, in which you state, "We shall doubtless reorganize on a basis of 100,000 shares," and ask you whether the policy of reorganizing on a basis of 150,000 shares was not a change from that under contemplation on June 11 and June 12, when you wrote the letters above referred to?

Mr. LAUTERBACH: The question is objected to because the question of counsel referred to a period after the formation of the new company with a capital of 150,000 shares, and had no reference to anything anterior to that time, and the answers referred only to a period after the formation of the new company.

A. No, sir; for the reason that they did not relate to the same subject.

R. 571. I call your attention to the question put to you by your counsel:

"X 320. It appears in evidence that in form the property of the Old Dominion Company of Baltimore, other than the mines and mining claims conveyed to Mr. Lewisohn by Mr. Keyser, were conveyed for a separate consideration of 100,000 shares of the new company, and those mining claims for a separate consideration of 30,000 shares of the new company. Was there any arrangement or agree-

ment or understanding at any time that separate values should be placed on the two classes of property?

"A. No, sir.

"X 321. Did any discussion ever take place in your presence in which the relative values of the Old Dominion property and the mining claims spoken of was considered or canvassed?

"A. No, sir, to the best of my recollection.

* * * * * * *

"X 325. Was your attention ever called to the separation referred to?

"A. I do not think it was called to my attention until Mr. Brandeis came into the office, at the time I read the record to Mr. Brandeis."

A. At the time the record was read to Mr. Brandeis.

Mr. BRANDEIS: Well, that has been changed since.

R. 572. I call your attention to the original offer of the Old Dominion Copper Company of Baltimore City to sell to the Old Dominion Copper Mining & Smelting Company its properties for 100,000 shares of the capital stock of the plaintiff company, which offer is dated July 11, 1895, and is as follows:

181 To the Old Dominion Copper Mining and Smelting Company, a corporation organized and existing under the laws of the State of New Jersey:

The Old Dominion Copper Company of Baltimore City, a corporation organized and existing under the laws of the State of Maryland being the owner of certain mines and mining properties at Globe in the Territory of Arizona described in the annexed Schedule and of machinery, lumber, wood, tools, implements and other personal property for use for and in connection with the operation and maintenance thereof hereby makes the following proposition.

To convey, assign and transfer all its property, both real and personal of every kind and nature whatsoever and wheresoever situated by good and sufficient deeds and instruments properly executed so as to confer absolute title thereto to the Old Dominion Copper Mining and Smelting Company upon receiving from said company one hundred thousand shares of its capital stock to be issued to said Old Dominion Copper Company or to its nominees.

It being understood that the Old Dominion Copper Mining and Smelting Company shall assume all obligations of The Old Dominion Copper Company of Baltimore City incurred since the first day of June 1895, and shall be entitled to all earnings and profits of said company since that date.

July eleventh 1895.

A. S. BIGELOW, *President.*

A. W. EVARTS, *Secretary.*"

SCHEDULE.

First. The Globe Mine, patented by the United States Government to B. W. Reagan on the 18th day of October 1881, by patent recorded in the office of the Recorder of Pinal County, Territory of Arizona, on the 19th day of November, 1881, to which record reference is made for a fuller description of said Mine.

Second. The Globe Ledge Mine, patented by the United States Government to Benjamin W. Reagan on the eighteenth day of October, 1881, by patent recorded in the office of the Recorder of Pinal County, Territory of Arizona on the nineteenth day of November, 1881, to which record reference is made for a fuller description of said Mine.

Third. The Copper Jack Mill Site, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 311, and to which record reference is hereby made for a fuller description of said Mill Site, and upon which the Smelting Works formerly owned by the Old Dominion Copper Mining Co. are situated.

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Fourth. The Globe Mill Site, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona in Book 2 of Records of Mines at page 311, to which record reference is hereby made for a fuller description of said Mill Site.

Fifth. The Globe Ledge Mill Site, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 310, to which record reference is hereby made for a fuller description of said Mill Site.

Sixth. The Southeast Globe Mine, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 312, and reference is hereby made to said records for a fuller description of said Mine.

Seventh. All of that certain Mining Claim known as the Interloper, in Globe District, County of Gila, Territory of Arizona, and recorded in Gila District Records on pages 116 and 117 in Book 2, reference to which will more fully show, being the same property conveyed to William Keyser by Thomas H. Mason, by deed bearing date January 3rd, 1887, and recorded at page 568, Book 2, record of deeds to Mines, Gila County, Arizona Territory.

Eighth. The Fraction mine, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines, at page 569, to which record reference is hereby made for a fuller description of said mine.

Ninth. The Alice Mine or lode, located October 10th, 1875, by A. R. Hammond and J. W. Reed, and notice of location recorded in Book 1, page 131, Globe District Mining Records (now a part of the Records of Gila County) and re-located February 28th, 1879, and notice of location recorded in Book 5, Globe District Mining Records (now a part of the Records of Gila County) on pages 184 and 185, said Mine or Lode being more particularly described in the last mentioned notice of location, as follows, to wit, commencing at

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this monument of stones in a gulch, being the centre of Southwest end of claim, and upon which this notice is posted, thence Southeast 300 feet to a monument of stones, thence Northeast 1400 feet to a monument of stones; thence Northwest 300 feet to a monument of stones, being the centre of the Northeast end of claim; thence
183 Northwest 300 feet to a monument of stones; thence Southwest 1400 feet to a monument of stones, under a tree; thence Southeast 300 feet to the place of beginning, being the same mining claim conveyed to Michael H. Simpson, deceased, by deed of the Globe City Mining Company, dated July 1st, 1884, and recorded with Gila County Deeds to Mines, Book 2, page 227, et seq.

Tenth. The Mining claim called and known as the Hypatia Mine, situate, lying and being in Globe Mining District, Gila County, Territory of Arizona, and more particularly described in the notice of location recorded at page sixty six (66) Book 2, Records of Mines, Gila County Records, to which Record reference is made for a more definite description of said Mine; said Mine was formerly known as the Southwest Alice Mine, being the same mining claim conveyed to said Michael H. Simpson, lately deceased, by deed of William H. Cook, dated November 18th, 1884, and recorded with Gila County Deeds, Book 2, page 305."

and ask you whether the signature of A. S. Bigelow to that offer is not in your handwriting?

A. Yes, sir.

R. 573. Do you wish to be understood as testifying that you did not know what you signed when you signed that paper?

A. Yes, sir.

R. 574. This book of records, Old Dominion Copper Company of Baltimore City, has been in your and Mr. Hyams' possession, and has been produced by you here in response to call, has it not?

A. Yes.

R. 575. I call your attention to the following record of the special meeting of the board of directors of the Old Dominion Copper Company of Baltimore City, held at New York, July 11, 1895:—

"NEW YORK CITY, *July* 11, 1895.

A special meeting duly called of the board of directors of this company was held at 11 o'clock in the forenoon at the office of Lewisohn Brothers, 81 Fulton St., in the city of New York.

Present: Messrs. A. S. Bigelow, Leonard Lewisohn and R. Brent Keyser.

The president, Mr. Bigelow, in the chair:

The assent in writing of all except two shares of stock to the making and carrying out of a proposition to convey all of the company's property to the Old Dominion Copper Mining & Smelting Company was presented by Mr. Lewisohn and read as follows:

[Side note in margin:]

Mem. July 11th, 1895. The assent of these two shares obtained."

[For text of this offer, see pages 181-183 of this deposition.]

184 "We, the undersigned, being all the stockholders of the Old Dominion Copper Company of Baltimore City, do hereby approve of and assent to the making and carrying out of the foregoing proposition, and request and authorize the board of directors to take all necessary steps to make and carry out the same.

July 11th, 1895.

A. S. BIGELOW,
LEONARD LEWISOHN,

Twenty-four thousand nine hundred and seventy-five	(24,975) shares.
A. S. BIGELOW.	Five (5) shares.
LEONARD LEWISOHN.	Five (5) shares.
R. BRENT KEYSER.	Five (5) shares.
*WILLIAM KEYSER.	Five (5) shares.
*GEORGE A. POPE.	Five (5) shares.

*Added after this meeting.

and it was stated that the like assent of the remaining ten shares was promised and would be promptly obtained, whereupon Mr. Lewisohn moved and Mr. Keyser seconded the adoption of the following resolutions.

Whereas a corporation has been formed in the interest of the stockholders of this company under the laws of the State of New Jersey by the name of the Old Dominion Copper Mining & Smelting Company which it is proposed shall, among other things, acquire and operate the mining property of this company at Globe, Arizona, and

Whereas said New Jersey corporation has perfected its organization and is duly authorized to transact business and issue its capital stock, and

Whereas the assent of every stockholder of this company to the making and carrying out of a certain proposition to convey all of this company's property to the Old Dominion Copper Mining & Smelting Company has been practically obtained,

Resolved that such proposition, duly signed, be submitted in writing to the Old Dominion Copper Mining & Smelting Company, and

Resolved that the proper officers of this company execute and deliver all conveyances, assignments and transfers necessary to carry out and complete the transaction involved in such proposition, and that the president and treasurer be and they are hereby appointed a committee to supervise and carry out the same on behalf of this company with full power and authority to name the persons
185 to whom the said 100,000 shares of the stock of the Old Dominion Copper Mining & Smelting Company shall be issued, and to dispose of and distribute said stock and to do any other matter or thing in the premises that may seem to them necessary or proper.

The president and secretary thereupon reported that they had

duly executed on behalf of the company the proposition authorized to be submitted to the Old Dominion Copper Mining & Smelting Company.

Mr. Evarts then offered his resignation as secretary which was, on motion, duly accepted, to take effect at the close of the meeting, and Mr. Thomas Nelson was duly chosen as secretary in his place.

The meeting then adjourned.

A. W. EVARTS, *Secretary.*"

and call your attention to the fact that the record shows that you were present at that meeting; that there was presented, signed by you, at that meeting, an offer to sell the property of the Old Dominion Copper Company to the Old Dominion Copper Mining & Smelting Company for 100,000 shares of its stock; that you, as a stockholder of the Old Dominion Copper Company of Baltimore City, signed, with Leonard Lewisohn, an assent to the making and carrying out of that proposition twice, once generally with Leonard Lewisohn, as the owner of 24,975 shares, and once individually as the holder of five shares; and that the record shows that you, as president, together with the secretary, reported that you had executed, on behalf of the company, the proposition so authorized; and I ask you whether you wish to have it understood that in performing the several acts set forth in that record you did not know what you were doing?

A. I left all those matters to the counsel, Mr. Beaman, to carry out those meetings in every respect; left it entirely to him and did not follow it up myself; supposed it was properly done.

R. 576. There is no evidence that Mr. Beaman was present at that meeting.

A. Was not there a partner of his there?

R. 577. Mr. Evarts?

A. That was the firm that was employed, Evarts, Choate, & Beaman.

Mr. BRANDEIS: I also introduce here as Exhibits 18 and 19, a copy of the record of the meeting of the directors of the Old Dominion Copper Company of Baltimore City, of June 17, 1895, and a copy of the record of the meeting of the directors of the Old Dominion Copper Company of Baltimore City on June 20, 1895.

186 [For text of the meeting of June 17, 1895, Exhibit 18, April 23, 1903, G. C. B., see Bigelow Exhibits, p. 258; for text of the meeting of June 20, 1895, marked "Exhibit 19, April 23, 1903, G. C. B.," see Bigelow Exhibits, p. 259.]

Mr. LAUTERBACH: I object to the admission of these records on the ground that Mr. Bigelow was not present at either of the meetings of the 17th or the 20th.

R. 578. I call your attention to the original offer purporting to be signed by Leonard Lewisohn, dated July 11, 1895, to sell to the Old Dominion Copper Mining & Smelting Company for 30,000 shares of its stock, the Old Dominion, the New York, the Chicago, the Keystone

mining claims, together with a certain parcel of land at Bloody Tanks, which is as follows:—

"To the Old Dominion Copper Mining and Smelting Company:

I hereby offer to convey the following described property now owned and held by me upon receiving thirty thousand shares of the capital stock of the Old Dominion Copper Mining and Smelting Company to be issued to me or to my nominees:

1st. The Old Dominion Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land office at Tucson, Arizona, Entry No. 267, Lot No. 45 situated in Globe Mining District, Gila County, Arizona.

2nd. The New York Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1883, in the United States Land office at Tucson, Arizona, Entry No. 268, Lot No. 46 in Globe Mining District in Gila County, Arizona.

3rd. The Chicago Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land office at Tucson, Arizona, Entry No. 269, Lot No. 51 in Globe Mining District, Gila County, Arizona.

4th. The Keystone Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1885, in the United States Land office at Tucson, Arizona, Entry No. 384, Lot No. 54 in Globe Mining District, Gila County, Arizona.

5th. A lot or parcel of land situated near the Bloody Tanks and deeded by E. A. Saxe to the Old Dominion Copper Mining Company, Deed recorded in Book 1 of Deeds to Real Estate at pages 126 187 and 127 in the office of the Recorder of Gila County, Arizona, and reference is hereby made to said record for a fuller description of said parcel of land.

New York, July 11th, 1895.

LEONARD LEWISOHN.

Please issue said 30,000 shares of stock to Mr. A. S. Bigelow & myself.

LEONARD LEWISOHN."

and ask you whether the signature of Leonard Lewisohn is in his handwriting?

A. I think it is, yes.

R. 579. I now call your attention to the record of the meeting of the directors of the Old Dominion Copper Mining & Smelting Company on July 11, 1895, as follows:—

"Minutes of a Meeting of the Directors Duly Called, Held at the Office of Lewisohn Brothers, at 81 Fulton St., in the City of New York, on the 11th Day of July, 1895, at 12 o'clock Noon.

Present: Messrs. Lewisohn, Evarts, Buffum, Welch, Riddlesberffer and Rowe.

The president, Mr. Evarts, in the chair.

The resignation in writing of Mr. Montgomery as a director of the company was presented and read and, on motion, was accepted, and Mr. A. S. Bigelow of Cohasset, Massachusetts, was duly elected a director in his place, and, being present, took his seat as such.

The resignation in writing of Mr. Rowe as a director of the company was presented and read and, on motion, duly accepted, and Mr. Leonard Lewisohn of New York was duly elected a director in his place, and, being present, took his seat as such.

The resignation in writing of Mr. Welch as a director of the company was presented and read and, on motion, duly accepted, and Mr. Henry M. Whitney of Boston, Massachusetts, was duly elected a director in his place.

The resignation in writing of Mr. Jesse Lewisohn as treasurer was presented and read, and on motion, duly accepted, and Mr. Thomas Nelson was duly elected as treasurer in his place.

The resignation in writing of Mr. Jesse Lewisohn as a director of the company was presented and read and, on motion, duly accepted, and Mr. Thomas Nelson of Boston, Massachusetts, was duly elected a director in his place.

The resignation in writing of Mr. Evarts as president was
188 presented and read and, on motion, duly accepted, and Mr. Bigelow was thereupon duly elected as president in his place and thereupon took the chair.

The resignation in writing of Mr. Riddlesborffer as a director was presented and read and, on motion, duly accepted, and Mr. Joseph G. Ray of Franklin, Massachusetts, was duly elected a director in his place.

Mr. Evarts presented and read a proposition from the Old Dominion Copper Company of Baltimore City as follows:

[For text of this offer, see pages 181-183 of this deposition.]

Whereupon Mr. Lewisohn moved and Mr. Evarts seconded the adoption of the following resolutions:

Whereas the Old Dominion Copper Company of Baltimore City has made and submitted a proposition to convey all of its property to this company which has just been presented and read; and

Whereas it is reported and appears that such property is reasonably and fairly worth the par value of the stock proposed to be paid and issued and received therefor,

Resolved that said proposition be and the same is hereby accepted and that this company do purchase and acquire all said property upon the terms contained in the said proposition and in payment therefor issue 100,000 shares of its capital stock to said The Old Dominion Copper Company of Baltimore City or to its nominees, all such stock to be full paid and not subject to assessment; and

Resolved that Messrs. Bigelow and Nelson be appointed a committee to supervise and carry out the details of such purchase and issue of stock.

Which were thereupon duly adopted.

Mr. Lewisohn presented and read a written proposition as follows:

[For text of this offer of Leonard Lewisohn, to Old Dominion Cop-

per Mining & Smelting Company, see pages 186 and 187 of this deposition.]

Whereupon Mr. Evarts moved and Mr. Buffum seconded the adoption of the following resolutions:

Whereas Mr. Leonard Lewisohn of the city of New York has made and submitted a proposition to convey certain mining properties in Arizona to this company, which has just been presented and read;

189 and whereas it is reported and appears that such properties are reasonably and fairly worth the par value of the stock proposed to be paid and issued and received therefor,

Resolved that said proposition be and the same is hereby accepted and that this company do purchase and acquire said properties upon the terms contained in said proposition and in payment therefor issue 30,000 shares of its capital stock to said Leonard Lewisohn or to his nominees, all such stock to be full paid and not subject to assessment; and

Resolved that Messrs. Bigelow and Nelson be appointed a committee to supervise and carry out the details of such purchase and issue of stock.

Which were thereupon duly adopted.

The following resolution was thereupon, on motion, duly adopted:

Resolved that Niles S. Berray of Globe, Gila county, in the Territory of Arizona, be and he is hereby appointed the agent of the Old Dominion Copper Mining & Smelting Company in and for said Territory upon whom all notices and processes, including the services of summonses may be served, which, when so served, may be deemed taken and held to be a lawful personal service on said company for all purposes whatsoever.

And the president and secretary were requested to attend to the prop- filing of a copy thereof in the office of the Recorder of Gila county, Arizona.

The secretary reported that he had caused the statements of officers, directors, &c., required by law to be filed in the office of the Secretary of the State of New Jersey on the 10th instant, and had received an official certificate to that effect and that he had caused to be filed in said office on the same day a certificate as to issue of additional stock.

The resignation in writing of Mr. Buffum as secretary was presented and read and, on motion, duly accepted, to take effect at close of meeting, and Mr. Thomas Nelson was duly elected as secretary in his place.

EDGAR BUFFUM, *Secretary.*"

and ask you whether you wish to be understood as testifying that when you voted at that meeting as is there stated to make the sale of the property of the Old Dominion Copper Company of Baltimore City for 100,000 shares, in accordance with your offer as president, and to make the sale of the mining claims standing in the name of Lewisohn for 30,000 shares, as there stated, you did not know what you were doing.

190 Mr. LAUTERBACH: Do the records show that he voted as president? You said that he voted.

Mr. BRANDEIS: He presented it as president of the other company, and he voted as a director.

A. I do not recollect being present at that meeting, and, after reading the record, I doubt very much if I noticed what the particular forms of votes were that were passed. My instructions to Messrs. Evarts, Choate & Beaman, as the lawyers in the case, were that they should carry out the programme in this way: that we owned all the properties of the Old Dominion Copper Mining Company of Maryland, and all those standing in the name of Keyser, and that we should receive all the stock of the new company for those properties and for $500,000 in money. What methods Mr. Beaman took in carrying out my instructions I would not have been likely to have noticed, supposing that to have been done in accordance with my instructions.

R. 580. I call your attention to a passage in the records:

"The resignation in writing of Mr. Montgomery as a director of the company was presented and read and, on motion, was accepted and Mr. A. S. Bigelow of Cohasset, Massachusetts, was duly elected a director in his place, and, being present, took his seat as such."

Do you now have any doubt as to your being present at that meeting?

A. Why, if the records state it, there certainly should be no doubt, I should think.

R. 581. I call your attention to Int. 141, and your answer thereto:

"Have you no recollection other than what appears by the correspondence which has been put in evidence in connection with your deposition and the record of the directors' meeting on July 11, 1895, now shown you, as to what took place in connection with the organization of that company or any conversations with Leonard Lewisohn or any other person in relation thereto? A. No, sir."

And also to numerous other interrogatories in which I endeavored to refresh and exhaust your recollection as to conversations or communications with Leonard Lewisohn, and other facts in regard to the organization of the plaintiff company, and the transfer of the property to it, and ask you how, in view of the answers then given, and the fact that at the several sessions at which you were examined by me on the direct you had no recollection as to the terms on which this property was going to be turned over to the company, you have now been able to testify with the directness with which you have testified on these facts in regard to the turning over of the property?

191 A. I think I have answered that by saying that I supposed your interrogatories referred to a meeting of the organization at which I was not present; but that I always had remembered the fundamental fact which I have stated here before.

R. 582. I call your attention to the following passages in the record of the meeting of the directors of the Old Dominion Copper Mining

& Smelting Company held in Boston September 18, 1895, at page 26 of the record book; viz.,—

"Upon a report of the committee appointed at a meeting of the stockholders of the Old Dominion Copper Company of Baltimore City, held at New York July 11, 1895, on motion of Mr. Ray, seconded by Mr. Stevens, it is

Voted that one hundred thousand (100,000) shares of this company's full paid stock be issued to Mr. Philip Dumaresq.

Upon the report of Messrs. Bigelow and Nelson, the committee appointed at the meeting of the directors of the Old Dominion Copper Mining & Smelting Company held at New York July 11, 1895, on motion of Mr. Ray, seconded by Mr. Stevens, it is

Voted that thirty thousand (30,000) shares of this company's full paid stock be issued to Messrs. A. S. Bigelow and Leonard Lewisohn."

I also call your attention to the fact that you were present at that meeting and presided, and I ask you whether you wish to be understood as testifying that you did not understand at the time the purport of the votes which have just been called to your attention?

A. That meeting was probably outlined by the attorneys, and I followed whatever programme they laid out.

R. 583. That does not answer my question.

[R-Int. 582 repeated.]

A. I probably could have understood them if I had given my attention to them.

R. 584. I also call your attention to the fact that after the record of the meeting there is a statement, "All action taken by directors at above meeting is fully confirmed and approved in all respects," to which are appended the names of the directors, yours being the first, and ask you whether you wish to be understood as testifying that when you signed that statement you did not understand its purport?

A. I could have understood it if I had read it. I probably did not read it.

R. 585. I also call your attention to the fact that following the statement signed by the directors as above, there is the following:—

"The undersigned, stockholders of the Old Dominion Copper Mining & Smelting Company do hereby approve of the action of the directors shown by the above record of meeting held on the 18th day of September, 1895."

192 and to which statement is subscribed, after the name of Leonard Lewisohn, your name; and I ask you whether you wish to be understood as testifying that when you signed your name to that statement you did not understand its purport?

A. I probably signed that in the same way as the one before.

R. 586. I call your attention to the following Cross-Ints. and your answers thereto:—

"X 317. What was it? A. It was that we should receive all the stock of the new company for the entire property of the Old Dominion Company of Baltimore located in Arizona and $500,000 in money.

"X 318. Which you were to furnish? A. Yes, sir.

* * * * * * *

"X 417. And you and Mr. Lewisohn received therefor what? A. We received all the stock of that company.

"X 418. The 150,000 shares? A. Yes, sir.

"X 419. And left you obligated at the time of the transfer to furnish a capital to the new company of $500,000? A. As a working capital, yes, sir.

"X 420. The subscription to stock under the subscription agreement of July 18 referred to what stock? A. It referred to stock belonging to Mr. Lewisohn and me.

"X 421. To a part of the 150,000 shares? A. Yes, sir.

* * * * * * *

"X 467. The 20,000 shares referred to in the fifteenth paragraph of the bill of complaint are alleged to have belonged to the complainant corporation. Did they in fact belong to that corporation or did they belong to you? A. They belonged to Mr. Lewisohn and me."

Do you wish by your answers to those questions, particularly the last, to be understood as testifying that the 20,000 shares of stock was not treasury stock?

A. I understood it belonged to us, sir; that we were to give the $500,000 in money for it.

R. 587. And that it was not treasury stock?

A. Not as I understand the meaning of those words.

R. 588. Is it not a fact that under date of August 8, 1895, you wrote to Mr. Woodhull as follows: "I received your letter of the 7th. You are right in presuming the 20,000 shares which has been offered to be treasury stock?"

Mr. LAUTERBACH: That is objected to on the ground that the witness is entitled to see the letter before answering. It does not appear that any such letter was written.

193 A. Naturally I do not know that it is a fact.

R. 589. Will you make further search in your letter book for a copy of that letter of August 8 1895; also for the original letter of August 7, 1895?

Mr. LAUTERBACH: I think he has already made answer that he has made search, and he has no other letter.

Mr. BRANDEIS: I still believe that the search is not yet complete.

Mr. HEMENWAY: It is a matter that is not material.

The WITNESS: How is the letter signed, Mr. Brandeis?

Mr. LAUTERBACH: This is mythical.

R. 590. To Cross-Int. 373, put to you by your counsel,—

"In availing of the options of the Simpson estate and of the Keyser, was any one interested in the purchase except Lewisohn or Lewisohn Brothers and yourself and your associates under the agreement of May 22?"

you answer, "I do not think so." Is that answer true?

A. I thought it was when I made it.

Mr. LAUTERBACH: That is my mistake, Mr. Brandeis. It is correct as to the Simpson, and incorrect as to the Keyser. I will make the statement that in asking the question I was mistaken in including the Keyser option, since the Keyser option was only availed of on June 12, and subscriptions to the Old Dominion Syndicate had been made in the mean time, and those subscribers may be looked upon as being parties in interest. If those subscriptions are to be looked upon as creating an interest in the purchase, then the error was mine in framing the question.

R. 591. Is not your answer to Cross-Int. 373 correct, with the amendment now submitted by Mr. Lauterbach?

A. To the best of my knowledge and belief, it is.

R. 592. Is it not a fact that the option to take the Simpson shares was not availed of until May 28, as appears by Exhibit —?

A. Yes, if the evidence shows it.

R. 593. Is it not also a fact, as appears by Exhibit 3, that one syndicate subscription paper was dated May 21, and, as appears by Exhibit 4, another subscription paper was dated May 24?

A. It appears so.

R. 594. Is it not also a fact that there were paid in to you by subscriptions of May 27, $—?

A. It appears so.

R. 595. You said, in answer to your counsel,—

"X 375. And the interest of those mentioned in the agreement of May 22 extended only to the purchase, to furnishing funds for the purchase, of your one half of the stock? A. That is all

194 "X 376. And, as you have stated, that agreement was never availed of? A. No. I knew it could be availed of very well."

Now I call your attention to the receipts given to Henry M. Whitney and J. Morris Meredith for their subscriptions under date of May 27, 1895, introduced by you in answer to Int. 84, namely,—

"Received of Henry M. Whitney the sum of $7000, being first payment of his subscription of $50,000 toward the purchase of stock in the Old Dominion Copper Company according to the terms set forth in a certain paper which said Whitney has signed, and a copy of which he has."

and ask you whether those payments made by Mr. Whitney and Mr. Meredith were not made under the agreement of May 22?

A. I think those were really payments on the Old Dominion Syndicate.

R. 596. It is obvious they do not so read, is it not?

A. It does not appear so.

R. 597. I call your attention to Cross-Int. 391, and your answer thereto, viz.,—

"X 391. Were the mining claims kept out of the original underwriting or syndicate of May 22, or out of any of the subsequent agreements? A. They were not supposed to be."

Do you wish to be understood as testifying that those mining claims,—by which I assume you refer to the Keyser claims,—were supposed to be included in the agreement of May 22?

A. They were included in the Keyser option.

R. 598. Mr. Lauterbach's question to you was, "Were the mining claims kept out of the original underwriting or syndicate of May 22," which is an agreement——

Mr. LAUTERBACH: Oh, no, the underwriting agreement, I mean.

A. What I mean to say is they were not supposed to be kept out. As we understood at the time, we were to buy all the claims they owned down there, but we found afterwards that some stood in the name of Mr. Keyser.

R. 599. Do you wish to be understood as testifying that you knew nothing whatever about those so-called Keyser claims at that time?

A. Not at that time, no, sir.

R. 600. You did not know anything whatever in regard to them until Mr. Hyams returned from the West and told you, from his previous knowledge, that there were some such claims?

A. That was my first information that I remember.

R. 601. And, learning that there were such claims, Mr. Lewisohn and you undertook to get them included in the Keyser agree-
195 ment, and also undertook to get the Simpson estate to agree to the transfer of their interest in them?

A. So I understand.

R. 602. Now it is a fact, is it not, that these claims did not belong to the Old Dominion Copper Company of Baltimore City?

A. I think they did, sir.

R. 603. They were not included in any of the list papers or lists of properties which were sent by the Old Dominion people, and on which Mr. Hyams examined the property, were they?

A. As I understood it, they stood in Mr. Keyser's name, but were held by him for the Old Dominion Copper Company at Baltimore.

R. 604. I ask you, is it not a fact that they were not included in the list of properties which was furnished to Mr. Hyams and Mr. Colquhoun for their examination?

A. That I do not remember.

R. 605. Now is it not a fact that the interest of Mr. Keyser, and of the Simpson estate in these mining claims was entirely different from the interest which they had in the Old Dominion Copper Company, namely, that in the Old Dominion Copper Company they had a five sevenths interest to Simpson, and a two sevenths interest to Keyser, but in these mining claims, Keyser owned one half, and the Simpson estate the other half?

A. That I do not remember.

R. 606. I call your attention to your letter to Leonard Lewisohn dated June 15, 1895, and introduced in evidence [p. 85] as part of your answer to Int. 112, which is as follows:—

"Old Dominion Syndicate,
Sears Building,
(Second Letter.)

BOSTON, MASS., *June* 15, 1895.

Leonard Lewisohn, Esq., Box 1247, New York.

DEAR SIR: I have just returned from an interview with Mr. Simpson. He tells me that he saw young Mr. Keyser and gave him authority to transfer their one-half interest in the Old Dominion, Keystone, New York, and Chicago claims and whatever others there may be to us"—

and ask you whether that does not refresh your recollection that the Simpson estate had a one half interest in these claims?

A. It would appear so by that letter.

R. 607. And those are the same claims, are they not, referred to in Lewisohn Brothers' letter to you of June 18, 1895, [p. 100], inquired about in Int. 126, where it is stated, "You telephoned today that Mr. Butler said that deed from Keyser to the Old Dominion was in Baltimore. But what Mr. Butler refers to are the deeds of 196 those properties which they claim are not worth anything, and which Mr. Keyser will transfer to Mr. Lewisohn in Baltimore"?

A. Whose letter is that?

R. 608. Lewisohn's to you. I ask you whether they are not the same thing?

A. The same claims? That I do not remember, whether they are the same or not.

R. 609. Did you have any report upon the value or character of these mining claims conveyed by Mr. Keyser to Mr. Lewisohn, and by Mr. Lewisohn to the company, for which the 30,000 shares appear to have been used?

A. Only the report of Mr. Hyams, saying he thought it was very important they should go in.

R. 610. You mean the early statement that he made to you?

A. Yes, sir. I do not know whether it was made to me or through Mr. Lewisohn first, and then through him to me.

R. 611. I call your attention again to the pages which were cut out of your letter book, namely pages 309-313, inclusive, under the date of June 15, 1895, referred to in Int. 219, and ask you whether you will permit an examination of the index of the letter book, and of the letter book, to be made, to ascertain if possible, what letters were copied on the pages which have been cut out?

Mr. LAUTERBACH: I see no objection. That is for us to answer, and not for the witness.

R. 612. Will you also permit the index to be examined with a view to searching the index and book for the letter to Woodhull of August 8, 1895?

Mr. LAUTERBACH: If you will give us a copy of the letter to which you refer that would make it very simple.

Mr. BRANDEIS: August 8, 1895.

Mr. LAUTERBACH: I do not want to be placed in the position of saying that there is no such letter.

The WITNESS: I have often written letters to Mr. Woodhull, and I have no copy of them.

Mr. BRANDEIS: Well, we have given you the date. I am asking for the letter of August 8.

Mr. LAUTERBACH: Yes. I think there is objection to that.

Mr. BRANDEIS: We ask whether you will permit it?

R. 613. And will you also permit the index and letter books to be examined for the purpose of ascertaining whether there is not in them a copy of a letter to Woodhull of August 8, 1895?

Mr. LAUTERBACH: The answer to that is that you have referred, in the examination of Mr. Bigelow, to what purports to be
197 the original of a letter so sent. If you have the original, there is no need of our furnishing secondary evidence by looking for a copy. If you will exhibit the original, we will see if we have a copy, and it may be unnecessary so to do, if the original is produced; but in the present attitude of the evidence we decline to make any further examination.

Mr. BRANDEIS: I think that is all, subject to that information that we may get.

Mr. LAUTERBACH: After we have read the minutes there may be a few questions we may want to ask Mr. Bigelow, and I will reserve that right. We will take an adjournment, I suppose, until some date that is agreeable.

[The further taking of this deposition was suspended until Thursday, April 30, 1903, at 10 a. m.]

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
220 DEVONSHIRE STREET, BOSTON,
TUESDAY, *May* 5, 1903.

Cross-examination of ALBERT S. BIGELOW resumed:

[Mr. Lauterbach states that he has found the original agreement, dated that 22d of May, of which a copy, without signatures, has been introduced in answer to Int. 255 of Mr. Bigelow's deposition; he produces it, and it is admitted in evidence as Exhibit 20; (for text of this exhibit, see Bigelow Exhibits, p. 262) that he has also found a telegram from Mr. Meredith to Lewisohn Brothers, dated Boston, May 25, 1895, which is admitted in evidence as Exhibit 21. (For text of this exhibit, see Bigelow Exhibits, p. 263.)

[Mr. Brandeis offers in evidence the certificate of incorporation, found in the record book of the Old Dominion Copper Company of Baltimore City on pages 3, 4, 5, and 7; also the record of the first meeting of the corporation, found on pages 8 and 9 and part of page 10 of the same record.]

[A copy of this record is designated as Exhibit 22, and the text will be found at page 263 of Bigelow Exhibits.]

Mr. LAUTERBACH: The admission of this record is objected to as immaterial, irrelevant, and incompetent.

[In answer to cross-interrogatories propounded by Mr. Lauterbach, counsel for the defendant, the witness further deposes and says—]

X 614. Mr. Bigelow, referring to Exhibit 20, just taken in evidence, and referring to Exhibit 3, that is, the subscription list, dated May 21, and to the respective dates of the two exhibits, Ex-
198 hibit 3 being dated the 21st day of May and Exhibit 20 being dated the 22d day of May, have you any recollection as to which of the two papers was in fact first executed in point of time?

A. Yes, I have.

X 615. Will you give us your best recollection on that subject?

A. This one [Exhibit 20] was the first.

X 616. Did you know Mr. Stanton, whose name is referred to in some of the correspondence?

A. Yes, sir.

X 617. Did you know him?

A. Know John Stanton?

X 618. Yes.

A. Yes, sir; "honest John Stanton."

X 619. Did you have any dealings with him in regard to the Old Dominion Copper Company matters?

A. No, sir.

X 620. Neither directly nor indirectly, so far as you know?

A. No, sir.

X 621. I have asked you the question whether you solicited any one to join the Old Dominion Syndicate or the stock-subscription syndicate, and you said you did not. Did any one, in your behalf or to your knowledge, solicit any one to join the syndicate?

A. No, sir; they did not solicit any one.

X 622. Or request anybody to solicit?

A. No, sir.

X 623. Some reference has been had to news-paper articles. Did you or Mr. Hyams, to your knowledge, or any one connected with you, to your knowledge, cause any news-paper statements concerning the Old Dominion Copper Company, or its successor company, or concerning the syndicate, to be published?

A. No, sir, not to my recollection.

X 624. Or of the stock subscription or the Old Dominion subscription?

A. No, sir.

Mr. LAUTERBACH: I notice that on page 154 of this deposition I asked the witness: "Int. 328. Is that the first occasion on which you read the letters?" The next interrogatory shows that the words "letters" should read "records," and I would like to have that correction made. The interrogatory before that is, "Int. 327. And you assumed, up to that time, that the 20,000 shares with the 130,000 shares had come into your possession as owners of the property in bulk? A. Entirely into my possession and Mr. Lewisohn's." "Int. 328. Is that the first occasion on which you read the letters? A. I think so, to the best of my knowledge."

That is all, Mr. Bigelow, that we have. Mr. Brandeis may have some more questions.

Mr. BRANDEIS: I think I have no questions.

Mr. LAUTERBACH: You will find another error in the copy
199 of a letter from Bigelow to Woodhull, in which he says, "Copper is rising, but so slow;" it should read, "go slow."

A. S. BIGELOW.

Boston, May 6, 1903.

Subscribed and sworn to before me this 6th day of May, 1903.

[SEAL.] GEO. C. BURPEE,
Notary Public.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE ST., BOSTON,
TUESDAY, *May* 22, 1906.

Deposition of ALBERT S. BIGELOW, resumed.

ALBERT S. BIGELOW, having been again duly sworn by Howland Twombly, Esq., a notary public, in answer to interrogatories propounded by Edward F. McClennen, Esq., of counsel for plaintiff, further deposes and says.—

Q. 625. Mr. Bigelow, this letter on page 48 of the company's letter book, dated July 10, 1895, was signed by you?

A. It was signed by me, yes.

Mr. MCCLENNEN: This letter I will offer.

Mr. HEMENWAY: It does not seem material.

Mr. MCCLENNEN: The letter reads as follows:—

"JULY 10TH, 1895.

N. S. Berray, Esq., Supt. Old Dominion Copper Company, Globe, Arizona.

DEAR SIR: The bearer, Mr. S. A. Parnall, has been appointed Manager of the reorganized Old Dominion Copper Mining and Smelting Company. If your arrangements with Mr. Simpson will permit it, we should be pleased to have you remain a week or two at Globe with him, in order to give him the benefit of your experience before turning over to him the affairs of the Company.

In this connection we wish to thank you for your consideration in staying on with us as you have done, up to the present time.

Very truly,

A. S. BIGELOW, *Pres't.*"

Q. 626. Mr. Bigelow, is the company which you refer to
200 in this letter as the Old Dominion Copper Mining & Smelting Company, the present company?

A. I surely do not remember.

Q. 627. Was there any company except the present company that had that name?

A. I do not know.

Q. 628. Did you ever know of any other company of that name?

A. No.

Q. 629. And the name of the company whose stock you acquired was what?

A. I do not remember.

Q. 630. You have no recollection on that subject at all?

A. I do not remember what the name was.

Q. 631. Do you remember whether it was the Old Dominion Copper Company?

A. I do not remember.

Q. 632. Does that name sound familiar to you?

A. "Old Dominion" does, that part of it.

Q. 633. But you do not recall the rest?

A. No.

Q. 634. Well, having in mind the date of that letter——

A. What was the date, please?

Q. 635. July 10, 1895,—would it enable you to state whether or not it was the present company to which you referred?

A. I could not possibly say.

Q. 636. With your knowledge of the transaction, to what company other than the present company could it refer?

A. That I do not know.

Q. 637. Do you think of any company other than the present to which it could refer?

A. I do not.

Mr. McClennen: The option recites it as the Old Dominion Copper Company; whether "of Baltimore City" was part of the title, I do not know.

Q. 638. Now I show you a letter of July 13 or 15, 1895, to N. S. Berray, which appears on page 51 of the letter book: is that signed by you?

A. That is signed by me.

Mr. McClennen: This letter I will offer.

Mr. Hemenway: Objected to as immaterial.

Mr. McClennen: The letter reads as follows:—

"July 13th, 1895.

N. S. Berray, Esq., Supt., Globe, Arizona.

Dear Sir: We have completed today the reorganization of the Old Dominion Co. and appointed the new officers. It is necessary to have an Agent in Arizona and we have appointed you as our agent, as you have been advised by Mr. Evarts, which appointment you
291 will please file in the usual way with the Recorder. We were obliged to do this temporarily until our Manager, Mr. Parnall, got out to Globe, as the Agent's appointment must be a continuous one. Of course, Mr. Parnall will be our permanent Agent there, after his arrival.

Will you please look over all the papers of the Company at Globe and forward to Mr. Evarts all the deeds, conveyances or other legal document connected with the Company, which you find. There are some deeds and conveyances, such as the title to the saw mills and others that are at Globe and we wish to have them all here so as to

have them recorded as the Statutes require. Please give this your prompt attention; also make a list of all claims of the Company on which assessment work for 1895 has yet to be done for Mr. Parnall.

We expect that our Mr. Parnall will arrive during the first week in August. Mr. Evarts, of the Firm of Evarts, Choate & Beaman, New York, will forward you some papers for filing which you will please attend to.

Yours truly,

A. S. BIGELOW, *Pres't.*"

Q. 639. In the first line of that letter, where you say "We have completed today the reorganization of the Old Dominion Co." to which company did you refer; the old or the new?

A. I do not remember.

Q. 640. Is there anything in the language of that letter that would enable you to answer that question?

A. No.

Q. 641. For instance, you say, "We have completed today the reorganization of the Old Dominion Co." speaking as of July 13 or 15. Do you remember whether you were at work at that time upon the reorganization of the old Old Dominion Company?

A. I do not remember.

Q. 642. Do you remember anything ever being done towards the reorganization of the old Old Dominion Company?

A. I do not remember.

Q. 643. Then I am right that so far as you now remember nothing was done?

A. I do not remember.

Q. 644. Now on the preceding June 11, as appears in your testimony at page 170, you had written to Mr. Maxwell Woodhull, "We shall doubtless reorganize on a basis of 100,000 shares, and our present idea is to place somewhat less than half of this in Europe." Was the reorganization there referred to the same one that you now refer to in this letter of July 13?

A. I do not know.

202 Q. 645. Do you entertain any doubt on that subject?

A. I do not know that I do, sir.

Q. 646. From your recollection of the matter, coupled with your desire at the present time to give us all possible information, do you entertain any doubt on that subject?

A. I cannot answer that question.

Q. 647. Do you mean by that you do entertain any doubt as you sit there?

A. I say I do not know anything about it.

Q. 648. I now ask you if you will state as nearly as possible, in the terms of yes or no, whether you entertain any doubt, in view of your recollection, as to whether you were talking about the same reorganization in the two letters?

A. I could not say whether I had any doubt or not; it might be the same and might not.

Q. 649. What is there that stands in your way, as you sit there, that prevents you from saying?

A. Because I do not know.

Q. 650. You do not know whether you entertain any doubt?

A. I say I do not know whether one refers to the other or not, therefore I suppose——

Q. 651. There is some doubt in your mind?

A. I suppose an inference can be drawn there.

Q. 652. What is in doubt in your mind on that subject?

A. Simply I do not know whether they refer one to the other, that is all.

Q. 653. Is there anything about the language of those letters that causes you to believe that they refer to different companies?

A. Well, I should like to see the two letters and compare them. I do not remember either letter.

Mr. HEMENWAY: What are the dates of the two letters?

Mr. MCCLENNEN: The one to Mr. Woodhull was June 11, and the one to Mr. Berray was July 13 or 15, both 1895.

The WITNESS: I do not know whether they referred to the same or not.

Q. 654. Do you see anything in them leading you to conclude that they refer to different companies?

A. Not if you do not.

Q. 655. How will my position in the matter assist you in determining?

A. By simply reading the two letters.

Q. 656. And you see nothing in them leading you to believe that they refer to different companies?

A. I do not see anything that they refer to different companies or to the same companies.

Q. 657. I am right in assuming, am I not, that you are desirous of investigating and as far as possible refreshing your recollection and giving us every information possible?

A. Certainly.

203 Q. 658. Does anything occur to you to assist you in determining whether those refer to different companies?

A. Nothing.

Q. 659. If for your own purposes you desired to find out, what would you do?

A. Well, I could not go beyond those letters, so far as I know.

Q. 660. Well, now, in one of them you say, "We shall doubtless reorganize on a basis of 100,000 shares." You never reorganized the old company on the basis of 100,000 shares, did you?

A. Not that I remember.

Q. 661. So it is clear to you that that phrase refers to the new company?

A. It is not clear to me.

Q. 662. What difficulty is there in the way?

A. Well, I think in my former testimony I said that we contemplated increasing the capital stock of the old company at first. I think that is in my testimony.

Q. 663. And you think that when you refer to reorganizing with 100,000 shares you have reference to that?

A. Well, I do not know.

Q. 664. That is to say, with all the facts before you that have come out, you do not know on June 11 whether you referred to the new corporation or to the old one?

A. I do not.

Q. 665. If you wanted to find out you would be obliged to simply draw an inference that was to be drawn from the text of the letter?

A. So far as I know.

Q. 666. I show you on page 81 of the letter book a letter purporting to be signed by Thomas Nelson. Is that in Mr. Nelson's handwriting?

A. Which one?

Mr. HEMENWAY: Let me see it first.

Q. 667. The one dated September 18.

A. It looks like his signature.

Mr. MCCLENNEN: That letter I will offer.

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

Mr. MCCLENNEN: The letter reads:

"SEPTEMBER 18TH, 1895.

Maxwell Woodhull, Esq., 2033 G Street, Washington, D. C.

DEAR SIR: Your favor of the 17th inst., enclosing note for Fifteen thousand dollars ($15,000.) in favor of the Old Dominion Copper Mining & Smelting Company, and two receipts as stated, has been received.

Yours truly,

THOMAS NELSON, *Treas.*"

204 Q. 668. Have you no recollection, Mr. Bigelow, for what that note was given.

A. No.

Q. 669. Do you recall now whether or not Mr. Maxwell Woodhull did give a note for some portion of his stock?

A. That I do not remember.

Q. 670. You have no recollection on that subject?

A. No.

Q. 671. Do you recall the fact that has appeared that he received 600 of the shares that were sold for cash?

A. For what?

Q. 672. Cash.

A. I do not remember anything about it.

Q. 673. You do not remember anything about that?

A. Not a thing.

Q. 674. Do you recall the fact that those shares which were sold for cash were sold on the basis of $25 a share?

A. I do not remember.

Q. 675. You do not recall that?

A. I do not remember.

Q. 676. You have no recollection of the price at which those shares were sold?

A. Not at all.

Q. 677. You have no knowledge at the present time of anything other than stock for which Maxwell Woodhull would be giving his note to the Old Dominion Copper Mining & Smelting Company?

A. I really do not have any memory of anything.

Q. 678. Have no memory of anything? There is nothing standing in the way of this note for $15,000 having been given for 600 shares of the treasury stock of the corporation?

A. I do not remember anything about it.

Q. 679. Do you remember whether you took any note of Maxwell Woodhull for any stock?

A. I do not.

Q. 680. You have no recollection of taking any note?

A. No, I have not.

Q. 681. Or any recollection of Mr. Lewisohn's taking any such note?

A. I do not remember.

Q. 682. Do you chance to know, Mr. Bigelow, as to whether any of the following persons are deceased: Horace Stevens?

A. He is dead.

Q. 683. H. C. Moses?

A. He is dead.

Q. 684. Moses T. Stevens?

A. I believe he is dead; I think he is.

Q. 685. Samuel S. Stevens?

A. I do not know.

Q. 686. W. A. Tower?

A. I do not think he is dead.

Q. 687. William Keyser?

A. I believe he is dead.

Q. 688. Mr. Bigelow, is this letter of June 12, 1902, one received by you from Mr. Altmiller?

[Objected to as immaterial.]

205 A. I do not know. It probably was. It is addressed to me.

Q. 689. That is Mr. Altmiller's signature?

A. That I do not know. I think it is, as near as I can remember.

Mr. McCLENNEN: That letter I will offer.

Mr. HEMENWAY: The contents of that letter are objected to as immaterial, incompetent, and irrelevant.

Mr. McCLENNEN: It reads:

"Old Dominion Copper Mining & Smelting Co.

Office 35 Congress Street.

Chas. S. Smith, *Pres't.*
Charles H. Altmiller, *Sec'y & Treas.*

BOSTON, *June* 12, 1902.

A. S. Bigelow, Esq.

DEAR SIR: When the new management assumed control of the Old Dominion Copper Mining and Smelting Company, I requested to be delivered to me all of the books and papers of the company.

On June 9th we had occasion to refer to some of the earlier correspondence, and upon looking at the letter book and files of letters, found there had not been sent to us any letter book showing letters sent from your office earlier than January 10th, 1900, nor any letters received at your office earlier than May 1st.

Early on June 9th I requested your Mr. Bissell to deliver these earlier books and papers to us. Mr. Bissell stated that he did not feel at liberty to do so until he had consulted you, and told me later on the 9th that he had had no opportunity to do so but would mention the matter to you on the following day.

On June 10th I again called the matter to Mr. Bissell's attention and not getting any satisfaction from him, I called again at the office and saw you. You stated that you did not wish to send us the books and papers until Mr. Hyams had looked them over and that you expected Mr. Hyams on the following day.

On the following day, June 11th, I called at the office again and then learned that Mr. Hyams had not returned from New York, but that he was expected to return today.

Today I called again and saw you and was informed by you that Mr. Hyams had been very busy, and that you had not had an opportunity to take up the matter with him, but would do so promptly, and you stated further that the business was at first conducted by the Old Dominion syndicate and not by the company and
206 that there might be some of the syndicate matter mixed up with the company matter, and you wanted Mr. Hyams to look it all over.

I realize that both you and Mr. Hyams have considerable other business, but do not think that you have treated us properly in deferring so long the sending us of the books and papers of the company, which are the company's property and which should have been sent to the company's office two months ago in accordance with the promise.

I must also protest against your taking from the books or files of the company anything that is in them. There should be nothing in those files that does not properly appertain to the company's business, and I believe that the company is entitled to all the information and assistance which any matter upon its files would give.

I must request you again to let me have these books and papers today.

Yours very truly,

C. H. ALTMILLER, *Treas.*"

Q. 690. Mr. Bigelow, will you read our copy of a letter of June 24, 1902, and see whether you recall receiving such a letter?

A. Only that one?

Q. 691. Yes, that is all. Do you recall receiving such a letter?

A. No.

Q. 692. Now the letter of Mr. Brandeis to Mr. Bigelow, July 16.

A. About the same time as that last one?

Q. 693. No, this is June 24.

A. I was off on my boat a good deal at about that time.

Q. 694. I show you this letter of July 16, produced from your files, from Mr. Brandeis: do you say that you recall receiving that letter?

[Objected to as incompetent, irrelevant, and immaterial.]

A. No.

Q. 695. Do you know in whose handwriting are the pencil notations on it?

A. It is signed by Mr. Chrimes.

Mr. McCLENNEN: This letter I will offer.

Mr. HEMENWAY: Objected to as incompetent and irrelevant, being simply a statement of plaintiff's counsel.

Mr. McCLENNEN: It reads:

207 "JULY 16, 1902.

A. S. Bigelow, Esq., 303 Sears Building, Boston.

DEAR SIR: I have completed to the extent of the information available, the investigation undertaken at the request of the Old Dominion Copper Mining & Smelting Co. concerning the organization of that company, the issue of its capital stock and the acquisition of its property.

I regret that you and the executors of Mr. Leonard Lewisohn have seen fit to deny to the company and myself access to the papers and other information in your possession directly bearing upon this subject, which I requested on June 25th and which obviously would afford the best evidence of the facts relating to the matter.

Upon all the information available to me you appear to be under liability to the company for a very large amount and I should be glad to confer with you or your counsel at an early day with a view to a possible adjustment.

Yours very truly,

LOUIS D. BRANDEIS."

Mr. McCLENNEN: I now offer a letter of July 21, 1902, from Mr. Chrimes to Mr. Brandeis.

Mr. HEMENWAY: Objected to as incompetent and immaterial, being correspondence between Mr. Chrimes and Mr. Brandeis.

Mr. McCLENNEN: It reads:

"Sears Building, Room 303, P. O. Box 5104, Boston, Mass.

JULY 21, 1902.

Louis D. Brandeis, 220 Devonshire Street, Boston, Mass.

DEAR SIR: Your favor of July 16th to Mr. A. S. Bigelow was

duly received. Mr. Bigelow is away on his vacation and will not return until the latter part of this month.

The writer was at home ill last week, hence the late acknowledgment of your letter.

Yours very truly,

W. A. S. CHRIMES, *Sec'y.*"

208 Q. 696. Mr. Chrimes was your secretary at that time?

A. So far as I know. I do not know what that date is. If he signed himself as secretary, he was.

Mr. McCLENNEN: Now may I have the letter to the executors of the estate of Leonard Lewisohn from Mr. Brandeis?

Mr. TREADWELL: I have not any such letter.

Mr. McCLENNEN: It is addressed to the executors of the estate of Leonard Lewisohn.

Mr. TREADWELL: I want to call your attention to this [showing a paper, not described].

Mr. McCLENNEN: Then I will offer that [referring to a page of a letter-press copy book].

Mr. HEMENWAY: I object. It is a mere copy. It does not appear it was ever received.

Mr. McCLENNEN: I now offer a letter-press copy of a letter of July 24, 1902, from Mr. Brandeis to the executors of the estate of Leonard Lewisohn.

Mr. HEMENWAY: Objected to as incompetent, being simply the declaration of Mr. Brandeis; also because it is a matter between parties other than parties to the suit in which Mr. Bigelow is party defendant; also because it is not yet shown to have been either signed by Mr. Brandeis or received by the executors of the estate of Leonard Lewisohn, it only appearing in the letter book of Mr. Brandeis.

Mr. McCLENNEN: I suppose it is conceded that counsel for Mr. Bigelow and counsel for the Lewisohn estate received notice to produce for this hearing the correspondence covering all this period.

Mr. HEMENWAY: Merely giving notice does not make the whole of Mr. Brandeis' correspondence competent evidence even in this case.

Mr. McCLENNEN: I quite agree with you that you cannot use a copy of a letter unless there is notice to produce; I simply ask if you concede there has been notice to produce.

Mr. HEMENWAY: So far as I am concerned, I will say there was a letter to produce given to me.

Mr. McCLENNEN: And the same to Mr. Treadwell?

Mr. HEMENWAY: It is not a letter which is in possession of my client, and it does not purport to be.

Mr. McCLENNEN: And you received also, Mr. Treadwell, notice to produce?

Mr. TREADWELL: Well, I only got this on the morning of Saturday. The only question is whether I have had reasonable
209 time to search for these letters. So far as my own opinion goes, I do not think I would find any more than I did find. Yes, I will concede that, because I know we have not got the letter.

Mr. McCLENNEN: The letter is as follows:

"JULY 24, 1902.

To the Executors of Leonard Lewisohn, deceased, 81 Fulton Street, New York City.

DEAR SIRS: As you have already heard from Mr. Hyams, we were requested by our clients, the Old Dominion Copper Mining and Smelting Company, to investigate the facts concerning the organization of that company, the issuing of its capital stock and the acquisition of its property.

In connection with that investigation we made a request of Mr. Bigelow for access to the papers and other information in his possession, mainly of the Old Dominion Syndicate, directly bearing upon the subject which would obviously have afforded the best evidence of the facts relating to the matter.

We have been informed by Mr. Hyams that you had instructed Mr. Bigelow to deny our request and had even given notice that you would hold Mr. Bigelow liable for any damages which might result from a failure to observe your instructions.

We have now completed our investigation to the extent of the information available, and, upon the facts as far as ascertained, you appear to be under liability to the company for a very large amount.

I should be glad to confer with you or your counsel at an early day with a view to a possible adjustment.

Yours very truly,

LOUIS D. BRANDEIS."

Mr. McCLENNEN: I will now offer a letter from Mr. Walter Lewisohn to Mr. Brandeis, dated August 1, 1902.

Mr. HEMENWAY: Objected to as immaterial.

Mr. McCLENNEN: The letter reads as follows:

"Estate of Leonard Lewisohn, 11 Broadway.

NEW YORK, *Aug.* 1, 1902.

Mr. Louis D. Brandeis, Boston, Mass.

DEAR SIR: We beg to acknowledge receipt of your letter of the 24th ult.

Mr. Edward Lauterbach, of the firm of Headly, Lauterbach & Johnson, of New York, is counsel to the executors of the
210 estate of Leonard Lewisohn, deceased, with whom any conference that you may desire to have upon the matters affecting the Old Dominion Copper Mining and Smelting Company may be had.

We observe that you add to the desire for a conference with our counsel the view that some adjustment of a claim which you state exists against the estate may be had.

In respect to this view we desire to say in order that no misconception may be had, that we believe that any claim such as that which you refer to is absolutely unfounded.

Very truly yours,

ESTATE OF LEONARD LEWISOHN,
WALTER LEWISOHN, *Executor.*"

Q. 697. Is this letter of August 2, 1902, to Mr. Brandeis from Mr. Bigelow, signed by you?

A. It is.

Mr. McCLENNEN: This letter I will offer.

Mr. HEMENWAY: Objected to as immaterial.

Mr. McCLENNEN: The letter reads as follows:

"Sears Building, Room 303, P. O. Box 5104, Boston, Mass.

AUG. 2, 1902.

Louis D. Brandies, Esq., 220 Devonshire St., Boston, Mass.

DEAR SIR: Upon receipt, on my return, of your letter of July 16th I communicated with the Estate of Leonard Lewisohn.

I am informed that Mr. Edward Lauterbach, of the firm of Hoadly, Lauterbach & Johnson, of New York, is of counsel to the executors, and that any conference that you desire to have in respect to the affairs of the Old Dominion Copper Mining and Smelting Company so far as they concern that estate, may be had with him.

Some such conference would perhaps render it unnecessary for me to refer you to counsel for a similar purpose, at least until after you had conferred with him.

I desire to add that I believe your statement that any obligation or liability from me to the company exists is entirely unfounded.

Very truly yours,

A. S. BIGELOW."

211 Mr. McCLENNEN: Now a letter to Mr. Bigelow from Brandeis, Dunbar & Nutter, dated August 6, and of the same date to the Lewisohns.

Mr. HEMENWAY: Objected to as incompetent and immaterial.

Mr. McCLENNEN: This letter reads:

"AUGUST 6, 1902.

A. S. Bigelow, Esq., P. O. Box 5104, Boston.

DEAR SIR: We are in receipt of your letter of the 2nd to Mr. Brandeis. Last week Mr. Brandeis left town on a vacation, and will not return before the first of September. On his return he will take the matter up.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER."

Mr. TREADWELL: I have not any such letter of any such date.

Mr. McCLENNEN: Then a letter of September 4, 1902, from Mr. Brandeis to Mr. Bigelow, also to the Lewisohns.

Mr. HEMENWAY: Objected to as incompetent and immaterial.

Mr. McCLENNEN: Now I offer the letter of September 4, 1902, from Mr. Brandeis to Walter Lewisohn.

Mr. HEMENWAY: Objected to for the reasons heretofore stated.

Mr. McCLENNEN: This letter reads as follows:—

"SEPT. 4, 1902.

Walter Lewisohn, Esq., Executor of Estate of Leonard Lewisohn,
11 Broadway, New York City.

Re Old Dominion Copper Mining and Smelting Co.

DEAR SIR: Upon my return from my vacation I find your letter of August 1st.

If you desire that I should confer with your counsel, Mr. Edward Lauterbach, I shall be glad to arrange for an interview with him at an early date.

The tone of your letter leaves me, however, in doubt as to whether you desire that such conference should be had, or prefer that without such conference the Old Dominion Copper Mining and Smelting Company shall take such action as it may deem best to protect its interests.

Yours very truly,

LOUIS D. BRANDEIS."

MR. MCCLENNEN: A letter of the same date to Mr. Bigelow reads as follows:—

212 "SEPT. 4, 1902.

A. S. Bigelow, Esq., Sears Building, Boston.

DEAR SIR: Upon my return from my vacation I find yours of August 6th.

As I previously advised you, I am requested by the Old Dominion Copper Mining and Smelting Company to investigate the facts concerning the organization of that company, the issue of its capital stock, and the acquisition of its property with a view to determining the legal rights of the company. Recognizing that you were in the possession of the papers and other information directly bearing upon the subject which would afford the best evidence of the facts relating to the matter, I applied to you for access to the same, and was denied the opportunity of getting information through you.

I therefore completed to the extent of the information available the investigation which I had undertaken and reached the conclusion that you were under a large liability to the company. I notified you of the result and suggested an interview with you or your counsel.

I do not understand that Mr. Edward Lauterbach is your counsel in this matter. If he is, I should be glad to arrange through you for an interview with him here at an early time. If he is not your counsel, I do not see how any interview which may possibly be had with him as counsel for the estate of Leonard Lewisohn could render unnecessary a conference with you.

Will you kindly let me know promptly whether you prefer a conference or whether it is your preference that without such conference the Old Dominion Copper Mining and Smelting Company take such action as it deems proper to protect its interests? Awaiting your reply,

Yours very truly,

LOUIS D. BRANDEIS."

Mr. McCLENNEN: I will now offer a letter from Edward Lauterbach, Esq., to Mr. Brandeis, dated September 9, 1902.

Mr. HEMENWAY: Objected to as immaterial.

Mr. McCLENNEN: It reads.—

"SEPT. 9, 1902.

Louis D. Brandeis, 220 Devonshire St., Boston, Mass.

DEAR SIR: The executors of the estate of Leonard Lewisohn have sent to me your letter to them of the 4th inst. in which you
213 express a desire to arrange for an interview with me upon the subject of the Old Dominion Copper Mining and Smelting Company.

I shall be very glad to have you call upon me at any time that may suit your convenience, suggesting that you notify me a day in advance of your coming.

Very truly yours,

EDWARD LAUTERBACH."

Mr. McCLENNEN: Now a letter of September 10, 1902, Brandeis to Bigelow.

Mr. HEMENWAY: The letter is objected to as incompetent, immaterial, and irrelevant.

Mr. McCLENNEN: The letter reads as follows:—

"SEPTEMBER 10, 1902.

A. S. Bigelow, Esq., Sears Building, Boston.

DEAR SIR: Will you kindly let me have before noon tomorrow an answer to my letter of September 4th?

Yours very truly,

LOUIS D. BRANDEIS."

Mr. McCLENNEN: This letter reads as follows:—

Mr. HEMENWAY: Objected to as immaterial.

Mr. McCLENNEN: [Reading:]

"Sears Building,
Room 303, P. O. Box 5104,
Boston.

SEPT. 10, 1902.

L. D. Brandeis, Esq., 220 Devonshire Street, Boston, Mass.

DEAR SIR: I have yours of September 4th. Permit me to correct the statement in the first paragraph of your letter. I have not only never refused, but have been more than ready to furnish any facts in my possession bearing upon the organization of the Old Dominion Copper Mining & Smelting Company or its affairs, to which, in my judgment, the stockholders and directors of the company are legitimately entitled. A general verbal request of yours to be allowed to have access to all the papers in relation to the original purchase of the property was very properly refused.

In order, however, that there may be no misconception as to my

position in the matter, and as to just what information I have
214 refused to give you, will you kindly send me a list of the questions which you wish answered, and I shall be pleased to promptly reply to them if they appear to call for information which your clients should legitimately possess.

If after the receipt of my answers you are still of the opinion that you would like to arrange for an interview with my counsel, I shall be prepared to take up the matter then.

My only desire is to have specific points upon which we may base a conference and it seems to me that the method I have suggested is the shortest way of coming at such a basis. I think the course I have recommended suggests my answer to the question in the last paragraph of your letter.

Very truly,

A. S. BIGELOW.

Mr. McCLENNEN: Now a letter of September 11, to Mr. Bigelow from Mr. Brandeis.

Mr. HEMENWAY: This letter is objected to as incompetent, irrelevant, immaterial, and impertinent.

Mr. McCLENNEN: This letter reads as follows:—

"SEPT. 11, 1902.

A. S. Bigelow, Esq., Sears Building, Boston.

DEAR SIR: I am in receipt of your letter of the 10th.

The statement in my letter of September 4th to which you take exception is, I assume, the following:

'Recognizing that you were in the possession of papers and other information directly bearing upon the subject which would afford the best evidence of the facts relating to the matter, I applied to you for access to the same, and was denied the opportunity of getting information through you.'

The statement is substantially a repetition of the statement made in my letter of July 16, 1902, to which you replied under date of August 2, 1902, without indicating in any way that you deemed it incorrect. The statement in my letter of July 16th was as follows:—

'I regret that you and the executors of Mr. Leonard Lewisohn have seen fit to deny to the company and myself access to the papers and other information in your possession directly bearing upon this subject, which I requested on June 25th, and which obviously would afford the best evidence of the facts relating to the matter.'

215 These statements made by me in my letters of July 16th and September 4th express, I believe, accurately the facts as to the past.

You say, however, that you are ready to furnish facts; but your remarks justifying the refusal of access to 'the papers in relation to the original purchase of the property' and your limitation of the information to the facts 'bearing upon the organization of the Old Dominion Copper Mining and Smelting Company or its affairs to which in my [your] judgment the stockholders or directors are legitimately entitled' leads me to fear that even you are not dis-

posed to furnish access to the papers and information which I have deemed and still deem important for determining the rights of my clients.

I desire to have access to those papers in your possession,—including in this term agreements, correspondence, and other documents, bearing upon the formation and acts of the syndicate formed by yourself or Mr. Leonard Lewisohn ,the organization of the Old Dominion Copper Mining & Smelting Company was issued to you and your associates, the acquisition of the property by the syndicate by yourself or Mr. Leonard Lewi-ohn, the organization of the Old Dominion Copper Mining and Smelting Company, the conveyance of the several properties to that company, and the taking of subscriptions for and the issue of such portion of the stock of that company which was issued for cash.

I understood from my interview with your secretary Mr. Hyams that substantially all such papers or copies of them are at your office.

If access to those papers is furnished me, I shall undoubtedly after examining them, desire to ask you specific questions, which I shall be glad to do in the presence of your counsel.

I feel clear that it would not be profitable for me to adopt the method which you suggest of formulating questions for you to answer. If, however, you prefer to talk with me before replying definitely to my request for access to the papers referred to above, I should be glad to make an appointment to see you at my office tomorrow, Friday, morning, at eleven o'clock, if you will let me hear from you some time today.

Yours truly,

LOUIS D. BRANDEIS."

Mr. McCLENNEN: I will now offer a letter of September 11, 1902, which reads——

Mr. HEMENWAY: One moment. Objected to as immaterial.

216 Mr. McCLENNEN: The letter reads as follows:—

"SEPT. 11, 1902.

Louis D. Brandeis, Esq., 220 Devonshire street, Boston, Mass.

DEAR SIR: I have yours of even date. As your request takes in all matters relating also to the late Leonard Lewisohn's connection, I have forwarded your letter to the counsel for the estate, Mr. Edward Lauterbach, with whom I understand you have been in correspondence on the matter, and shall act according to his instructions.

I have telephoned his office this afternoon that an important letter is on the way, so that he may get it to-morrow and there be no delay.

Yours truly,

A. S. BIGELOW."

Mr. McCLENNEN: Now the letter of Mr. Brandeis to Mr. Bigelow of September 12, 1902.

Mr. HEMENWAY: Objected to as incompetent, irrelevant, and immaterial.

Mr. McCLENNEN: I offer this letter, which reads as follows:—

"SEPT. 12, 1902.

A. S. Bigelow, Esq., Sears Building, Boston.

DEAR SIR: I received your letter of the 11th this morning, and have not heard from you since.

As our clients are desirous that there should be no delay I enclose herewith a letter addressed to yourself and the Executors of Leonard Lewisohn relating to a part of the claim concerning which we have written you.

I may add that in the event of no adjustment being reached we are directed to commence proceedings, and in that event we should like to have an attachment bond in the amount of $500,000. The claim considerably exceeds that amount, but our clients have expressed a willingness to accept a bond for that amount.

Yours very truly,

LOUIS D. BRANDEIS."

Mr. McCLENNEN: Now a letter from the Old Dominion Copper Mining & Smelting Company of the same date to Mr. Bigelow and the executors of the estate of Leonard Lewisohn.

217 Mr. HEMENWAY: Objected to as immaterial.

Mr. McCLENNEN: The letter I offer reads as follows:—

"OLD DOMINION COPPER MINING AND SMELTING CO.
Office 35 Congress Street.

Charles S. Smith, Prest.
Charles H. Altmiller, Sec't'y and Treas.

BOSTON

A. S. Bigelow, Esq., and the Executors of the Estate of Leonard Lewisohn, Deceased.

DEAR SIRS: Shortly after the organization of the Old Dominion Copper Mining & Smelting Co., Mr. A. S. Bigelow and Mr. Leonard Lewisohn caused 30,000 shares of the stock of that company to be issued to themselves, ostensibly as the consideration for a conveyance to the company of certain mining properties and claims, the title of which we are advised then stood in the name of Mr. Leonard Lewisohn and which in the record of the meeting of the company held July 11, 1895, were described as follows:

First. The Old Dominion mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land Office at Tucson, Arizona, entry #267, Lot #45, situated in Globe Mining District, Gila County, Arizona.

Second. The New York mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land Office at Tucson, Arizona, entry #268, Lot #46, in Globe Mining District, in Gila County, Arizona.

Third. The Chicago mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the

United States Land Office at Tucson, Arizona, entry #269, Lot #51, in Globe Mining District, Gila County, Arizona.

Fourth, The Keystone mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1885, in the United States Land office at Tucson, Arizona, entry #384, Lot 54, in Globe Mining District, Gila County, Arizona.

Fifth, A lot or parcel of land situated near the Bloody Tanks and deeded by E. A. Saxe to the Old Dominion Copper Mining Company, deed recorded in Book 1 of deeds to real estate at pages 126 and 127 in the office of the recorder of Gila County, Arizona, and reference is hereby made to said record for a fuller description of said parcel of land.

218 The Old Dominion Copper Mining & Smelting Company is advised that these shares were issued under circumstances which entitle it to rescind the transaction, and hereby offers to reconvey the property to you or either of you, or to such person as you or either of you may name, upon the return by you or either of you of the 30,000 shares, or if and so far as said shares have been disposed of upon a proper accounting therefor.

Yours truly,
OLD DOMINION COPPER MINING & SMELTING CO.
By CHARLES S. SMITH, *Prest.*,
CHARLES H. ALTMILLER, *Treas.*"

Mr. McCLENNEN: I will now offer a letter from Mr. Hyams to Mr. Brandeis, dated September 12, 1902.

Mr. HEMENWAY: Objected to as immaterial.

Mr. McCLENNEN: [Reading]:

"G. M. Hyams,
Sears Building,
P. O. Box 5104, Boston.

SEPT. 12, 1902.

Louis D. Brandeis, Esq., 220 Devonshire Street, Boston, Mass.

DEAR SIR: Your letter of today to Mr. Bigelow was received at 4:45 p. m., after he had left the office for the day.

You do not say whether you have forwarded a copy of the Old Dominion Company's letter to the executors of the estate of Leonard Lewisohn. I have called up their office in New York but every one had gone, nor had Mr. Lauterbach, their counsel, heard anything.

To make sure, I am sending him a copy of the Old Dominion Company's letter and requested that he call me up on the telephone tomorrow, as soon as he has read it.

Very truly,
G. M. HYAMS.
B."

Q. 698. Mr. Hyams was acting for you in this connection, was he?

A. He was in the office as general manager of all the different companies.

Q. 699. Mr. Bigelow, after the change in the office of the com-

pany which occurred in 1902, and up to the time of this
219 letter of September 12, 1902, did you have any conversation with Mr. Brandeis about the subject of the alleged claim of the Old Dominion Copper Mining & Smelting Company against you?

A. I do not remember what the time was; I remember his calling at the office once.

Q. 700. You remember it was after the change?

A. That I do not remember. It was about that time, I should say; but I do not remember.

Q. 701. Do you remember what the conversation was?

A. No, it is very hazy, I just remember his being there.

Q. 702. Did it include a request by him to you for access to all the papers connected with the affairs of the old company?

A. That I do not remember.

Q. 703. In view of the letters that have been read, is your memory refreshed at all?

A. Well, simply from what those letters tell me, that is all.

Q. 704. In a general way, do you recall that from that time on until the time suit was brought, there was constant activity on the part of counsel?

Mr. HEMENWAY: Objected to as immaterial and irrelevant. The activity of counsel has nothing to do with the issues in this case.

A. Will you repeat the question?

Q. 705 Do you remember that from the time of the change of management of the company in 1902 up to the time suit was brought, there was practically constant activity on the part of counsel?

A. I do not remember at all. I do not remember how soon suit was brought after the changes.

Q. 706. You do recall that there was considerable communication on the subject?

A. No, I do not. I remember Mr. Brandeis came into the office once.

Q. 707. How long was he there; have you any recollection?

A. He made himself quite inquisitive, I remember that.

Q. 708. Was that the only thing.

A. I believe I was not in the office at the time, or the result might have been different.

Q. 709. Well, then, did he ever have the pleasure of meeting you in the course of these negotiations?

A. As I remember it, when he came in I went into the back office, —I do not know why, but it may have been to look after some of the things he wanted. Then when I came back there had been quite a little disturbance.

Q. 710. Do you recall that that related to the information that Mr. Brandeis attempted to get?

A. That I do not remember; it is so hazy now.

Q. 711. Were those waters that you spoke of composed of Mr. Brandeis and Mr. Hyams?

A. They were. I do not think Mr. Brandeis would have
220 said what I was told he had said if I had been there.

Q. 712. The substance of the interview was reported to you, was it, by Mr. Hyams?

A. Yes, certainly. Mr. Ladd, I believe, was there.

Mr McCLENNEN: That is all.

Mr. HEMENWAY: That is all. We will notify you after we have seen Mr. Lauterbach whether we desire to cross-examine.

EXHIBITS.

Copies of Exhibits to be Attached to the Deposition of Albert S. Bigelow.

[EXHIBIT 1, MARCH 24, 1903. G. C. B.]

BOSTON, *April* 30, 1895.

In consideration of two thousand dollars ($2,000) paid Frank E. Simpson of Framingham, Massachusetts, by J. Morris Meredith, receipt whereof is hereby acknowledged, the said Simpson hereby covenants and agrees to sell and convey to the said Meredith, his heirs or assigns, any time prior to the expiration of fourteen days from the date of this agreement, his five sevenths (5-7ths) of the capital stock of the Old Dominion Copper Mining Company of Maryland, with property in Arizona, for the sum of seven hundred and fourteen thousand, two hundred and eighty-five dollars ($714,285) on the following terms and conditions, to-wit:

From the property of the said Old Dominion Copper Mining Company shall be reserved to the said Simpson five sevenths (5-7ths) or its equivalent of copper, cash or notes receivable, not to exceed three hundred and fifty thousand dollars ($350,000) from the company's surplus, and the purchase money shall be paid in the following manner: One hundred thousand dollars ($100,000) down in cash prior to the expiration of said fourteen days from the date of this agreement, the balance in three notes of equal amount each, bearing interest at the rate of 5% per annum and payable respectively in sixty (60) ninety (90) and one hundred and twenty (120) days from the date of conveyance. Said notes to be secured by the to be conveyed stock of the company as collateral and also by good and satisfactory indorsements and it is understood and agreed that said Simpson shall be the sole judge of what indorsements are satisfactory.

As the above sold stock is in the possession of said Simpson as trustee under his father's will sufficient time shall be allowed for the necessary legal steps to transfer said stock, but nothing in this
221 condition shall relieve said Simpson from his obligations to complete this sale as soon as possible and in the event of such delay the purchase money shall be deposited in some trust company agreeable to both parties.

Under this agreement the place for paying the money and passing the other necessary papers shall be at the office of the said Simpson in Boston, county of Suffolk, and Commonwealth of Massachusetts,

and it is also agreed that at the time of making the conveyance as above and paying the said purchase money, a good and satisfactory guarantee shall be given to said Simpson that at any time within sixty (60) days, on sight, the purchasers shall take and pay for at the same pro rata price and on the same terms and conditions as the above sale, any part or all of the remaining two sevenths (2-7ths) of the capital stock of the said Old Dominion Copper Mining Company.

Witness said Simpson's hand and seal the day and year first above written.

FRANK E. SIMPSON.

G. H. GREENWOOD.

[Mem. in pencil: Are any contracts out with Keyser for sale of smelting, refining or other contracts; are any liabilities, mortgages, liens, etc., against Co. Want twenty days instead of fourteen.]

[EXHIBIT 2, MARCH 24, 1903. G. C. B.]

Memorandum of agreement between Frank E. Simpson of Framingham, Massachusetts, and William Butler of Boston, Massachusetts, for themselves and the other executors of Michael H. Simpson, parties of the first part, and J. Morris Meredith of Boston, Massachusetts, party of the second part, made at New York this fourth day of May, eighteen hundred and ninety-five.

The Old Dominion Copper Company is a corporation organized under the laws of Maryland, having a capital of five hundred thousand dollars ($500,000) divided into twenty five thousand (25,000) shares of twenty (20) dollars each and owns certain property in Arizona known as the Old Dominion mine, which has been worked for some years and other property in Arizona and elsewhere The estate of Michael H. Simpson is the owner of seventeen thousand eight hundred and fifty seven (17,857) shares of the capital stock of said company and is desirous of selling the same. The property owned by the company consists of mines, mining rights, smelting furnaces, buildings, mining tools and other appurtenances; also ores in
222 dump and in process and in the furnaces; also pig or ingot copper and cash and certain notes receivable and amounts due.

Mr. Meredith is desirous of buying the seventeen thousand eight hundred and fifty seven (17,857) shares of the capital stock owned by the said Simpson estate.

Now, therefore, in consideration of two thousand dollars paid to the parties of the first part by the said Meredith, the party of the first part agree with the said Meredith, his executors, administrators and assigns as follows:

First. The said parties of the first part agree to sell, transfer and deliver to the said Meredith seventeen thousand eight hundred and fifty seven (17,857) shares of the capital stock of the said Old Dominion Copper Company at and for the price of seven hundred and

fourteen thousand two hundred and eighty five dollars ($714,285) and an additional sum not exceeding two hundred and fifty thousand dollars ($250,000), such additional sum to be equal to the value of five sevenths of the pig or ingot copper and of the cash and notes receivable and amounts due which shall constitute part of its assets when the first payment on account of said sale shall have been made as hereinafter provided and which are hereinafter called surplus earnings.

Second. Payments for said stock are to be made as follows: One hundred thousand dollars ($100,000) on the deposit of the said capital stock endorsed in blank with the Old Colony Trust Company in Boston on or before the twenty eighth day of May eighteen hundred and ninety five, said stock to be held by said trust company in trust to secure to the said parties of the first part the balance of the said payments. The balance of said seven hundred and fourteen thousand two hundred and eighty five dollars ($714,285), namely, six hundred and fourteen thousand two hundred and eighty five dollars ($614,285) shall be evidenced by three notes made by the said Meredith or his assigns, of equal amount each, namely, for two hundred and four thousand seven hundred and sixty one dollars and sixty six cents ($204,761.66), bearing interest at the rate of five per cent per annum and payable respectively in sixty, ninety and one hundred and twenty days from the date of the deposit of said stock, said stock to be held as security for the payment of said notes and the said notes also to have an endorsement satisfactory to the said parties of the first part.

Third. It is understood and agreed that the payment of any or all of said notes may be anticipated by the said Meredith with interest down to the date of payment, and the stock shall be delivered to the said Meredith when all of the said notes are paid, and the said parties of the first part will try in all practicable ways to cause such steps to be taken that whenever the first of said notes shall have been paid, the majority of the board of directors of said Old Do-
223 minion Copper Company shall be persons satisfactory to said Meredith or his assigns, and that the president or other officers of said company and the superintendent of said mine shall be persons satisfactory to the said Meredith or his assigns.

Fourth. It is further agreed that the value of the five sevenths of said surplus earnings shall be determined as follows: As soon as practicable and prior to the fourteenth day of May eighteen hundred and ninety five the parties of the first part will give to the said Meredith a written memorandum showing in detail said surplus assets, and if the said Meredith purchases the said seventeen thousand eight hundred and fifty seven (17,857) shares of the capital stock, such of the surplus assets as remain shall either be retained by the company and five sevenths of the value thereof be paid by said Meredith to the parties of the first part or shall be divided in kind pro rata to the said parties of the first part and to the holders of the remainder of the capital stock of said company.

Fifth. The said parties of the first part guarantee and agree that the said mining company and its property is or will be at the time

of sale of said stock free from all debts, claims, liens or mortgages, and that there are no outstanding contracts between it and any other person or corporation except as stated in the list thereof to be furnished to the said Meredith on or before the fourteenth day of May eighteen hundred and ninety five.

Sixth. It is also agreed that at the time of depositing said seventeen thousand eight hundred and fifty seven (17,857) shares of stock as above provided and paying said one hundred thousand dollars ($100,000) said Meredith shall give a good and satisfactory guarantee to the said parties of the first part that at any time within sixty days thereafter on ten days' notice and tender he will take and pay for at the same pro rata price and on the same general terms and conditions as hereinbefore provided any part or all of the remainder of the capital stock of said company.

Seventh. Said parties of the first part give to said Meredith the option until and during the twenty eighth day of May eighteen hundred and ninety five to purchase said shares of stock on the terms herein set forth and agree that meanwhile and until that time said Meredith shall have every facility by himself or by his assigns to examine the property of said company and its title thereto.

Eighth. It is understood and agreed that the two thousand dollars ($2000) paid on the signing of this agreement shall form part of the first one hundred thousand dollars ($100,000) to be paid thereunder.

Ninth. It is understood and agreed that the foregoing agreement finds the estate of Michael H. Simpson and is for the benefit
224 of the executors, administrators and assigns of the said Meredith.

In witness whereof the parties hereto have set their hands and seals this — day of — eighteen hundred and ninety five.

I, Lucius W. Smith of Boston, Massachusetts, one of the executors of Michael H. Simpson, for value received do hereby approve, ratify and make the agreement hereinbefore made by Frank E. Simpson and William Butler for themselves and other executors of Michael H. Simpson with J. Morris Meredith.

[Note.—The following is written in ink on the margin of the first page of this agreement.]

"Received from Leonard Lewisohn, assignee of J. Morris Meredith, one hundred thousand dollars, being the payment due this date under the within agreement on the deposit with the Old Colony Trust Co., of 17,857 shares of the capital stock of the Old Dominion Copper Company.

WILLIAM BUTLER,
For Self and Co-executor of
Thos. C. Simpson's Estate of M. H. Simpson."

Boston, May 28, 1895.

[Exhibit 3, G. C. B., March 24, 1903.]

We the undersigned propose to form a syndicate to be called the Old Dominion Syndicate.

And we hereby agree to pay to A. S. Bigelow the sums set against our respective names.

Subscriptions to this syndicate shall be payable as follows:

May 27, 1895, fourteen per cent (14 per cent).

July 26, 1895, twenty eight and two thirds per cent (28⅔ per cent) and interest at five per cent from date of first payment.

August 25, 1895, twenty eight and two thirds per cent (28⅔ per cent) and interest at five per cent from date of first payment.

Sept. 24, 1895, twenty eight and two thirds per cent (28⅔ per cent) and interest at five per cent from date of first payment.

It is expressly agreed and understood that each subscriber hereto acts for himself alone and that the relation of partners shall
225 not exist or be deemed to exist between the subscribers hereto by virtue hereof.

The conditions, covenants and agreements herein contained shall be binding on the substitutes, successors, heirs, representatives and assigns of the respective subscribers hereto.

In witness whereof we have hereunto set our hands and opposite thereto the amounts of our subscription respectively this twenty-first day of May, A. D. 1895.

Charles J. Hodge,	Ten thousand dollars.	$10,000
D. L. Demmon,	Ten thousand dollars	10,000
Henry T. Coe, by S. B. Capen,	Six thousand dollars.	6,000
C. H. Palmer,	Ten thousand dollars.	10,000
James S. Cumston and William Cumston, by S. W. Richardson	Ten thousand dollars.	10,000
Stephen M. Crosby,	Ten thousand dollars.	10,000
Samuel N. Brown,	Ten thousand dollars.	10,000
George H. Ball,	Ten thousand dollars.	10,000
H. H. Stevens,	Five thousand dollars.	5,000
	Ten thousand dollars.	10,000
A. S. Maltman, by J. A. Coram, Atty.,		$91,000
J. A. Coram.	Nine thousand dollars.	9,000
		$100,000

Memo.—See other paper.

[Exhibit 4, G. C. B., March 24, 1903.]

We the undersigned propose to form a syndicate to be called the Old Dominion Syndicate.

And we hereby agree to pay to A. S. Bigelow the sums set against our respective names.

Subscriptions to this syndicate shall be payable as follows:

May 27, 1895, fourteen per cent (14 per cent).

July 26, 1895, twenty eight and two thirds per cent (28 2/3 per cent) and interest at five per cent from date of first payment.

August 25, 1895, twenty eight and two thirds per cent (28 2/3 per cent) and interest at five per cent from date of first payment.

226 Sept. 24, 1895, twenty eight and two thirds per cent (28⅔ per cent) and interest at five per cent from date of first payment.

It is expressly agreed and understood that each subscriber hereto acts for himself alone and that the relation of partners shall not exist or be deemed to exist between the subscribers hereto by virtue hereof.

The conditions, covenants and agreements herein contained shall be binding on the substitutes, successors, heirs, representatives and assigns of the respective subscribers hereto.

In witness whereof we have hereunto set our hands and opposite thereto the amounts of our subscriptions respectively this twenty-fourth day of May, A. D. 1895.

F. D. Somers,	Five thousand dollars.	$5,000
Albert O. Smith, by Albert P. Smith, att'y,	Five thousand dollars.	5,000
Isaac Fenno,	Five thousand dollars.	5,000
George M. Preston, by M. Luce,	Five thousand dollars.	5,000
Total.		$20,000

[Exhibit 5, G. C. B., March 24, 1903.]

We the undersigned propose to form a syndicate to be called the Old Dominion Syndicate.

And we hereby agree to pay to A. S. Bigelow the sums set against our respective names.

Subscriptions to this syndicate shall be payable as follows:

May 27, 1895, fourteen per cent (14 per cent).

July 26, 1895, twenty-eight and two thirds per cent (28⅔ per cent) and interest at five per cent from date of first payment.

August 25, 1895, twenty eight and two-thirds per cent (28⅔ per cent) and interest at five per cent from date of first payment.

Sept. 24, 1895, twenty eight and two thirds per cent (28⅔ per cent) and interest at five per cent from date of first payment.

It is expressly agreed and understood that each subscriber hereto acts for himself alone and that the relation of partners shall not exist or be deemed to exist between the subscribers hereto by virtue hereof.

The conditions, covenants and agreements herein contained
227 shall be binding on the substitutes, successors, heirs, representatives and assigns of the respective subscribers hereto.

In witness whereof we have hereunto set our hands and opposite thereto the amounts of our subscriptions respectively this fourteenth day of June, A. D. 1895.

Figures in pencil

$2,000	Henry T. Coe by S.B.C.	Two thousand dollars.
10,000	George H. Ball.	Ten thousand dollars.
10,000	Charles W. Moseley.	Ten thousand dollars.
5,000	Charles H. Cole.	Five thousand dollars.
10,000	John H. Pierce.	Ten thousand dollars.
10,000	Harry Burnett.	Ten thousand dollars.
10,000	Hayden, Stone & Co.,	Ten thousand dollars.
10,000	Stephen M. Crosby.	Ten thousand dollars.
5,000	Ely & Co.,	Five thousand dollars.
2,500	Thomas P. Beal.	Two thousand five hundred dollars.
10,000	W. F. Fitzgerald.	Ten thousand dollars.
10,000	F. S. Mead & Co.,	Ten thousand dollars.
10,000	J. W. Belches & Co.,	Ten thousand dollars.
2,500	C. R. Batt by H.H.S.,	Two thousand five hundred dollars.
2,500	R. M. Field by H. H. S.,	Two thousand five hundred dollars.
2,500	S. S. Stevens by H.H.S.,	Two thousand five hundred dollars.
2,500	B. F. Meservy by H.H.S.	Two thousand five hundred dollars.
10,000	Charles Head.	Ten thousand dollars.
5,000	Gordon Prince.	Five thousand dollars.

(His original signature on other paper.)

1,500	C. H. Cole, Jr.,	One thousand one hundred dollars.
500	C. H. Altmiller.	Five hundred dollars.
500	W. A. S. Chrimes.	Five hundred dollars.
3,000	Leonard Wheeler.	Three thousand dollars.

(Per letter June 12.)

500	Wm. A. L. Bazeley.	Five hundred dollars.
2,000	H. H. Mawhinney.	Two thousand dollars.

(Per letter.)

15,000	M. Woodhull.	Fifteen thousand dollars.

(Per letter.)

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$5,000	Harold Williams.	Five thousand dollars.
10,000	M. T. Stevens.	Ten thousand dollars.
3,119	T. E. Hopkins.	Three thousand one hundred nineteen dollars.

(Less the amount oversubscribed.)

2,000	Judge Lowell,	Two thousand dollars.
3,000	S. S. Spaulding,	Three thousand dollars.
1,000	T. H. Perkins,	One thousand dollars.
2,500	George Lyman,	Two thousand five hundred dollars.
$179,119		

[Exhibit 6, G. C. B., March 24, 1903.]

We the undersigned propose to form a syndicate to be called the Old Dominion Syndicate.

And we hereby agree to pay to A. S. Bigelow the sums set against our respective names.

Subscriptions to this syndicate shall be payable as follows:

May 27, 1895, fourteen per cent (14 per cent).

July 26, 1895, twenty eight and two thirds per cent (28⅔ per cent) and interest at five per cent from date of first payment.

August 25, 1895, twenty eight and two thirds per cent (28⅔ per cent) and interest at five per cent from date of first payment.

Sept. 24, 1895, twenty-eight and two thirds per cent (28⅔ per cent) and interest at five per cent from date of first payment.

It is expressly agreed and understood that each subscriber hereto acts for himself alone and that the relation of partners shall not exist or be deemed to exist between the subscribers hereto by virtue hereof.

The conditions, covenants and agreements herein contained shall be binding on the substitutes, successors, heirs, representatives and assigns of the respective subscribers hereto.

In witness whereof we have hereunto set our hands and opposite thereto the amounts of our subscriptions respectively this — day of —, A. D. 1895.

Joseph G. Ray,	Five thousand dollars.	$5,000
Mrs. Abby H. Manning, by F. H. M.,	Five thousand dollars.	5,000
Francis H. Manning,	Ten thousand dollars.	10,000
229 Mary L. Jones, by M. Luce, Att'y.	Ten thousand dollars.	$10,000
Henry Woods,	Ten thousand dollars.	10,000
W. H. Reed,	Five thousand dollars.	5,000
Z. T. Hollingsworth,	Five thousand dollars.	5,000
J. S. Kendall,	Ten thousand dollars.	10,000
Richard Bolles,	Six thousand dollars.	6,000
Albert E. Harding,	Two thousand dollars.	2,000
Robert C. Billings,	Ten thousand dollars.	10,000
Jeremiah Williams,	Five thousand dollars.	5,000
John W. Alline, by F. H. M.,	Five hundred dollars.	500
E. C. Swift,	Ten thousand dollars.	10,000
D. M. Anthony,	Five thousand dollars.	5,000

Harold H. Anthony,	Five thousand dollars.	5,000
N. E. Hollis.	Two thousand dollars.	2,000
H. B. Goodenough,	Two thousand dollars.	2,000
John O. Connor,	Two thousand dollars.	2,000
T. E. Hopkins, by F. H. M.,	Five thousand dollars.	5,000
Mrs. Nancy E. Rust, by W. A. Rust.	One thousand dollars.	1,000
Henry C. Moses,	Three thousand dollars.	3,000
Stephen O. Metcalf.	Five thousand dollars.	5,000
	Total,	$123,500

[EXHIBIT 7. MARCH 25, 1903, G. C. B.]

BOSTON, *May* 28, 1895.

A. S. Bigelow, Esq., Boston, Mass.

DEAR MR. BIGELOW: As you know, I am the assignee of J. Morris Meredith under a contract between him and Frank E. Simpson and William Butler and others, executors of Michael H. Simpson, under which contract the executors of Simpson agree to sell to Meredith or his assigns seventeen thousand eight hundred and fifty seven (17,857) shares of the stock of the Old Dominion Copper Company. In pursuance of the terms of that contract you and I have each paid today fifty thousand dollars ($50,000) to the executors of Simpson, and I have made an agreement pursuant to the sixth article
230 of said agreement by which I have agreed to buy the balance of the stock of the Old Dominion Copper Company on the same general terms and conditions and you have warranted my performance of said agreement, in which warranty Lewisohn Brothers have also joined.

I have also given the three (3) notes called for by said contract, each for —, you have endorsed those notes and they have also been endorsed by Lewisohn Brothers. It is understood that you are to pay one-half of those notes when they become due or are sooner paid, and on your making such payments it is understood that you and I will be equally interested as owners of the seventeen thousand eight hundred and fifty seven (17,857) shares of the stock of the Old Dominion Copper Company, and if any additional shares of the stock are bought in pursuance of said agreement, you and I are to pay equally therefor and to be equally interested therein.

Yours truly,

LEONARD LEWISOHN

[Attached to this exhibit is the following:]

For value received and for other good and valuable considerations, I, Leonard Lewisohn, of New York City, agree with Frank E. Simpson, William Butler and others, executors of Michael H. Simpson, who have this day deposited seventeen thousand eight hundred and fifty seven (17,857) shares of stock of the Old Dominion Copper Company with the Old Colony Trust Company in Boston, that

I, Leonard Lewisohn, who have this day paid to the said Simpson and Butler one hundred thousand dollars ($100,000) on account of the purchase of said shares of stock, will at any time with- sixty (60) days hereafter, at ten (10) days' notice and tender, take and pay for at the same pro rata price and on the same general terms and conditions as provided in the agreement between said Simpson and Butler and J. Morris Meredith of Boston, dated — day of ——, 1895, any part or all of the remainder of the capital stock of said company; this agreement being given and received in performance of the sixth article of the said agreement between the said Simpson and Butler and the said Meredith; the said Meredith having assigned to me all his right, title and interest in the said agreement.

May 28th, 1895.

For value received we jointly and severally warrant and guarantee the performance by Leonard Lewisohn of the foregoing agreement between him and Frank E. Simpson and William Butler and others, executors of Michael H. Simpson.

May 28th, 1895.

231 [Exhibit S, March 25, 1903, G. C. B.]

William Keyser of Baltimore and associates are the owners of seven thousand one hundred and forty three shares of twenty dollars each of the Old Dominion Copper Company of Baltimore City. Leonard Lewisohn and associates have already bought seventeen thousand eight hundred and fifty seven shares of the capital stock of the said company from the estate of Michael H. Simpson, and Lewisohn and associates are desirous of buying the other seven thousand one hundred and forty three shares and Keyser and associates and Lewisohn and associates have agreed together as follows:

Keyser and associates agree to sell their shares of stock for two hundred and eighty five thousand seven hundred and fifteen dollars, forty thousand dollars of which shall be payable on Thursday the twentieth day of June, and the balance of the payments shall be made by three promissory notes, each for eighty one thousand nine hundred and five dollars bearing interest at five per cent from the twenty eighth day of May eighteen hundred and ninety five, and running respectively sixty, ninety and one hundred and twenty days from that date. The payments of any or all of these notes may be anticipated, and on the payment of the first note Keyser and associates agree to do everything practicable to turn over to Lewisohn and associates the board of directors and the absolute management of the company.

The stock is to be deposited with the Old Colony Trust Company in Boston as security for the parties here and for the payment of the notes, the general understanding being that this sale is made in pursuance of and in general accordance with the agreement made between Frank E. Simpson and others representing the estate of Michael H. Simpson and J. Morris Meredith for himself, dated

the first day of May eighteen hundred and ninety five, Lewisohn and associates having become the assignee of the rights of said Meredith under said contract.

It is further understood that so far as this particular sale is concerned of the seven thousand one hundred and forty three shares Lewisohn and associates are to protect Keyser and associates from any claim for commissions by J. Morris Meredith, the understanding being that Keyser and associates are to receive their agreed price net.

There are certain mines in Arizona near the property of the Old Dominion Copper Company which are known as the Old Dominion mine, the Keystone mine and the Chicago and New York mine. Those mining properties now stand in the name of William Keyser, but he states that he is only interested to the extent of one-half thereof, and that Michael H. Simpson's estate is the owner of
232 the other half thereof, and Mr. Keyser agrees that in consideration of the purchase of the stock hereinbefore arranged for, he will transfer, deliver and assign to Leonard Lewisohn or to his order all his interest in the said mines without any additional consideration than the purchase of the stock herein provided for.

Keyser and associates agree to guarantee to Lewisohn and associates that they will hold them and the Old Dominion Copper Company harmless from all debts, claims, liens or mortgages or outstanding contracts existing between it and any other person or corporation as of May twenty eighth. It is understood that in this matter William Keyser represents himself and all associates, and that payments may be made to him and the notes made payable to his order.

Baltimore, June 13th, 1895.

WILLIAM KEYSER.

Witness:
N. S. WHEAT.

Received June 20th, 1895, of Leonard Lewisohn & associates one hundred & twenty two thousand one hundred & 66/100 dollars and two notes of eighty one thousand nine hundred and five dollars each in accordance with the foregoing agreement, said money and notes having been paid to the Old Colony Trust Co., Boston, for my account.

WM. KEYSER.
P. P. R. BRENT KEYSER.

[Exhibit 9, March 25, 1903. G. C. B.]

Plan of Procedure on Thursday, June 20, 1905. G. C. B.

At least three of the present board of directors of the Old Dominion Copper Company will meet in Baltimore pursuant to a regular notice to all directors.

Directors not present, who are not residents of Maryland, will send in their resignations. Those resignations will be accepted by the

directors present, and thereupon Leonard Lewisohn and A. S. Bigelow or some of their appointees will be elected directors in place of the directors thus resigning.

The president and treasurer of the company will then resign and appointees of Lewisohn and Bigelow will be elected as president and treasurer respectively.

The Maryland directors will remain temporarily at the desire of Lewisohn and Bigelow and will give them their resignations
233 so that if desired new men can be put in their places in the board. The law, however, seems to require that a majority of the board shall be residents of Maryland.

This meeting herein outlined is not to take place except with the approval of Messrs. Keyser and the Simpson estate and on the assumption that the first note due them has been paid or they are satisfied, but it is expected that the cash payment to Keyser will be made on this date, Thursday the 20th of June, and that the first note to the Simpson estate will be paid on the same date and that the first note to Keyser and associates will be paid on the same date and at the same time the stock held by Keyser and associates will be handed over to the trust company and notes given to Keyser and associates for the balance of the amount due to them.

WILLIAM KEYSER.

Witness:
R. BRENT KEYSER.

Baltimore, June 13th, '95.

[EXHIBIT 10, G. C. B., MARCH 27, 1903.]

BOSTON, *July 18th*, 1895.

We the undersigned, each for himself and not for the others, hereby subscribe for and agree to take and pay for stock of the Old Dominion Copper Mining and Smelting Company, organized under the laws of the State of New Jersey, to the number of shares set opposite our names respectively at twenty-five dollars ($25) a share on or before October first, 1895.

Lewisohn Bros. by A. S. Bigelow,	Ten Thousand shares,	10,000
A. S. Bigelow,	Four thousand shares.	4,000
Leonard Lewisohn, by G. M. Hyams,	Four thousand shares.	4,000
A. S. Bigelow,	Four Thousand shares.	4,000
G. M. Hyams,	Four thousand shares.	4,000
Thomas Nelson, & J. M. Meredith, by T. N.	Four thousand shares.	4,000
J. A. Coram, by Thomas Nelson,	Four thousand shares.	4,000
Matthew Luce,	Four thousand shares.	4,000
Albert W. Smith,	Five thousand shares.	5,000
(Footing in pencil		38,500)
John H. Pierce,	Six hundred shares,	600

	C. H. Bissell,	One hundred shares.	100
234	W. A. S. Chrimes,	Two hundred shares.	200
	C. H. Altmiller,	Two hundred shares.	200
	Joseph S. Beal,	Two hundred shares.	200
	William A. L. Bazeley,	Two hundred shares.	200
	C. H. Coe, Jr.,	Two hundred shares.	200
	E. C. Swift,	One thousand shares.	1,000
	Horace H. Stevens,	Two hundred shares.	200
	George H. Ball, by C. H. Cole,	Three hundred shares.	300
	Charles H. Cole,	Two hundred shares.	200
	Richard F. Bowles,	Five hundred shares.	500
	John W. Belches, & Co.,	Nine hundred shares.	900
	Charles Head & Co.,	Eleven hundred shares.	1,100
	Charles Head, by J. Sullivan,	Five hundred shares.	500
	C. A. Putnam & Co.,	Five hundred shares.	500
	F. S. Mead & Co.,	One thousand shares.	1,000
	Gray, Dewey & Co.,	Five hundred shares.	500
	Price & Co.,	Five hundred shares.	500
	Harry Burnett,	Four hundred shares.	400
	Hayden, Stone & Co.,	Two thousand shares.	2,000
	Clark, Ward & Co.,	Fifteen hundred shares.	1,500
	William A. Tower, by E. L. Giddings,	Three hundred shares.	300
	Spencer W. Richardson, Agt	Four hundred shares.	400
	W. F. Fitzgerald,	One hundred shares.	100
	Foote & French,	One hundred shares.	100
	Frederick W. Remick,	Two hundred shares.	200
	H. C. Wainwright & Co.,	One hundred shares.	100
	E. C. Swift,	One thousand shares.	1,000
	D. M. Anthony,	Five hundred shares.	500
	Horatio Newhall,	Fifty shares.	50
	Henry T. Coe,	Six hundred shares.	600
	J. S. Kendall,	Two hundred shares.	200
	George N. Preston,	Two hundred shares.	200
	Robert C. Billings,	Five hundred shares.	500
	Nancy E. Rust, per W. R.,	Forty shares.	40
235	Mrs. Abbie H. Manning, by F. H. Manning,	One thousand shares.	1,000
	William H. Reed,	Four Hundred shares.	400
	George E. Newhall,	One hundred shares.	100
	George O. Sears, by Matthew Luce,	Two hundred shares.	200
	Edward M. Dodd, by Matthew Luce,	Fifty shares.	50
	T. E. Hopkins, by Matthew Luce,	Five hundred shares.	500
	Joseph G. Ray, by Matthew Luce,	One thousand shares.	1,000
	Henry F. Woods,	One hundred shares.	100

E. V. R. Thayer, by A. S. Bigelow,	One thousand shares.	1,000
Charles J. Hodge,	Four hundred shares.	400
Maxwell Woodhull,	Six hundred shares.	600
Henry Wood,	One hundred shares.	100
Charles P. Bond,	Twenty shares.	20
F. & C. S. Smith,	One hundred shares.	100
Benjamin F. Meservy,	One hundred shares.	100
Jeremiah Williams, per letter,	Six hundred shares.	600
W. B. Mosman,	One hundred shares.	100
L. M. Prendergast, per letter,	Two hundred shares.	200
J. T. Herrick, per telegram,	One hundred shares.	100
R. M. Field, per letter,	One hundred shares.	100
R. R. Goodell, per telegram,	Three hundred shares.	300
James B. Sturgis, per telegram,	One thousand and fifty shares.	1,050
F. G. Webster, per letter,	Three hundred shares.	300
John O. Connor,	Eighty shares.	80
A. Albert Sach, Providence,	Two hundred shares.	200
William W. Grout, St. Johnsbury, East	One thousand shares.	1,000
George H. Ball,	Five hundred shares.	500
Leland, Towle & Co., Fitz.	One hundred and sixty shares.	160
236 John F. Towle,	One hundred shares.	100
George H. Lyman,	One hundred shares.	100
James Ormond,	Fifty shares.	50
Henry Woods,	One thousand shares.	1,000
S. N. Brown,	Four hundred shares.	400
E. D. Greenleaf,	Two hundred shares.	200
Homer N. Snow,	Five hundred shares.	500
Moses T. Stevens,	One thousand shares.	1,000
John T. Howe,	Three hundred shares.	300
B. N. Towle,	Sixty shares.	60
Amos Towle,	Forty shares.	40
P. T. Bradley,	One hundred shares.	100
C. L. Davenport,	One hundred and twenty shares.	120
? Richardson,	Three hundred shares.	300
A. Eldredge,	One hundred shares.	100
S. B. Bartholomew,	One hundred shares.	100
Gustave Lundberg,	One hundred shares.	100
George Whitney,	Fifty shares.	50
Charles J. MacKenzie,	Five hundred shares.	500
C. W. Barron,	Five shares.	5
H. P. Winsor,	Fifty shares.	50
J. O. Wetherbee,	One hundred shares.	100

Mrs. Mary O. Jones,	Four hundred shares	400
? Sanborn,	One hundred shares.	100
Edward P. Abbe,	Two hundred shares.	200
Samuel Cook,	One hundred shares.	100
David W. Chever.	Twenty-five shares.	25
Otis N. Pierce,	One hundred shares.	100
Albert O. Smith,	One hundred and twenty shares.	120
H. S. Goodell,	Fifty shares.	50
Henry Stackpole. A. S. B.,	Three hundred shares.	300
	Total,	72,120

237 [EXHIBIT 13, G. C. B., APRIL 10, 1903.]

CLIFTON, ARIZONA, *June 18th*, 1895.

To Messrs. A. S. Bigelow and Leonard Lewisohn.

GENTLEMEN: In compliance with your instructions we have examined the property of the Old Dominion Copper Co., of Globe, Ariz., and we now take pleasure in submitting our report on the same.

Globe is situated about 100 miles to the Northwest of the Clifton copper belt and is reached by the G. V. G. & N. Ry. which terminates at Fort Thomas, 61 7/10 miles distant from the connection with the Southern Pacific Railway at Bowie, and 71 miles distant from Globe. From Fort Thomas freight and passengers are presently conveyed by wagons and by stage. We may here state that for the proper and economical working of the Globe properties it is necessary that the G. V. G. & N. Ry. should be extended to Globe.

In our calculations we have considered the completion of the railroad as an assured fact. The property of the Old Dominion Co. comprises the following:—

The Globe Mine.
" Globe Ledge.
" Fraction.
" S. E. Globe.
" Interloper.
" Globe, S. W.
" Hidden Globe.
" Alice.
" S. W. Alice or Hypatia.
" S. E. Globe Millsite } of these the present Smelting Plant is
" Interloper " } built.
" Hidden Globe " }
" S. W. Globe Millsite.
" Hypatia "
" Alice "

Smelting Plant.

The smelting Plant consists of 2-60-ton water jacket furnaces and 1-40-ton furnace, each supplied with an independent Baker blower

propelled by independent engines. The steam boilers and machinery we found ample for the requirements of the plant. The building covering the plant and the ore bins we found roomy and
238 commodious, the ore bins having a capacity of 3500 tons. On a self-fluxing charge the furnaces could be pushed to 80 or 90 tons per day, as the ore is probably the finest smelting ore in the world, being remarkably free from fines and admirably suited for rapid and economical running. For matting the ores a somewhat larger furnace, say 7 ft. x 3' 3" would be required. But if the object be to make black copper, in that case the present plant is probably as economical as any, and it had the advantage of being ready to commence work at a moment's notice. The admirable condition of everything connected with this plant showed that the management had taken the greatest pains to keep everything in perfect order.

The Interloper shaft, the main outlet for the Mines, is situated less than a quarter of a mile from the Smelting Works on an upper slope of the same hill, and a Bleichert tramway, with a capacity of 200 tons in 10 hours, furnishes a cheap and exceedingly convenient method of haulage. For the present system of working, the Smelting Plant and the haulage leave but little to be desired.

Mines.

In locating the Mines of the property the locators have been singularly happy in covering in length and width what we cannot but regard as the principal lode of the district and one of the largest in Arizona. The surface level and the first level are tapped without hoisting, both delivering their ores direct to the Bleichert tramway. The second, third, fourth, fifth, sixth and seventh levels are connected to and deliver their ores through the Interloper shaft, which has been sunk to the eighth level, the latter being at the present time no more than a pumping station. The levels have not been run in straight lines and they are therefore longer than is shown by the figures given below, which represent the length in a straight line opened up by each level.

Surface level	625	feet.
Alice Tunnel	600	"
No. 1 level	2500	"
No. 2 level	2500	"
No. 3 level	1500	"
No. 4 level	850	"
No. 5 level	1650	"
No. 6 level	1350	"
No. 7 level	1700	"
No. 8 level	375	"

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Surface Level.

The surface level, run in at an average depth of 50 feet below the surface of the hill, exposes large ore bodies at three different points

on each of which stoping to a considerable extent has been done. At the main outcrop the vein is 200 feet in width and practically all ore, mainly of the low grade self fluxing character. The tremendous outcrop, the most noticeable feature on the property, at once stamps the lode as one of extraordinary character. In stoping here, as on all the other levels, only the rich streaks have been followed and the main portion of the vein has, therefore, been but little disturbed.

The rich ore descends in sheets with layers of the low grade ore and occasionally of vein matter between. This characteristic we found repeated on the lower levels. A careful examination satisfied us that there is every reason to expect a continuous ore body for a distance of 700 feet on this level. In opening up this ground the footwall should be closely followed and in stoping upwards the ore should be followed to its junction with the hanging wall, and this also applies to the lower levels. The low grade ore in the backs will nearly all pay to smelt and in running we expect that sheets of richer ore will be uncovered.

First Level.

Development on this level has been done altogether between the Moony shaft and the outcrop, the total length of vein broken into being 600 feet, the main working being on the downward extension of the outcrop which showed as strong here as it did on the surface 160 feet above. With the exception of the work on the extension of the outcrop, stoping has not been conducted to a height greater than from 20 to 25 feet above the level, the lower grade ores being as usual left untouched in the backs. The promising ground lying to the Southwest of the Moony shaft lies untouched. Here there should be no difficulty in finding the extension of the ore body. It is evident that this level should produce much more than it has done heretofore.

Second Level.

On this level ore has been touched in spots for a length on the vein of 1200 feet, but only over a distance of 500 feet has stoping been done to a considerable extent and that altogether on the hanging wall and away from the main contact. At the Moony shaft, ore is to be seen in place on the footwall. Ore is again exposed at a point 50 feet to the Southeast of the same shaft. At this point the vein narrows to a few feet in width, but it opens out immediately. In the belt of ground 1400 feet in length practically no work has
240 been done along the footwall. Judging from the relative position of the stopes it would appear as if the ore body might have left the footwall immediately below the first level and folding out horizontally had again descended on the hanging wall. This theory, however, finds no support in the developments on the levels above and below which invariably expose the main ore body making on the footwall. The development of the ore bodies on the hanging wall has no doubt been due to the driving of the main levels through the limestone. These ore bodies will I have no doubt be ultimately followed to their starting point,—the footwall. With ore to com-

mence upon at the Moony shaft it should not be difficult to prove up this ground.

Third Level.

With the exception of two small stopes on the footwall on the S. W. end of the property, all the development work has been done in the hanging wall. The work to the N. E. of the Moony shaft has been run too far into the country rock and has been done in ground which cannot be considered as in the vein or as likely to be ore bearing. We consider this level as practically so much undeveloped ground. As the ore is very strong on the footwall in the fourth level we see no reason why it should not be found in the same position on the third.

Fourth Level.

With the exception of a block of 90 ft. the ore has been followed on the footwall and found to be continuous for a distance of 900 feet. All of this work has been done to the S. W. of the Moony shaft. Stoping as usual has been done only on the rich ore sheet, good fluxing ore being left in the back. Ore has also been mined to a considerable extent along the footwall. The vein shows a width between walls of fully 200 feet for quite a distance. Much good stoping ground remains, and between the walls there is a big unprospected territory which can hardly fail to be highly productive. The ground lying to the N. E. of the Moony shaft should be tested along the footwall.

Fifth Level.

On this level the ore body on the footwall has been shown up and stoped for a distance of about 800 feet on the vein, the work being done to the S. W. of the Moony shaft. Most of this ground being inaccessible on account of a large cave due to insufficient timbering, it is impossible to judge with any degree of accuracy how much ore has been left. As only the rich ore was stoped, it is obvious that the bulk of it will pay to turn over, and we should expect it to
241 yield besides the low grade fluxing ores quite abundantly in high grade ore. With the exception of a stone situated 600 feet to the Northeast of the Moony shaft no ore has been developed or touched on the extension of the vein in that direction. No doubt this is due to the fact that the main level and all cross-cuts have been driven in the country rock and away from the vein. In a distance of 850 feet not a single crosscut has been run to test the footwall. While indications point to a narrowing of the vein on its Northeast extension there is good reason to believe that ore will be found by prospecting along the footwall and by following up the ore body in the stope last referred to. This view is strengthened by the work on the sixth and seventh levels which show the extension of the vein for a distance of 600 feet N. E. of the Moony shaft.

Sixth Level.

Ore has been stoped at intervals for a total distance of 1100 feet on the vein. In a total number of nine crosscuts run in to cut the foot-

wall, no less than eight of them struck ore, which is an excellent proof of the continuity of the ore body and emphasizes the need of systematic work in this direction. The most noticeable feature of this and of the fifth level has been the development of the ore body to the S. W. of the Interloper shaft. The ground in this direction justifies further prospecting in height, length and width. We consider it very important ground.

Seventh Level.

The continuation of the ore body in depth is shown by three large stopes opened at widely separate points on the vein. As on the upper levels the bulk of the development work has been done in the hanging wall and in no case has ore been found on this level in crosscutting into the limestone. All the ore found has been discovered in crosscutting towards the footwall. Rich sulphide ore in pay streaks shows for a considerable distance, along the floor and roof of the main level. These streaks should be followed downward and upward, especially downward in order to develop the sulphides as rapidly as possible. So little real development work has been done that this level must be regarded as new and undeveloped. The vein is undoubtedly slimmer here than on the upper levels, but it is still wide enough to hold large ore bodies. Development work to the S. W. of the Interloper should also be pushed with vigor as the ground is very favorable and inviting.

Summary.

We need not encumber this report with a detailed description of the geological conditions which obtain in the Mines at Globe.
242 It will suffice for your clear understanding of the situation if we explain only its more important features. The ores occur altogether in a strong fissure between the diorite which forms the foot wall and the limestone which is the country rock lying to the East of the vein. The ore body has been found in the various levels, at intervals, over a total length of 1800 feet, and it has been followed to a depth of 515 feet from the surface of the main outcrop to the floor of the seventh level, where such small developments as have been made go to show that it is still a strong body. Near the fissure the limestone has been fractured, leaving fissures and pockets in it which have in places been filled with ore derived no doubt from the same source which impregnated the main vein. This is particularly evident on the third level where the ore makes in the limestone and away from the vein. On the same level the ore is also found in the vein on the footwall. The nature of the vein being such—and in this it resembles most limestone formations—it was impossible to block out and measure the ore in sight, and we were compelled to rely altogether on our own judgment of the ground, assisted, of course, by our knowledge of what it had produced in the past, and by our experience in other limestone formations and also by a close study of the geological conditions. The immensity of the vein and of the ore bodies in sight made this a fairly simple task. Particu-

larly were we impressed by the enormous bodies of low grade fluxing ores, nearly all of which can be treated to profit with the assistance of the cheap coke which will be obtained when the railroad is completed. With coke ranging from 40 to 60 per ton, all low grade ore had to be avoided, and wherever struck it was left standing in the mine. Sulphide ore, in like manner, whenever found *were* at once abandoned, on the ground that it was difficult to treat.

Metallurgy.

The method of treatment heretofore followed has been the simple one of smelting oxidized ores into black copper of high grade. The same method can still be followed and with good profit, but there are heavy losses in it which can be avoided by converting all the ores into copper matte and then bessemerizing. But to make the ores, a great deal more sulphur will be required than is presently in sight. It is therefore highly necessary that while the plant is shut down the development of the sulphides should proceed with vigor. The sinking of the Interloper shaft for a further depth of 300 feet we look upon as an immediate necessity. At the same time winzes should be sunk on the sulphide ores to prove them in depth and thus work should keep pace with the shaft sinking. As this work pro-
ceeds, short campaigns should be made in smelting to treat
243 the ores now in stock and those that will be derived from the prospecting. If necessary the production of black copper may be commenced at any time; but as the present shaft would not be able to keep up a large output and at the same time allow of its being sunk, we deem it better to sink before commencing to smelt on the large scale. The rich sulphide ores will probably be found for a considerable depth, possibly 200 to 300 feet below the eighth level, and much of it will be associated with considerable vein matter, forming a low grade ore which will require to be concentrated. For the treatment of this ore a concentrator will be required. Later it will be necessary to erect a leaching plant, but this need not be thought of until a sufficiency of iron pyrites has been developed. Since the commencement of the Company there has been produced about 68,000,000 lbs. fine copper, and we think that a very conservative estimate would give a like amount still to be extracted from the ground opened by the old Company. This would give a supply of five and a half years at the rate of 6,000 tons copper per annum. Taking the figures of the Old Company as a basis and reducing them to figures based on present situation of the railroad showing a wagon haul of 65 miles, will show a net profit at present price of black copper (10½c.) of $60. per ton, or $360,000. on 6,000 tons of copper per annum. To this can be added $60,000. when the railroad is completed into Globe.

Of course when the low grade sulphides are mined and the matter obtained treated by the Bessemer process, this yield can be materially increased, but of this we have taken no account in our calculations. Calculating on a yearly output of 6,000 tons of black copper and on a market value of the same of 8½ cents per pound,

and also the completion of the railroad, the profit should be $180,000. per annum; with black copper realizing 9½c per pound, the profits should be $300,000. per annum; with black copper realizing 10 cents per pound, $360,000. per annum, and with black copper realizing 10½ cents, $420,000. per annum.

In this estimate we have counted upon a yield from the ores of 9 per cent. of copper, an average which can easily be sustained, and we have not counted upon the richer sulphides, likely to be opened out in depth. With this much assured from the ground already opened out, and with every prospect of an extension of the ore bodies both in length on the vein and in depth, we consider the property as certain to be a heavy producer for many years to come.

Attached hereto is a plan showing the ground covered by the various claims and also the trend of the footwall through the Globe Ledge and Globe Claims, which have produced nearly all of the ore so far produced.

244 The following analysis shows the composition of the ore, amounting to 4,600 tons, now in the furnace bins and ready for smelting. The sample was taken from all over the surface of the ore pile:

	Per cent.
Moisture and volatile matter	12.40
Silica	22.48
Oxide of copper (Metallic copper 16.9%)	21.18
Oxide of iron (F2O)	27.26
Alumina	9.44
Oxide of Manganese	2.09
Lime (CaO)	1.35
Alkalies, Oxygen and loss	3.80
	100.00

This ore should form a slag not exceeding 36% in silica. It is perfectly self fluxing. Samples of the sulphide ores taken from various parts of the Mine assayed as follows:—

	Per cent. copper.
Sulphide streaks in raise from 5th level	28.85
" " " main drift "	9.60
" ore from stope near 7th level	12.90
" from main drift 7th level	34.90

During the 18 months ending at the time the Works were closed down, 50,947 tons of ore were smelted, resulting in a yield of 6,068 tons of black copper, being equal to an average yield of 11.9%.

The cost of Pocohontas coke during the same time was $13.10 per ton at Wilcox or $39.60 per ton at Globe. Timber is obtained from the Pinal Mountains where the Company own a saw mill. The fuel is wood from the same mountains. Water is obtained from Pinal Creek which flows past the smelter dump. A small quantity will also be obtained from the Mines.

We consider that the railroad should make you a rate of $5 per ton on coke, coal and copper hauled between Bowie and Globe and vice versa. On all other material they should be allowed to make their own rates.

For smelting purposes an ample supply of water can be
245 obtained from the creek and from the Mine. The latter will undoubtedly give an increased supply in depth.

Globe is situated at an elevation of 3500 feet above sea level. The climate is superb, being cool and pleasant every night in the year. The water being of most excellent quality, and the climate so superior, Globe has long been considered the healthiest camp in Arizona.

In conclusion we would say that we consider the property one of very great value. We have found nothing either above ground or below the surface pointing in the slightest degree to a shortening or narrowing of the ore bodies either in depth or length. The work done in the past has served to open up vast ore bodies from which only the richest streaks running from 15 to 30 per cent. copper have been removed, while the large bodies of rich sulphide ores have hardly been touched. The Mining and Smelting Plant is ample for present purposes except a boiler or two, and everything about the property is in excellent shape. We have no hesitation in recommending it as a safe and profitable investment and one which will undoubtedly increase rapidly in value as new development work is completed.

All of which is respectfully submitted.

JAMES COLQUHOUN.
G. M. HYAMS.

[Exhibit 14, G. C. B., April 10, 1903.]

Boston, *April* 3, 1901.

To the Stockholders of the Old Dominion Copper Mining and Smelting Company:

The Directors submit herewith a statement of the business of the Old Dominion Copper Mining and Smelting Company, from the formation of the Company to January 1, 1901.

Capital Stock.

Outstanding, full paid,	150,000	shares, at par	$25.00..	$3,750,000
In Treasury	50,000	" "	25.00..	1,250,000
Total.....	200,000	" "	$25.00..	$5,000,000

246 Statement.

From subscription receipts			$500,000 00
Value of copper, silver and gold produced		$3,567,557.83	
Less:			
Cost of production at mines and smelter and electrolytic refining	$2,161,293.11		
All expenses of handling copper, such as freight, copper charges, commissions and expense account	553,303.56		
Total		$2,714,596.67	
Profit from production			852,961.16
Total			$1,352,961.16
From which deduct:			
For purchase of Continental Group of Mines and sundry mining claims		$109,821.00	
For construction and improvement account and development work at Globe and Continental Mines		841,217.64	
Total			951,038.64
Balance on hand, January 1, 1901			$401,922 52

At the time of the purchase of the Old Dominion Copper Company, there was upon the property a small but complete Smelting Plant, and a Mine equipment sufficient to supply this Plant with ore. The Gila Valley, Globe & Northern Railroad had been built north from Bowie some thirty miles towards Globe, and all supplies had to be hauled at great expense to the Mine from the end of the road. Steps were promptly taken to secure the completion of the Railroad line into Globe, but it was only after long negotiations that this was accomplished. Meantime, the Plant was run upon a small scale, more to encourage the builders of the Railroad than for any great profit. As soon as the completion of the road was assured, steps were at once taken to put the property in shape to produce largely. For this purpose, new hoisting works and pumping appliances were necessary. These have been completed, as also the necessary enlargement to the Smelting Plant. New machine, car-

penter and blacksmith shops have been built, new boiler houses built, and new boilers installed both at Mine and Smelter.

247 The great problem, however, to be solved was the finding of sulphuretted ores in the Mine, which could be used, together with the richer oxidized ores, so as to make a more economical smelting mixture. To this end very extensive exploration work has been done and much more money spent than would ordinarily be the case. Of course, this money will come back later to us, as this work will not have to be done in future.

Up to date we have not succeeded in finding any large sulphide ore bodies, although the oxidized ore bodies have continued in depth.

In order to provide ourselves with a supply of sulphides, the Continental Group of Mines was purchased in 1899. While we have developed a sufficient quantity of these ores to many times pay back the original price of the property, developments in depths have not warranted any large expenditures of money at present.

The Company has been producing at the average rate of 750,000 pounds of fine copper per month during the past twelve months, and the Mines are now developed sufficiently to insure an average monthly product of not less than this amount, and we have every reason to anticipate a steady gradual increase monthly.

At the Stockholders' Special Meeting held June 15, 1899, an increase of 50,000 shares of new stock was authorized. This is the stock now in the Treasury of the Company, the Directors having considered that it was better to use the Net Earnings of the Company as long as they were sufficient, for developing the Mines and increasing the smelting facilities rather than increase the amount of outstanding stock, reserving this new stock for the erection of larger works later on when the still further developments of the Mines warrant such expenditure.

The Directors had intended to use part of this new stock to build a railroad to the Continental Mines, but developments there are not such as to warrant the expenditure at present.

When the time comes to issue this new stock such an amount of it as will be needed will be offered to the stockholders at par, pro rata to their holdings of the present outstanding stock.

By Order of the Board of Directors,

A. S. BIGELOW, *President.*

[Exhibit 15, G. C. B., April 10, 1903.]

[Cover.]

Report of the Old Dominion Copper Mining and Smelting Company, for the Year Ending December 31, 1901.

248 [Title page.]

Report of the Directors to the Stockholders for the Year Ending December 31, 1901.

John A. Lowell & Co., Engravers and Printers, 147 Franklin Street, Boston.

Old Dominion Copper Mining and Smelting Company.

Capital Stock.

Outstanding, full paid,	150,000	shares, at par	$25.00..	$3,750,000
In Treasury	50,000	" "	25.00..	1,250,000
Total	200,000	" "	$25.00..	$5,000,000

Officers.

President, A. S. Bigelow. Vice-president, E. V. R. Thayer. Directors, A. S. Bigelow, Leonard Lewisohn, E. V. R. Thayer, Joseph S. Bigelow, W. J. Ladd, C. H. Bissell, Edgar Buffum. Secretary and Treasurer, W. J. Ladd.

Office, 199 Washington Street, Boston.

The Annual Meeting of Stockholders is held on the First Wednesday in April in each year.

Report.

The Directors submit the following Report of the operations of this Company for the year ending December 31, 1901:—

Gross value of copper, silver and gold produced		$1,276,979.83
Cost of production at Mines and smelter and electrolytic refining	$993,800.93	
All expenses of handling copper, such as freight, copper charges, commission, and expense and interest accounts	169,339.49	
249 Total		1,163,140.42
Profit from production		$113,839.41
Special Construction and Improvement Account and development work at Globe and Continental Mines		$72,179.98
Surplus for the year		$41,659.43
Balance on hand January 1, 1901	$401,922.52	
From which deduct:		
Difference in price on product at works at Globe Arizona, in matte and stock pile January 1, 1901, 2,300,000 pounds fine copper, @ 16⅝ cents per pound, and on December 31, 1901, @ 12 cents per pound, or 4⅝ cents per pound	106,375.00	
		295,547.52
Balance of Assets December 31, 1901		$337,206.95

Summary of Results.

Cost per ton ore mined	$5.845	
" " " " smelted	$4.798	
Cost per pound fine copper, excluding Construction, etc.		11.53 cts.
Cost per pound Construction, etc.		.72 "
Total cost per pound		12.25 cts.

Average yield fine copper per ton ore smelted 6.23%

The result of the operations for the year 1901 for the first time enables the Management to place before the stockholders an intelligent and safe basis for determining what the costs of mining and producing copper are at Globe. Prior to this time the various vicissitudes of a new mining property were encountered; much development work had to be done and this, together with various unforeseen difficulties

and expenses, made up a total cost which the Management knew was abnormally high, and which could not form any basis for obtaining a fair average cost.

As stated in our last report, the great problem to be solved was the finding of sulphuretted ores in the Mines which could be used to furnish a more economical smelting mixture. The richer oxyidized ores are not at all refractory in the sense of being difficult to smelt, but on the contrary, owing to the ease with which they can be
250 smelted into metallic copper they occasion an undue loss of the metal in the slag. By the use of a sulphuretted ore this loss can be to a great extent obviated by changing the process of smelting. During the present year we have succeeded in finding in the bottom of the Mine some limited ore bodies containing rich sulphide ores, but we have not yet been fortunate enough to discover any ore bodies of this nature sufficient to furnish us with the requisite amount of sulphides to warrant us in changing our methods of smelting. With this end in view we purchased, as stated in our last report, the Continental Group of Mines, but while these Mines have developed a certain amount of ore, they cannot help more than in a certain degree to supply our needs.

Operations at the Mine are shown in the report of Mr. F. W. Hoar, the Acting Superintendent, who took charge upon the resignation of Mr. S. A. Parnall. It will be seen from this report that the condition of the Mine as far as oxydized ores go is very satisfactory, and that we have in the lower levels, as already mentioned, proven the existence of sulphide ore bodies which await further development before their extent can be determined. We have always had at the Mine to contend with a large amount of water which seems to come at irregular periods. This has been the case since the opening of the Mine twenty years ago, and during the latter part of the year 1901 we were practically shut off from extensive developments in the lower levels on this account. Since Mr. Hoar's report was written, however, the water has subsided to a large extent and we are again prosecuting development work in the lower levels with very favorable results.

At the Smelter everything has progressed smoothly during the year. It will be noticed that the time lost during the whole year was less than five days. While we have a Smelting Plant much in excess of our present production, the Management have deemed it best only to smelt a quantity of ore which could be produced from the Mines without exhausting unduly the reserves. In the present condition of the copper market this policy has been a fortunate one for the Company, as, if we had rushed production unduly, besides having exhausted our ore reserves we should have piled up a large quantity of copper which could not be sold at present without making a loss.

Had it not been for the sudden drop in the price of copper and had the Company been able to sell its total production at the price ruling early in the year, the financial report would have been a highly satisfactory one. When it was found that our copper was not being disposed of as rapidly as produced, the officers of the Company, upon consultation with the United Metals Selling Company, the successors

of Lewisohn Brothers, who had been the Selling Agents of
251 the Old Dominion Copper Mining and Smelting Company from the beginning, found that owing to a very great shrinkage in the foreign demand all of the copper made in this country could not be disposed of without a serious fall in the price which it was deemed inadvisable to bring about, as it was supposed the falling off in demand was only temporary. As various copper producing Companies who sold their copper through other sources than the United Metals Selling Company had expressed the same ideas and the same feeling, the officers of the Selling Company felt that it would be very unwise for them to initiate a general break-down in prices, in which the officers of this Company thoroughly concurred. When it was found later in the year that the outside Companies were systematically and secretly cutting prices and underselling the market under the protection of our maintaining the price, instructions were given to our Selling Agents to dispose of a sufficient quantity of our copper at cut prices to pay all our operating expenses for the year. The result has been that we have obtained for the copper produced during the year an average of 12½ cents per pound. It should be borne in mind, however, that had we initiated this policy early in the year the result would have been that we should have obtained a still lower average for our product, as we should then have lost the benefit of all the copper that we disposed of at high prices.

At present prices for labor, supplies, freights, etc., and setting aside a fair amount for development work, copper cannot be produced, refined and sold by our Company for less than 12 cents per pound, which is just about the price which it will bring in the market at present. Although at this price no profit can be made, the Management consider it unwise to close down the property, as it would deteriorate very rapidly owing to the large quantity of water which would accumulate in the Mine. As soon as the sulphide ore bodies are developed to a sufficient extent to warrant the installation of a Converting Plant it will be at once erected, and the cost of production will be considerably reduced. At present, however, it is not thought wise to proceed with this plant, as it can be erected in a comparatively short time.

A. S. BIGELOW, *President.*
E. V. R. THAYER,
W. J. LADD,
LEONARD LEWISOHN,
JOSEPH S. BIGELOW,
C. H. BISSELL,
EDGAR BUFFUM,
Directors.

252 *Assets and Liabilities.*

Assets.

*Cash and accounts receivable at Boston, and copper, silver and gold on hand, since sold, and at Works at Globe, Arizona, in matte and stock pile	$1,063,181.52	
Cash and accounts receivable at Mine	8,247.28	
Supplies on hand at Mine	159,801.26	
Total Assets		$1,231,230.06

Liabilities.

Accounts payable at Mine	$52,281.27	
Accounts payable at Boston, including advances on copper, since paid from the sale of same	841,741.84	
Total Liabilities		894,023.11
Balance of Assets December 31, 1901		$337,206.95

Superintendent's Report.

GLOBE, ARIZONA, *January* 24, 1902.

To the President and Directors of the Old Dominion Copper Mining and Smelting Company.

GENTLEMEN: I herewith submit a general report of the operations at the Mines and Smelter for the year ending December 31, 1901.

As maps showing where the year's work has been done, also the annual cost sheet where will be found tabulated the cost of each department, together with the construction expense for the year, have been sent, I will not here repeat.

* In addition to the assets in this item there are sulphide and Continental ores on the dumps at Smelter and at Globe and Continental mines; also fine dust at Smelter, containing in all about 1,675,000 pounds fine copper of which no account is taken in this statement.

Globe Mine.

Operations.

The total material hoisted in the Interloper Shaft, together with that which came from the surface levels, is as follows:

253

Total cars	Quartz Ore	72,666
" "	Iron Ore	20,006
" "	Mixed	10,743
" "	Waste	66,154
	Grand Total	169,569 cars.

From which we obtained 82,005 tons of ore, exclusive of 935 tons of sulphide ore.

Development Work.

The number of feet opposite each level is the total of all drifting, raising or sinking on that leved:

Surface level	494.5 feet.
First "	459.0 "
Second "	490.0 "
Third "	719.0 "
Fourth "	365.5 "
Fifth "	171.0 "
Sixth "	886.0 "
Seventh "	167.0 "
Eighth "	229.0 "
Ninth "	2,273.5 "
Tenth "	1,790.5 "
Eleventh "	1,222.0 "
Twelfth	1,046.0 "
Total	10,313.0 feet.

The diamond drill was used in connection with the development work, the extent of which being as follows:

Drilled	205	feet 6	inches on	9th level.
"	129	" 6	"	10th "
"	81	" 0	"	11th "
"	162	" 9	"	12th "
Total,	579	feet 9	inches.	

254 Ore Reserves.

From the surface to and including the 8th level we now have as much ore in sight as at any time in the history of the Mine to my knowledge.

On the 9th and 10th levels are some good bodies of ore, the extent of which can only be proved by further development.

On the 11th and 12th levels, have developed sulphide ore carrying varying percentages of copper.

The development of the lower levels has shown more to encourage the Management than all other development work so done. This work has shown that which the Management has always endeavored to prove, namely, the existence of sulphide ore bodies. The extent of said ore bodies can only be proved by further development, and at such a time as the water supply will permit.

From the development of the lower levels, the low grade or concentrating sulphide ores have been dumped in a pile in connection with our mine surface dump. The high grade sulphide ores, of which we had on hand December 31, 1901, 935 tons, are piled separately.

Smelter.

In a stock pile at the Smelter, we have 4,500 tons of quartz ore, 1,400 tons of iron ore, and 1,500 tons of lime, which we keep as a reserve in case of accident or derangement at the Mine.

Operations at the Smelter were as follows:

Smelter in operation	361.13	days.
Delays caused by power plant	1.59	"
Delays caused by furnace	0.28	"
Holidays	2.00	"
Total	365.00	days.

Having smelted 81,015 tons of ore, from which we produced 9,248,093 pounds of pig copper and 1,737,331 pounds of matte.

The pig copper was all shipped, but the matte was placed with that previously produced, making a total on hand December 31, 1901, of 3,797,837 pounds of matte, containing about 2,650,000 pounds fine copper.

The flue dust made during the year not treated was 2,850 tons. This being placed with the flue dust previously made, gives a total of 5,924 tons on hand December 31, 1901.

255 Construction.

The main items were as follows:

Fuel Oil Installation.

Experimenting with fuel oil for boiler fuel at the Smelter resulted in showing a saving over coal and the adoption for the entire

plant thereof. This required the installation of oil storage tanks, pipe lines, and pumps, about three-fourths of the total installation expense having been charged out in year 1901.

Excavation

On account of the movements of the surface ground, it was necessary to relieve the pressure on the hoisting engine foundation, which required the removal of a large amount of ground back of the engine house.

Continental Mine.

Operations at this Mine were discontinued on February 14, 1901.

Development Work,

Including raises, winzes and drifts, was as follows:

Continental 1st level	23.0 feet.
" 2d level	48.5 "
" 3d level	222.5 "
" 5th level	25.0 "
" 6th level	13.0 "
Selby Claim	30.0 "
Railroad Claim	36.0 "
Total	398.0 feet.

During the time the Mine was in operation there were 208½ tons of ore delivered to the Smelter at Globe Mine, being placed on slag dump with the ore previously delivered.

General.

On July 25th, I received the official appointment of Acting Superintendent of the Old Dominion Copper Mining and Smelting Company to succeed Mr. S. A. Parnall, and on the following day assumed the duties and powers thereof, previous to which time, during the absence of the Superintendent, I also held the position of Acting Superintendent.

I wish to state that all the officials, more particularly Mr.
256 Frank Juleff, Mine Foreman, Mr. H. B. Paull, Chief Clerk, Mr. E. F. Lundgren, Master Mechanic, and Mr. Paul Michaelson, Boss Carpenter, have performed the duties of their respective positions in the most satisfactory manner, always showing faithful devotion to the interest of the Company.

Yours respectfully,

F. W. HOAR,
Acting Superintendent.

[EXHIBIT 16, APRIL 16, 1903, G. C. B.]

Old Dominion Syndicate.

May	16.	Received from Subscribers		720		May	16.	Pd. Lewisohn Bros.	1,000
	27.	"		36,610			27.	" Atlas Nat. Bank Boston	683 33
	28.	"		1,000			28.	" J. A. Coram	280
	"	"		3,920			"	" J. M. Meredith	70
	29.	"		2,940			"	" Thos. Nelson	90
	"	"		700			"	" Matthew Luce	280
	31.	"		420			29.	" Atlas Nat. Bank Boston	49,327 78
	"	"		700		June	13.	" Lewisohn Bros.	700
June	13.	"		11,880			19.	" S. S. Spaulding	855 16
	14.	"		1,400			20.	" Lewisohn Bros.	184,152 37
	15.	"		980			"	" for extra work	20 00
	18.	"		13,588 12		Jul-	12.	" Lewisohn Bros.	175
	19.	"		107,612 05			15.	" " "	43,003 90
	"	"		7,189 56			16.	" " "	55,999 14
	20.	"		16,316 40			17.	" " "	25,474 26
	21.	"		8,627 49			18.	" " "	10,105 79
	22.	"		2,875 83			19.	" " "	4,333 25
July	15.	"		43,003 90			20.	" " "	2,888 57
	16.	"		55,999 14			22.	" " "	28,889 63
	17.	"		25,474 26			24.	" " "	44,936 43
	18.	"		10,105 79			25.	" " "	8,670 47
	19.	"		4,333 25			29.	" " "	4,337 51
	20.	"		2,888 57			31.	" " "	7,520 86
	22.	"		28,889 63		Aug.	3.	" " "	3,183 48
	24.	"		14,448 83					

1895.									
July	25.	Received	from	Subscribers.....	8,670	47	Aug. 19.	Pd. Lewisohn Bros.....	8,988 79
	26.	"		.....	4,337	51	21.	" " "	19,581 06
	31.	"		.....	7,520	86	22.	" " "	13,926 26
Aug.	2/3.	"		.....	3,183	48	23.	" " "	4,787 80
	5.	"		.....	578	90	26.	" " "	17,707 79
	9.	"		.....	1,000		30.	" " "	2,903 70
	16.	"		.....	1,449	46	Sept. 16.	" " "	2,328 03
	19.	"		.....	5,800	23	23.	" " "	1,456 25
	"	"		.....	1,160	20	24.	" " "	5,651 25
	21.	"		.....	19,581	06	1896.		
	22.	"		.....	13,926	26	Jan. 20.	" " "	1,000
	23.	"		.....	4,787	80			
	26.	"		.....	17,707	79			
	28.	"		.....	2,903	70			
Sept.	16.	"		.....	2,328	03			
	23.	"		.....	1,456	25			
	"	"		.....	5,828	89			
	Total receipts				504,843	71		Total Payments	555,307 86
								Less amount received from subscribers	504,843 71
								Balance, paid by A. S. Bigelow.....	50,464 15

[Exhibit 17, April 16, 1903, G. C. B.]

A. S. Bigelow Old Dominion Investment Account.

1895.			
May 22.	Subscription	4,000 sh.	$50,000
	Shares received Sept. 27.		
Oct. 17.	For Underwriting Syndicate	27,350 "	
1897.			
Oct. 8.	Bought from Luce	25 "	625
1900.			
Dec. 1.	Bought	50 "	1,575
31.	Credited G. M. H. on B. & M. joint a/c 3230 shs. at av. 29		93,670
	Balance		151,016 06
		31,425 sh.	$296,886 06

The 4 Directors' shares not included in above.

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1895.			
Oct. 17.	Transferred to J. H. Coram	5,240 sh.	
"	" " " M. Luce	5,240 "	
"	" " " T. Nelson	4,240 "	
"	" " " J. M. Meredith	1,960 "	
"	" " " H. M. Whitney	2,990 "	
Dec. 19.	" " " Mrs. Bigelow	200 "	
1896.			
Jan. 11.	" " " C. W. Barron	10 "	
1897.			
Sept. 22.	Sold to M. Fay	50 "	$1,250
Dec. 9.	Sold	315 "	7,870 62
10.	Transferred to G. M. Hyams	1,460 "	
1898.			
Feb. 8.	Mar. 2 Sold	1,960 "	57,295
Apr. 28.	May 2 "	2,000 "	51,900
May 4.	"	700 "	18,168 75
9.	"	500 "	13,937 50
10.	"	350 "	9,656 25
11.	"	1,150 "	31,399 25
Dec. 3, '98, Jan. 2/3, '99.	Sold	2,010 "	74,408 69
1900.			
Nov. 30.	Sold	1,000 "	31,000
Dec. 31.	On hand	50 "	
		31,425 sh.	$296,886 06

[Exhibit 18, April 23, 1903. G. C. B.]

Baltimore, *June 17th*, 1895.

A special meeting duly called of Board of Directors in this company was held this day at 2 o'clock p. m. at Co.'s office.

Present, Mess. William Keyser, William F. Frick and H. Irvine Keyser.

Mr. Frick moved and Mr. H. I. Keyser seconded following resolution.

Resolved that the President be authorized to make such distribution of the accumulated net profits of the Co. as he may deem proper.

259 President handed in the resignation of Mr. William Butler as a director to take effect at once.

On motion of Mr. H. I. Keyser seconded by W. F. Frick, Mr. Butler's resignation was accepted.

On motion of Mr. W. F. Frick seconded by Mr. H. I. Keyser, Mr. George A. Pope was elected to Mr. Butler's position as Director in this Co. and Mr. Pope, being present, took his seat as director.

President handed in the resignation of Mr. W. F. Frick as a director to take effect at one.

On motion of Mr. Geo. A. Pope seconded by Mr. H. I. Keyser, Mr. Frick's resignation was accepted.

On motion of Mr. Geo. A. Pope, seconded by Mr. H. I. Keyser, Mr. R. Brent Keyser was elected to Mr. Frick's position as Director in this Co., and Mr. Keyser being present took his seat as Director.

Mr. Clendenin offered his resignation as secretary of the Co. to take effect Tuesday, June 18th, and on motion of Mr. R. B. Keyser, seconded by Mr. H. I. Keyser, same was accepted.

On motion of Mr. Geo. A. Pope, seconded by Mr. H. I. Keyser, Mr. Albert H. Weld was elected to succeed Mr. Clendenin as secretary of the Co.

On motion,

Adjourned.

JOS. CLENDENIN, Jr., *Sec'y.*

Board of Directors as of this date: Frank E. Simpson, Wm Keyser, H. Irvine Keyser, George A. Pope, R. Brent Keyser.

JOS. CLENDENIN, Jr., *Sec'y.*

[Exhibit 19, April 23, 1903. G. C. B.]

Baltimore, Md., *June 20th*, 1895.

A special meeting duly called of Board of Directors in this company was held at company's office.

Present, Messrs. Frank E. Simpson, H. Irvine Keyser, George A. Pope and R. Brent Keyser.

260 Mr. R. Brent Keyser moved, and Mr. Simpson seconded that Mr. Pope take the chair.

The minutes of the last meeting were then read and approved

Mr. Simpson moved and Mr. R. B. Keyser seconded the following resolution:

Resolved that the dividend paid by the President on June 19th, being dividend No. 28 for 26%—$130,000.00 be, and the same is hereby approved by the board of Directors—which motion was carried.

Mr. Simpson then moved and Mr. H. Irvine Keyser seconded the following Resolution:

Resolved that any right, title or interest this company may have in any claim or claims vs. the Societe des Metaux, the Comptoir d'Escomptes, or Moreau, the Liquidateur of the Comptoir d'Escomptes be sold and assigned to Wm. Keyser for $100 with full power to him to collect and receipt for any moneys coming to this company from said claim. Approved.

Mr. R. Brent Keyser then handed in the resignation of Mr. H. Irvine Keyser as a director, to take effect at once.

On motion of Mr. Frank E. Simpson duly seconded Mr. Keyser's resignation was accepted.

Mr. R. B. Keyser moved and Mr. Simpson seconded the nomination of Leonard Lewisohn to Mr. Irvine Keyser's position as Director in this company.

Mr. Lewisohn was duly elected, and, being present, took his seat.

Mr. Frank E. Simpson then tendered his resignation as a Director to take effect at once and on motion of Mr. Keyser duly seconded Mr. Simpson's resignation was accepted.

On motion of Mr. R. Brent Keyser seconded by Mr. Leonard Lewisohn, Mr. A. S. Bigelow was elected to Mr. Simpson's position as a Director in this company.

Mr. Pope then read Mr. William Keyser's resignation as President of this Company to take effect at the pleasure of the Board of Directors.

On motion duly seconded Mr. Keyser's resignation as president was accepted.

On motion of Mr. R. B. Keyser, seconded by Leonard Lewisohn, Mr. A. S. Bigelow was unanimously elected to succeed Mr. William Keyser as president of the company.

Mr. R. Brent Keyser's resignation was then handed in as treasurer of this Co.

On motion duly seconded Mr. Keyser's resignation as treasurer was accepted.

On motion of Mr. R. Brent Keyser, duly seconded, Mr. Leonard Lewisohn was unanimously elected to succeed Mr. R. D. Keyser as treasurer of the company.

261 Mr. Weld offered his resignation as secretary of the Co. to take effect at the end of this meeting. On motion of Mr. R. B. Keyser, duly seconded, same was accepted.

On motion of Mr. Leonard Lewisohn seconded by Mr. R. Brent Keyser, Mr. A. W. Evarts was unanimously elected to succeed Mr. Weld as secretary of the company.

Mr. Lewisohn then moved and Mr. Keyser seconded the following resolutions:

Resolved that the resignation of Messrs. William Keyser, R. Brent Keyser and George A. Pope as directors now tendered in writing, be received and filed, and that the gentlemen be requested — retain their offices for the present.

On motion,

Adjourned till three o'clock this afternoon.

ALBERT H. WELD, *Sec'y.*

Board of Directors as of this date. A. S. Bigelow, Leonard Lewisohn, William Keyser, R. Brent Keyser, George A. Pope.

ALBERT H. WELD, *Sec'y.*

June 20th, 1895.

Upon reassembling at 3 o'clock June 20th, 1895, pusuant to adjournment, with Mr. Pope in the chair, there was present Messrs. Pope, Lewisohn and R. Brent Keyser.

On motion of Mr. Lewisohn the following resolution was duly passed.

Resolved that Mr. William Keyser be requested to send to Mr. N. S. Berray the Superintendent of the company at Globe, Arizona, a telegram as follows:

"The management of the Old Dominion Company has today been turned over to the proposed purchasers. Report to A. S. Bigelow, Sears Building, Boston, as President. The company, Mr. Simpson assenting, desires you to retain position as superintendent and agent until early July. Please confirm to Boston. Wm. Keyser."

The meeting then adjourned.

A. W. EVARTS, *Sec'y.*

262 [EXHIBIT 20, MAY 5, 1903. G. C. B.]

Whereas A. S. Bigelow has contracted to purchase eighty-nine hundred and twenty-eight (8928) shares of the stock of the Old Dominion Copper Company, a Corporation organized under the laws of Maryland, and owning property in Arizona, at Forty dollars ($40) per share, or thereabouts, the undersigned hereby agree to take the number of shares set opposite their respective names and pay for the same at the rate of Forty dollars ($40) per share; the said stock to remain in the hands of A. S. Bigelow, and the management of the property to be left with him.

Payments to be made as follows:—

May 27th 1895, fourteen per cent (14%).

July 26th 1895, Twenty-eight and two thirds per cent (28⅔%) and interest at 5% from date of first payment.

August 25th 1895, Twenty-eight and two thirds per cent (28⅔%) and interest at 5% from date of first payment.

September 25, 1895, Twenty-eight and two thirds per cent (28⅔%) and interest at 5% from date of first payment.

The conditions, covenants and agreements herein contained shall be binding on the substitutes, successors, heirs, representatives and assigns of the respective subscribers hereto.

In witness whereof we have hereunto set our hands and opposite thereto the amounts of our subscriptions respectively, this 22d day of May A. D. 1895.

MATTHEW LUCE	$100,000
A. S. BIGELOW	50,000
J. A. CORAM	$100,000
HENRY M. WHITNEY	$50,000
J. MORRIS MEREDITH	$25,000
	(in pencil)
THOMAS NELSON	32,142.50
(in pencil)	357,142.50

263 [EXHIBIT 21, MAY 5, 1903. G. C. B.]

[Telegram.]

Boston ms 25.

To Lewisohn Bros. Co.

Keyser does not care to consult other owners two sevenths until option is acted upon, assures me if sale is made there will be no captious opposition nor any delay in transfer of property control to new owners. If you get telegram from Hyams tomorrow cannot you repeat to me Somerset Club Boston there is so little time. Show this to Beaman.

J. MEREDITH.

[EXHIBIT 22, MAY 5, 1903. G. C. B.]

Copy of Certificate of Incorporation.

Know all men by these presents, that we William F. Frick, John S. Gilman, George A. Pope, R. Brent Keyser, Joseph Clendenin, Jr., Frank E. Simpson and Wm. Butler, being citizens of the United States, and a majority of whom are citizens of the State of Maryland do hereby certify that we do, under and by virtue of the General Laws of this State, authorizing the formation of corporations, hereby form a corporation under the name of "The Old Dominion Copper Company of Baltimore City."

2. We do certify further, that the said corporation so formed, is a corporation for conducting any kind of mining business in this State and for selling or otherwise disposing of the products of said business; and also, for washing, dressing, smelting and otherwise preparing for and bringing to market and selling the ores of all kinds of metals, that the term of existence of the said corporation is limited to forty years; and that the said corporation is formed upon

the articles, conditions, and provisions herein expressed, and subject in all particulars to the limitations relating to corporations, which are contained in the General Laws of this State;

3. We do further certify, that the general operations of the said corporation are to be carried on in the State of Maryland and that the principal office of the said corporation will be located in Baltimore City.

4. We do further certify, that the aggregate of the capital stock of the said corporation is Five hundred thousand Dollars and that the said capital is divided into twenty-five thousand shares of the par value of twenty dollars each;

5. We do further certify, that the said corporation will be managed by five Directors and that William F. Frick, John S. Gilman, R. Brent Keyser, Frank E. Simpson and William Butler are the names of the Directors who will manage the concerns of the said corporation for the first year.

264 In witness whereof, we have hereunto set our hands and seals this first day of December in the year eighteen hundred and eighty-seven.

WILLIAM F. FRICK. [SEAL.]
JOHN S. GILMAN. [SEAL.]
GEORGE A. POPE. [SEAL.]
FRANK E. SIMPSON. [SEAL.]
R. BRENT KEYSER. [SEAL.]
JOSEPH CLENDENIN, JR. [SEAL.]
WILLIAM BUTLER. [SEAL.]

Witness as to Wm. F. Frick, John S. Gilman, Geo. A. Pope, Frank E. Simpson, R. B. Keyser & Jos. Clendenin, Jr.

JOHN G. MADDOX.

and as to Wm. Butler.

CHAS. HALL ADAMS.

STATE OF MARYLAND.
Baltimore City, to wit:

Before the subscriber, a Justice of the Peace of the State of Maryland, in and for the City of Baltimore, personally appeared on this First day of December eighteen hundred and eighty seven Wm. F. Frick, John S. Gilman, George A. Pope, Frank E. Simpson, R. Brent Keyser and Joseph Clendenin, Jr., and did severally acknowledge the foregoing certificate to be their act and deed.

JOHN G. MADDOX, *J. P.*

STATE OF MASSACHUSETTS.
County of Suffolk, ss:

Before me, Charles Hall Adams, a Commissioner of the State of Maryland residing in the City of Boston and State of Massachusetts, on this sixth day of December A. D. 1887 personally appeared Wil-

liam Butler and acknowledged the foregoing certificate to be his act and deed. In witness whereof, I have heerunto set my hand and affixed my official seal at my office No. 5 Court street in the city of Boston, in the County of Suffolk and State of Massachusetts, this sixth day of December A. D. eighteen hundred & eighty seven.

[SEAL'S PLACE.] CHARLES HALL ADAMS,
Commissioner of the State of Maryland.

I, William A. Stewart, one of the Judges of the Supreme Bench of Baltimore City, do hereby certify that the foregoing certificate has been submitted to me for examination; and I do further
265 certify that the said certificate is in conformity with the provisions of the law authorizing the formation of said corporation.

WILLIAM A. STEWART.

STATE OF MARYLAND,
City of Baltimore, set:

I hereby certify, that the aforegoing is a true copy, taken from the "original" filed for record on the 27th day of December A. D. 1887 at 10.50 o'clock A. M.

In testimony whereof, I hereto set my hand and affix the seal of the Superior Court of Baltimore City this 27th day of December A. D. 1887.

JAS. BOND,
Clerk of the Superior Court of Baltimore City.

[Seal of the Superior Court of Baltimore City in the 8th Judicial Circuit of Maryland.]

At a meeting of the Corporators of the Old Dominion Copper Company of Baltimore City, held in the City of Baltimore on the 29th day of December in the year 1887, at 12 o'clock, pursuant to adjournment, the committee appointed at the previous meeting to obtain subscriptions in cash to the capital stock of the Company, reported that they had performed the duty assigned to them and procured subscriptions to the same in full.

The committee delivered to the chairman the subscription list which they had obtained, and a copy of the same was ordered to be entered on the minutes of this meeting, which is done accordingly, as follows:

We, the undersigned, do hereby subscribe for the number of shares set opposite our names respectively, of the capital stock of The Old Dominion Copper Company of Baltimore City, chartered by a certificate of incorporation, recorded in the office of the Clerk of the Superior Court of Baltimore City, on the 27th December 1887.

And we do hereby, each of us, agree to pay in cash for the number of shares, subscribed by us respectively, at the rate of $20 per share,

whenever such payment may be called in by the Board of Directors of the Company.

WM. F. FRICK	1000	Shares	$20,000 00
GEORGE A. POPE	250	"	5,000 00
FRANK E. SIMPSON	7500	"	150,000 00
WILLIAM BUTLER	7500	"	150,000 00
JOHN S. GILMAN	7500	"	150,000 00
R. BRENT KEYSER	1000	"	20,000 00
JOSEPH CLENDENIN, JR.	250	"	5,000 00
	25000	Shares	$500,000 00

266 The chairman then reported to the meeting that he had received a written offer from William Keyser of Baltimore to sell and convey to the company, in consideration of $400,000 certain valuable mine property, and from the executors of Michael H. Simpson of Boston a written offer, in consideration of $50,000.00 to sell and convey to the company, certain other mine property adjoining the former, and recommended that the same should be submitted to a regular called meeting of the stockholders of the company, for their consideration and action.

Whereupon it was, on motion, unanimously,

Resolved, that a meeting of the stockholders of the company should be called to be held on the succeeding day at 12 o'clock, for the consideration of said propositions, and such other matters as might be brought before them.

On motion the meeting adjourned.

JOSEPH CLENDENIN, JR., *Secretary.*

I hereby certify that the foregoing is a true copy of the original deposition of Albert S. Bigelow taken before me in the case of Old Dominion Copper Mining and Smelting Co. v. Frederick Lewisohn et al. pending in the Circuit Court of the United States for the Southern District of New York, and of the exhibits annexed thereto.

[SEAL.] HOWLAND TWOMBLY,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
220 DEVONSHIRE ST., BOSTON, *March* 27, 1903.

Deposition of Godfrey M. Hyams.

GODFREY M. HYAMS, Esq., being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by L. D. Brandeis, Esq., counsel for plaintiff, deposes and says,—

Q. 1. Please state your full name, age, residence, and occupation.

A. Godfrey M. Hyams; forty-six years; Boston; manager.

267 Q. 2. Please state fully what your connection has been with Mr. A. S. Bigelow, and how long that connection has existed.

A. Well, I first became connected with Mr. Bigelow in the days of the old Santa Fé Mining Company in 1885 or 1886; at any rate, it was before the early '90s; then I had nothing more to do with him. That was merely in a consulting way. Then I had nothing more to do with him until 1891. I was then hired by the Boston & Montana Company as consulting engineer, if you please, in regard to the Great Falls works which were then being built; from that time on I took over the direction of various other enterprises with which Mr. Bigelow was connected, and gradually became more and more of a personal representative of Mr. Bigelow as a sort of connecting link between the East and West. In addition to that, I have been a sort of confidential clerk, adviser, or whatever you may please, with Mr. Bigelow, and been interested with him in a great many investments.

Q. 3. You have had your office with him?

A. Yes.

Q. 4. Please state what, during this period, your connection and relations have been with Lewisohn Brothers or Leonard Lewisohn and the members of the concern.

A. Well, I have never had any official connection with any of them, but Mr. Leonard Lewisohn was interested financially, and was an officer, in a great many of the corporations with which Mr. Bigelow was identified. I got to know him in that way, and he asked my advice on a great many things, and in that sort of a natural growth I became more or less intimately connected with Mr. Leonard Lewisohn, and he asked my advice on all sorts of questions, and we became interested together in little investments and things of that kind; and it was just in that natural line of advice that I had anything to do with Old Dominion.

Q. 5. What was your first connection with the purchase or the proposed purchase by Mr. Lewisohn and Mr. Bigelow of the interest in the Old Dominion Copper Company of Baltimore City?

Mr. HEMENWAY: The defendants object to this interrogatory, and to all similar interrogatories, on the ground of their immateriality, irrelevancy, and on the ground that they are matters wholly between parties other than the parties to the suit, and in no way binding on the defendants in this action, in this suit.

A. Well, I positively cannot recollect how I first heard of it. My impression is—and I have no record to verify it, my impression—that I was at Lake Superior and got a telegram from Mr. Lewisohn asking me what I knew about the Old Dominion mine, or something of that kind; it is an impression, and nothing more. And I do not know—I am like the fellow who woke up in the morning and did not know what had happened over night—the next thing
268 that I remember is that I was in New York, and I think I went up to Mr. Lewisohn's house, and he told me that he thought he could get control of the Old Dominion property. I told him I did not believe it.

Q. 6. Is that all that happened?

A. Whether it all happened at that interview, I cannot tell. Within a very short time, my impression is it was within a day or two, I was on the train going out to look at that Dominion mine; and I remember going there and examining it, and meeting Mr. Colquhoun at some intermediate station, and hiring a train and going up to the mine, as far as we could towards the mine, and examining it; and taking another train and coming down and wiring to accept. Now I must have had,—I must have known what they were to accept, naturally; but I have no recollection of just how the details got to me; what I got or what I did not get.

Q. 7. Have you stated all that you recall in regard to the matter prior to your sending that telegram advising them to accept?

A. I think so, yes.

Q. 8. Have you that telegram?

A. No.

Q. 9. Do you recall the date of that telegram?

A. Why, it developed that it must have been on the 27th of May, if it was received on the 28th.

Q. 10. Have you in your possession any letters or papers, or copies of letters or papers, relating to the option to purchase, or the proposed purchase of interests in the Old Dominion Company of Baltimore City prior to May 27?

A. I have got some letters here. The reason I happen to have them is that I searched through my papers and found these papers, and I have no reason why I should have them rather than Mr. Bigelow or Mr. Lewisohn, but I have got them.

Q. 11. Will you now produce such letters as you have in your possession from Mr. Meredith?

Mr. HEMENWAY: It is understood that Mr. Lauterbach may object to this testimony as if personally present to make objection now.

Mr. BRANDEIS: You can put that at the beginning, if you like, or anywhere.

A.—

"BOSTON, *April* 30, 1895.

Leonard Lewisohn, Esq., Fulton St., New York.

DEAR SIR: Your favor of yesterday received. In accordance with your instructions of this morning over the telephone, I sent for Mr. Simpson, who was out of town, at his mill, and he only arrived late

this afternoon, too late to consult you or any one. I found it harder than I supposed to pin him down. He showed a strong desire
269 before committing himself, to consult with some one, and, as he stated it, that giving an option might ruin another negotiation under way. My reply was that it appeared that he had got to ruin one or the other; that my instructions were to settle the matter forever at my first interview; and that I would not allow him even to use the long distance; if I left without a bond, he would be sure he never would hear from my people again. My acquaintance with him permitted me to be a little more severe with him than otherwise. After two hours, he has given me a bond, copy of which I enclose. We had to write it ourselves, as neither of us wanted to leave the other for fear of the long distance. If any of the details of the form are very objectionable, wire me tomorrow 'Form of bond impossible' and send me by night's mail a form provided by your lawyer, and I will try to get him to change it. Mr. Simpson is a fair-minded man, and I believe he will be perfectly reasonable with me. He goes West in two days, leaving his power of attorney at his office. He says that the company has got on hand an actual surplus of over $350,000 in copper, cash and notes receivable which are undeclared dividends, and that he will not include those in the sale. He has nothing else connected with this company except an interest in the store, which is a private enterprise. The provision for delay in transfer is because it might turn out that he would have to apply to the Probate Court. But there is no one to consult but himself. I think some of your warm friends in the street will be much troubled if this sale is completed. You may send me your check for $2000. He expects an expert to be sent by me down to the mine so as to report within fourteen days. You will know if this is necessary. He has no idea who my people are. If I have done wrong in any thing correct me. It was a difficult matter.

Yours very truly,

J. MORRIS MEREDITH."

Another letter from Meredith to Lewisohn, dated May 1, 1895, written from the Somerset Club, Boston:

"Leonard Lewisohn, Esq., Fulton St., New York.

DEAR SIR: Your favor over the telephone today was duly received. Mr. Simpson, not feeling very well, did not come to town today, so this afternoon I had to go out to his house at Saxonville to see him. My form of bond was of course unsatisfactory, but knowing him to be a thoroughly honorable man, and having
270 asked him verbally about many of the points you suggest, I deemed it better to lock him in with an unsatisfactory bond, rather than to let him talk to Baltimore, and I still think I was right. He shows every willingness this afternoon to put the bond in any form that is absolutely fair. He agrees that of course the corporation of which you buy the shares owns all the mines, smelters, furnaces, buildings, mining tools and other appurtenances, also all the ores on dump or in process, copper bottoms, and so forth,

and that all he wishes to reserve from the sale is any finished copper product, such as pig copper or ingot copper, cash or notes receivable which have been in the company's possession before this time, the total not to exceed in any case over $350,000, so-called company surplus. The clause about legal delivery of the stock from his father's estate was put in by prudence. Tomorrow I consult an attorney as to whether it is not in his power to absolutely deliver it. I think it is. He agrees with me that this must be put in such shape that no outside influence can interfere; but, when it comes to terms, he not knowing, you understand, who my people are, refuses longer time, in doing away with satisfactory endorsements; as he expresses it, he either runs the mine or sells it; and $100,000 cash is nothing to him if he loses the control of the mine and then has to take it back. He remarks that if my people are as strong as I state them, the terms named are ample. He agrees to be in New York with me on Friday and sign any new bond from which day the fourteen days shall run, but insists that he must go West Friday night and that after that day he cannot change the terms of the bond. Therefore you must consult your attorney and have him ready on Friday to prepare a bond, and I can again see Mr. Simpson without his disclosing you in the matter at all.

Telephone me tomorrow if this is all right, and I will wire you about his father's will. I should not be surprised if he believes the purchasers to be Anaconda and Calumet & Hecla, who buy to whip Montana and Tamarack.

Yours very truly, J. MORRIS MEREDITH."

May 6 is the next one from Mr. Meredith as follows:

"BOSTON, *May* 6, 1895.

Leonard Lewisohn, Esq., Fulton St., New York.

MY DEAR SIR: Mr. Butler did not find Mr. Keyser at Old Point Comfort and was to follow him to Baltimore hoping to return
271 to Boston tomorrow morning. I have secured the third executor's signature to the option, and have written Mr. Beaman to that effect. Mr. Bigelow has agreed to let me have, or rather take and pay for a small share of his interest in this venture. I only mention this to show my desire to aid your side of the copper business. I think I can help you on the railroad situation with Mr. Huntington. His private secretary, Mr. Tweed, formerly a partner of Evarts, Southmayd & Choate, I have known for years, and our relations are always of the pleasantest. Mr. Johnson wires me that the senior of the banking house cannot be reached for a day or two more. I will consult with you on this on Wednesday when I shall be in New York. Tonight Mr. Hyams is to coach me thoroughly on the railroad situation. My rough idea is to try and get a five years' contract before the option is closed. It will greatly strengthen the situation and enhance the value of the property. But we will talk this over when I meet you.

All comes to those who know how to work for it. Believe me,

Yours truly, J. MORRIS MEREDITH."

"BOSTON, *May* 7, 1895.

Leonard Lewisohn, Esq., P. O. Box 1247, New York.

DEAR SIR: Your favor of yesterday enclosing check to my order for the $2000 paid out by me under agreement of May 4, received with thanks. I shall hope to see you tomorrow, and will call at the office. My hotel will be the Waldorf.

Yours very truly,

J. MORRIS MEREDITH."

The only other letter I have is one of June 12, which we will get around to in time.

Q. 12. Well, you might as well read that, and then we will have them in order. Have you any letters from J. Morris Meredith, or copies of letters to him, relating to Old Dominion matters, covering the period from April 1 to July 1?

A. A letter from J. Morris Meredith to Leonard Lewisohn:

"BOSTON, *June* 12, 1895.

Leonard Lewisohn, Esq., of Lewisohn Brothers, Fulton St., New York.

DEAR SIR: Your favor of the 11th instant received and is satisfactory excepting, of course, that my deviation from the pres-
272 ent basis of arrangement would throw me back on my rights under my commission contract unless we make another arrangement. I hope you will get the two-sevenths.

Yours very truly,

J. MORRIS MEREDITH."

"BOSTON, *June* 10, 1895.

Leonard Lewisohn, Esq., of Lewisohn Brothers, Fulton St., New York.

DEAR SIR: According to our understanding by telephone today, I am to have, for surrendering all claim to commission on the two-sevenths minority stock in the Old Dominion Copper Co. deal, fourteen four hundred and fifty third (14/453) parts of any profit coming to you, or those under you, taking the four hundred and fifty three one thousandths (453/1000) interest in the entire deal, and I also get for the same reason a similar interest of $15,000 in the Boston pool profits. Kindly write me a line agreeing to this.

Yours very truly,

J. MORRIS MEREDITH.

J. S.—This is what Messrs. Bigelow and Nelson think is fair, and it was suggested by them."

"JUNE 11, 1895.

J. Morris Meredith, 15 Congress St., Boston.

DEAR SIR: Yours of the 10th instant received and contents noted. Provided we are able to secure the two-sevenths interest from Mr. Keyser at a proportionate price to that at which we secured the

five-sevenths from Mr. Simpson, of which we individually are to get one-third and Mr. Bigelow and his people two-thirds, we agree to the payment to you of fourteen four hundred and fifty thirds (14/453) of the profits coming to us or to those taking the four hundred and fifty three one thousandths (453/1000) interest in the entire deal—this in consideration of the fact that Mr. Keyser will not pay the commission and provided the arrangement goes through on the present basis without any material modification.

Very truly yours,

LEWISOHN BROTHERS.

L. L." ——, *General Manager.*

Q. 13. Have you any letters from William Keyser, or copies
273 of letters to him, relating to Old Dominion matters, covering the period from April 1 to July 1?

A. A letter from William Keyser to Leonard Lewisohn, dated—

"BALTIMORE, *May* 14, 1895.

Mr. Leonard Lewisohn, New York City.

DEAR SIR: I have your favor of the 13th instant, also your telegram in regard to description of the Old Dominion Copper Company's property. The deeds, etc., sent you were forwarded by express and not by registered mail. The package you have received therefore is the only one sent you. I enclose a list of the property at Globe which I trust will give you the information desired. As stated in my letter of the 11th instant the records and details covering the smaller pieces are in the company's office at Globe, and your representative when there can obtain full information from Mr. Berray, our superintendent. I trust this will give you all the information you desire. If not, I will send you such information as I can.

Yours truly,

WILLIAM KEYSER."

Attached to that is the following:

"List of Property Owned by the Old Dominion Copper Company at Globe, Gila County, Arizona.

Globe Ledge Mine, patented.
Globe Mine, patented.
Southwest Globe Mine, (deed at Globe).
Hidden Globe Mine (record at Globe).
The Interloper Mine.
The Southeast Globe Mine.
Fraction Mine.
Hypatia Mine.
Alice Mine.
The Southeast Globe mill site. } Property on which smelting
The Interloper mill site. } works is situated
The Hidden Globe mill site. }
Hypatia mill site. } Property on which the Isabella
Alice mill site. } mill site was formerly situated.

Private road leading from the main county road opposite
274 the Southwest Globe mill site to the company's smelting plant.
Saw mills, tools and logging roads, etc., on Pinal mountains."

The next letter I have is a copy of a letter from Mr. C. C. Beaman to William Keyser, Esq., Baltimore, Md.:

"JUNE 14, 1895.

William Keyser, Esq., Baltimore, Md.

DEAR SIR: Referring to the memorandum we sent you yesterday signed by Lewisohn, we understand, of course, that the words 'as of May 20th' which you suggest mean that the old stockholders are responsible only for obligations made prior to May 28th, at the same time we understand that you have not, as managers of the company, since May 28, done anything in the way of making obligations or debts of any kind except such as relate to the ordinary exery-day working and operation of the mines, the idea being that when Lewisohn takes the property on the 20th of June he will be responsible for no debts prior to May 28th, and that there have been no debts between May 28 and June 20 except such as the ordinary and usual operation of the mines necessitate. Please confirm this understanding.

We understand that you are to arrange to have your stock on deposit with the Old Colony Trust Company of Boston on Wednesday or Thursday next. If you will have it there on Wednesday, Lewisohn will arrange to make his payment so that you can arrange for telegraphic communication from the Old Colony Trust Company on Thursday that the payment has been made and the notes delivered.

Yours very truly,

C. C. BEAMAN."

"BALTIMORE, *June* 19, 1895.

Mr. Leonard Lewisohn, New York City.

DEAR SIR: I have your favor of the 18th instant, and have written the Old Colony Trust Company in accordance with your request contained therein as per enclosed copy.

Yours truly,

WILLIAM KEYSER.

P. S.—This covers only the stock purchased from me. Mr.
275 Bigelow will doubtless have no trouble in obtaining whatever authority is necessary from the Simpson executors in Boston, it being necessary that any instructions in connection with their stock should come from them."

"BALTIMORE, *June* 19, 1895.

Old Colony Trust Company, Boston Mass.

GENTLEMEN: Referring again to my letter of instructions of the 17th of June, you are hereby authorized to deliver to Leonard Lewisohn the 7118 shares of stock of the Old Dominion Copper Company

of Baltimore City upon the payment of the last note mentioned therein. The understanding is that I have sold the stock to Mr. Lewisohn subject to the payments mentioned in our agreement of June 13, and subject to its being held as collateral until the payment of the last note, after which time I have no further interest in the stock. I was under the impression that my letter of the 17th instant, taken in connection with the copy of the agreement sent you made this point clear, but write this at the request of Mr. Lewisohn to avoid any misunderstanding.

WILLIAM KEYSER,
pp. R. BRENT KEYSER."

"BALTIMORE, *June* 20, 1895.

Mr. Leonard Lewisohn, New York City.

DEAR SIR: Referring to the notes to be given to me today in payment for my two-sevenths of the interest in the stock of the Old Dominion Copper Company, I hereby agree that the said notes shall be held by me during the time of their existence, and not negotiated.

Yours truly,

WILLIAM KEYSER,
pp. R. BRENT KEYSER."

Q. 14. Have you any letters from Frank E. Simpson, or copies of letters to him, relating to Old Dominion matters, covering the period from April 1 to July 1, 1895?

A.—

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"BALTIMORE, *May* 13, 1895.

Mr. Leonard Lewisohn, of Lewisohn Brothers, New York City.

DEAR SIR: I am just in receipt of your telegram as follows:

Hope to receive by tomorrow list of debts, claims, etc., as per clause fifth of agreement.

LEWISOHN BROTHERS.

By referring to clause fifth of the agreement I see that the property is sold free from all debts, claims, liens or mortgages, and that there are no outstanding contracts between it and any other person or corporation except as stated in the list thereof to be furnished to the said Mr. Meredith. I beg to say that, as stated by Mr. Butler in his communication to you on Friday last, there are no claims, liens, mortgages or outstanding contracts with any person or corporation and that therefore under this clause there is no list to be sent.

Yours very truly,

FRANK E. SIMPSON."

"MAY 14, 1895.

Mr. Leonard Lewisohn, Lewisohn Brothers, New York.

MY DEAR SIR: In reply to your telegraph of yesterday, sent to Baltimore, I would say that having just returned from the West I fear it will be impossible for me to accompany Mr. Hyams on his trip

to Globe, but I do not think that I should have been of any assistance to him; he will find everything open for inspection.

Yours very truly,

FRANK E. SIMPSON."

The WITNESS: Now this appears to be the original deed of assignment, Meredith to Leonard Lewisohn, dated the 4th day of May, 1895.

Q. 15. I will ask you whether you have the original assignment from Meredith to Leonard Lewisohn of the option of May 4?

A. Yes [producing the paper].

[The original assignment, Meredith to Leonard Lewisohn, of the option of May 4 is marked "Exhibit 2A, G. C. B., March 27, 1903."]

[For text, see Exhibits.]

277 The WITNESS: This [referring to a paper] appears to be a copy of an option which Lewisohn was advised to sign, agreeing to take the two sevenths of Keyser's at the same price, within sixty days after it was offered.

[This copy of an option, signed by Lewisohn, was marked "Exhibit 7A, G. C. B., March 27, 1903."]

[For text, see Exhibits.]

The WITNESS: The next thing appears to be the Old Dominion Copper Company's statement of June 19.

[This statement was marked "Exhibit 11, G. C. B., March 27, 1903."]

[For text, see Exhibits.]

Mr. HEMENWAY: That is objected to on the ground that it does not appear to be made by anybody or addressed to anybody, or where it came from. It is immaterial, and is not competent proof of anything

Q. 16. How do you happen to have in your possession the various letters to Lewisohn or Lewisohn Brothers, which you have produced, and the original papers which you have produced?

A. I have already answered that by saying how I got those papers; that I found them in the back of a drawer in my desk, and they were done up in a piece of paper, and they were given to me at some time; the probability is they were given me at some time when I was in New York to bring over to Boston. I carefully brought them over and put them in the drawer, and they got side-tracked.

Q. 17. How long have they been in your possession?

A. I should imagine, from the amount of dust on the package, that they had been there a long, long time. You can see they are not in relation to any one particular thing, but they were a lot of papers in a bundle tied up with a string.

Q. 18. Are those papers which you have produced the only papers which you found in that bundle?

A. Those papers, as far as I recollect, are everything I found in that bundle; at least, that is all I have.

Q. 19. Have you now produced in evidence, during your deposition, everything that you have found?

A. Yes, sir.

Q. 20. Were there not some letters subsequent in date to July 1 which were in the same package?

A. Haven't I read them?

Q. 21. No, you have not.

A. Well, do you want me to look through and see?

Q. 22. I want you to look through and see that your answer is correct; that is all. Were there not some letters subsequent
278 in date, relating to the Old Dominion Copper Company purchase, the organization of the syndicate, the organization of the Old Dominion Copper Mining & Smelting Company, or subscriptions to the syndicate or to the company, which were in that same package, and which are now in your possession?

A. I probably got other letters later than July 1; I have probably got them in here,—yes, in my letter book.

Q. 23. But you have produced everything that you have found in that package? What letters have you, subsequent to July 1, if any, from Leonard Lewisohn or Lewisohn Brothers, or any member of that concern? Just let me see if I am right. You testified you had no letters whatever from Lewisohn up to July 1; that is right?

A. I have got a letter from Leonard Lewisohn, dated July 3, as follows:—

"NEW YORK, *July* 3,

Mr. G. M. Hyams, Boston, Mass.

DEAR SIR: Please find enclosed herewith copy of letter of Mr. R. Brent Keyser dated July 2, 1895; copy of letter of Mr. William Keyser dated July 2, 1895.

Yours very truly,

LEWISOHN BROTHERS
L. LEWISOHN,
General Manager.

First, copy from R. Brent Keyser.

BALTIMORE, *July* 2, 1895.

Mr. Leonard Lewisohn, New York City.

MY DEAR SIR: We confirm our telephone conversation this morning, and in accordance with your request we have wired Mr. N. S. Berray at Globe to pay off all June pay-rolls as usual, drawing upon us here for the money, and as soon as we receive the draft we will advise you and you can then remit us. We will also forward to you the papers and documents in connection therewith should they come to us. We were under the impression from what Mr. Hyams said when he was here on the 29th that he would advise Globe in regard to this matter. In the meantime we were to pay any drafts that were drawn prior to said advice and charge same to your account. Not having heard from Globe, we supposed the matter had been arranged, and hence did nothing about it until this morning when we received advices that the June pay roll had not been provided for.

We will write you in regard to the Ladenburg, Thalmann
279 matter, and are writing you today in regard to the Commercial Company's affairs, as we agreed with you that it would be well to get these matters settled if possible before your departure.

Yours very truly,

R. BRENT KEYSER."

"BALTIMORE, *July* 2, 1895.

Mr. Leonard Lewisohn, New York City:

DEAR Mr. LEWISOHN: I write you in reference to the Old Dominion Commercial Company of Globe, thinking that you and your friends might like to purchase the stock and operate the concern which during the few years it has been in existence has been very profitable to the owners, besides being of considerable assistance to the Old Dominion Company. The capital stock of the concern is $22,500, one-third of which is owned by Mr. Simpson and myself, the balance—two-thirds—being owned by our officers and their friends in Globe. The profits earned have been as follows:

1891	$22,000
1892	19,000
1893	18,500
1894	15,800

The reduced amounts in the past two years being caused by the curtailment of the operations of the copper company. With a concern operated on the basis upon which you will doubtless start your new company, I think there is no doubt but that the profits would be larger, and that the advantage to your copper organization would be very material. The company has been used as a general banking place by the men, the cash deposits without interest being from $15,000 to $30,000; in addition to which we have paid off at the store and availed ourselves of their assistance when currency was scarce. The assets at the present time are:

Cash on deposit		$20,326 26
Bills receivable		836 86
Outstanding accounts		7,522 29
Lumber yard		500 00
Stock at lumber yard		2,000 00
Merchandise stock, say		30,000 00
		$61,187 41

280 And liabilities:

Capital stock	$32,500 00	
Due depositors	18,048 70	40,548 70

This estimate would be improved by careful inventory so that the stock at the present time could be converted into cash by closing out the business at about 200 per cent of its face value. The business is

well organized and equipped, and has, I think, the good will of the larger part of the community. We have given a good deal of attention in organizing it, and would not sell it except that we do not care to have such a small interest so far from home. We think the business should be worth, as it stands, $50,000. If you would like to buy the stock upon this basis, we can, we think, control and turn the organization over to you in its present effective condition promptly.

Yours very truly,

WILLIAM KEYSER."

Mr. BRANDEIS: Well, I do not think that has anything to do with our inquiry. Do you want it in?

Mr. HEMENWAY: I would just as soon have it go in.

[The witness produced a number of letters: one dated July 8, 1895, from Adolph Lewisohn to Hyams concerning Trippel; another from Adolph Lewisohn to Hyams, dated July 8, 1895, enclosing letter from James Colquhoun, dated Clifton, Ariz., July 3, together with copies of several bills therein mentioned, and at the request of counsel reads the following:]

"Nov. 26, 1895.

Mr. G. M. Hyams, Boston, Mass.

DEAR SIR: Confirming our conversation over the telephone this afternoon, we have looked up the papers and find the information given us by our clerk was wrong. According to the document amongst our papers, 'order of procedure for Thursday, June 20th,' we find that June 20th was the date on which the transfer of Mr. Keyser's two-sevenths interest was transferred. We believe you have copies of all the papers, and you will doubtless find this paper amongst the same if you need it.

Very truly yours,

LEWISOHN BROTHERS,
A. LEWISOHN, *General Manager.*"

281 Q. 24. Have you, in your possession, any letters from any of the subscribers to the Old Dominion Syndicate or to the stock of the Old Dominion Copper Mining & Smelting Company, relating to the syndicate, its operations or subscription to the stock of the company?

A. None except what have already been read. I have these in my possession.

Q. 25. You mean those have been already read in the deposition of Mr. Bigelow?

A. In the deposition of Mr. Bigelow. Here are the letters which were taken out of the Old Dominion letter files. [Shown to Mr. Brandeis.]

Q. 26. Have you, in your possession, the letters which were taken out of the Old Dominion Copper Mining & Smelting Company letter files before their delivery to the new management?

A. I have.

[The witness produces a file of letters from Which plaintiff's counsel takes the following, which he requests him to read:]

The WITNESS: [Reading:]

"JULY 23, 1895.

A. S. Bigelow, Esq.

DEAR SIR: I send to you by express today the minute book and secretary's files of the Old Dominion Copper Company of Baltimore City of which I was recently the secretary.

Yours very truly,

A. W. EVARTS.

To A. S. Bigelow, Esq., 199 Washington St., Boston Mass."

"NEW YORK, *Dec.* 6, 1895.

Thomas Nelson, Esq., Treasurer Old Dominion Copper Mining & Smelting Co.

DEAR SIR: We enclose herewith a bill against the Old Dominion syndicate for professional services and abstracts which we send at the request of Messrs. Lewisohn Brothers of this city.

Yours very truly,

EVARTS, CHOATE & BEAMAN."

"DEC. 9, 1895.

Thomas Nelson, Esq., Treasurer Old Dominion Copper Mining & Smelting Co., 199 Washington St., Boston.

DEAR SIR: We beg to acknowledge the receipt of your favor of Dec. 7 in reference to the sub-division of our bill for profes-
282 sional services rendered to the Old Dominion syndicate. Our Mr. Beaman who has this matter particularly in charge is now absent in the West and is not expected here again until Saturday next, when your letter will be handed to him for his personal attention.

Yours very truly,

EVARTS, CHOATE & BEAMAN."

"DEC. 18, 1895.

Thomas Nelson, Esq., Treasurer Old Dominion Copper Mining & Smelting Co., 199 Washington St., Boston.

DEAR SIR: Replying to your letter of Dec. 7th, in reply to our letter of the 6th, enclosing our account against the Old Dominion syndicate, we would say that our first employment in this matter was by Messrs. Lewisohn Brothers for account of syndicate, but that appears to be separate from Mr. Meredith's contract. Mr. Meredith's contract at that time was not in a condition satisfactory to us, and we afterwards advised with Mr. Meredith and with Mr. Simpson and put the contract in such shape that it was afterwards found to be satisfactory and could not be avoided. We afterwards attended to the business of the syndicate in making the payments at Boston, and so forth, and afterwards in reference to the organization of the new company and the turning over of the property by the old company. We never, strictly speaking, considered Mr. Meredith

in any way a client, but on the other hand it may be very fair that between him and the syndicate he should pay part of our bill. Our charge for services to the syndicate, including services to Mr. Meredith, would be $5000; our charge for services in reference to the organization of the new company and the turning over of the property of the old company would be $2500. Speaking generally it would seem to us fair that the $5000 charged to Mr. Meredith and the syndicate the amount should be equally paid by Mr. Meredith and the syndicate; but as we have already stated, we never considered Mr. Meredith our client and have not felt justified in sending any bill to him. I am,

Yours very truly,

EVARTS, CHOATE & BEAMAN."

That is written by Mr. Beaman.

Q. 27. Have you at any time had access to the files of papers in the office or connected with the office, of Lewisohn Brothers relating to the Old Dominion Syndicate?

A. Not since,—well, before the death of Leonard Lewisohn.

283 Q. 28. Has, so far as you know, everything, all papers relating to the Old Dominion Syndicate, the purchase of the Old Dominion Copper Company of Baltimore City, the Old Dominion Syndicate, and the organization, the subscription for stock in the Old Dominion Copper Mining & Smelting Company, which are in your possession or which were in the possession or control of Mr. Bigelow, been produced at this examination by you to-day or by Mr. Bigelow during the preceding days?

A. I have made a thorough search everywhere. Every paper that can be found, that we have or can get hold of, or that Mr. Bigelow can get hold of, has been produced at this hearing.

Mr. HEMENWAY: Has that indemnity bond been put in?

Mr. BRANDEIS: We will consider that as having been put in, and it will be marked "Exhibit 12, G. C. B., March 27, 1903."

[For text, see Exhibits.]

Q. 29. Were you yourself one of the subscribers to the Old Dominion Syndicate?

A. You mean on the paper? No, I was on no paper. [Inspecting.] No, sir; my name is not on the paper.

Q. 30. Did you contribute any money toward the purchase of the stock of the Old Dominion Copper Company of Baltimore City?

A. I think I was charged in my account with Lewisohn for part of that subscription. I had a running account with them for a great many years. I should have to get them to give me the facts.

Q. 31. Will you do that?

A. I will ask them, yes, sir.

Q. 32. You are going to go to New York yourself, so you can look it up.

A. Yes.

Q. 33. Now were you a subscriber to the stock of the Old Do-

minion Copper Mining & Smelting Company? If so, how many shares did you subscribe for and how many were allotted to you?

A. My name is down here for 4000 shares, and that is absolutely the extent of my knowledge: just how much I got, I have forgotten all about it, and do not know. Whatever I got, I probably sent right over to Mr. Lewisohn to be credited on my account, and I would probably have to get that same figure from them.

Q. 34. Did you have any part in the soliciting or receiving the subscriptions for the Old Dominion Copper Mining & Smelting Company stock?

A. Well, do you mean did I take a paper and go around with it? Because I do not know that any solicitation was ever made.

Q. 35. Well, the expression used was, "soliciting or receiving."

A. Whether I remember? I see I signed Mr. Lewisohn's name there, or Leonard Lewisohn's.

284 Q. 36. Have you any recollection?

A. They probably called me over the telephone, but, as for any recollection as to who I saw or what I did, I have no idea whatever.

Q. 37. Have you any recollection of any interviews or any conversations between Mr. Bigelow and any of the subscribers to the stock of the Old Dominion Copper Mining & Smelting Company?

A. No, not any.

Q. 38. Have you any recollection of any such conversations between Leonard Lewisohn, or Adolph Lewisohn, or Jesse Lewisohn, or any of the subscribers?

A. I have not the faintest idea, sir; I could not remember. That is eight years ago. I could not remember that.

Q. 39. Have you any recollection of anything that was done in connection with the purchase of the interest of the Old Dominion Copper Company of Baltimore City, or the operations of the syndicate, or the organization of the company, or the subscriptions to the stock other than what has been testified to by you or by Mr. Bigelow, or other than what has appeared by the papers which have gone in, in evidence?

A. Well, I would not want to answer that until I went over it and saw what there was, what I had done.

Q. 40. Do you recall anything now?

A. I do not recall what has been said, to tell the truth, right here in the last few days, I do not know how the thing would connect. I will tell you in the beginning, I cannot remember to-day, though I have been trying, ever since this thing started, to see how I first got into communication or connection with this thing. I cannot remember. I would like to read over. I see an expression in a letter there which you showed me from Lewisohn to me which has given me the idea that I was at an entirely different place.

Q. 41. You mean the leter of May 14?

A. Yes, which was sent to me.

Q. 42. Which indicated you were in the West at that time?

A. Yes. But I evidently went by the way of Great Falls. Now I would not like to say anything about it. I would like to read that

correspondence over to know where I stand, because I want to stand on what I say; I do not want to come back here a week after and say I recollected something that I had told you to-day I did not recollect.

Q. 43. You do not at the present time recall anything in regard to the purchase of the property or the operations of the syndicate or the organization of the company or the making of the allotment of the subscriptions that you have not testified to?

A. No, I do not want to say that I do.

Q. 44. I mean you do not now do it?

A. I have got sort of confused ideas I cannot correlate; that is absolutely the fact. I do not want to tell you I don not know
285 anything. I have ideas, and they do not match up with what I read in these letters.

Q. 45. To what points have you reference?

A. On the points of talking with Mr. Leonard Lewisohn and talking with Mr. Meredith. I see in a letter there that I was to post Mr. Meredith up about the railroad situation, that I had posted him. I should have gone on the stand and sworn I never said anything to him about it. I do not want to state that.

[The further taking of the deposition of this witness was suspended.]

[Adjourned to Friday, April 3, 1903.]

FRIDAY, *April* 10, 1903.

[The taking of the deposition of Godfrey M. Hyams was resumed at 10 a. m. at the office of Messrs. Brandeis, Dunbar & Nutter, 220 Devonshire St., Boston, Mass.]

Q. 46. Have you, since the adjournment of the taking of your deposition, found any other letters or papers in any way bearing upon the matter in controversy?

A. I have found no book or paper not already introduced in evidence; I have brought with me the record book of the Old Dominion Copper Company of Baltimore City which I had found at the time you requested me to bring the record book.

Q. 47. I call your attention to Int. 39 of your deposition and your answer thereto, which I will read:

"Q. 39. Have you any recollection of anything that was done in connection with the purchase of the interest of the Old Dominion Copper Company of Baltimore City or the operations of the syndicate or the organization of the company or the subscriptions to the stock, other than what has been testified to by you and Mr. Bigelow, other than what has appeared by the papers which have gone in evidence?

A. Well, I would not want to answer that until I went over it and saw what there was, what I had done * * *"

and ask you whether since the adjournment you have refreshed your recollection or otherwise been able to recall any such facts?

A. I have tried to piece out what I thought, what I remembered, and verify it by the letters and papers and other documents, and

think I am pretty clear; I know I am pretty clear as to my recollection of what happened in the beginning.

Q. 48. Well, do you recall any facts other than those that you have testified to?

A. Yes.

Q. 49. In what connection?

286 A. Well, in the first place, in connection with my original knowledge of the matter, and in connection with the furnishing of the money and with reference to the railroad situation. I have been able now to see, by going over all the correspondence and the letters, just the sequence of affairs, and have got considerable light on the matter in a systematic way.

Q. 50. Well, now will you state what you have been able to recall, following the order which you have indicated?

A. I was engaged in work at Lake Superior at some of our properties, and was called East about the end of April, and I had conversations with Leonard Lewisohn, and probably with Mr. Bigelow over the telephone. I find no letters from him in regard to the Old Dominion property, and the chance of its being valuable, and the desirability of taking an option or control of that stock, and the questions that would naturally be asked by a business man of an engineer who was supposed to know about mining properties. It is evident that I stayed in New York longer than I thought when I testified before. And I can remember now of meeting with Mr. Meredith before I went away to examine the property, and discussing with him the manner in which mining options were taken; something of that kind is in my mind; that we talked over the form of option, and whether it would be desirable to only get a controlling interest. I must have been in New York until after the option of May 4, and when that was obtained I evidently started West immediately to examine the property, but went by the way of Montana, for I find at least one letter on the train, one or two letters on the train, about the 14th of May. Evidently Mr. Simpson was to go with me to the property; that was the original plan. And, seeing that letter, that brought me back to remember of my talk with Mr. Meredith as to the form of the option. And I told him at the time that the property had always been very closely held and information was very hard to obtain, and I did not really think that unless one of the owners was on the ground I would get very much insight into the actual conditions. That seems to me to clear up pretty well the hiatus that existed in my mind as to how I came into connection with this thing, how I got started, and how those letters happened to be dated as they were. After I returned, which must have been later than the 1st of June, for there is a telegram referred to by me in Globe as of the 27th of May, I found preparations had been made to take over the five sevenths of stock upon which he had an option, and that the first payment had been made. And the question then came up as to operating the property. And it was in that connection that the railroad situation came to be discussed. At the time of the purchase there was a railroad whose terminus was to be in Globe, and had been constructed part of the way, and the builder of it had stopped on account of lack of funds. This road was tribu-

287 tary to the Southern Pacific. And, in talking with Mr. Meredith originally about the condition of affairs, he had told me

that he knew he could be of considerable assistance to us if we ever took the property, because he was a particular friend, I believe, in some way connected in business with Mr. Tweed, who was the confidential man and general counsel for Mr. Huntington of the Southern Pacific road. And that is undoubtedly what is referred to in some of his letters, stating that I had posted Mr. Meredith as to the railroad situation. I explained to him what we wanted, what rates we ought to have, about what could be done, and he was to take it up with Mr. Tweed, and through Mr. Tweed with Mr. Huntington, to see how much he could help us along. But naturally he had to get the facts and the data first. I did not remember anything about that until I read the letter. Even as late as my return, I had figured on operating the property as representing people who owned a control, and never expected to get anything more than a control.

Q. 51. I am asking you for what you recollect, of course, not anything as to what occurred.

A. I am trying to tell you how I recollected it.

And it was a question of most carefully considering every step so that we would not furnish any ground for a hostile minority to annoy us. And it was for that reason that I suggested getting a man of our own as a manager, and not trusting to the manager who was there and of whom we knew nothing. I remember this end of it by seeing letters in reference to their man being willing to stay until we replaced him. That is in some letters of Mr. Keyser's; you will remember that he telegraphed he would be pleased to stay until the 1st of July, or something of that kind. I remember now, although I cannot fix the exact date, of calling Mr. Lewisohn's attention to the fact that all the claims which were always supposed to be owned by the Old Dominion Company were not included in the deeds which he had furnished to Mr. Colquhoun; and I know that he must have taken some steps in the matter; for in the option from Mr. Keyser I find that these other claims are referred to and included. I remember of explaining to Mr. Lewisohn that the Old Dominion Company originally was founded and based upon the Old Dominion mine, and that the property had been considered, even before the first reorganization of the company, quite a valuable property. I may say here that many years ago I had been in Globe for some time and remembered my first memory of the property. At that time the Old Dominion mine was the principal source of ore for the Old Dominion company, but I had known nothing of the property at all for years. I also remember telling Mr. Lewisohn that the company originally, before it was the Old Dominion Company, had been formed and had located a smelter at the point called "Bloody Tanks,"

where the New York and Chicago claims were situated, based
288 on the ore supplies of these mines, these claims being some
miles from Globe. After the option upon the Keyser stock was obtained and exercised, I remember now my visit to Baltimore with Mr. Lewisohn, to take over the company as a company. I cannot be absolutely positive, but I am quite sure that there was no one else from our office, from the Boston office, who went with me, but I looked over the books myself. After the transfer was made, or at the time the transfer was made, it is evident that we asked to have all work stopped until we could get it commenced with our own man;

and that, evidently, explains the telegram. I remember that from seeing a telegram that was sent on Thursday by one of the directors to their manager there, to stop the work until our man came. In going over Mr. Bigelow's accounts I find, as the accounts will show,—or first I will say that in going over the accounts, I found that I had received none of the 60,000 shares of Old Dominion Copper Mining & Smelting Company, although I had subscribed for 1000,—and in going over Mr. Bigelow's figures and looking at the stock books I found I had received a certain number of shares; and that started another train of remembrance, and I remember now that up to the time I went away the idea of what was to be done or how we were going to do it was very indefinite, because we did not know whether we were going to take the property at all. But I can remember I was promised an interest in it if we took it, in lieu of fees or anything of that kind; that I was to receive no fees, and as a matter of fact I did receive no fees. I found when I came back that an arrangement for the purchase of the five sevenths had been made, and I was left out. And I can remember that I thought perhaps I had not been properly treated, and asked about it, as to why I had been left out, and I was told that the demand for a participation was so great that everybody had taken less than he wanted, and that I might expect to get something finally, and the thing was left in a very indefinite way; I do not find my name upon the first Old Dominion Syndicate paper of June, which was extended to take up the two sevenths, and therefore it is evident that I was not allowed to participate in that, undoubtedly for the same reason. I can remember, in a very general way, the notices or whatever you have a mind to call them, in the papers about the matter——

Q. 52. Just state what papers.

A. Well, all the daily papers. The Boston papers, all of the Boston papers, had so-called financial articles every day—they comment on various things going on, and in that connection they commented quite frequently on Old Dominion business, perhaps might refer to letters; you would see frequently references in the papers saying so-and-so about Old Dominion, or discussing Old Dominion; that is, the articles all pointed out——

289 Mr. BRANDEIS: I object to that testimony as to the contents of the newspaper articles because we can get those.

The WITNESS: My remembrance is that those articles all pointed out the great value that was going to come from subscriptions to this Old Dominion, and I have been trying to think who it was finally advised me to agree not to take any. What I am trying to get at in this whole thing is to tell you how I remembered not getting on that second paper. At any rate, it was decided that I should not have any of it. Later, after the formation of the company, and when it was decided that some of the shares were to be sold, it is evident that I was permitted to participate in that, from the fact that I did participate as far as signing the paper; but on looking at the stock book I find I received none of that subscription; and I remember that I was told again that it was best for the interests of everybody that I waive any rights I might have there, and that I

would be taken care of in some way. That is what I can, up to date, remember in anything like a connected way.

Q. 53. Have you now stated, together with what you testified in the earlier part of your deposition, everything that you recall?

A. I think I have stated substantially everything.

Q. 54. Do you remember how many shares you ultimately did get in the Old Dominion Copper Mining & Smelting Company?

A. I do not remember. I can only tell you now what the record shows. The stock book shows that I received, as a subscriber under Leonard Lewisohn, a certificate for 2240 shares on October 3, 1895. I did not remember that until I saw it upon the statement that was furnished me in New York in the testimony you took there in the suit of Old Dominion Copper Mining & Smelting Co. v. Bigelow; but I find that there was transferred into my name in December, 1897, a certificate for 1460 shares which had stood in Mr. Bigelow's name, and immediately transferred out of my name to Lewisohn. That is the only record I can find of any stock in my name at any time of the Old Dominion Company; and I have gone over the stock ledger, which, of course, is an absolute record, and that is confirmed.

Q. 55. Have you now stated your whole recollection as to the nature of your interest and the amount paid for it?

A. I have received from Mr. Bigelow, which will show on his statement, 3230 shares, and that shows on account of the Old Dominion, but does not seem to tell me how I got it, any more than as I have told you that was always promised me as a consideration for my giving up all sorts of participation in the syndicate and stock of the company in lieu of services, etc. Now, as I say, that is not, with me, so much a matter of recollection as it is a
290 matter of finding the facts out in going over the stock books of the company and the accounts of Lewisohn Brothers and of Mr. Bigelow.

Q. 56. Does the report of James Colquhoun and G. M. Hyams, dated Clifton, Ariz., June 18, 1895, addressed to Messrs. A. S. Bigelow and Leonard Lewisohn, which was introduced as Exhibit 13 in the deposition of Mr. Bigelow, contain a report of all of the properties which you examined in their behalf in connection with the Old Dominion purchase?

A. To the best of my knowledge, it does. I cannot tell whether everything I saw at Globe is included in this report, but I have mentioned here a certain number of claims, on the first page.

Q. 57. Then, to the best of your recollection, that report contains a list of all of the claims and properties which you examined for Messrs. Lewisohn and Bigelow in that connection, does it not?

A. I think so.

Q. 58. And the claims on which you make report are the same claims referred to in the memorandum attached to the letter of William Keyser which is in evidence, in answer to Int. 13 of your deposition?

A. Yes, sir.

Q. 59. It is a fact, is it not, that you made no examination of the

several mining claims, namely, the Old Dominion mine, the New York mine, the Chicago mine, and the Keystone mine, or of the parcel of land near Bloody Tanks, all of which were deeded by Leonard Lewisohn to the Old Dominion Copper Mining & Smelting Company, in pursuance of the vote at the directors' meeting of July 11, 1895?

A. I did not examine those claims.

Q. 60. Are those the claims that you referred to as being called the Old Dominion mine, as being called to Mr. Lewisohn's attention as not being included in the deeds and papers furnished by Mr. Keyser?

A. Yes.

Q. 61. As coming under the Simpson option?

A. Those are the claims that I called to his attention as being owned, according to common repute, by the Old Dominion Company.

Q. 62. And not being included in the list furnished by Mr. Keyser?

A. Not included in the list furnished by Mr. Keyser.

Q 63. You speak of the Old Dominion Mining Claim Company, a claim on which the original company had been based. You refer, do you not, to a company that existed prior to the Old Dominion Company of Baltimore City?

A. Yes.

Q. 64. Which failed and was subsequently reorganized?

Mr. HEMENWAY: There is no evidence of that whatever.

Mr. BRANDEIS: I am asking what he referred to.

291 A. I cannot say about failing, or anything of that kind. I know what I wanted to say was that there was an Old Dominion Company which took its name from the Old Dominion claim.

Q. 65. And which had gone out of existence?

A. That I cannot, from knowledge, say, whether it had gone out of existence or not.

Q. 66. It was not the company known as the Old Dominion Copper Company of Baltimore City, was it?

A. I cannot tell you that, sir.

Q. 67. Now have you made any examination at any other time of these claims known as the Old Dominion mine, the New York mine, the Chicago mine, the Keyser mine, or the parcel of land situated near Bloody Tanks?

A. I have never made a technical examination of the claims, but I have passed them about, and being in the same mining camp, naturally I would know, in a general way, what claims were producing; in tonnage, I mean.

Q. 68. What do you mean when you say you have "passed" them?

A. I was engaged in work at Globe.

Q. 69. When?

A. Somewhere in the 80's.

Q. 70. How early?

A. I should say somewhere between 1884 and 1886.

Q. 71. It was then that you got such information as you had?

A. That was the first information that I had, because that was the time at which the properties were first worked. Subsequently to that I had visited Globe and the surrounding country several times.

Q. 72. When?

A. Oh, up to 189–, certainly in the early 90's. I cannot tell you the dates, but some years after I had left the town of Globe.

Q. 73. Well, did you at any time subsequent to 1884 or 1886, see any of these properties known as the Old Dominion mine, the New York mine, the Chicago mine, the Keystone mine, and the parcel of land near Bloody Tank?

A. Well, just say how long "since" refers to. Do you mean up to date?

Q. 74. Any time between 1884 and August 1895?

A. Well, I could not have helped seeing the Old Dominion mine every time I went in that part of the country, because it was right on the main road; the other mines are located on another road that was some six or seven miles away; but I am quite certain every time I went through Globe I must have seen the Old Dominion mine.

Q. 75. You mean, simply seen it in passing?

A. Yes.

Q. 76. You made no examination?

A. I made no examination.

Q. 77. Of either that or any of the other properties?

A. No, sir.

Q. 78. Do you know whether or not at any time at any of your visits between 1886 and August, 1895, any of those properties
292 were being worked; I mean either the Old Dominion mine, the New York mine, the Chicago mine, or the Keystone mine were being worked, or anything being done on that parcel of land near Bloody Tanks?

A. I could not say now, sir; I could not say whether they were being worked or not.

Q. 79. You have no recollection of their being worked?

A. I have no recollection one way or the other.

Q. 80. When you were out in Globe making an examination on which you and Mr. Colquhoun reported, under date of June 18, 1895, to Mr. Bigelow and Mr. Lewisohn, did you gather any information in regard to these properties known as the Old Dominion mine, New York mine, Chicago mine, Keystone mine, or the parcel of land near Bloody Tanks?

A. I do not now recollect of doing so.

Q. 81. Well, do you know what the character of the ores, if any, in those properties called the Old Dominion mine, the New York mine, the Chicago mine, the Keystone mine was or is?

A. Yes, sir; they are what is generally known as oxidized copper ores.

Q. 82. The same as the mines at Globe generally operated by the Old Dominion mine?

457

A. There is the same character of ores in those mines as in the mine now operated by the plaintiff company; there are other characters of ore in some of the mines operated by the Old Dominion Copper Mining & Smelting Company.

[The further taking of this deposition was suspended until Thursday, April 16, 1903, at 10 A. M.]

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
220 DEVONSHIRE STREET, BOSTON.
TUESDAY, *May* 5, 1903.

Deposition of Godfrey M. Hyams, Resumed.

[In answer to interrogatories propounded by Mr. Brandeis, counsel for the plaintiff, the witness further deposes and says:]

Q. 83. Mr. Hyams, you stated you would examine the records to ascertain the facts in regard to your relation to the Old Dominion Syndicate and embody that in an account. Is the account which you now present, which is marked "Exhibit 23," a statement showing your relation to the Old Dominion Syndicate?

Mr. LAUTERBACH: I object to its admission as incompetent, irrelevant, and immaterial.

293 A. That is right, sir.

Q. 84. That is correct?

A. Yes, sir.

Q. 85. Have you, since the adjournment of the taking of your deposition on April 10, 1903, found any further papers bearing upon the question at issue which you have been inquired of about?

A. No, sir.

Q. 86. Have you made any investigation of the records which has disclosed to you any facts, or recalled to you any facts, which you were not in possession of at the time you testified?

A. Well, I have gone over the record pretty carefully and every time I have gone over it I have got the thing a little clearer in my mind.

Q. 87. That is not the question. What record have you gone over?

A. The testimony; I assumed you meant, by "the records," that.

Q. 88. You mean your own testimony?

A. I mean everything that has been taken here.

Q. 89. That is, the report of your testimony and of Mr. Bigelow's testimony?

A. Yes, sir.

Q. 90. Other than that, you have not had access to any books or papers or sources of information which have in any way refreshed your recollection, have you?

A. No, I do not think so, sir.

Mr. HEMENWAY: There is one thing I do not know, whether it is included in that answer or not, and that is you requested him to go

through Mr. Bigelow's letter books and see if there were any letters indexed that were on those missing pages of the letter book.

The WITNESS: I had a purpose in not mentioning that, because that was not refreshing my recollection.

Mr. HEMENWAY: I simply suggested the inquiry whether that was in or not.

Mr. BRANDEIS: I do not see why you cannot leave in the record what you have said about that.

Q. 91. Now will you state, Mr. Hyams, what the result of your examination of that index was,—what the result of your examination of the index, which was to be made for the purpose of determining whether there was in the index any reference to any letters on pages 309–313, inclusive, was?

A. I went over the letter book and looked at the index, and found that the missing pages were in between notices sent to the members of the syndicate, and there is no index number in the index at all referring to either of those pages.

Q. 92. That is, referring either to pages 309, 310, 311, 312, or 313?

294 A. Yes, sir. They appear evidently to have been copies that for some reason or other were wrongly written or spelled in some way.

Q. 93. That is simply your inference?

A. I say that is my inference from the fact that they were between, right in the middle of, a lot of notices, and the date is the same before and after.

Q. 94. Will you state whether, in making search or otherwise, you have been able to find a letter, or a copy of a letter, to Mr. Woodhull dated August 8, 1895?

A. That is the one we did not attempt to do anything with at all.

Q. 95. Do you wish to be understood now as testifying that you have no knowledge whatsoever in regard to the existence of any copy of that letter of August 8, 1895?

A. I do not know what letter you refer to; I have never seen the letter. You read some words off of a piece of paper; that is all I know.

Q. 96. Do you now wish to be understood as testifying that you have never seen, so far as you can remember, any letter of Mr. Bigelow to Mr. Woodhull under date of August 8, 1895, or any copy of a letter of that date, containing, among other things, the passage quoted in Redirect Int. 588 of the deposition of Mr. Bigelow, viz., "I received your letter of the 7th. You are right in presuming the 20,000 shares which has been offered, to be treasury stock."

Mr. LAUTERBACH: I renew the objection made when the question referred to was put: That if the plaintiff has in his possession such a letter, it ought to be exhibited to the witness before he is required to answer concerning its contents; that if the plaintiff is not in possession of any such letter, and will so state, and desires an examination to be made to see if a copy of such a letter exists, we are perfectly willing to make it; but in the absence of such statement by the

plaintiff, we do not feel called upon to search for secondary evidence, if the best evidence exists.

Q. 97. [Int. 96 read.]

Mr. LAUTERBACH: I supopse the answer to that is, "No, sir."

A. No, sir.

Mr. LAUTERBACH: Whether you have seen such a letter.

Mr. BRANDEIS: No, that is not the question; the question is whether you wish to be understood as so testifying. Please read the question.

Q. 98. [Int. 96 read.]

A. You have simply inverted the question. The answer is, "Yes, sir."

Q. 99. Do you wish to be understood as so testifying? That is what you mean to state?

A. Yes.

Q. 100. Is it not a fact that since the examination of April 23, 1903, when this matter was called to Mr. Bigelow's attention,
295 you have made an examination of the letter-press copy books to see whether or not there was a copy of such a letter written?

A. No, sir.

Q. 101. And you wish also to be understood as testifying that, so far as you know, no examination has been made, and no search has been made for such a letter?

A. Yes, sir.

Q. 102. And that no such letter or copy thereof is in the possession of Mr. Bigelow or of his counsel?

A. Not to my knowledge.

Q. 103. Or has been at any time since this deposition has been commenced?

A. Not to my knowledge.

Cross-Examination.

[In answer to cross-interrogatories propounded by Edward Lauterbach, Esq., counsel for the defendants, the witness further deposes and says.—]

X 104. Mr. Hyams, before Redirect Int. 588 was asked by Mr. Brandeis of Mr. Bigelow, had you examined all the letter books and records and files of Mr. Bigelow, and your own so as to find the originals and copies of all letters and telegrams and papers affecting the Old Dominion Copper Company and the purchase of its stock by Bigelow and Lewisohn, and the original guarantee syndicate of May 22, 1895, and the Old Dominion Syndicate, and the stock-subscription syndicate of July 18, 1895 (Exhibit 10), and all correspondence with subscribers to the various syndicates, so as to produce them while Mr. Bigelow was being examined, and while you were being examined?

A. I examined them originally and marked them, and then, from

time to time, as you probably remember, during the examination, we were constantly going over them again, and I am quite certain Mr. Brandeis stood at my elbow while I was looking at them, trying to find everything; and I remember distinctly of looking in the index for letters to Maxwell Woodhull, and tallying them one after the other as they were indexed, with Mr. Brandeis.

X 105. And during that examination no such letter as that which Mr. Brandeis has referred to came under your observation?

A. No, sir.

X 106. Or at any other time?

A. No, sir.

X 107. Do you know of any written evidence in Mr. Bigelow's possession or yours, or under his control or yours, or in the possession of the Lewisohns, pertaining to the matters referred to in my last question that has not been produced?

A. No, sir.

296 X 108. Mr. Hyams, referring to Exhibit 13, which is the report of Mr. Colquhoun and yourself to Messrs. Bigelow and Lewisohn, was that report, so far as you know, an accurate statement concerning the mines that you examined?

A. Yes, sir.

X 109. In addition to examining the physical condition of the mines, did you examine the books and records at Globe in order to make up your report?

A. I went over them very carefully, and was obliged to do so in order to base any figures of cost of production or probable profits, costs of supplies, etc.

X 110. And the basis of your report in respect to such matters was furnished by the books of the Baltimore Company. In making that examination did you examine the books of the Old Dominion Copper Company of Baltimore?

A. I do not think they kept any books containing that information at Baltimore.

X 111. Well, I refer to Exhibit 11, which has been introduced in evidence. Was any such statement as that examined by you in order to ascertain the condition of the property and its value?

A. Well, that is a statement made June 19.

X 112. That statement had not then been made?

A. No, sir; but I did not examine the Baltimore books at all, because that would have been nonsense; the records were all at Globe, and the only books at Baltimore would be just the financial books of the company, and they would not have shown anything so far as the real value of the property was concerned.

X 113. Referring to Exhibit 11, I see that there is an item "Real Estate, Globe, $450,000." Would that have indicated to you anything concerning the value of the property if you had seen such a statement as that in the books of the Old Dominion Copper Company or on any balance sheet such as that which was made up on the 19th of June?

A. Absolutely nothing. That is simply a balance entry to cover the capital stock.

X 114. There is no indication of value?

A. Nothing whatever, absolutely nothing.

X 115. And would the exhibition of any such balance sheet, or of the books from which it was made, as is contained in Exhibit 11, have given you any information concerning the actual value of the property?

A. Well, only as far as—it would have shown me that the property had no debts, but it would not have shown me what supplies it had on hand; the supplies I would get at Globe; and the debts,—as I remember the opinion, it was stated that the property was to be turned over free of debt, so that would not interest us at all.

X 116. You are familiar with the matter of keeping books of mining companies?

A. Yes, sir.

X 117. You consider yourself an expert in that respect?

297 A. I am familiar with the books of mining companies.

X 118. And have had how many years' experience in that?

A. Ever since I have had to do with the management of mines I have naturally had to know about the keeping of books.

X 119. And a balance sheet, or the books upon which such a balance sheet would be founded, or the statement of value contained in such a balance sheet or on its books, would be no criterion of actual value, in your opinion, would it?

A. A statement of the property of any mining concern is of no value as showing its real value. For instance, a great many corporations are organized in Maine, if you please, that have only one dollar paid in—I believe that is all that is necessary—and yet their real estate and property account shows the full value of the capital stock; on the other hand, a great many of the largest mining companies in this country show a real-estate and property account of a nominal amount; that is, simply a book-keeping entry. If you took that, you would have to mark it up and down constantly if you wanted to get a true idea of the value of the concern. But, of course, as you extract the ore from any mining property, the real estate becomes less and less valuable, and you would have to keep cutting that down constantly. Do you get my idea?

Mr. LAUTERBACH: Perfectly.

The WITNESS: The value of a property is, in my judgment, best shown by an examination of the property rather than by what somebody else has been willing to put it on the books at.

X 120. Referring again to Exhibit 13, I observe that you placed you estimate upon the value of copper at the "present price of black copper, 10½ cents."

Mr. BRANDEIS: At the then present price of black copper, 10½ cents.

X 120. ([continued.] With black copper realizing 10 cents per pound, you prognosticate the profits to be $360,000 per annum, and with black copper realizing 10½ cents per pound, $420,000 per annum. What was the fact as to the increase or decrease of the market

value of black copper after the purchase of the stock by Lewisohn and Bigelow?

A. My impression is that it went up.

X 121. It went up steadily from that period, did it?

A. I think so.

X 122. How much was it, do you remember?

A. I don't, sir, but I will submit a table showing the price of copper from May 28, 1895, up to April, 1902, quarterly, which may be marked "Exhibit 24."

[For text of this exhibit see Hyams Exhibits, page 324.]

298 X 123. Now is there anything concerning that report that you want to state?

A. Well, just on that point that there are two factors in determining the profit of a copper mine. One is the value of the product, and the other is the copper contents of the ore. The profit set down here was based, as I have stated, upon a yield of 9 per cent copper. When we started up the property the yield, instead of being 9 per cent, was less. Consequently, although the price of copper might have gone much higher, the company might have still made a loss in its profits, owing to the lower yield of the copper in the rock; and that is exactly what happened.

X 124. Did the books indicate the percentage prior to your examination?

A. Yes.

X 125. What was that percentage?

A. That percentage was about 9 per cent, as I have stated.

X 126. And the basis of your calculation was 9 per cent?

A. I have stated in the report "Taking the figures of the old Company as a basis."

X 127. And that basis was about 9 per cent?

A. About 9 per cent.

X 128. But, in point of fact, after the purchase the ore turned out to be a lower grade of ore?

A. We found that the old management had made a careful selection and had only taken out the better grade of material and worked in a limited way. When we came to work in a larger way, a supply of that grade was not forthcoming, and it dropped down.

X 129. You spoke of working the mine in a larger way: was the working done under the Lewisohn and Bigelow regime, if I may call it such, conducted on a larger basis than it had been done before?

A. It was conducted on a larger basis in this way: that the old company had only run their smelting plant at intervals, and during the intervals of the closing down of the smelting plant they had continued mining and accumulated a reserve, so that, while they smelted a good deal while they ran, they did not smelt all the time. When the new management took hold, our policy was to keep on smelting continuously; and that, of course, called for a larger daily ore production.

X 130. What was the condition as to the operation of the smelter

at the time of the transfer of the control of the property by Keyser and the Simpson estate to Lewisohn and Bigelow?

A. The smelter had been closed down since the preceding year, since, I believe it was, August or September. And, just on that point, the mine had been run in the interval and was running when I went there.

X 131. That is to say, the ore production continued?

A. The ore production continued.

X 132. And the smelter was discontinued?

A. The smelter was discontinued.

299 X 133. And there was consequently a large accumulation of ore?

A. There was a large accumulation of ore, and that was the reason that I recommended the cessation of mining operations until our man could get to the mine so we could start smelting at once. They had been mining for seven or eight months and storing the ore and every nook and corner of the place was filled with ore; and that made it very expensive, making a double handling; and I recommended that they stop this mining—they were not doing anything particularly except taking out ore—that they stop this mining until we could start the smelter and get rid of this accumulation of ore.

X 134. What you desired was to send out a man competent to run the smelter?

A. He could not come until, I think it was in July, some time the end of July—he could not get there. Of course, at that time we did not know who we were going to get.

X 135. This discontinuance of the operation of the mining of ore was in consequence of your suggestions, and for the reasons you have stated?

A. Purely so, and for the reasons I have stated.

X 136. Mr. Hyams, did you, at my request, look into the subject of the payment by Whitney and by Meredith of the sum of $7000 by Whitney, and of $3500 by Meredith on May 27, 1895, referred to in Int. 84 of Mr. Bigelow's deposition, and can you tell me whether any further amounts, whether any other receipts than the receipt of $7000 and the receipt of $3500, as being part payment under the original guarantee syndicate of May 22, were ever paid by Whitney or Meredith?

A. There was no record anywhere of any further payment.

X 137. And can you tell me what, in fact, was done with the payment of $7000 and of $3500 made, apparently, on the guarantee syndicate of May 22?

A. It was treated as a first payment on the Old Dominion Syndicate.

X 138. And all subsequent payments by Whitney and Meredith were charged as contributions to the Old Dominion Syndicate?

A. Yes, sir.

X 139. And in the division of the stock finally, was this contribution of money treated as a contribution of the Old Dominion Syndicate?

A. Treated as a contribution to the Old Dominion Syndicate only.

X 140. And were they treated as subscribers to the guarantee

syndicate of May 22 in the same way as the other subscribers to the syndicate that had contributed in proportion?

A. Exactly in the same proportion.

X 141. So that their treatment was twofold; in the one capacity as subscribers to the Old Dominion Syndicate, and in the other as members of the original guarantee syndicate?

A. Yes, sir.

300 X 152. Mr. Hyams, as to Mr. Bigelow's relations to the various syndicates: he was a member of the original guarantee syndicate, was he not?

A. Yes.

X 143. And in that respect was a guarantor or underwriter?

A. As an underwriter.

X 144. He was a subscriber to the Old Dominion Syndicate?

A. Yes, sir.

X 145. And in that respect stood on the same basis as the other subscribers to the syndicate?

A. Yes, sir.

X 146. He was also a subscriber to the stock subscription or agreement of July 18, was he not?

A. Yes.

X 147. And was also part owner by purchase of the stock of the Old Dominion Company and the Keyser mining claims?

A. Yes, sir.

[In order to secure easy access to certificates, stubs, and books necessary to the inquiry, the further taking of this deposition was continued on the same day at the office of the Old Dominion Mining & Smelting Company, No. 35 Congress street, Boston, Mass., as follows:—

X 148. Mr. Hyams, I refer to Exhibit 17, it being a statement which you have called "A. S. Bigelow Old Dominion Investment Account," in which Mr. Bigelow appears to be charged with 31,425 shares, and to be credited with the disposition of part of those shares. From what sources did you obtain that information?

A. From the stock books, the stock certificates, transfers, and stock ledgers of the Old Dominion Copper Mining & Smelting Company.

X 149. Which are now before you?

A. Yes, sir.

X 150. Will you kindly explain in detail how you arrived at those figures and how you made up the account?

A. On the 18th of September, 1895, certificate No. 71 was issued to P. K. Dumaresq for 100,000 shares, stamped "Issued for property purchased."

Certificate No. 73 was issued to Thomas Nelson, treasurer, for 20,000 shares.

Certificate No. 74 was issued to A. S. Bigelow and Leonard Lewisohn for 30,000 shares. This certificate is also stamped "Issued for property purchased."

Certificate No. 71 stub contains the following:—

"No. 71.
100 Shares."

(This evidently a mistake for 100,000 shares, as the certificate calls for 100,000 shares.)

301 "Issued to Sundries
Dated September 18, 1895.
for Sundries.
Returned and cancelled
Received the above Certificate ."

Certificate No. 73 stub contains the following:—

"No. 73.
20,000 Shares.
Issued to Thomas Nelson, Treasurer.
Dated September 18, 1895.
For Vote of Syn.
Returned and cancelled
Transferred from
Received the above Certificate ."

"No. 74.
30,000 Shares
Issued to A. S. Bigelow and Leonard Lewisohn.
Dated September 18, 1895.
For
Returned and cancelled
Transferred from
Received the above certificate ."

On the same day certificate No. 71 was split up, 4 shares being transferred to each of the following persons:—

Moses T. Stevens, 4; A. S. Bigelow, 4; Leonard Lewisohn, 4; Edgar Buffun, 4; J. G. Ray, 4; H. M. Whitney, 4.

Sixteen (16) transferred shares to Thomas Nelson, and a balance certificate, No. 82, issued to P. K. Dumaresq, for 99,960 shares.

Certificate No. 73 was on the same day split up into certificates to the following persons, whose names will be found in Exhibit 25, May 5, 1903, G. C. B.

[For list see H Exhibits, p. 324.]

Certificate No. 82, in the name of P. K. Dumaresq, for 99,960 shares, was on the 19th of September, 1895, exchanged for
302 some small certificates aggregating 520 shares and a balance certificate, No. 140, issued to P. K. Dumaresq, for 99,420 shares.

On the 27th of September, 1895, this certificate was split up to the persons and in the number of shares shown in Exhibit —, May 5, 1903, G. C. B. [see H Exhibit p. —], these people being the subscribers to the Old Dominion Syndicate.

Among those certificates was one to A. S. Bigelow for 4000 shares. And that explains the first item of 4000 shares on Exhibit 17.

It appears from Mr. Bigelow's check book that, disregarding small items of interest, he paid out on Old Dominion account $50,000 more than he received from Old Dominion Syndicate subscribers, as shown by Exhibit 16. As a subscriber to this syndicate, he was entitled to receive his $50,000 back and 2000 shares of stock, or to subscribe the $50,000, on the list of July 18, to shares of the Old Dominion Copper Mining & Smelting Company for an equivalent number of shares at par, that is, 2000 shares, so that I have said here that his subscription for $50,000 entitled him to 4000 shares, which he received accordingly. And a balance certificate No. 262, was issued to P. K. Dumaresq for 20,000 shares. Upon this list, with the 4000 shares which went to Mr. Bigelow, there was also a certificate, No. 269, issued to Leonard Lewisohn for 36,190 shares.

On the 17th of October, 1895, certificate No. 74, in the name of A. S. Bigelow and Leonard Lewisohn, for 30,000 shares, and certificate No. 262, in the name of P. K. Dumaresq, for 20,000 shares, equalling 50,000 shares, were split up into certificates No. 419, in the name of Leonard Lewisohn, for 22,650 shares, and certificate No. 520, in the name of A. S. Bigelow, for 27,350 shares. This explains the second debit item on Exhibit No. 17, marked "For Underwriting Syndicate, 27,350 shares."

I find from Mr. Bigelow's check book that on the 8th of October, 1897, he purchased 25 shares, for which he paid $625, and on the 1st of December, 1900, he purchased 50 shares, for which he paid $1575. This accounts for the total amount charged to him, 31,425 shares, but does not include the 4 shares to each director taken out of certificate No. 71.

Now, coming to the other side, certificate No. 421, issued in the name of A. S. Bigelow, for 27,350 shares, on October 17, was, on the same day, split up into the following certificates, all in the name of A. S. Bigelow:—

Certificate No. 427, for 6220 shares, was retained by A. S. Bigelow.

Certificate No. 428, for 5240 shares, to J. A. Coram.

Certificate No. 429, for 5240 shares, to Matthew Luce.

Certificate No. 430, for 4240 shares, to Thomas Nelson.

303 Certificate No. 431, for 1960 shares, to J. Morris Meredith.

Certificate No. 432, for 1460 shares, G. M. Hvams.

Certificate No. 433, for 2990 shares, to Henry M. Whitney.

I have examined the stock ledger of the Old Dominion Copper Mining & Smelting Company, and find that the greatest number of shares with which Mr. Bigelow was ever charged was 31,425; which aggregate is made up of the 4000 shares, the 27,350 shares, the 25 shares, the 50 shares, and the 4 directors' shares testified to by me above.

Referring again to the credit side of Exhibit 17, it appears that on the 17th of October there was transferred to J. A. Coram, 5240 shares; to Matthew Luce, 5240 shares; to Thomas Nelson, 4240 shares; to

J. M. Meredith, 1960 shares; to H. M. Whitney, 2990 shares; being the balance of the 27,350 shares received by Mr. Bigelow for the underwriting syndicate, less the amount reserved to himself, and the amount 1460 shares, appearing as transferred to G. M. Hyams, December 10, 1897.

On December 19, 1895, Mr. Bigelow transferred to Mrs. Bigelow, 200 shares; on the 11th of January, 1896, to C. W. Barron, 10 shares.

On the 22nd of September, 1897, it appears from Mr. Bigelow's check book that he sold to M. Fay 50 shares, for which he received $1250. That is the first sale of stock that he made. On the 9th of December, 1897, he sold to various parties 315 shares for $7870.62. On the 10th of December, 1897, as already stated, there was transferred to G. M. Hyams, 1460 shares. In 1898 he sold from February 8 to March 2, 1960 shares, aggregating $57,295; from April 28 to May 2, 2000 shares, aggregating $51,900, on May 5, 700 shares aggregating $18,168.75; on the 9th of May 500 shares, aggregating $13,957.50; on the 10th of May, 350 shares, aggregating $9656.25; on the 11th of May, 1150 shares, aggregating $31,399.25; from December 3, 1898, to January 3, 1899, 2010 shares, aggregating $74,408.69; on November 30, 1900, 1000 shares, aggregating $31,000; and he had on hand December 31, 1900, 50 shares.

This shows the total distribution of 31,425 shares, and a total receipt in cash of $296,886.06.

On the 31st of December, 1900, there was credited to G. M. Hyams the proceeds of 3230 shares at average of $29, $93,670, on B. & M. joint account, leaving a balance of $151,016.06, this balance being the difference between the two sides of the account. This credit to G. M. Hyams is merely a transfer to the credit of my account
304 on a joint account existing between Mr. Bigelow and myself and has no bearing upon the Old Dominion Syndicate transaction.

GODFREY M. HYAMS.

Subscribed and sworn to this 26th day of June A. D. 1903, before me. Right to testify further reserved.

GEORGE C. BURPEE,
Notary Public.

[SEAL.]

SATURDAY, *February* 16, 1907.

Deposition of GODFREY H. HYAMS resumed:

[The taking of the deposition of Godfrey M. Hyams was resumed at 9 a. m., at the office of Messrs. Brandeis, Dunbar & Nutter, 161 Devonshire street, Boston, Mass.]

Mr. HEMENWAY. In the first place, you have asked us to produce a letter dated June 24, 1902 (Altmiller to Bigelow). Mr. Hyams has looked, and cannot find any such letter; but, on looking through the testimony, we find that there was testimony of Mr. Bigelow in regard to it.

Mr. MCCLENNEN. I remember Mr. Bigelow could not find it; I did not know but Mr. Hyams might.

Mr. HYAMS: I hunted all through and could not find it, and then I thought I would look at the testimony.

[In answer to further interrogatories propounded by Mr. McClennen, counsel for the plaintiff, the witness, Godfrey M. Hyams, deposes and says,—]

Q. 151. Mr. Hyams, I understand you have looked for a letter from Mr. Altmiller to Mr. Bigelow, dated June 24, 1902, and you cannot find it?

A. No, sir.

Q. 152. You have recently looked at the text of that letter?

A. I do not find any such letter.

Q. 153. I mean of a copy of it in the testimony?

A. I do not find any copy in the testimony.

Q. 154. In looking to find the text of it, did you look at a copy of Mr. Altmiller's testimony given at the last hearing?

A. I do not think I have that.

Q. 155. Well, that is the explanation of it, then. Referring to Mr. Altmiller's testimony, given on July 24, 1906, at page
305 72, will you look at the copy of a letter there which Mr. Altmiller identified, and see whether you recall having, at this time, seen a letter which was of somewhat that text?

A. I do not recall of ever seeing the original.

Q. 156. Do you remember some correspondence with the officers of the company in the summer of 1902, which called Mr. Bigelow's attention, or yours, as his lieutenant, to the fact that there were letters missing from the books or from the files?

[Objected to immaterial and irrelevant.]

A. I do not remember, sir.

Q. 157. Do you remember, in negotiations that went on from the time of the election in April, 1902, up to the time of bringing suit, that the matter of letters being missing from the files was discussed in your presence?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I do.

Q. 158. You do remember that?

A. Yes, sir.

Q. 159. Without going into detail, is it true that, from the spring of 1902 up to the time suit was brought, communications with reference to getting information were pretty constant?

A. I cannot answer that without going into details.

Q. 160. Then will you go into detail and state what occurred in that summer?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I think I have already gone into that in my testimony.

Q. 161. Well, I am not certain at the moment.

A. Then I will suggest that you look at the testimony, or permit me to do so.

Q. 162. Well, I would be very glad to have you do that. But,

without stopping now to look up the testimony, do you remember how many interviews you had with Mr. Brandeis?

[Objected to as immaterial.]

A. I do not, sir.

Q. 163. It was more than two, was it not?

A. I do not remember, sir.

Q. 164. Do you remember how many interviews you had with Mr. Altmiller?

A. No, sir.

Q. 165. Do you remember how many interviews you had with Mr. Smith?

A. I do not.

306 Q. 166. Your memory has become quite hazy on the transactions of that summer of 1902, has it?

[Objected to as immaterial and incompetent.]

A. What is that; a conclusion, an inference, or what? What do you want me to say?

Q. 167. Whatever the fact is.

A. I do not know that there is any fact. I do not see any fact.

Q. 168. You were acting in this matter for Mr. Bigelow to some extent in the summer of 1902, were you not?

A. I assisted him, yes.

Q. 169. Having a position that might properly be described as private secretary in this matter?

A. Describe it as you please, sir.

Q. 170. How would you describe it most accurately to conform to the truth?

A. Assisting Mr. Bigelow upon this matter.

Q. 171. Were the communications that were had from time to time brought to your attention?

A. Some of them.

Q. 172. Most of them?

A. I could not tell. I could only tell what was brought to my attention.

Q. 173. You have been into the thing in detail since?

A. Yes.

Q. 174. You have been present at practically all of the taking of the testimony in the case?

A. Yes.

Q. 175. Have you come across, in your experience, anything connected with those negotiations which was not at the time brought to your attention during the summer of 1902?

A. I should have to go over all the testimony to look that thing up.

Q. 176. With your recollection in its present shape you do not recall anything of the kind, do you?

A. You will have to repeat the previous question.

[Ints. 175 and 176 are read.]

The WITNESS: I cannot answer that question offhand, sir.

Q. 177. Then I will put it the other way: Will you state such things, if any, as do now come to your mind that were not known to you in the summer of 1902?

A. I cannot answer that question offhand, sir.

Q. 178. Now will you state all that you recall of your conversations with Mr. Brandeis in the summer of 1902?

[Objected to as incompetent, immaterial, and irrelevant.]

307 A. I think I have already testified to that, sir.

Q. 179. Are you indisposed to testify to it again now?

A. I do not quite understand.

Q. 180. Do you have any personal objection to testifying again to it if you have already testified to it?

A. I think my former testimony was based upon what I recalled at the time; I do not know how much of that I still remember. In other words, I should prefer to read my former testimony before I attempted to say anything which might do me an injustice.

Q. 181. Were you informed that some further testimony of yours was to be taken this morning?

A. Yes, sir.

Q. 182. Have you investigated your former testimony at all with reference to it?

A. No, sir.

Q. 183. Have you made any other effort to refresh your mind as to matters connected with this case since you learned that you were to testify this morning?

A. Only by searching for that letter.

Q. 184. Did you have a conversation with Mr. Brandeis between the period when Mr. Smith became the president of this company and the time when this suit was begun?

[Objected to as immaterial, incompetent, and irrelevant.]

A. I certainly did, sir.

Q. 185. Do you remember anything whatever that occurred in that conversation?

A. I do not think I do.

Q. 186. Did you have more than one conversation with Mr. Brandeis during that summer?

A. I do not remember. I do not remember how many conversations I had.

Q. 187. Well, your memory does not go far enough to remember even whether it was as many as two, do I understand?

A. I do not remember, really.

Q. 188. Was Mr. Bigelow present at the time of the conversations that you had with Mr. Brandeis?

A. To what period are you referring?

Q. 189. Between the election of Mr. Smith as president of the company in April, 1902, and the institution of this suit in the fall of 1902.

A. I do not remember.

Q. 190. Do you now remember and conversation you had with Mr. Brandeis when Mr. Bigelow was not present?

A. I do not, sir.

Q. 191. You are desirous, I assume, of remembering as
308 far as possible everything that occurred in that summer that I have asked about, are you not?

A. I cannot tell what you are going to assume.

Q. 192. Well, you think you are or you are not desirous of giving me the fullest benefit you can of your recollection of what occurred in that summer?

A. I am desirous of telling you all that I can remember.

Q. 193. Are you a man of fairly accurate memory?

A. I do not really know how to answer that; I might be considered somewhat conceited if I answered that question in one way.

Q. 194. I shall not object to your stating the truth even if it seems presumptuous.

A. I think I have a fair memory.

Q. 195. For instance, you thought a short time ago you remembered that you testified about all this sort of things.

A. I don't know; that is a very general question,—"all these things."

Q. 196. Conversations with Mr. Brandeis in the summer of 1902.

A. I think I remember to have testified to everything I remembered at the conversations with Mr. Brandeis.

Q. 197. What had you done by way of refreshing your recollection as to those conversations at the time you testified?

A. I had heard all that had been said before, all that had been testified before, and I had gone over all the correspondence, everything in the case that I could find, to be prepared to give you the best information I could as to my knowledge of the case.

Q. 198. Now have you exhausted entirely your present recollection as to those conversations?

A. I think so, yes.

Q. 199. Did Mr. Brandeis, in any of those conversations, request the production of any letters or papers connected with the Old Dominion Copper Mining & Smelting Company?

[Objected to as immaterial.]

A. I told you I did not remember anything further in regard to the matter.

Q. 200. You mean by that, you do not remember now that he made any such request?

A. I do not remember. I am not trying to hide anything, but I do not remember anything further than Mr. Brandeis talking at some time with me about something connected with the case; I have not any memory as to the details, but my only recollection is that I did years ago testify to what I then remembered, and I should have to stand on that.

309 Q. 201. Do you remember that your conversation with Mr. Brandeis related to the Old Dominion Copper Mining & Smelting Company?

[Objected to as immaterial.]

A. I do not remember that.

Q. 202. Is there in your mind any other matter than the Old Dominion Copper Mining & Smelting Company which was discussed in those conversations?

A. Nothing in my mind at the moment, sir.

Q. 203. Would your recollection go so far as to permit you to say that, as far as you now recall, the subject matter of those conversations was the Old Dominion Copper Mining & Smelting Company?

[Objected to as immaterial.]

A. That would simply be a matter of assuming, a matter of weeding out everything else, as you have done. I have told you I do not remember, sir. I do not remember.

Q. 204. Does it now lie in your mind that you have had any dealings with Mr. Brandeis at any time other than in connection with the Old Dominion Copper Mining & Smelting Company?

A. Not to my recollection.

Q. 205. Does it lie in your mind that any of the conversations which you have had with Mr. Brandeis related in any way to the obtaining of information by Mr. Brandeis concerning the Old Dominion Copper Mining & Smelting Company, and the facts connected with the promotion and organization thereof?

[Objected to as immaterial.]

A. He certainly asked me about that, sir.

Q. 206. But to an extent your recollection is absolutely barren whether in the course of those conversations he called attention to the fact that there were letters or papers missing from the files or the letter books which he desired to obtain?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I do not remember that, sir.

Q. 207. Was this letter, copied in the company's letter book at page 167, on January 13, 1896, written by you?

A. There are two letters there, both dated January 13.

Q. 208. The second one on the page?

A. That is my signature.

310 Q. 209. Were the facts set forth in that letter within your recollection at the time you wrote the letter?

[Objected to as incompetent, irrelevant, and immaterial.]

A. How can I tell?

Q. 210. By the exercise of your reasoning faculties, I suppose; that is what I want you to do.

A. I should assume, having signed the letter and finding it in the company's letter book, that I knew what I was writing about.

Q. 211. Have you any independent recollection at the present time of the promotion expenses of the Old Dominion Copper Mining & Smelting Company?

[Objected to as incompetent, irrelevant, and immaterial.]

A. No, sir.

Q. 212. Will you refer to the letter of January 13, 1896, to which I have just called your attention, and state in as much detail as you can, with the assistance of that letter, what they were?

[Objected to as incompetent and immaterial.]

Mr. McCLENNEN: What is the remark you are making to counsel, Mr. Hyams?

Mr. TREADWELL: He says it is a copy of a letter.

Q. 213. Mr. Hyams, what was your reason for calling to the attention of Counsel, Mr. Treadwell, that this was a copy of a letter to which your attention was directed?

A. It was really to correct your misstatement.

Q. 214. You wanted to correct my misstatement in speaking of it as a letter?

A. Yes.

Q. 215. Then I will consider that as corrected. Will you now refer to that copy of a letter—if in my first question I said "letter," I will say "copy of a letter"—in the letter book, and tell me from that what the promotion expenses were?

[Objected to as incompetent, irrelevant, and immaterial.]

A. Well, I will read from the copy the figures in the copy.

Mr. TREADWELL: Please repeat the question.

Q. 216. Then I will consider that as corrected. Will you now refer to that copy of a letter—if in my first question I said
311 "letter," I will say "copy of a letter"—in the letter book and state what were the promotion expenses of the Old Dominion Copper Mining & Smelting Company?

Mr. TREADWELL: Do you now ask the witness to state the contents of the paper before him or to give his memory of what were the promotion expenses, so far as the letter may refresh it?

Mr. McCLENNEN: I am asking the witness to exercise his best recollection, his best mental faculties, with the assistance of the letter which he wrote on January 13, 1896, and to state the facts of the promotion expenses connected with the organization of the Old Dominion Copper Mining & Smelting Company. I should like to have him use his independent recollection as far as he can, and to supplement it by an inspection of the letter referred to.

Q. 216 (continued). Now, with that explanation, will you answer the question and give us those expenses?

[Objected to as incompetent, immaterial, and irrelevant.]

A. This copy does not refresh my memory a particle. It consists of figures. I can quote from this copy what those figures are.

Q. 217. I wish you would make use of all sources of information that you have at the moment within your reach and do the best you can to give us all the expenses connected with the Old Dominion Copper Mining & Smelting Company promotion.

Mr. HEMENWAY: The defendant objects to placing upon the record figures taken from a letter if he does not remember in regard to the way those figures are made up. If, as a refreshing paper, it does not refresh his memory, it is incompetent.

A. I can only repeat; I see figures here; they do not in the slightest assist me to remember what the expenses were other than as stated in this copy. This letter is now ten years old, over ten years old.

Q. 218. I intended to convey that to you at the time I put the question and stated the date. In view of the fact that it is now over ten years old, do you entertain any doubt but what the statements contained in it were true at the time that you signed the letter?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I do not think the date of the letter has anything to do with it.

Q. 219. Why did you call my attention to the fact that it was over ten years old if you do not think the date of the letter has anything to do with it?

A. I do not think it has anything to do with the question you asked.

312 Q. 220. Were you as conversant as any one at the time of the organization of the Old Dominion Copper Mining & Smelting Company with the detail of expenses connected therewith?

[Objected to as immaterial.]

A. I do not think I was, sir.

Q. 221. Who had more specific information than yourself at that time?

A. I should say Mr. Thomas Nelson.

Q. 222. He is now deceased?

A. Yes.

Q. 223. Do you know whether or not you got the facts set out in this letter of January 13, 1896, from Mr. Nelson?

[Objected to as immaterial.]

A. I do not.

Q. 224. Have you any independent recollection of the promotion expenses connected with the formation of that company?

A. No, sir.

Q. 225. Is it a fact that the expenditures incurred by the Boston Syndicate were $1021?

[Objected to as incompetent and immaterial.]

A. I could not say, sir.

Q. 226. Is it a fact that the proportion of Evarts, Choate & Beaman's bill belonging to the syndicate was taken at $3000?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I cannot say, sir.

Q. 227. Is it a fact that the bill was divided by Mr. Bigelow in the proportion in which they took the 50,000 shares of stock, namely, 455/1000ths?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I cannot say, sir.

Q. 228. Is it a fact that the total expenses of the syndicate were $5581.31?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I cannot say.

Q. 229. You have in your recollection at the present time
313 nothing that would conflict with that being the approximate amount of the entire expenditures of the syndicate in connection with the promotion of the Old Dominion Copper Mining & Smelting Company?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I have no recollection whatever.

Mr. McCLENNEN: Now I will offer the letter.

Mr. HEMENWAY: The letter is objected to as incompetent, irrelevant, and immaterial.

Mr. McCLENNEN: I understand Mr. Treadwell does not object.

Mr. TREADWELL: If you have laid a foundation for it, I have no objection. I understood that was secondary evidence. Of course the letter itself may be incompetent.

Mr. McCLENNEN: The letter offered reads:

[The Company's Letter Book, Page 167.]

"JAN. 13*th*, 1896.

Leonard Lewisohn, Esq., Box 1247, New York.

DEAR SIR: We enclose you memorandum showing division of expenses of the Old Dominion syndicate. There is a balance due from you of $2528.35. The amount due from the syndicate, $5581.31, is made up by taking from Lewisohn Brothers' bill of $10,399.83 those items which properly belonged to the syndicate, $1557.31, and adding to this the expense incurred in Boston by the syndicate, $1024,—and the proportion of Evarts, Choate & Beaman's bill belonging to the syndicate as suggested by Mr. Evarts, namely, $3000. This amount has been divided between yourself and Mr. Bigelow in proportion to the percentages of the 50,000 shares of stock which were given to each of you; that is to say, your share was 455/1000. If this is not plain you can call me up on the telephone and I will try to make it so.

Very truly, G. M. HYAMS."

Q. 230. Is it your recollection that Mr. Lewisohn called you up on the telephone after the receipt of that letter?

[Objected to as incompetent and immaterial.]

A. I do not recollect.

314 Q. 231. Is there in your recollection any fact in conflict with the statement of facts made in that letter signed by you on or about January 13, 1896, of which a copy has just been shown you and read into the record?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I have no recollection in regard to the matter, sir.

Q. 232. Do you entertain any doubt whatever at the present time but that those items in that letter were a true statement of facts?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I assume it was a true statement.

Q. 233. Well, now, referring to the statement which you assume to be true, made at about the time, will you state all the facts that you can state from an inspection of this letter which you believe to be a true statement?

[Objected to as incompetent, immaterial, and irrelevant.]

A. The statements are all in the letter. I can read the letter again to you if you wish me to. That is all that I could do.

Q. 234. Is it a fact that the facts were as stated in that letter——

[Objected to as incompetent, irrelevant, and immaterial.]

A. I cannot say.

Q. 235. —as far as you now recollect?

A. I cannot say, sir. I have no recollection.

Q. 236. Is there within your recollection any more definite way of discovering what were the expenses of the promotion of the Old Dominion Copper Mining & Smelting Company at the present time than this letter, a copy of which I have shown you and just read into the record?

[Objected to as immaterial and incompetent.]

A. I do not know.

Q. 237. Are you willing to investigate such sources of information as you have most readily at hand that would assist your recollection in any way and see if you can tell us anything whatever as to what were the expenses of that promotion?

[Objected to as incompetent, irrelevant, and immaterial.]

315 A. Do you refer to this source?

Q. 238. Any sources.

A. I have no other source.

Q. 239. You have no other source?

A. Here.

Q. 240. Do you deem this letter of January 13, 1896, a copy of which has been shown you, as sufficiently veracious so that you would dare to trust it as a refresher of your recollection?

[Objected to as incompetent, irrelevant, and immaterial.]

A. That is a question of opinion.

Q. 241. If you answer it I will take it as being an expression of opinion.

[Objected to as incompetent.]

A. I certainly repeat what I have said already, that I do not think

I signed things that were not correct; if the figures were furnished me and I put them into a letter I took what was given me.

Q. 242. Do I understand you that the figures there were figures given to you?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I do not know; I do not remember.

Q. 243. And you do not know whether those figures were your own figures or Mr. Nelson's figures?

A. No, sir.

Q. 244. Now I show you a letter—pardon me—a letter-press copy on page 81 of the company's letter book, of what purports to be a letter of September 18, 1895, to Maxwell Woodhull: is that signature in the handwriting of Thomas Nelson?

A. It looks like his writing.

Q. 245. Was Thomas Nelson's position in the company such that he would have knowledge of the receipt of a note from Maxwell Woodhull, if one was sent to the company?

[Objected to as incompetent, irrelevant, and immaterial.]

A. Mr. Nelson was treasurer of the company.

Q. 246. And he is now deceased?

A. Yes, sir.

Mr. McCLENNEN: That letter I will offer.

Mr. HEMENWAY: Objected to as incompetent, irrelevant, and immaterial.

Mr. McCLENNEN: And the letter reads:

316 [Company's Letter Book, Page 81.]

"SEPT. 18TH, 1895.

Maxwell Woodhull, Esq., 2033 G Street, Washington, D. C.

DEAR SIR: Your favor of 17th inst. enclosing note for fifteen thousand dollars ($15,000) in favor of the Old Dominion Copper Mining & Smelting Company and two receipts as stated, has been received.

Yours truly, THOMAS NELSON, *Treas.*"

Mr. TREADWELL: How does that read,—as if it were an original letter?

Mr. McCLENNEN: No, a copy of a letter.

Q. 247. Maxwell Woodhull resides where?

A. I have not heard from him for some years.

Q. 248. So you cannot really say whether he is residing in Washington or not?

A. No, sir.

Q. 249. Was he a resident of Washington the last you heard of him?

A. Yes.

Q. 250. Do you have any recollection yourself whether Maxwe

Woodhull gave any notes to the company in connection with his subscription for stock?

[Objected to as incompetent, immaterial, and irrelevant, and as assuming a fact which does not appear.]

A. I have no recollection and no knowledge.

Q. 251. At the time of the promotion of the Old Dominion Copper Mining & Smelting Company, or, rather, from the period beginning at or about the date of the first option, about April 30, 1895, up to the 1st of October, 1895, were you in conference to some extent with Mr. Leonard Lewisohn?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I was in conference with Mr. Leonard Lewisohn on all subjects during these periods.

Q. 252. Was he apprised of what was going on in Boston, in a pretty general way, connected with the promoting of the company, getting subscriptions, and so forth?

[Objected to as incompetent, immaterial, and irrelevant, and as leading.]

317 A. I suppose so.

Q. 253. Mr. Lewisohn knew of the fact of the various syndicate agreements in Boston, did he not?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I suppose so.

Q. 254. Your conferences with him, either in person or over the telephone, were matters of perhaps almost daily occurrence during this time?

[Objected to as immaterial.]

A. I think so.

Q. 255. On these subjects?

A. I did not say that.

Q. 256. Well, do you mean to make a distinction?

A. A very marked distinction.

Q. 257. For instance, how often should you say you conferred with Mr. Lewisohn, either in his personal presence or by telephone, on the subject of Old Dominion during that summer of 1895?

[Objected to as immaterial.]

A. From recollection, I should say a very small proportion of the conferences we had had relation to this matter.

Q. 258. By that process of elimination, how often should you say, as nearly as your recollection, which you are trying to exert at present, would enable you to state?

A. I cannot say any more definitely than I have. Mr. Lewisohn was our selling agent, and questions in relation to these matters would come up constantly.

Mr. HEMENWAY: "Our selling agent"—I do not know what that means. I want him to elaborate it.

The WITNESS: Mr. Leonard Lewisohn was a member of the firm of Lewisohn Brothers, which firm was the selling agent for all the copper produced by the various mining companies in which Mr. Bigelow was interested.

—— ——.

Subscribed and sworn to this — day of —— before me,

——, ——,
Notary Public.

318 EXHIBITS.

Copies of Exhibits to be Attached to the Deposition of Godfrey M. Hyams.

[EXHIBIT 2 A, MARCH 27, 1903. G. C. B.]

In consideration of two thousand dollars ($2,000) paid to me by Leonard Lewisohn of the city of New York and the assumption by him of all and every obligation of mine under a contract made this day between me and Frank E. Simpson and William Butler, executors of Michael H. Simpson, giving to me the option to purchase seventeen thousand eight hundred and fifty seven (17,857) shares of the capital stock of the Old Dominion Copper Mining Company, I do hereby sell, transfer and assign unto the said Leonard Lewisohn, his executors, administrators and assigns, all my right, title and interest in and to the said contract or arising therefrom.

In witness whereof I have hereunto set my hand at New York this fourth day of May eighteen hundred and ninety five.

J. MORRIS MEREDITH.

Witness:
CHARLES C. BEAMAN.

[EXHIBIT 7 A, MARCH 27, 1903. G. C. B.]

For value received and for other good and valuable considerations I Leonard Lewisohn of New York City agree with Frederick E. Simpson, William Butler and others executors of Michael H. Simpson who have this day deposited seventeen thousand eight hundred and fifty seven (17,857) shares of the stock of the Old Dominion Copper Company with the Old Colony Trust Company in Boston that I Leonard Lewisohn, who have this day paid to the said Simpson and Butler one hundred thousand dollars ($100,000) on account of the purchase of said shares of stock, will at any time within sixty (60) days hereafter at ten (10) days' notice and tender, take and pay for at the same pro rata price and on the same general terms and conditions as provided in the agreement between the said Simpson and Butler and J. Morris Meredith of Boston, dated the fourth day of May 1895 any part or all of the remainder of the capital stock of said company. This agreement being given and received in performance of the sixth article of said agreement between said Simp-

son and Butler and the said Meredith; said Meredith having assigned to me all of his right title and interest in the said agreement.

May 28th, 1895.

[No signature.]

319 For value received we jointly and severally warrant and guarantee the performance by Leonard Lewisohn of the foregoing agreement between him and Frank H. Simpson and William Butler and others, executors of Michael H. Simpson.

May 28th, 1895.

[No signature.]

[EXHIBIT 11, MARCH 27, 1903. G. C. B.]

Old Dominion Copper Company Statement, June 19, 1895.

Assets.

Property:		
Real estate, Globe	$450,000 00	
Saw mill	8,083 25	
Supplies	6,837 54	
Wood	3,987 80	
Lumber	1,865 12	
Coke	196 90	
Stulls	1,791 33	
		$472,761 94
Developments:		
Mine expenses	$29,704 93	
Development work	7,077 55	
Furnace expenses	183 60	
Plant	5 66	
Draft in transit	118 50	
General expenses	756 25	
Eastern office expenses	10,789 14	
Globe office expenses	921 85	
		$49,557 38
Cash items:		
Cash at Globe	$1,341 10	
Overcharge claims	705 80	
		$2,046 90
		$524,366 22

320 Liabilities.

Capital	$500,000 00	
B. C. S. & R. Co. loan	3,542 62	
		$503,542 62
Surplus		$20,823 60

[Attached to this exhibit is the following:]

BALTIMORE, *June* 20, 1895.

Ledger Balance the Old Dominion Copper Company.

	Cash at mine	$1,341 10	
3	Capital		$500,000 00
24	General expense	756 25	
62	Baltimore Copper S. & R. Co.		3,542 62
100	Real estate	450,000 00	
115	Profit & Loss		20,823 60
166	Supplies	6,837 54	
182	Wood	3,987 80	
192	Lumber	1,865 12	
204	Coke	196 90	
240	Development work	7,077 55	
244	Furnace expenses	183 60	
250	Mining expenses	29,704 93	
260	Eastern office	10,789 14	
270	Stulls	1,791 33	
286	Overcharge account	705 80	
304	Office expenses at Globe	921 85	
330	Plant	5 56	
342	Treasurer's account, draft in transit	118 50	
350	Saw mill	8,083 25	
		$524,366 22	$524,366 22

[EXHIBIT 12, MARCH 27, 1903. G. C. B.]

Know all men by these presents: That we, Frank E. Simpson, William Butler, Lucius W. Smith and Thomas C. Simpson, executors &c. of Michael H. Simpson, deceased, of Boston, Massa-
321 chusetts, and William Keyser of Baltimore, Maryland, are held and firmly bound unto Leonard Lewisohn of the city of New York and the Old Dominion Copper Company of Baltimore, a corporation organized and existing under the laws of the State of Maryland, in the sum of fifty thousand dollars lawful money of the United States of America, to be paid to the said Lewisohn, his executors, administrators and assigns and the said company, its successors or assigns for which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors firmly by these presents sealed with our seals. Dated the twentieth (20) day of June one thousand eight hundred and ninety five.

Whereas we have sold, assigned and transferred unto the said Leonard Lewisohn all the capital stock of the said Old Dominion Copper Company and as part of the consideration therefor have agreed to assume and discharge any and all claims and demands against and debts and obligations of the said company of every kind and nature whatsoever which were existing and outstanding on the 28th day of May, eighteen hundred and ninety five.

Now, the condition of this obligation is such that if the said above bounden Frank E. Simpson, William Butler and Lucius W. Smith as executors, &c., and William Keyser, their executors, administrators, assigns or successors, or any of them, shall well and truly pay or discharge all and every of said claims, demands, debts and obligations and indemnify and save harmless the said Leonard Lewisohn, his executors and administrators, and the said Old Dominion Copper Company, its successors and assigns, from and against any and all suits, actions, damages, costs, charges, expenses by reason of any such claims, demands, debts or obligations, then this obligation is to be void, otherwise to remain in full force.

FRANK E. SIMPSON, [SEAL.]
WM. BUTLER, [SEAL.]
LUCIUS W. SMITH, [SEAL.]
THOMAS C. SIMPSON, [SEAL.]
WM. KEYSER, [SEAL.]
Executors Estate of Michael H. Simpson.

In the presence of

SAMUEL P. TENNEY to all.
W. K. SIMPSON.

As to Wm. Keyser,

R. BRENT KEYSER.

322 [SUBSTITUTE FOR EXHIBIT 23, G. C. B., MAY 5, 1903.]

[The original of this exhibit having been lost or mislaid, the following is substituted therefor.
Boston, June 20, 1903.

GEORGE C. BURPEE,
Stenographer.]

JUNE 19, 1903.

Bacon & Burpee, 617 Tremont Building, Boston, Mass.

MY DEAR MR. BURPEE: I have had considerable trouble in getting the figures of average costs for past years as there was considerable discrepancy in the various tables. This accounts for the delay in answering your letter.

I enclose now the average price of electrolytic copper for the years 1895 to 1902 inclusive, given monthly.

I also enclose a statement of my Old Dominion account. I cannot tell you whether the wording is exactly the same as the former one as I cannot find it, but the figures are correct. I am still quite positive that I gave the account to Mr. Brandeis at the office of the Old Dominion Company.

Very truly, G. M. HYAMS.

323 *G. M. Hyams' Old Dominion Account.*

1895.				1897.			
Oct. 3,	Interest in.....	2,240 sh.	$28,000 00	Dec. 13,	Transferred to L. Bros.	150 sh.	
1897.				1898.			
Dec. 10,	From A. S. Bigelow..	1,460 "		Apr. 4,	" " " "	850 "	
" 13,	" " " " ..	15 "		Nov. 4,	" " " "	2,240 "	
				Dec. 24,	" " " "	300 "	
1898.				1900.			
Apr. 4,	" " " " ..	10 "		Nov. 21,	" " " "	185 "	
	Balance		65,670 00	Dec. 31,	Credit by A. S. Bigelow		$93,670 00
		3,725	$93,670 00			3,725	$93,670 00

In addition to the above, proceeds of 3,725 shares. This merged in general joint account with Leonard Lewisohn and identity lost.

	1895 E. & M. Elec.	1896 E. & M. Elec.	1897 E. & M. Elec.	1898 E. & M. Elec.	1899 E. & M. Elec.	1900 E. & M. Elec.	1901 E. & M. Elec.	1902 E. & M. Elec.
January	9 25	9 62	11 50	10 71	14 26	15 58	16 25	11 05
February	9 25	10 39	11 67	10 99	17 02	15 78	16 38	12 17
March	9 50	10 78	11 55	11 49	16 35	16 29	16 42	11 88
April	9 50	10 73	11 23	11 75	17 13	16 76	16 43	11 61
May	10	10 90	10 78	11 55	17 20	16 34	16 41	11 85
June	10 38	11 42	10 86	11 47	16 89	15 75	16 38	12 11
July	11	11 15	10 86	11 25	17 09	15 97	16 31	11 77
August	11 75	10 73	10 91	11 63	17 42	16 35	16 25	11 40
September	12	10 41	11 05	11 90	17 34	16 44	16 25	11 48
October	11 75	10 41	10 88	12 15	16 94	16 37	16 25	11 44
November	10 75	10 98	10 63	12 51	16 49	16 40	16 22	11 28
December	10 25	11 03	10 53	12 69	15 85	16 31	13 82	11 43

[Exhibit 25, G. C. B., May 5, 1903.]

Division of Certificate 75.

See Page 301 of Testimony.

	Names.	No. shares.
	Altmiller, Charles H.	145
	Anthony, D. M.	200
	Abbe, Edward P.	200
	Beal, Joseph S.	200
	Babeley, William A. L.	20
	" "	100
	" "	10
	" "	50
	Bolles, Richard F.	260
	Belches, J. W. & Co.	500
	Bond, Chas. P.	20
	Barron, Clarence W.	10
	Bissell, G. H.	100
325	Bradley, Peter B.	100
	Bartholomew, Samuel B.	100
	In red ink. Issued to Thos. Nelson, Treas., with others	350
	Chrimes, W. A. S.	140
	Cole, Charles H., Jr.	140
	Clark, Ward & Co.	1,250
	Coe, H. T.	80
	Davenport, C. L.	120
	Dodd, Edwin N.	50
	Eldredge, A.	100
	In red ink. Issued to Thos. Nelson, Treas. (See Bartholomew.)	
	Fitzgerald, Wm. F.	100
	Gray, Dewey & Co.	400
	Godell, Rufus R.	300
	Grout, W. W.	1,000
	Goodell, H. S.	50
	In Red Ink. Issued to Thomas Nelson, Treas. (See Bartholomew.)	
	Greenleaf, E. D.	200
	Head, Charles	100
	Head, Charles & Co.	100
	" "	100
	" "	100
	" "	100
	" "	100
	" "	50
	" "	50
	" "	50
	" "	50
	" "	50
	" "	50

	Hopkins, Timothy E.	175
	Howe, John G.	300
	Hayden, Stone & Co.	1,300
	Lundberg, Gustaf.	100
	Mosman, W. B.	100
326	Mead, F. S. & Co.	400
	Manning, Mrs. Abby H.	500
	Mackenzie, Charles J.	400
	Newhall, Horatio.	50
	Ormond, James F.	50
	Pierce, John H.	200
	Putnam, G. A. & Co.	400
	Price & Co.	400
	Prendergast, James M.	200
	Pierce, O. N.	100
	In red ink. Issued to Thos. Nelson, Treas. (See Bartholomew.)	
	Newhall, George E.	100
	Remick, Frank W.	200
	Reed, William H.	200
	Ray, Joseph G.	700
	Richards, J. J.	250
	Smith, Albert W.	500
	Sach, A. Albert	200
	Swift, E. C.	1,000
	Sears, George O.	200
	Sturgis, J. B.	1,000
	Snow, Homer V.	500
	Stackpole, Henry	300
	Smith, F. & G. S.	100
	Tower, William A.	300
	Thayer, Eugene V. R.	500
	Towle, B. N.	60
	Towle, Amos	40
	Woodhull, Maxwell	600
	Williams, Jeremiah	400
	Webster, Frank G.	300
	Woods, Henry	600
	Wainwright, H. G. & Co.	100
	Wood, Henry	100
	Wetherbee, J. Otis	100
327	Whitney, George	50
	Winsor, W. P.	50
	Attached to trans-fer ±15.	
		20,000

pencil.

OLD DOMINION C. M. & S. CO.,
W. H. SHEPARD, *Atty.*

[Exhibit 26, G. C. B., May 5, 1903.]

Division of Certificate 81.

(See Page 302.)

Names.	Shares.
Altmiller, Charles H.	40
Anthony, D. M.	400
Alline, John W.	40
Anthony, Harold H.	200
Anthony, Miss Annie R.	100
Bazeley, W. A. L.	40
Ball, Geo. H.	1,600
Bolles, Richard F.	480
Belches & Co., J. W.	800
Burnett, Harry	800
Billings, Robt. C.	800
Barron, —. ?	
Brown, S. N.	800
Bigelow, A. S.	1,000
Batt, Chas. R.	200
Beal, Thos. P.	200
Chrimes, W. A. S.	40
Cole, Jr., Chas. H.	120
Coe, Henry T.	640
Cole, Chas. H.	400
Coram, Jas. A.	1,520
Crosby, Stephen M.	1,600
328 Demmon, Daniel L.	800
Ely & Co.	400
Field, Robert M.	200
Fenno, Isaac	400
Goodenough, H. B.	160
Head, Chas.	800
Head & Co., Chas.	280
Hopkins, Timothy E.	650
Hayden, Stone & Co.	800
Hodge, Chas. J.	800
Hollingsworth, Zach. T.	400
Harding, Albert E.	80
Hollis, N. E.	160
" Geo. W.	160
Janes, Mrs. Mary L.	500
Kendall, Jos. S.	600
Leland, Towland & Co.	520
Lyman, Geo. H.	200
Lewisohn, Leonard	36,190
Mead, F. S. & Co.	800
Manning, Mrs. Abby H.	400

	Messervy, Benj. F.	200
	Meredith, J. Morris	2,000
	Maltman, A. S.	800
	Manning, Francis H.	800
	Moses, Henry C.	240
	Metcalf, Stephen O.	400
	Moseley, Chas. O.	800
	Mawhinney, H. H.	160
	O'Connor, John	160
	Pierce, Jno. H.	800
	Preston, Geo. M.	400
	Prince, Gordon	400
	Perkins, Thos. H.	80
	Reed, Wm. H.	400
	Ray, Jas. G.	400
329	Richardson, W. S., for Jas. S. Cunston	800
	Rust, Nancy E.	80
	Sanborn, Geo. E.	100
	Swift, E. C.	800
	Stevens, Horace H.	400
	" Moses T.	800
	" Samuel S.	200
	Smith, Albert O.	400
	Somers, Frank D.	400
	Spaulding, Samuel S.	240
	Towle, Jno. F.	200
	Woodhull, Maxwell	1,200
	Williams, Jeremiah	400
	Woods, Henry	800
	Williams, Harold	400
	Wheeler, Leonard	240
	Whitney, Henry M.	4,000
	P. K. Dumaresque	20,000

I hereby certify that the foregoing is a true copy of the original deposition of Godfrey M. Hyams taken before me in the case of Old Dominion Copper Mining & Smelting Company v. Frederick Lewisohn et al., pending in the Circuit Court of the United States for the Southern District of New York, and of the exhibits annexed thereto.

[SEAL.] HOWLAND TWOMBLY,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF MESSRS. BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET, BOSTON, *June* 15, 1904.

Deposition of Joseph A. Coram.

JOSEPH A. CORAM, Esq., being first duly sworn by Howland Twombly, Esq., notary public, in answer to interrogatories propounded by Louis D. Brandeis, Esq., counsel for plaintiff, deposes and says:

330 Q. 1. Will you state your full name, age, residence, and occupation?

A. Joseph A. Coram; fifty-two; Lowell, Mass.; mine owner.—I am connected with mines.

Q. 2. You are personally interested in a number of mines at the present time?

A. Yes, sir.

Q. 3. Will you state what mines and where?

A. I am connected with the Bingham Consolidated, the Bingham Copper & Gold Mining Company, the Montana Coal & Coke Company, and some others.

Q. 4. You are president of the Bingham Copper & Gold Mining Company?

A. Yes.

Q. 5. How long have you been connected with the copper-mining business, approximately?

A. Fifteen years or more.

Q. 6. Were you at any time associated with A. S. Bigelow in connection with copper mining and enterprises of a like nature?

A. You mean, associated——

Mr. BRANDEIS: In the same office.

A. Yes.

Q. 7. Were you, during any period, associated in connection in the same offices with him?

A. Yes, I made his offices my headquarters.

Q. 8. During what years?

A. Well, I do not remember exactly, but I should say from 1888 or 1889 to 1897; I do not remember exactly, but it was several years.

Q. 9. During that time were you connected with him in connection with the Old Dominion Syndicate and the Old Dominion Copper Mining & Smelting Company?

A. Merely as a stockholder.

Q. 10. What was your first connection with the Old Dominion Syndicate, so called?

A. Well, as I remember that, the first connection I had was that I subscribed for $100,000.

(By Mr. HEMENWAY:)

Q. Was that subscription in writing?

A. I am not sure, but I think it was.

Mr. HEMENWAY: Then the defendants object to the witness stating the contents, and require that the writing be produced.

Q. 11. Will you state the circumstances as nearly as you recall them—how you first became connected with this syndicate?

[The defendants object to the statement of the circumstances, on the ground that such circumstances are immaterial, provided that what was done finally resulted in a written agreement of any kind; so that it is immaterial, incompetent, and irrelevant.]

331 A. Well, I do not know that I quite understand what you mean by my "first connection with the syndicate."

Q. 12. You stated that you took a $100,000 interest in it: where were you when you took that interest?

A. I was at Mr. Bigelow's office.

Q. 13. And to whom did you indicate your purpose to take that $100,000 interest?

[Counsel for defendants objects to the question, that it does not apepar that he indicated to anybody and as assuming a fact that is not proved; and also because, if the witness is to be examined with reference to a subscription in writing, the writing should be produced; and therefore the question is irrelevant, incompetent, and immaterial.]

A. I was solicited or invited by Mr. Bigelow to be one of a few to subscribe to the raising of $300,000, or of $300,000 and some odd, towards the purchase of an interest from some estate called, I think, the Simpson estate.

[Counsel for defendants objects to this form of answer, that if it refers to a conversation between Mr. Bigelow and himself he should give that conversation as it took place, as far as he can remember it.]

Q. 14. If you can recall any of the circumstances of that conversation any further than you already have, you may do so.

A. Mr. Bigelow told me that he and Mr. Lewisohn had acquired an option, or a certain interest, from the Simpson estate in a certain mine called the Old Dominion, and wanted me to subscribe to the raising of $100,000, which I did.

Q. 15. Are you able to fix approximately when that was?

A. No; but I think it was in 1895.

Q. 16. I hand you herewith a paper marked "Exhibit 3, March 24, 1903," and dated May 21, 1895, which is an exhibit introduced in connection with the testimony of A. S. Bigelow in this suit, and ask you whether the signature of "J. A. Coram, $9000" is in your handwriting?

A. Yes.

Q. 17. Is there anything else in that paper which is in your handwriting?

A. "A. S. Maltman, by J. A. Coram," is in my handwriting.

Q. 18. $10,000?

A. Yes.

Q. 19. Are the words "twenty-first" and "May" in your handwriting?

A. Yes, I should say they were.

332 Q. 20. What, if anything, did you have to do with the procuring of the other signatures on that paper?

[Counsel for the defendants objects to the interrogatory on the ground that it is immaterial, irrelevant, and incompetent.]

A. I believe that this is my subscription for the $100,000 which I agreed to raise, and the names hereto annexed, all with the exception of that of H. H. Stevens, were obtained by me.

Q. 21. Are you able to state when, with reference to what date, you obtained those subscriptions

A. I could not state that from my memory.

Q. 22. Whether it was done on May 21, or before or after that date, as nearly as you can recall.

A. No, I could not remember.

Q. 23. Can you state whether or not the conversation with Mr. Bigelow in regard to your making a $100,000 subscription to the Old Dominion Syndicate or purchase was had before or after you commenced to get the signatures on this paper?

A. Before.

Q. 24. Do you recall whether or not, before you commenced getting the signatures on the paper which is shown you, you had made any money contribution towards the purchase, or any payment on account of the purchase, of that interest in the Old Dominion?

[Counsel for defendants objects to the question as leading, and also because it is incompetent, irrelevant, and immaterial.]

A. I could not remember that. All I remember in that connection is that I did contribute some money towards some expenses, but whether it was before I obtained the subscriptions, or whether it was before the money was paid in or not, I do not know.

Q. 25. I hand you now a paper marked "Exhibit No. 20, May 5, 1903," which was introduced in evidence as an exhibit in connection with the deposition of A. S. Bigelow in this cause, dated May 22, 1895, and ask you whether the name "J. A. Coram," signed to that paper, is in your handwriting?

A. I should say it was.

Q. 26. And the figures, "$100,000," against it?

A. Yes, sir.

Q. 27. Are you able to recall whether or not that paper was, in fact, signed before or after the paper dated May 21, 1895?

A. I could not say.

Q. 28. Are you able to state whether, at the time that you had the conversation with Mr. Bigelow already testified to by you

333 in which you say that you agree to take a $100,000 subscription, you signed any paper, or whether this paper was signed some time after that conversation?

A. As I said before, I do not remember whether I signed the paper at that time or not, or whether it was by verbal conversation

I remember, distinctly, that I agreed to get a subscription to the amount of $100,000.

Q. 29. State whether or not, at the time you subscribed, or at the time that you obtained this subscription, there was any agreement, any understanding, with Mr. Bigelow, as to forming at any time a corporation to take over the interest which was being purchased.

[Counsel for defendants objects to the question as leading, and also as immaterial, irrelevant, and incompetent, and that asking for an understanding is too indefinite, the witness being competent to only testify as to what was said or written by Mr. Bigelow to himself in reference to the subject inquired of.]

A. I could not say there was any definite understanding, any definite plans.

Q. 30. What do you mean by saying there were no "definite plans"?

A. Well, just as these papers would show; they do not show any definite purpose except for the temporary raising of this money.

Q. 31. When you say there were no definite plans, do you mean to be understood as saying that there was no plan or any understanding, any reference to the formation of any corporation at any time for the purpose of taking them over?

[Counsel for defendants objects to the interrogatory, for the reason stated in the objection to the last interrogatory.]

A. No, I do not mean that.

Q. 32. Will you state exactly what you do mean?

A. Well, it was understood that sooner or later we would form a corporation, or a corporation would be formed.

[Counsel for defendants objects to the question for the reasons stated in reference to the last inquiries.]

Q. 33. To take over the properties?

[Counsel for defendants objects to the question as leading.]

A. To take over these properties and to get stock for our subscription.

[Counsel for defendants objects also to the answer as being
334 a conclusion rather than a statement of what actually took place between the witness and Mr. Bigelow.]

Q. 34. When you say that it was understood, do you refer to any words spoken or acts in that connection? If so, state what, as nearly as you can remember, *what* was said or done in reference to that matter?

A. The time being so long, it is very difficult to remember accurately as to the statement. The impression in my mind is——

[Counsel for defendants objects to a mere impression.]

The WITNESS: Well, my recollection is that there was to be a corporation formed.

Q. 35. Was that a subject which was talked over between you and

Mr. Bigelow, or referred to in your conversations with him on this subject at that time?

[Counsel for defendants objects to the question as leading, and as incompetent, irrelevant, and immaterial.]

Mr. HEMENWAY: When do you mean by "at that time"?
Mr. BRANDEIS: That is, at the time of your subscribing to $100,000 of stock.
The WITNESS: That is, on May 22?
Mr. BRANDEIS: Well, in May. I do not refer to any particular date, but at the time that your subscription was made.
Mr. HEMENWAY: Whenever this subscription was made.
Mr. BRANDEIS: Or when you were obtaining these subscriptions from these persons that appear on the paper dated May 21, 1895.

[Counsel for defendants objects to the question as leading, immaterial, and incompetent, for the reason that conversations leading up to written subscriptions are of no consequence.]

A. It is impossible for me to remember the dates.
Q. 36. Please bear in mind that I am not asking specifically as to any day or dates; but I am asking whether the conversation to which you refer took place at a certain period, which is the period of the taking of these subscriptions?

Mr. HEMENWAY: That seems to be a date.
Mr. BRANDEIS: No, it is a period; it is not one date.
Mr. HEMENWAY: It refers to an act.

335 A. The conversation concerning the whole matter was between Mr. Bigelow and I, and I cannot fix the date; but my recollection is it was prior to the date of either one of these subscriptions.
Q. 37. According to your recollection, it was prior to the date of either one of these subscriptions that you talked with him of ultimately forming some corporation to take over the interest which was to be purchased?

[Counsel for defendants objects to the question as leading, not stating anything that has already been testified to by the witness, the witness having stated that he has no recollection when the alleged conversation inquired about did take place.]

A. Yes, in my judgment; my recollection is it was prior to those dates.
Q. 38. What, if anything, did you have to do with the formation of the Old Dominion Copper Mining & Smelting Company?

[Counsel for the defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I have no recollection of having had anything to do with it.
Q. 39. What, if anything, did you have to do with the transfer to the Old Dominion Copper Mining & Smelting Company of the Old Dominion properties?

[Counsel for defendants objects to the question as immaterial, incompetent, and irrelevant.]

A. I do not remember that I had anything to do with it.

Q. 40. Do you recall whether or not you were consulted by Mr. Bigelow or by Mr. Lewisohn in regard to the formation of the company?

[Counsel for defendants objects to the question as leading, and also as involving a conclusion from acts or words or writings, which, if material, should be put in evidence.]

A. I have no recollection at this time about it at all.

Q. 41. Or that you were consulted by either Mr. Bigelow or Mr. Lewisohn in regard to the fixing of the amount of the capital of the company?

[Counsel for defendants objects to the question for the reasons stated in his objection to the last interrogatory.]

336 A. I do not recollect that I was consulted about that at all.

Q. 42. Or that you were consulted by either Mr. Bigelow or Mr. Lewisohn in regard to the amount of stock to be issued by the Old Dominion Copper Mining & Smelting Company for the Old Dominion properties?

[Counsel for defendants objects to the question for the reasons stated in the objections to the last two interrogatories.]

A. I do not remember of being consulted by them at all.

Q. 43. Do you recall whether or not you were informed by Mr. Bigelow as to the amount of stock to be issued, or actually issued, by the Old Dominion Copper Mining & Smelting Company for the Old Dominion properties?

[Counsel for defendants objects to the question as leading, and also on the ground that it is immaterial, irrelevant, and incompetent.]

A. You mean by a question like that—a question like that in form means a positive statement?

Q. 44. Well, yes. If there was any information which was given to you, state what it was.

[Counsel for defendants requests that the witness, in answer to this interrogatory, should be confined to the words or substance of what was said to him, and specify by whom it was said.]

Mr. BRANDEIS: I would be glad to have you conform to Mr. Hemenway's request, so far as possible, Mr. Coram.

A. I positively cannot recollect any positive statement. The time is too far back. My recollection regarding such points as that is just general impressions I had on my mind,—fixed on my mind.

Q. 45. Do you mean by "impressions" your recollection?

A. Yes.

Q. 46. Will you state that recollection?

A. My recollection regarding that is that originally we thought of organizing a company——

Mr. HEMENWAY: You were asked to tell what was stated to you, not what "we thought," or anything of that kind. If you do not remember, that is the end of it. You are undertaking to give a recollection now of what was stated to you, and not any inference therefrom. Of course, if you have no recollection, that is an answer to the question.

337 Mr. BRANDEIS: The witness undertook to state "we thought." I suppose it could ordinarily be supposed to mean that they talked about such a subject.

Mr. HEMENWAY: That would hardly be my interpretation, and that illustrates why I insist upon the objection to conclusions rather than to testimony of what was said on the point by the respective parties.

Q. 47. Mr. Coram, will you please state as nearly as your recollection enables you to, the conversation? Of course, as you cannot probably remember the words, or any specific words, you must, as nearly as you can, state the substance of any conversation as to which you are testifying.

A. [Previous answer read] —with a capitalization of not less than 100,000 shares.

[Counsel for defendants objects to the answer as being irresponsive.]

Q. 48. Do you recall anything further in regard to the capitalization,—the fixing of the capitalization of the company that was to be formed or actually was formed?

[Counsel for defendants objects to the question on the ground that the witness has already given his whole recollection upon the point, and that it is incompetent, irrelevant, and immaterial.]

A. Of course I recollect that a corporation was formed for 150,000 shares.

Q. 49. Now do you remember when you first learned of that fact?

[Counsel for defendants objects to the question as immaterial, incompetent, and irrelevant.]

A. My recollection is that I was away West during the time.

Q. 50. During what time

A. During the time of the organization of the Old Dominion.

Q. 51. For how long a time, approximately?

A. My stays used to be from three weeks to six or seven weeks.

Q. 52. Was any stock in the Old Dominion Copper Mining & Smelting Company ever issued to you?

A. Yes, sir.

Q. 53. Are you able to state approximately, or actually, the amount of stock that was actually issued to you?

[Counsel for defendants objects to the question on the ground

that it is irrelevant, incompetent, and immaterial; also that,
338 as to the issue of any stock to the witness, that would be a matter of record that should be produced before the witness is examined with reference to it.]

A. I could not remember that; I should have to see the figures.

Q. 54. I call your attention to Exhibit 11, annexed to the deposition of A. S. Bigelow, in which it appears—particularly to the item under date of October 17, 1895—that there was transferred to you from Mr. Bigelow, 5240 shares of stock in the Old Dominion Copper Mining & Smelting Company, and ask you whether it is a fact that such stock was transferred to you by Mr. Bigelow?

[Counsel for defendants objects to the question on the ground that the exhibit shown to the witness is a mere typewritten copy, and that the only way of showing the transfer of any stock to Mr. Coram would be by the books of the corporation, which are in the possession of the plaintiff.]

[The certificates of stock were sent for, and in the mean time certain other interrogatories were put to the deponent as follows:]

Q. 55. Whether or not you ever received any stock in this company as a subscriber to the syndicate?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. As a subscriber? Yes, sir.

Q. 56. Are you able to recall how many shares of stock you received as such subscriber?

A. No.

Q. 57. Whether or not you ever received any stock from Mr. Bigelow in addition to that which you received as a subscriber?

[Counsel for defendants objects to the question as immaterial, incompetent, and irrelevant.]

A. Are you dividing any subscriptions?

Q. 58. My first question asked you whether you had received any stock as a subscriber to the syndicate?

A. And my answer is that I did.

Q. 59. And I refer to the subscription on the paper shown you, dated May 21, 1895, on which you appear as subscriber in your own name for $9000, and Mr. Maltman, by you as attorney, for $40,000. Now did you receive any stock for that subscription?

339 [Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial, and also as leading.]

A. That paper referred to as of date May 21 has my subscription completing my obligation to raise $100,000, and whatever stock distribution came to my subscription on that paper would be as a subscriber to $9000.

Q. 60. Now do you recall how much stock you received for that subscription of $9000?

A. No, I do not.

Q. 61. Or on what basis that stock was issued?

A. No, I do not.

Q. 62. Was there any other stock which you received besides that which you say you received on account of your subscription on that paper of May 21?

[Counsel for defendants objects to the question as immaterial, irrelevant, and incompetent.]

A. Yes, I remember of receiving a bonus in stock.

[Counsel for defendants objects to the answer as immaterial.]

Q. 63. Now state fully what you remember with reference to that subject.

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial, and as being also apparently matters between the witness and others than parties defendant.]

A. It is a broad question, and I cannot answer it.

Q. 64. From whom did you receive that bonus?

A. It was handed to me by Mr. A. S. Bigelow.

Q. 65. Was it handed to you at the same time, or at a different time from the time when you received the stock which you say was under the subscription paper of May 21, 1895?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I could not remember.

Q. 66. Are you able to recall the amount of this bonus that you received?

A. From memory?

Q. 67. Yes.

A. No, sir.

Q. 68. Do you recall where this bonus stock was delivered to you?

340 [Counsel for defendants objects to the question as immaterial, incompetent, and irrelevant.]

A. In Mr. Bigelow's office.

Q. 69. Are you able to recall approximately when it was?

A. No, sir.

Q. 70. Was anything said by Mr. Bigelow to you at the time of delivering to you that bonus stock?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. Yes. He said I would not need to distribute that among the rest of my subscribers.

Q. 71. Is the answer which you have given to the last question all that you remember of the conversation between you and Mr. Bigelow at that time?

[Counsel for defendants says the conversation is still objected to

as immaterial, incompetent, and irrelevant, as is also the answer of the witness to the last interrogatory.]

A. No, it is not.

Q. 72. State as nearly as you can recollect the whole of that conversation.

A. Well, I told Mr. Bigelow I would have to distribute it to my subscribers, because I had promised them that they would get their shares at the same price as I got mine, and inasmuch as I had put Mr. Maltman down without even consulting him, I would have to distribute, in equal proportions, those shares.

[Counsel for defendants objects to the answer as being irresponsive.]

Q. 73. Was anything else said at that conversation by Mr. Bigelow or by you?

[Counsel for defendants objects to the question for the reasons already stated as to this conversation.]

A. I do not remember.

Q. 74. Do you remember whether or not he stated to you at that time the amount of bonus stock which was distributed?

[Counsel for defendants objects to the question as incompetent, immaterial, and irrelevant.]

341 A. I do not.

Q. 75. Do you remember whether or not he stated at that time anything about the amount of stock which had been taken by him and his associates as a bonus?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. No, sir, I do not. That is all of that conversation that I remember.

Q. 76. Do you remember whether at any time Mr. Bigelow informed you what the amount of stock was that was taken as a bonus?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. No.

Q. 77. Did you learn at any time what amount of stock was taken by Mr. Bigelow and Mr. Lewisohn as a bonus?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I have no recollection that I ever did.

Q. 78. I hand you herewith a certificate of stock of the Old Dominion Copper Mining & Smelting Company, No. 128, for 5240 shares, dated October 17, 1895, standing in the name of A. S. Bigelow, and endorsed by A. S. Bigelow, "Assigned and transferred to J. A. Coram," "All" shares represented by that certificate, and ask

you whether or not after examining that certificate you are able to say whether certificate was delivered to you by Mr. Bigelow.

[Counsel for defendants objects to the question as incompetent, immaterial, and irrelevant.]

A. I could not say.

Q. 79. Is the handwriting on the back of that certificate, "J. A. Coram," in your handwriting?

A. It is not.

[Counsel for defendants objects to the last interrogatory as incompetent, immaterial, and irrelevant.]

Q. 80. Are you able to say in whose handwriting that is?

342 [Counsel for defendants objects to the question as incompetent, immaterial, and irrelevant.]

A. No. It is not mine.

Q. 81. Or in whose handwriting the word "All" is on the back of that certificate?

[Counsel for defendants objects to the question as incompetent, immaterial, and irrelevant.]

A. No.

Q. 82. What disposition did you make of the bonus stock which you say you received from Mr. Bigelow?

[Counsel for defendants objects to the question as to its incompetency, irrelevancy, and immateriality to the issue between these parties.]

A. I distributed it among the subscribers obtained by me who furnished the $100,000, with the exception of H. H. Stevens.

Q. 83. Was H. H. Stevens a subscriber through you?

[Counsel for defendants objects to the question as immaterial, incompetent, and irrelevant.]

A. He was not a subscriber through me, but he was a subscriber on my paper.

Q. 84. Did you have any conferences or discussions in connection with the organization of the Old Dominion Copper Mining & Smelting Company with any of the subscribers other than A. S. Bigelow to the agreement of May 22, 1895, which is Exhibit 20, introduced in connection with the deposition of A. S. Bigelow?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial, the witness being inquired of in relation to matters between himself and others than parties to the record.]

A. I do not remember that I did.

Q. 85. I call your attention to a paper dated July 18, 1895, which was introduced in evidence as Exhibit 10, in connection with the deposition of A. S. Bigelow in this cause, and particularly call your attention to the words "J. A. Coram, by Thomas Nelson, four thou-

sand shares (4000)," and ask you whether or not you have any recollection in regard to the signing of that paper?

343 A. No, I have no recollection, of course. My name does not appear on it except by Mr. Nelson.

Q. 86. Do you recall whether or not you authorized that signature?

[Counsel for defendants objects to the question on the ground that it is irrelevant, immaterial, and incompetent.]

A. I do not recall whether I did or not. If he obligated me, I would have stood to the obligation.

Q. 87. Do you recall whether or not you took any stock under that subscription paper?

[Counsel for defendants objects to the question as incompetent, immaterial, and irrelevant.]

A. I do not remember; it is too long ago.

Q. 88. Mr. Thomas Nelson is dead?

A. Yes, I believe so.

Q. 89. And Mr. Matthew Luce, whose name also appears on the paper of May 22, is dead also?

A. Yes, sir.

[Stipulation: The deposition of the witness is now closed, but it is agreed that if Mr. Lauterbach, for whom Mr. Hemenway now appears, desires to examine Mr. Coram, counsel for plaintiff will recall Mr. Coram so that he may do so with the same rights as upon cross-examination.]

JOSEPH A. CORAM.

Subscribed and sworn to before me this 22d day of June, 1904.

[SEAL.] GEORGE C. BURPEE,
Notary Public.

I hereby certify that the foregoing is a true copy of the original deposition of Joseph A. Coram taken before me in the case of Old Dominion Copper Mining & Smelting Co. v. Frederick Lewisohn et al., pending in the Circuit Court of the United States for the Southern District of New York, and of the exhibits annexed thereto.

[SEAL.] HOWLAND TWOMBLY,
Notary Public.

344 *Stipulation.*

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF MESSRS. BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET,
161 DEVONSHIRE STREET,
BOSTON, *June* 15, 1904.

Deposition of Galen L. Stone.

GALEN L. STONE, Esq., being first duly sworn by Howland Twombly, Esq., notary public, in answer to interrogatories propounded by Louis D. Brandeis, Esq., counsel for plaintiff, deposes and says,—

Q. 1. State your full name, age, residence, and occupation.

A. My full name is Galen L. Stone; I am forty-one years and seven months of age; my residence is in Brookline, county of Norfolk; my occupation is that of a stockbroker.

Q. 2. You are a member of the firm of Hayden, Stone & Company?

A. Yes.

Q. 3. And have been for how long?

A. Since February, 1892, when it was organized.

Q. 4. I hand you herewith a paper dated June 14, 1895, marked "Exhibit 5," which is an exhibit put in evidence in connection with the testimony of A. S. Bigelow in this cause, and call your attention to the words of "Hayden, Stone & Co. ten thousand dollars" affixed to that paper: will you state whether or not that is in your handwriting?

[Counsel for defendants objects to the question as being immaterial, irrelevant, and incompetent.]

A. That is in my handwriting.

Q. 5. Will you state whether or not, prior to the signing of that paper, you had any conversation with Mr. A. S. Bigelow in relation to your subscribing to the Old Dominion Syndicate?

[Counsel for defendants objects to the question on the ground of its immateriality, as relating to a conversation with a third party.]

A. I did.

345 Q. 6. Where was that conversation held?

[Counsel for defendants makes the same objection to this question as to the prior interrogatory.]

A. The first conversation with relation to a subscription to the stock of the Old Dominion Company which I recall was held in the alleyway between Washington street and Young's Hotel, right by Thompson's Spa. I have a very vivid recollection of meeting Mr. Bigelow there, and his speaking to me and telling me that they had this enterprise in view.

Q. 7. Will you state, as nearly as you can, what you remember?

[Counsel for defendants objects to this conversation as being irrelevant, immaterial, and incompetent.]

A. Mr. Bigelow told me that they had made a purchase of what

was known as the Old Dominion property, that they proposed to organize a syndicate to purchase it, and he offered me an opportunity, which I considered valuable, to subscribe to the shares.

Q. 8. What, if anything else, was said in that connection, if you recall?

A. That is all that I can recall as having been said distinctly at that time.

Q. 9. Did you have any other conversation with him before you signed the subscription paper?

[Counsel for defendants objects to the question as incompetent, immaterial, and irrelevant.]

A. I did, in his office in the Sears building.

Q. 10. How soon after the first conversation?

A. Well, it would be impossible for me to say, but I do not recall that there was any delay in closing the matter up after I heard of it.

Q. 11. State, as nearly as you can remember, the conversation that you had at Mr. Bigelow's office.

[Counsel for defendants objects to this interrogatory as calling for that which is immaterial, incompetent, and irrelevant, being a conversation with a third party.]

A. Mr. Bigelow explained to me briefly the purchase of the property, what they hoped to do with it, told me how it was to be capitalized, and invited me——

346 Mr. HEMENWAY: Well, if you remember, you are to give the conversation, what he said and what you said; not how it was to be capitalized, but exactly what he did say about the capitalization.

The WITNESS: Among other things, Mr. Bigelow stated to me that a syndicate had been formed to purchase the Old Dominion mine; that a corporation would be organized to own and operate this property; that the syndicate would raise $1,000,000; that he offered me an opportunity to subscribe for $10,000 in the syndicate, and told me for that I was to receive 400 shares of stock of the Old Dominion Company to be organized, and 400 shares were to go as a bonus; and further stated distinctly at that time that a company would be organized with a capital of $2,500,000, that is, 100,000 shares of a par value of $25 each, and 80,000 shares would be used in raising $1,000,000, exactly on the terms I have stated in my own case; and that there would be 20,000 shares left in the treasury, which would later be sold to provide a working capital; and at that time he also told me that the price at which the 20,000 shares would be sold would be considerably greater than the price at which I made the first subscription.

Q. 12. Was there anything else which he said on that occasion which you can remember?

A. I do not remember anything else.

Q. 13. Do you remember whether anything was said on that occasion to the effect that Mr. Bigelow and Mr. Lewisohn were going to

take a large block of this stock for themselves as a bonus to themselves?

[Counsel for defendants objects to the question as immaterial, irrelevant, and incompetent.]

A. Certainly nothing of that sort was said.

Q. 14. Was there anything said by Mr. Bigelow as to his and Mr. Lewisohn's having terms more favorable than those which were offered to you?

[Counsel for defendants objects to the question because it is immaterial, irrelevant, and incompetent, as well as leading.]

A. No, sir.

Q. 15. Did you have any conversation with Mr. Bigelow in reference to the Old Dominion matter other than those two that you have testified to before you signed the paper Exhibit 5?

[Counsel for defendants objects to the interrogatory because it is immaterial, irrelevant, and incompetent.]

347 A. I cannot swear that I did or that I did not; it is quite probable that I did, as I thought a great deal of Mr. Bigelow and of his judgment, and naturally would have wished to inquire about the opportunity a great deal, but I cannot recall distinctly.

Q. 16. Do you recall where it was that you put your name on that paper?

A. I do not.

Q. 17. Did you have any conversation with Mr. Bigelow at any time before you heard that the Old Dominion Copper Mining & Smelting Company had actually been organized, relating to the organization of the company, or its capitalization, other than that you have testified to?

[Counsel for defendants objects to this interrogatory because it is immaterial, irrelevant, and incompetent.]

A. I do not recall of any conversation on that subject.

Q. 18. I hand you, herewith, a paper marked "Exhibit 10," dated Boston, July 18, 1895, which is an exhibit introduced in connection with the testimony of A. S. Bigelow in this case, and call your attention specifically to the signature of "Hayden, Stone & Co., two thousand shares," and ask you whether or not that is your signature?

A. That is not.

Q. 19. Whose signature is that?

A. That is the signature of Mr. Charles Hayden.

Q. 20. Were you aware of that subscription being made to stock in the name of Hayden, Stone & Company at that time?

[Counsel for defendants objects to the question because it is incompetent, immaterial, and irrelevant.]

A. I was.

Q. 21. Whether or not that subscription was made by, or the sig-

nature to the paper signed by, Mr. Hayden in or after consultation with you?

[Counsel for defendants objects to the question as immaterial, irrelevant, and incompetent, calling for conversations between third parties.]

A. It was.

Q. 22. State whether or not, at the time of the making of that subscription on that paper, you knew, or to your knowledge Hayden, Stone & Company knew, that Bigelow and Lewisohn had caused to be conveyed to the Old Dominion Copper Mining & Smelting
348 Company the Old Dominion properties, not for 80,000 shares of the stock, but for 130,000 shares of the stock.

[Counsel for defendants objects to this interrogatory as being an inquiry about matters that are immaterial, and that the evidence is irrelevant and incompetent.]

A. I did not know that.

Q. 23. Did you, at the time of making that subscription, know that Bigelow and Lewisohn had caused to be issued to them for themselves any stock in connection with the transfer of the Old Dominion properties to that company other than the 80,000 shares of stock about which Mr. Bigelow had told you before making your subscription of June 14?

[Counsel for defendants objects to the interrogatory as immaterial, irrelevant, and incompetent.]

A. I did not.

Q. 24. Had Mr. Bigelow, up to the time of subscribing by your firm on July 18, 1895, said anything to you to the effect that he and Lewisohn, or either of them, were taking for themselves as a bonus or as compensation any stock other than what would form a part of the 80,000 shares which were to be issued by the syndicate?

[Counsel for defendants objects to the question as leading, incompetent, irrelevant, and immaterial.]

A. He had not.

Q. 25. State whether or not Hayden, Stone & Company paid the amount of $10,000 which they subscribed to the Old Dominion Syndicate, as appears by the paper of July 14, 1895, which you have examined.

[Counsel for defendants objects to this interrogatory as being immaterial, incompetent, and irrelevant.]

A. I cannot state as a fact, of course, that I remember the payment.

Q. 26. Beg pardon?

A. I should answer yes. You can look at my books, of course.

Mr. HEMENWAY: You simply say you cannot, and you immediately say you can, it appears, that is all.

349 The WITNESS: Well, I think I might ask Mr. Brandeis to be instructed about a thing like that, in answering such a question as that. That, of course, will show through a check in my office. I may have signed that check, or my partner may have signed it. I cannot testify to the actual physical act of making that payment, but my recollection is that we did make that payment.

Q. 27. And have you any recollection as to whether or not you took and paid for any stock in pursuance of the subscription, or of any part of the subscription, appearing on the paper of July 18?

[Counsel for defendants objects to the interrogatory as being immaterial, irrelevant, and incompetent.]

A. My recollection is that we paid for that stock and received it.

Q. 28. Will you state whether or not, at any time subsequent to the signing of that paper by Hayden, Stone & Company, dated July 18, 1895, you ascertained that Bigelow and Lewisohn had taken to themselves as a bonus or compensation a large amount of the stock of the Old Dominion Copper Mining & Smelting Company?

[Counsel for defendants objects to this interrogatory as being immaterial, incompetent, and irrelevant, and also leading.]

A. My recollection is that some months after——

Mr. HEMENWAY: When you testify "my recollection is," you recall a fact and swear to the fact, of course; not that you think it is so.

The WITNESS: Well, you know what "recollection" means.

Mr. HEMENWAY: You are swearing to a fact, not to the recollection of a fact. If you cannot recollect the thing, it did not take place, of course.

Mr. BRANDEIS: It is perfectly proper, of course.

Mr. HEMENWAY: Yes, if he means that.

The WITNESS: I do not know. I want to tell the truth as far as I know. Some months after the second subscription was made I became aware that the Old Dominion had capital issued amounting to 150,000 shares.

[Counsel for defendants objects to the answer as not being responsive.]

Q. 29. Had you, before that time, learned that Bigelow and Lewisohn had taken any of the Old Dominion stock as a bonus to themselves or their associates?

[Counsel for defendants objects to the interrogatory as being leading, and as inquiring for information that is immaterial and incompetent.]

350 A. May I ask you to instruct me? Do you mean before I found out there were 150,000 shares?

Q. 30. Yes.

A. No. After I found out there were 150,000 shares, that was the first I knew of it; I had not heard anything previous to that.

Q. 31. After you found out there were 150,000 shares in the Old Dominion Copper Mining & Smelting Company, what, if anything, did you do with reference to Mr. Bigelow?

[Counsel for defendants objects to this interrogatory, it being incompetent, irrelevant, and immaterial what his action was with reference to Mr. Bigelow.]

A. As soon as I learned that the company had issued a capital of 150,000 shares I went to Mr. Bigelow and stated to him that my understanding clearly was that there was to be a capital of 100,000 shares, and I asked him to explain the increase in capital.

Q. 32. What, if anything, did Mr. Bigelow say to you on that occasion?

[Counsel for defendants objects to any testimony with reference to what Mr. Bigelow said to this witness as being incompetent, immaterial, and irrelevant in this suit.]

A. I will not attempt to repeat Mr. Bigelow's words, but I came away with an——

Mr. HEMENWAY: One moment. It is the words you are asked for and not what you went away with.

The WITNESS: Shall I answer just the way I was going to and let you see how much is to go into the record?

Mr. HEMENWAY: No.

Q. 33. State, as nearly as you can, the substance of what Mr. Bigelow said to you, if you cannot state the words.

A. The substance of his statement to me was that the 50,000 shares extra had been taken as a profit by himself and associates.

Q. 34. Is that all of the conversation that you remember?

A. Well, that is the substance of it, as I say.

Q. 35. Were Hayden, Stone & Company, at that time, at the time of that conversation, stockholders in the Old Dominion Copper Mining & Smelting Company?

[Counsel for defendants objects to the interrogatory as incompetent, immaterial, and irrelevant to the issues in this suit.]

A. I cannot answer that.

351 Q. 36. That is, you do not recall whether or not——

A. —whether we had sold our stock or not. I do not know.

Q. 37. Did Hayden, Stone & Company sell their stock which they subscribed for?

[Counsel for defendants objects to the interrogatory as being immaterial, irrelevant, and incompetent.]

A. They did.

Q. 38. Have you any recollection as to when they sold their stock?

A. Only that it was within a comparatively short time.

Q. 39. What, if anything, did you say to Mr. Bigelow after he told you that he and Lewisohn had taken 50,000 shares to themselves?

[Counsel for defendants objects to the interrogatory as calling for a conversation or statements which are immaterial, incompetent, and irrelevant.]

A. I cannot recall, Mr. Brandeis.

Q. 40. Whether or not anything was said expressing satisfaction or assent or dissatisfaction with the statement that was made?

[Counsel for defendants objects to the answer to the last interrogatory.]

A. I was very much dissatisfied.

Mr. HEMENWAY: That you were not asked. That I object to.

Q. 41. [Int. 40 is repeated.]
A. I cannot remember.

[STIPULATION.—The deposition of the witness is now closed, but it is agreed that if Mr. Lauterbach, for whom Mr. Hemenway now appears, desires to examine Mr. Stone, counsel for plaintiff will recall Mr. Stone so that he may do so with the same rights as upon cross-examination.]

GALEN L. STONE.

Subscribed and sworn to before me this 23d day of June, 1904.
[SEAL.] GEORGE C. BURPEE,
Notary Public.

I hereby certify that the foregoing is a true copy of the original deposition of Galen L. Stone, taken before me in the case of
352 Old Dominion Copper Mining & Smelting Co. v. Frederick Lewisohn et al., pending in the Circuit Court of the United States for the Southern District of New York, and of the exhibits annexed thereto.
[SEAL.] HOWLAND TWOMBLY,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *October* 11, 1904.

Deposition of Charles H. Altmiller.

CHARLES H. ALTMILLER, Esq., being first duly sworn by Howland Twombly, Esq., notary public, in answer to interrogatories propounded by Louis D. Brandeis, Esq., counsel for plaintiff, deposes and says:

Q. 1. Please state your full name, age, residence, and occupation.
A. Charles H. Altmiller; thirty-eight years; 86 Highland street, Roxbury; secretary and treasurer of the Old Dominion Copper Mining & Smelting Company.
Q. 2. How long have you been secretary and treasurer of that company?
A. Since about April, 1902, I believe.

Q. 3. Were you connected with the Old Dominion Copper Mining & Smelting Company prior to April, 1902?

A. Yes, I have been connected with it since the start.

Q. 4. Since the organization of the company in July, 1895?

A. Since the organization of the company.

Q. 5. In what capacity?

A. Well, clerk or bookkeeper, whatever you have a mind to call it.

Q. 6. Were you connected with Mr. A. S. Bigelow, or with his companies prior to the organization of the Old Dominion Copper Mining & Smelting Company?

A. Yes.

Q. 7. For how long a time?

A. About fifteen years.

Q. 8. For how long a time had you been head bookkeeper of those companies?

353 A. Well, I had been clerk and bookkeeper ever since I had been in there; I don't know how much head bookkeeper there was about it. I suppose the treasurer was the head bookkeeper.

Q. 9. Who were the bookkeepers under you in 1895?

A. Well, there was one that used to work for me—Mr. Beal.

Q. 10. Is he still living?

A. He is still living.

Q. 11. And in the employ of Mr. Bigelow?

A. Still.

Q. 12. Any other?

A. No, that is all that I remember.

Q. 13. In what business were you bookkeeper for Mr. Bigelow prior to the organization of the Old Dominion Copper Mining & Smelting Company?

A. I do not know that I understand what you mean.

Q. 14. Well, for him personally, or for the companies in which he was interested, or which he managed?

A. Companies in which he was interested and managed, I suppose.

Q. 15. Was there one, or more than one?

A. There were twenty, or twenty-two, I think.

Q. 16. They had an office together?

A. All in one office.

Q. 17. In Mr. Bigelow's suite of offices in the Sears building?

A. Well, previously in the Advertiser building, afterwards in the Sears building.

Q. 18. Were those companies mining companies?

A. Mining companies, water companies, electric-light companies, and land companies.

Q. 19. Were those companies in which Mr. Leonard Lewisohn was interested, any of them?

A. I think he was interested in all of them.

Q. 20. Was there any general designation by which those companies were known?

A. I think they used to be called the Bigelow & Lewisohn Syndicate.

Q. 21. Was Mr. Leonard Lewisohn consulted about the organization of the Old Dominion Copper Mining & Smelting Company at its organization?

A. Yes.

Q. 22. At that time there was a private wire between Mr. Bigelow's office and Mr. Lewisohn's office?

A. Yes.

Q. 23. [Presenting a record book.] I will ask you now to turn to the record book of the Old Dominion Copper Mining & Smelting Company: are these the records of the meetings of the stockholders and directors of the Old Dominion Copper Mining & Smelting Company?

A. They are.

Q. 24. Will you now turn to those records and give the dates of each of the meetings of the stockholders from the date of the meeting of the incorporators for organization up to the annual meeting of April, 1902? [To counsel for defendants.] If you will per-

354 mit me, I will call attention to this.

A. Well, I don't know much about that part of it.

Q. 25. Well, the meeting of the incorporators.

A. July 8, 1895.

Mr. HEMENWAY: He kept these records?

The WITNESS: No, I did not.

Mr. BRANDEIS: He didn't keep them before he was secretary.

The WITNESS: When I was at Mr. Bigelow's office I did not keep them; previous to 1902 I did not keep them.

Q. 25*a*. The 9th day of July, 1895, is the meeting for organization?

A. Yes.

Q. 25*b*. The next meeting is the annual stockholders' meeting, held April 5, 1899?

A. Yes.

Mr. LAUTERBACH: Is there no record of any intermediate meeting?

Mr. BRANDEIS: No; as a matter of fact, there was none.

The WITNESS: The next is a special meeting of the stockholders, June 15, 1899, and the next is the annual meeting of the stockholders, April 3, 1901.

Q. 26. Will you now turn to the record book and give us a list of all the meetings of the directors?

A. The first was on July 9, 1895; then on July 11, 1895, July 24, 1895, September 18, 1895, November 24, 1897, December 16, 1897, May 10, 1899, February 13, 1900, March 2, 1901, Apirl 10, 1901, October 17, 1901, March 4, 1902, March 25, 1902.

Q. 27. I call your attention to the record of the first meeting of the incorporators on July 9, 1895, at which Jesse Lewisohn, Allen W. Evarts, Edgar Buffum, Charles W. Welch, Sidney Riddlesdorffer, William B. Rowe, and William R. Montgomery were elected as directors, and ask you who Edgar Buffum was?

A. He was a clerk in the office of Lewisohn Brothers at that time.

Q. 28. Has he remained as a clerk there since?

A. As far as I know, he is there to-day.

Q. 29. I now call your attention to the meeting of the directors on July 11, 1895, and to the fact that the following directors were elected; namely, Thomas Nelson in place of Jesse Lewisohn; H. M. Whitney in place of Charles W. Welch; Joseph G. Ray in place of Sidney Riddlesdorffer; Leonard Lewisohn in place of William B. Rowe, and A. S. Bigelow in place of William R. Montgomery, and ask you how long Thomas Nelson remained a director of the company?

A. I suppose until his death.

Q. 30. Do you recall the date of his death, approximately?

A. I think it was in 1897, the fall of 1897; I do not know exactly.

355 Mr. HEMENWAY: Of course it is understood that this witness is testifying from what he finds in the books?

Mr. BRANDEIS: Yes, he is testifying as to these dates.

Mr. HEMENWAY: As appearing upon the books, only, and not as a matter of his own personal knowledge.

The WITNESS: No; it is simply what is on the books.

(By Mr. HEMENWAY:)

Q. Will you give me the date of Nelson's death again?

A. In 1897.

Q. 31. I will next call your attention to the directors' meeting of July 24, 1895, to the election of Moses T. Stevens in place of Allen W. Evarts; and to the directors' meeting of November 24, 1897, in which it appears that E. V. R. Thayer is elected a director in place of H. M. Whitney, resigned, and W. J. Ladd in place of Thomas Nelson, deceased. As far as you can remember, were all of the other persons who had been directors, elected directors previously, still on the board at that time?

A. Yes.

Mr. HEMENWAY: It is not as far as he remembers, but as far as it appears by that book?

The WITNESS: Yes.

Mr. BRANDEIS: I suppose he has some recollection, but I mean so far as it appears.

Mr. LAUTERBACH: You are not endeavoring to get his recollection?

Mr. BRANDEIS: No, not on this point. I just want to get the dates on the record.

Q. 32. And the W. J. Ladd elected at that meeting is the director who was elected secretary and treasurer of the company, and remained such until the change of management at the April meeting in 1902, after which you became secretary and treasurer?

A. Yes, sir.

Q. 33. Now, turning to the annual meeting of April 5, 1899 at which it appears that Albert S. Bigelow, William J. Ladd, Joseph G. Ray, Joseph S. Bigelow, Leonard Lewisohn, E. V. R. Thayer, and Edgar Buffum were elected directors, I ask you who Joseph S. Bigelow is, who was then elected a director?

A. A brother of A. S. Bigelow.

Q. 34. Turning now to the meeting of the directors on March 2, 1901, at which it appears that C. H. Bissell was elected a director in place of J. G. Ray, deceased, I ask who Mr. Bissell was?

A. A clerk in the office, a clerk in the employ of the Bigelow & Lewisohn Syndicate, a clerk in the office.

356 Q. 35. And Mr. Bissell is still in the employ of Mr. Bigelow, in his office?

A. Yes.

Q. 36. Now, turning to the special meeting of the stockholders on June 15, 1899, in which it appears that F. M. Stone called the meeting to order and represented A. S. Bigelow and his proxy, I will ask you who F. M. Stone is?

A. A partner of Mr. Perkins of Perkins & Stone, lawyers, counsel for Mr. Bigelow.

Q. 37. Now, turning to the annual stockholders' meeting on April 3, 1901, at which it appears that P. K. Dumaresq was elected secretary of the meeting, and represented by proxy 85,520 shares, who was P. K. Dumaresq?

A. Transfer agent of the various companies.

Q. 38. He had been transfer agent throughout the time from the time of the organization?

A. Yes, sir, he was.

Q. 39. He was the general transfer agent?

A. Of all the companies.

Q. 40. That is, the transfer agent of all the Bigelow-Lewisohn companies of which you were clerk?

A. Yes.

Q. 41. And for a time, also, assistant secretary and treasurer of the Old Dominion Copper Mining & Smelting Company?

A. Yes, I believe that was also his title,—assistant secretary and assistant treasurer of all the companies,—transfer agent and assistant secretary.

Mr. Brandeis: Now I offer in evidence, and annex hereto, the records of all of the meetings of the stockholders and of the directors which have been referred to by the witness.

Mr. Lauterbach: I object to that, of course.

Mr. Brandeis: And, subject to that objection, I assume it is agreeable to you to have annexed to the deposition a copy of the records?

Mr. Lauterbach: Perhaps I had better state the objection. It is objected to on the ground that the witness did not personally keep the records, and has no knowledge of them except from the records themselves; and on the further ground, as Mr. Hemenway suggests, that the records are immaterial and irrelevant.

Mr. Brandeis: I will furnish a copy of the records to be annexed to the deposition as an exhibit.

[A copy of the records, as furnished by Mr. Brandeis, will be found annexed to this deposition, marked "Exhibit 1, Oct. 11, 1904, G. C. B." at Exhibits p. 412.]

357 **Q. 42. I will ask you now, Mr. Altmiller, to turn to the** entry in the journal of the Old Dominion Copper Mining & Smelting Company relating to the issue of the stock. It is the first entry in the journal, is it?

A. The first two entries.

Q. 43. Will you read those entries?

Mr. LAUTERBACH: Do you offer them now?

Mr. BRANDEIS: Yes.

Mr. LAUTERBACH: The introduction of the entries in the books is objected to on the ground that they are irrelevant and incompetent, and especially on the further ground that the witness did not keep the record.

Q. 44. Whose handwriting is that?

A. J. S. Beal's.

Q. 45. And J. S. Beal was your assistant?

Mr. HEMENWAY: He has not stated that.

Mr. BRANDEIS: He said, "assistant under me."

Mr. HEMENWAY: He said, "He was with me."

Mr. BRANDEIS: He used the expression, "assistant under me."

A. We worked together, and he took instructions from me in making the entries.

(By Mr. LAUTERBACH:)

Q. Do you recall that you gave instructions about these particular entries?

A. No, not about these particular entries, but all of these entries on the books, every entry, I guess, is in his handwriting; I would tell him in what form to make the entries and he would make them.

Q. 46. Now will you read those entries?

A. "Boston, 1895. Real and property account, Dr. to capital stock, $3,250,000."

"100,000 shares at $25 each, $2,500,000. This stock was part of the consideration given in payment for the real estate and property of this company."

"30,000 shares at $25 each, $750,000. This stock was part of the consideration given in payment for the real estate and property of this company."

Then there is a line or rule under that.

"Treasury stock Dr. to capital stock. 20,000 shares at $25, $500,000. This issue of stock authorized at the meeting of directors held Sept. 18, 1895."

Q. 47. Now will you turn in the ledger of the company to the account of treasury stock? In whose handwriting is that?

A. That is Mr. J. S. Beal's.

Q. 48. Also made under your direction?

A. Yes.

Q. 49. Will you read that entry?

Mr. LAUTERBACH: That is objected to as irrelevant, incompetent, and immaterial.

A. "Treasury stock."—of course this is ruled all off, you know,—on the debit side, "1895, To capital stock, $500,000.00

358 On the credit side: "1895, September, By cash, $485,350. "1897, September, By cash, $14,650."

Total under each, "$500,000."

Q. 50. From what book of the company are those entries posted in the ledger?

A. From the cash book.

Q. 51. Now will you turn to the corresponding entry in the cash book?

A. Page 2 of the cash book.

Q. 52. Will you read that entry?

Mr. LAUTERBACH: The same objection.

A. On the debit side of the cash book, under date of September, "To treasury stock, cash, $485,350."

Also on the same side, page 56, on the debit side, "September 21, To treasury stock, cash, $14,650."

Q. 53. In whose handwriting is that entry?

A. That is in my handwriting.

(By Mr. HEMENWAY:)

Q. What do you point out as being in your handwriting?

A. All this [referring to the page of the book.] Mr. Beal was sick at that time.

Q. 54. Now will you turn to the book of original entry which contains the items from which the item of $485,350, under date of September, 1895, is made up?

Mr. LAUTERBACH: The same objection.

A. They are entered first on the stub of the check book.

[Shown to counsel.]

Q. 55. Now will you give us the dates of payment, the parties by whom the payments were made, and the amounts of payment, the figures comprising the items from which this aggregate of $485,350 is made up?

Mr. LAUTERBACH: The same objection. You will insert that?

Mr. BRANDEIS: Yes, I will give it to the stenographer.

A. 1895.

Sept.	13,	Horatio Newhall	1,250
"	13,	T. G. Hopkins	4,375
	16,	Foote & French	2,500
	18,	H. T. Coe	7,000
		Oswald H. Causman	375
		Jas. Herrick	2,500
		Hy. F. Woods	2,500
	19,	D. W. Chever	625

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	Anthony, D. M.	5,000
	Beal, J. S.	5,000
	Bazeley, W. A. L.	4,500
	Belches & Co., J. W.	12,500
	Cole, Jr., C. H.	3,500
	Davenport, C. L.	3,000
	Dodd, G. M.	1,250
	Fitzgerald, W. F.	2,500
	Grey, Dewey & Co.	10,000
	Greenleaf, G. D.	5,000
	Howes, John C.	7,500
	Hayden, Stone & Co.	32,500
	Lundberg, Gustaf	2,500
	Mosman, W. B.	2,500
	Mead & Co., F. S.	10,000
	Manning, Mrs. A. H.	12,500
	Ormond, Jas. F.	1,250
	Putnam & Co., C. A.	10,000
	Remick, F. W.	5,000
	Reed, W. H.	5,000
	Richards, J. J.	6,250
	Smith, A. W.	12,500
	Sears, O. G.	5,000
	Snow, H. V.	12,500
	Stackpole, Henry	7,500
	Smith, F. & C. S.	2,500
	Tower, W. A.	7,500
	Thayer, E. V. R.	12,500
	Towle, B. N.	1,500
	" Amos	1,000
	Woods, Henry	15,000
	Wainwright & Co., H. C.	2,500
	Wetherbee, J. O.	2,500
	Whitney, Geo.	1,250
	Head & Co., Chas.	20,000
	" Chas.	2,500

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Sept. 20.	Bolles, R. F.	6,500
	Clark, Ward & Co.	31,250
	McKenzie, Chas. J.	10,000
	Sack, Albert A.	5,000
	Swift, E. C.	25,000
	Sturgis, J. B.	25,000
	Webster, F. G.	7,500
	Winsor, W. P.	1,250
	Prendergast, J. M.	5,000
	Bissell, C. H.	2,500
21.	Abbe, E. P.	5,000
	Wood, Henry	2,500

	23,	Goodell, R. R.	7,500
		Grant, W. W.	23,750
		Pierce, J. H.	5,000
		Williams, Jere	10,000
	25,	Newhall, G. G.	2,500
		Ray, J. G.	17,500
	26,	Bradley, P. B.	2,500
		Price & Co.	10,000
	16,	Bond, Chas. P.	500
	19,	Woodhull, Maxwell	15,000
Oct.	1,	Grant, W. W.	1,250
	4,	Altmiller, C. H.	3,625
		Chrimes, W. A. S.	3,500

Those items aggregate $503,750. Against those were credits aggregating $19,500, representing moneys to the people who did not take their stock, as follows:

1895, Sept.	28,	J. S. Kendall	$5,000
Oct.	1,	D. M. Anthony	5,000
Oct.	1,	A. D. Harding	2,000
Oct.	31,	M. Luce	7,500

And there was an additional item of $1000 for 40 shares of stock for C. W. Barron, which was received later; and $100 received for 4 shares issued to Edgar Buffum.

361 Q. 56. Will you state whether or not those amounts were paid by the respective parties to the Old Dominion Company on the dates named?

A. They were.

(By Mr. LAUTERBACH:)

Q. You mean you have no knowledge except as appears by the book? You do not remember the fact, do you?

A. No, I could not say that; I could not swear to that.

Mr. LAUTERBACH: It is objected to as incompetent, irrelevant, and immaterial.

Q. 57. You knew that fact at the time of the payments?

A. Oh, at the time of the payments, yes.

Q. 58. But you mean you have no recollection independent of the fact that they are entered in the books?

A. No.

(By Mr. HEMENWAY:)

Q. — That is all in your handwriting?

A. No, this is not; none of this.

Q. 59. Will you turn to the item of September 28, "J. S. Kendall, $5,000," and read the entry as it appears upon the stub of the check book?

(By Mr. LAUTERBACH:)

Q. The same is true as to all the entries, as to your knowledge?
A. Yes.

Mr. LAUTERBACH: I make the same objection.
The WITNESS: I suppose I knew at the time what was going on.

A. "Sept. 28, 1895, Suspense account. J. S. Kendall, $5000. He took 600 shares and $5000 for 200 shares which he did not take."
Q. 60. Now the entry of October 1.
A. "Oct. 1, 1895, Albert E. Harding, balance of $2000, money instead of shares.
"Oct. 1, H. H. Anthony"——
Q. 61. Are those lead-pencil entries?
A. They are.
Q. 62. In whose handwriting?
A. In the handwriting of W. A. S. Chrimes.
Q. 63. And the entries under Harding and Kendall are in Mr. Chrimes' handwriting?
A. All in Mr. Chrimes' handwriting.
Q. 64. Who is Mr. Chrimes?
A. He is Mr. Bigelow's private secretary.
Q. 65. And was at that time?
A. Yes.
Q. 66. And remains so?
A. Yes.
"H. H. Anthony, suspense account, $5000, money instead of shares.
"Oct. 31, 1895, check to Butte City Water Co. on account of subscription of Mr. Luce to Water Company bonds, $7500."

362 Q. 67. In regard to these several payments that you have testified to, did you know of them at the time they were made?
A. Yes, I suppose I did, but I have forgotten it to-day. I suppose I knew at the time.
Q. 68. Now coming to the entries under date of September, 1897, about which you were beginning to testify, did you know of those at the time?
A. Yes, I did, as near as I can remember now. It was stock which was in the treasury, and we wanted to close up that treasury account on the books, so I spoke to Mr. Nelson——

Mr. LAUTERBACH: Well, never mind that.

Q. 69. Well, the stock was sold?
A. The stock was sold.
Q. 70. That is, you had personal knowledge of the matter at the time?
A. Yes.
Q. 71. Now will you refer to the books and tell us just what was done?

Mr. LAUTERBACH: The same objection.

A. The stock was sold by Stackpole & Gay, and they gave a return for it; it was turned in and turned to the credit of the company.

Q. 72. Tell us just precisely what the transaction was.

A. —.

On September 21, 1897, 125 shares of treasury stock at 28⅛	3,515.63
450 shares of treasury stock at 28	12,600.00
Total	16,115.63
Commission	71.88
Balance	16,043.75

STACKPOLE & GAY.

September 23, sold through Stackpole & Gay 10 shares treasury stock at 25, less commission $1.25	273.75
October 1, '97, sold through Stackpole & Gay 1 share treasury stock at $25, less commission, 25 cts	24.75

That accounts for 586 shares. Do you want these 4 shares?

Q. 73. Yes.

A. Under date of January 16, 1896, in settlement with Lewisohn Brothers, they deducted "less amount due from Edgar Buffum for 4 shares of stock, $100."

Q. 74. Now I notice in the statement aggregating $485,350 a single sale on January 6, to C. W. Barron, 40 shares, $1000?

A. Yes.

Q. 75. And that was settled for on that date?

A. Settled for on that date, through Mr. Bigelow's account.

363 Q. 76. Now the amounts which you have read as being the proceeds of the sale, through Stackpole & Gay, of the 586 shares of stock, appear as to $14,750 which you have entered in the ledger or cash book under the treasury stock. What disposition was made of that difference?

A. The balance was placed to the credit of interest account; the difference between what we received for them and $25 per share was placed to the credit of interest account.

Q. 77. Will you turn to that item in the ledger?

A. Do you want the cash book and ledger?

Q. 78. Yes.

A. It appears in the cash book on page 56, three items:

Under date of September 21, interest account, cash	1,643.75
September 23, cash	273.75
October 1, cash	24.75

Q. 79. Where was that placed on the ledger; on what page?

A. On page 38. It includes other items, you see. [Exhibiting page 38 of the ledger.]

Q. 80. I hand you now a paper beginning, "New York, December 1, 1895. Old Dominion Syndicate, To Evarts, Choate & Beaman,

Dr. No. 52 Wall St.," being a bill for services and disbursements aggregating $7689.66, and ask whether or not that bill was paid by a check of the Old Dominion Copper Mining & Smelting Company; and if so, on what date?

Mr. LAUTERBACH: That is objected to on the ground that it is incompetent, immaterial, and irrelevant.

A. Yes, it was, under date of January 1, 1896.

Mr. BRANDEIS: I will introduce this in evidence, and it will be marked "Exhibit 22."

[A copy of the bill produced by Mr. Brandeis will be found annexed to this deposition, marked "Exhibit 2, Oct. 11, 1904, G. C. B." at page 462.]

Q. 81. I hand you herewith a paper entitled "Boston, January 1, 1896. Old Dominion Copper Company to Edward C. Perkins, Dr.," being a bill for services from January 1, 1895, to January 1, 1896, for $1000, and ask you whether or not that bill was paid by check of the Old Dominion Copper Mining & Smelting Company; and if so, on what date?

Mr. LAUTERBACH: That is objected to for the reasons stated above.

A. It was, on January 27, 1896.

Mr. BRANDEIS: I will introduce that bill in evidence, and it will be marked "Exhibit 3."

364 Mr. LAUTERBACH: The same objection to the bill.

[A copy of the bill produced by Mr. Brandeis will be found annexed to this deposition, marked "Exhibit 3, Oct. 11, 1904, G. C. B." at page 464.]

Q. 82. I hand you herewith a paper entitled "Old Dominion Copper Co. in account with Lewisohn Bros.," being an account showing a balance in ink of $10,393.83 with "86" added in pencil, making $10,399.83, and ask you whether or not that account was paid by a check of the Old Dominion Copper Mining & Smelting Company; and if so, on what date?

Mr. LAUTERBACH: The same objection.

A. It was, on January 16, 1896.

Q. 83. I call your attention to the papers attached to this account of Lewisohn Brothers, and ask you whether or not those are the vouchers which accompanied that account and are referred to in it?

Mr. LAUTERBACH: The same objection.

A. They are.

Mr. BRANDEIS: I now introduce in evidence this account with the annexed papers, and ask that it be marked "Exhibit 4."

Mr. LAUTERBACH: The same objection.

[Account and vouchers produced by Mr. Brandeis will be found annexed to this deposition, marked "Exhibit 4, Oct. 11, 1904, G. C. B." at page 465.]

Q. 84. Among these vouchers I call your attention to one of July 1, 1895, of "L. Barta & Co. for 1 vol. 300 receipt- 2 to the page, with stub 1st, 2nd and 3rd and extra lettering, $6.50." What does that bill refer to?

A. If I can remember, it was receipts for payments of subscriptions, $28\frac{2}{3}$, $28\frac{2}{3}$, and another. I believe that is the form.

Q. 85. That is the form of the receipts which were used here in Boston?

A. Used here in Boston; I would not say for that; perhaps used in New York.

Q. 86. It was the same form?

A. The same form as those used in Boston; probably used in New York by the parties interested in the payments.

Q. 87. Now will you turn to the books and let us know whether, besides the payments made to Evarts, Choate & Beaman, Edward C. Perkins, and Lewisohn Brothers, there were any other payments made relating to the expenses of the Old Dominion Syndicate?

A. Yes, I suppose to Hyams and Bigelow.

Q. 88. What was the amount of the payment made to Mr. Hyams?

365 Mr. LAUTERBACH: The same objection.

A. Do you want the gross paid to Hyams?

Q. 89. Give the gross now.

A. $604.

Q. 90. And that is subject to a deduction?

A. A deduction of money due on these bills of $67.48.

Q. 91. Leaving a net of $536.52, for which a check was given on what date?

A. January 20, 1896.

Q. 92. What payment or credit was made to Mr. Bigelow?

A. Do you want the total amount? You see we paid him $420 as against the $604 for Mr. Hyams.

(By Mr. HEMENWAY:)

Q. Paid whom?

A. Mr. Bigelow.

Mr. BRANDEIS: A credit.

Q. 93. Will you state whether or not certain payments were made in to the Old Dominion Copper Mining & Smelting Company towards the several bills which you have just testified were paid by it?

A. The stub of the check book shows, on January 6, 1896, there was a check from J. Morris Meredith for $202.32; ditto $1500; total..... $1,702.32

Also ditto Meredith	20.98
Also Luce	665.56
Also Coram	665.55
Also Leonard Lewisohn	2,528.35
Also T. N.	665.56

Also A. S. B.	665.55
Account Barron	1,000.00
	$16,603.53
Less	420
Net	$16,183.53

[For correction, see Altmiller recalled, 514, and Nov. 1907, page —.]

Q. 94. That is the $420 about which you have just testified?
A. Yes.
Q. 95. Now this $1000, account Barron, is an amount also that you have testified about?
A. It is.
Q. 96. A payment through Mr. Bigelow for 40 shares to Barron?
A. Yes.
Q. 97. I will ask you whether subsequent to January there was any payment made on account of a further payment made to Evarts, Choate & Beaman?

Mr. LAUTERBACH: The same objection.

366 A. Yes, there was, on April 29, 1896; $344.34.
Q. 98. For what was that paid?
A. It reads, "Evarts, Choate & Beaman, in accordance with their letter of April 28, 1896."
Q. 99. I hand you herewith a file of letters of the Old Dominion Copper Mining & Smelting Company, and ask you whether you find there this letter of April 28, 1896, referred to?
A. I do.

Mr. BRANDEIS: I will introduce that letter.
Mr. LAUTERBACH: The same objection.
[The letter referred to by Mr. Brandeis will be found annexed to this deposition, marked "Exhibit 5, Oct. 11, 1904, G. C. B." at page 469.]

Q. 100. How was this bill, or the amount paid to Evarts, Choate & Beaman for services in winding up the Old Dominion Copper Mining Company, charged upon your books?

Mr. LAUTERBACH: The same objection.

A. I suppose to expense account; it may be to suspense account. The cash book, under date of April 29, on the credit side: "Suspense account, Evarts, Choate & Beaman, $344.34." I have not that account, but later on I know it was put into the account with others. On the journal, under date of April 30, 1896, this entry was made: "Expense account, Dr. to balance account, account transferred this day, $344.34."
Q. 101. I call your attention now to the company's letter file for 1896, to a notice entitled "Old Dominion Copper Mining & Smelting

Company. 199 Washington Street, Room 303. Oct. 9, 1895," partly printed and partly written: in whose handwriting is that portion that is written?

A. Mr. Chrimes'.

Q. 102. That is, the words on it, "Mr. Nelson said call this unsold," that is in Mr. Chrimes' handwriting?

A. Yes.

Q. 103. That is in red ink. And the words in black ink "100" and $2500," and the words "are now ready and," and the words "O. N. Pierce, Esq."?

A. They are all in his handwriting.

Q. 104. In whose handwriting are the words "Grinnell Mfg. Co., New Bedford, Mass."?

A. I don't know; I do not think that is his writing.

Q. 105. Now the word "over," and the words on the back, "There was a misunderstanding as to this stock being in my name. I do not care for it. Yours truly, O. N. Pierce 10/5 95"?

A. I suppose that to be in Mr. Pierce's handwriting.

Mr. BRANDEIS: Now I will introduce that in evidence.

367 Mr. LAUTERBACH: Note the same objection.

[The letter referred to by Mr. Brandeis will be found annexed to this deposition marked, "Exhibit 6, Oct. 11, 1904, G. C. B." at page 470.]

Q. 106. Was there kept by the company as it was organized more than one line of certificates?

A. Yes, there was.

Mr. HEMENWAY: The books will show for themselves.

Q. 107. What were they?

A. A book of miscellaneous, a book of 50's and a book of 100's.

Q. 108. That is, three separate books?

A. Three separate books.

Q. 109. Were each of those sets of 50's numbered from 1 consecutively?

A. They were; the 50's had a B before the number, and the 100's had an A.

Q. 110. Will you turn to the earliest No. 1 certificate book of each of those three sets? Turn first to the book entitled "Miscellaneous," which you call the miscellaneous book, and will you proceed with that and tell us what the first seven certificates were which were issued from that book?

Mr. LAUTERBACH: The same objection.

(By Mr. LAUTERBACH:)

Q. That is not in your handwriting?

A. No.

A. [Ans. to Int. 110.] No. 1, 16 shares, issued to Jesse Lewisohn, dated July 9/95, for Articles ass'n.

No. 2, 4 shares, issued to A. W. Evarts, dated July 9/95.

No. 3, 4 shares issued to Edgar Buffum, dated July 9/95, for Articles ass'n.

No. 4, 4 shares, issued to C. W. Welch, dated July 9/95, for Articles ass'n.

No. 5, 4 shares, issued to Sidney Riddlestorffer, dated July 9/95, for Articles ass'n.

No. 6, 4 shares, issued to William P. Rowe, dated July 9/95, for Articles ass'n.

No. 7, 4 shares, issued to W. R. Montgomery, dated July 9/95, for Articles ass'n.

Q. 111. Making in the aggregate 40 shares of stock?

A. Forty shares.

Q. 112. Now I call your attention to the first entry upon the stub of the check book: "Received from Lewisohn Bros. July 12, '95, $1000, for 40 shares of stock at $25, to qualify directors," and ask you whether or not that $1000 was actually received from Lewisohn Brothers?

Mr. LAUTERBACH: The same objection.

A. It was.

Q. 113. And that was the $1000 in payment for those 40 shares that you have given us the memoranda of the certificates for?

A. Yes, sir.

368 Q. 114. Where is that $1000 entered in the books of the company?

A. Well, that is entered first in suspense account; then it is worked out later in the payment made Lewisohn Brothers, January 16, 1896.

Q. 115. What do you mean by saying it is worked out in that payment?

A. It is included in that payment.

Q. 116. Do you now refer to the item for which the bill is rendered by Lewisohn Brothers to the Old Dominion Copper Company?

A. Yes; and the item under date of July 9, 1895, "deposited in the Market and Fulton Bank, remitted to T. Nelson, $1000."

Q. 117. Will you turn to any entry upon the books covering that $1000?

A. That is on the cash book, page 2, on the debit side, "1895, July, to balance account, Lewisohn Bros., $1000."

Q. 118. Now will you follow that through suspense account and show what became of that item?

A. It is entered on the credit side, "July, cash, $1000." Then it is included in that entry there.

Q. 119. What do you mean by "included in that entry there," what do you refer to?

A. To the entry on the debit side, under date of January, 1896, "Cash, $12,032.14."

Mr. LAUTERBACH: All this is taken under the same objection.

The WITNESS: In the cash book, on the credit side of the cash book, "Jan. 31, suspense account, cash, $12,032.12."

Q. 120. It is not a fact that that $1000 for which Lewisohn

Brothers rendered their account is included in the various items for which Lewisohn Brothers rendered their account, and which is settled by a check of the Old Dominion Copper Mining & Smelting Company, under date of January——

A. January 16, 1896. In other words, it was paid back to Lewisohn Brothers in that check.

Mr. LAUTERBACH: The same objection.

Q. 121. Now, returning to the miscellaneous certificate book, will you show what the next certificates were issued by this company?

A. No. 8, 16 shares, issued to Thomas Nelson, dated July 11/95, for certificate No. 1, transferred from Jesse Lewisohn.

Mr. BRANDEIS: Just one moment. The original certificates are here, of course, but I do not want to use them. Suppose, with your consent, Mr. Hemenway and Mr. Lauterbach, I put in here the certificate book and the original certificates therein referred to.

Mr. LAUTERBACH: Subject to our objection as to relevancy, but not as to form; any formal objection being waived.

369 The WITNESS: [Continuing his answer:]

No. 9, 4 shares, issued to Moses T. Stevens, for certificate #2, transferred from A. W. Evarts, and marked "Cancelled."

No. 10, 4 shares, issued to Henry M. Whitney, dated July 11/95, for certificate #4, transferred from C. W. Welch.

No. 11, 4 shares issued to Joseph G. Ray, dated July 11/95, for certificate #5, transferred from S. Riddlestorffer.

No. 12, 4 shares, issued to Leonard Lewisohn, dated July 11/95, for certificate #6, transferred from W. P. Rowe.

No. 13, 4 shares, issued to A. S. Bigelow, dated July 11/95, for certificate #7, transferred from W. R. Montgomery.

No. 14, 4 shares, issued to Moses T. Stevens, dated July 24/95, for certificate #2, transferred from A. W. Evarts.

(By Mr. HEMENWAY:)

Q. Were there two transfers of #2?

A. The first one was canceled, marked "Cancelled" across the face of it. There was no delivery under that.

Q. 122. Now I call your attention to the stub of the miscellaneous certificate book covering certificates from No. 15 to No. 66, inclusive, and ask you also to look at the certificates themselves, and state whether or not any of the certificates covered by those numbers were ever actually issued.

A. No, they were all canceled. [Referring to the certificates.] They were all canceled.

Q. 123. Those were not only canceled, but were not signed?

A. No. I have examined the stub and also the certificates, as requested, and find that all of those certificates were canceled, and that none of them bear the signature of any officer of the company; also that all of those certificates are dated September 19, 1895, and that the respective numbers of those certificates, names and amount of shares, are as follows:—

Mr. LAUTERBACH: The same objection. The certificates, never having been signed and executed, have no validity or effect, and are incompetent, irrelevant, and immaterial.

[Following is the list furnished by the witness to complete his answer to the above interrogatory 123:]

No. of Certificate.	No. of Shares.	Name.	Date.
15	145	Chas. H. Altmiller	Sept. 19, 1895.
16	200	D. M. Anthony	Sept. 19, 1895.
17	200	Edward P. Abbe	Sept. 19, 1895.
370			
18	200	Jos. S. Beal	Sept. 19, 1895.
19	20	Wm. A. L. Bazeley	Sept. 19, 1895.
20	260	Richard F. Bolles	Sept. 19, 1895.
21	500	J. W. Belches & Co.	Sept. 19, 1895.
22	20	Chas. P. Bond	Sept. 19, 1895.
23	40	Clarence W. Barron	Sept. 19, 1895.
24	140	W. A. S. Chrimes	Sept. 19, 1895.
25	140	C. H. Cole, Jr.	Sept. 19, 1895.
26	1,250	Clark, Ward & Co.	Sept. 19, 1895.
27	280	Henry T. Coe	Sept. 19, 1895.
28	25	David W. Cheever	Sept. 19, 1895.
29	15	Oswald N. Causman	Sept. 19, 1895.
30	120	C. L. Davenport	Sept. 19, 1895.
31	400	Gray, Dewey & Co.	Sept. 19, 1895.
32	300	Rufus R. Goodell	Sept. 19, 1895.
33	1,000	W. W. Grout	Sept. 19, 1895.
34	200	E. D. Greenleaf	Sept. 19, 1895.
35	800	Chas. Head & Co.	Sept. 19, 1895.
36	1,300	Hayden, Stone & Co.	Sept. 19, 1895.
37	175	Timothy E. Hopkins	Sept. 19, 1895.
38	300	John T. Howe	Sept. 19, 1895.
39	400	F. S. Mead & Co.	Sept. 19, 1895.
40	500	Mrs. Abby H. Manning	Sept. 19, 1895.
41	400	Chas. J. Mackenzie	Sept. 19, 1895.
42	200	John H. Pierce	Sept. 19, 1895.
43	400	C. A. Putnam & Co.	Sept. 19, 1895.
44	400	Price & Co.	Sept. 19, 1895.
45	200	James M. Prendergast	Sept. 19, 1895.
46	200	Frank W. Remick	Sept. 19, 1895.
47	200	Wm. H. Reed	Sept. 19, 1895.
48	700	Jos. R. Ray	Sept. 19, 1895.
49	250	J. J. Richards	Sept. 19, 1895.
50	500	Albert W. Smith	Sept. 19, 1895.
51	1,000	E. C. Swift	Sept. 19, 1895.
52	200	Geo. O. Sears	Sept. 19, 1895.
53	1,000	J. B. Sturgis	Sept. 19, 1895.
54	200	A. Albert Sack	Sept. 19, 1895.
55	500	Homer N. Snow	Sept. 19, 1895.
56	300	Henry Stackpole	Sept. 19, 1895.

No. of Certificate.	No. of Shares.	Name.	Date.
57	300	Wm. A. Tower.....	Sept. 19, 1895.
58	500	E. V. R. Thayer.....	Sept. 19, 1895.
59	60	B. N. Towle.....	Sept. 19, 1895.
60	40	Amos Towle	Sept. 19, 1895.
61	600	Maxwell Woodhull	Sept. 19, 1895.
62	400	Jeremiah Williams	Sept. 19, 1895.
63	300	Frank G. Webster.....	Sept. 19, 1895.
64	600	Henry Woods	Sept. 19, 1895.
65	10	Wm. A. L. Bazeley.....	Sept. 19, 1895.
66	200	A. Albert Sack.....	Sept. 19, 1895.

371 Q. 124. In whose handwriting is the writing in the body of the certificates?

A. Mr. Bazeley's.

Q. 125. Who is Mr. Bazeley?

A. He was one of the transfer clerks.

Q. 126. In Mr. Bigelow's office?

A. Yes.

Q. 127. Is he now living?

A. Yes.

Q. 128. Is he still in that office?

A. No.

Q. 129. Where is he now?

A. He is in the real-estate business, I think, in the Exchange building.

Q. 130. I call your attention, now, to the stub of certificate No. 67, and ask you what it shows.

A. No. 67, 100,000 shares, issued to P. K. Dumaresq, dated September 13, 1895, for "ctf. of orig." issue, marked "Cancelled." The original certificate also was not signed by any officer of the company.

Q. 131. And the written words in the certificate are in the handwriting of whom?

A. Mr. W. A. Shepard.

The next one is No. 68, 30,000 shares, issued to A. S. Bigelow and Leonard Lewisohn, dated September 13, 1895, for original stock issue, marked "Cancelled." The certificate, also, as far as I know, is in Mr. Shepard's handwriting, and is not signed by either the president or the treasurer.

Mr. LAUTERBACH: The same objection.

The WITNESS: No. 69, 1300 shares, issued to Hayden, Stone & Company, dated September 19, 1895, for certificate No. 36, canceled and that is canceled. The certificate is also canceled and is not signed by either the president or the treasurer.

Mr. LAUTERBACH: The same objection.

Q. 132. Now No. 70.

A. No. 70, 40 shares, issued to P. K. Dumaresq, dated September

18, 1895, for sundries. This certificate is signed by P. K. Dumaresq, assistant treasurer, canceled, and no signature of the president.

Mr. LAUTERBACH: The same objection.

Q. 133. Now will you read No. 71?

A. The stub is in Mr. Shepard's handwriting. It is made out for 100 shares, for sundries, dated September 18, 1895, and marked "Cancelled." The certificate itself is signed by P. K. Dumaresq, assistant treasurer, and C. H. Bissell, assistant president, and is registered by the Atlas National Bank; it is for 100,000 shares, while the stub is for 100 shares, and there is stamped across it in red ink the words "Issued for property purchased." There is an indorsement upon the certificate assigning and transferring unto Moses T. Stevens, 4 shares; A. S. Bigelow, 4 shares; Leonard Lewisohn, 4 shares;
372 Thomas Nelson, 16 shares; Edgar Buffum, 4 shares; Joseph G. Ray, 4 shares; Henry M. Whitney, 4 shares; "to myself" 99,960 shares, all under date of September 18, 1895.

Mr. LAUTERBACH: It is understood that my objection applies to this all through, and that I need not continue to repeat the objection.

Q. 134. Now No. 72.

A. The stub of No. 72 is as follows, the words written in ink being underscored [italicized]:—

"No. 72.
30,000 Shares.
Issued to *A. S. Bigelow*.
Dated *Sept. 18 '95*.
For *Vote of Sqn.*
Returned and Cancelled.
Transferred from

Received the above Certificate"

Marked across the face "*Cancelled.*"

The certificate itself is signed by C. H. Bissell, assistant president, and P. K. Dumaresq, assistant treasurer, and is marked "Cancelled." It is not registered by the Atlas Bank.

The stub of No. 73 is as follows, the words written in ink being underscored [italicized]:

"No. 73.
30,000 Shares.
Issued to *Thomas Nelson, Trens.*
Dated *Sept. 18 '95*.
For *Vote of Sqn.*
Returned and Cancelled.
Transferred from

Received the above certificate."

The certificate itself is signed by C. H. Bissell, assistant president, and P. K. Dumaresq, assistant treasurer, and registered by the Atlas

National Bank, and bears a transfer on the back in blank appointing W. H. Shepard attorney to make the transfer; this under date of September 19, 1895.

Mr. LAUTERBACH: Executed by Thomas Nelson, treasurer.

373 Q. 135. Are there any words printed on the face of this certificate indicating it was issued for property purchased?

A. No. The face of the certificate and the endorsement thereon are as follows:

"Incorporated under the Laws of the State of New Jersey.

Registered Atlas National Bank.

By J. L. Foster, Assist. Cash.

No. 73. 20,000 Shares.

Old Dominion Copper Mining and Smelting Company.

Capital Stock $3,750,000 in shares of $25 each full paid.

This Certifies, That Thomas Nelson, treasurer, is entitled to Twenty Thousand shares of the Capital Stock of the Old Dominion Copper Mining and Smelting Company, transferable only on the books of said Company, by the holder thereof, in person, or by Attorney, on surrender of this Certificate.

Boston, Mass., Sept. 19, 1895.

C. H. BISSELL,
Assist. President.
P. K. DUMARESQ,
Assist. Treasurer.

Old Dominion Copper Mining and Smelting Company. 1895.

'Notice.' The Signature of this Assignment must correspond with the name as written upon the Face of the Certificate in every particular without alteration or enlargement or any change whatever.

For Value Received —— —— hereby assign and transfer unto —— ——, — Shares of the Capital Stock represented by the within Certificate and do hereby irrevocably constitute and appoint W. H. Shepard Attorney to transfer the said stock on the books of the within named Company, with full power of substitution in the premises.

Dated this 19th day of Sept., 1895.

THOMAS NELSON, *Treas.*"

Witness:
W. H. SHEPARD.

Q. 136. The transfer of the certificate appears as Exhibit 25 annexed to the deposition of Godfrey M. Hyams in this case?

A. Yes.

Q. 137. Now No. 74.

A. No. 74, 30,000 shares, issued to A. S. Bigelow and Leonard Lewisohn, dated September 18, 1895. This certificate is signed by C. H. Bissell, assistant president, and registered by the Atlas
374 National Bank, and has printed across it in red ink the words "Issued for property purchased," and bears a transfer under date of September 20, 1895, assigning unto Leonard Lewisohn 2650, and to A. S. Bigelow, 27,350 shares, the transfer being signed "Leonard Lewisohn, by Adolph Lewisohn, attorney, in the presence of Sidney Riddlestorffer," and "A. S. Bigelow, in the presence of C. H. Bissell." The transfer appoints C. H. Bissell attorney to register the transfer.

Q. 138. Who is Sidney Riddlestorffer?

A. He is in Mr. Lewisohn's office.

Q. 139. A clerk or assistant there?

A. He is in their employ; I do not know in what position.

No. 75, 4 shares, issued to Moses T. Stevens, dated September 18, 1895, for part of certificate 71; transferred from P. K. Dumaresq.

No. 76, 4 shares, issued to A. S. Bigelow, dated September 18, 1895, for part of certificate 71.

No. 77, 4 shares, issued to Leonard Lewisohn, dated September 18, 1895, for part of certificate 71.

No. 78, 16 shares, issued to Thomas Nelson, dated September 18, 1895, for part of certificate 71.

No. 79, 4 shares, issued to Edgar Buffum, dated September 18, 1895, for part of certificate 71.

No. 80, 4 shares, issued to Joseph G. Ray, dated September 18, 1895, for part of certificate 71.

No. 81, 4 shares, issued to Henry M. Whitney, dated September 18, 1895, for part of certificate 71.

No. 82, 99,960 shares issued to P. K. Dumaresq, transferred September 18, 1895, for balance of certificate 71. This certificate is signed by C. H. Bissell, assistant president, and P. K. Dumaresq, assistant treasurer, and registered by the Atlas National Bank; is endorsed by Mr. Dumaresq, September 19, 1895, transferring to Foote & French, 100 shares; H. T. Coe, 200 shares; J. T. Herrick, 100 shares; Henry F. Woods, 100 shares; Oswald N. Cammann, 15 shares; David W. Cheever, 25 shares; "to myself," 99,420 shares, with W. H. Shepard as attorney, but no other transfer.

Q. 140. No. 83 is a blank, and appears never to have been issued, likewise No. 84? A. Yes.

Q. 141. Now No. 85,—this is a new list, is it?

A. That is a new list.

Certificates 85 to 138, inclusive, with the exception of 97, 104, and 122, hereafter referred to, are all certificates dated September 19, 1895, to the parties and for the number of shares as follows:

375

No. of certificate.	No. of shares.	Name.	Date.
85	145	Charles H. Altmiller	Sept. 19, 1895.
86	200	D. M. Anthony	Sept. 19, 1895.
87	200	Edward P. Abbe	Sept. 19, 1895.
88	200	Joseph S. Beal	Sept. 19, 1895.
89	20	Wm. A. L. Bazeley	Sept. 19, 1895.
90	260	Richard F. Bolles	Sept. 19, 1895.
91	500	J. W. Belches & Co.	Sept. 19, 1895.
92	20	Chas. P. Bond	Sept. 19, 1895.
93	40	Clarence W. Barron	Sept. 19, 1895.
94	140	W. A. S. Chrimes	Sept. 19, 1895.
95	140	Chas. H. Cole, Jr.	Sept. 19, 1895.
96	1,250	Clark, Ward & Co.	Sept. 19, 1895.
98	25	David W. Cheever	Sept. 19, 1895.
99	15	Oswald N. Causman	Sept. 19, 1895.
100	120	C. L. Davenport	Sept. 19, 1895.
101	400	Gray, Dewey & Co.	Sept. 19, 1895.
102	300	Rufus R. Goodell	Sept. 19, 1895.
103	1,000	W. W. Grout	Sept. 19, 1895.
105	175	Timothy E. Hopkins	Sept. 19, 1895.
106	300	John T. Howe	Sept. 19, 1895.
107	400	F. S. Mead & Co.	Sept. 19, 1895.
108	500	Mrs. Abby H. Manning	Sept. 19, 1895.
109	400	Chas. J. Mackenzie	Sept. 19, 1895.
110	200	John H. Pierce	Sept. 19, 1895.
111	400	C. A. Putnam & Co.	Sept. 19, 1895.
112	400	Price & Co.	Sept. 19, 1895.
113	200	James M. Prendergast	Sept. 19, 1895.
114	200	Frank W. Remick	Sept. 19, 1895.
115	200	Wm. H. Reed	Sept. 19, 1895.
116	700	Jos. G. Reed	Sept. 19, 1895.
117	250	J. J. Richards	Sept. 19, 1895.
118	500	Albt. W. Smith	Sept. 19, 1895.
119	1,000	E. C. Swift	Sept. 19, 1895.
120	200	Geo. O. Sears	Sept. 19, 1895.
121	1,000	J. B. Sturgis	Sept. 19, 1895.
123	300	Henry Stackpole	Sept. 19, 1895.
124	300	Wm. A. Tower	Sept. 19, 1895.
125	500	E. V. R. Thayer	Sept. 19, 1895.
126	60	B. N. Towle	Sept. 19, 1895.
127	40	Amos Towle	Sept. 19, 1895.
128	600	Maxwell Woodhull	Sept. 19, 1895.
129	400	Jeremiah Williams	Sept. 19, 1895.
130	300	Frank G. Webster	Sept. 19, 1895.
131	600	Henry Woods	Sept. 19, 1895.
132	10	Wm. A. L. Bazeley	Sept. 19, 1895.
133	200	A. Albert Sack	Sept. 19, 1895.
134	1,300	Hayden, Stone & Co.	Sept. 19, 1895.

No. of certificate.	No. of shares.	Name.	Date.
135	140	W. A. S. Chrimes	Sept. 19, 1895.
136	200	E. D. Greenleaf	Sept. 19, 1895.
137	200	H. T. Coe	
138	80	H. T. Coe	

376 Certificate No. 97 is for 280 shares, issued to Henry T. Coe, dated September 19, 1895, and was canceled.

Certificate 104,200 shares, issued to E. D. Greenleaf, dated September 19, 1895, was canceled.

Certificate 122, 500 shares, issued to Homer N. [sic V] Snow, dated September 19, 1895, was also canceled.

Certificate 139, for 99,420 shares, issued to P. K. Dumaresq, was canceled before signature by the officers.

Certificate 140, issued to P. K. Dumaresq, for 99,420 shares, is dated September 19, 1895, signed by C. H. Bissell as assistant president and P. K. Dumaresq as assistant treasurer, registered by the Atlas Bank, and bears a transfer under date of September 27, 1895, to the following persons of the number of shares set against their respective names:

Names.	Shares.
Altmiller, Chas. H.	40
Anthony, D. M.	400
Alline, John W.	40
Anthony, Harold H.	200
Anthony, Miss Annie R.	100
Bazeley, W. A. L.	40
Ball, Geo. H.	1,600
Bolles, Richard F.	480
Belches & Co., J. W.	800
Burnett, Harry	800
Billings, Robt. C.	800
Barron, —?.	
Brown, S. N.	800
Bigelow, A. S.	4,000
Batt, Chas. R.	200
Beal, Thos. P.	200
Chrimes, W. A. S.	40
Cole, Jr., Chas. H.	120
Coe, Henry T.	640
Cole, Chas. H.	400
Coram, Jos. A.	1,520
Crosby, Stephen M.	1,600
Demmon, Daniel L.	800
Ely & Co.	400
Field, Robert M.	200
Fenno, Isaac	400
Goodenough, H. B.	160
Head, Chas.	800

	Head & Co., Chas.	280
	Hopkins, Timothy E.	650
377	Hayden, Stone & Co.	800
	Hodge, Chas. J.	800
	Hollingsworth, Zach. T.	400
	Harding, Albert E.	80
	Hollis, N. E.	160
	" Geo. W.	160
	Jones, Mrs. Mary L.	500
	Kendall, Jos. S.	600
	Leland, Towle & Co.	320
	Lyman, Geo. H.	200
	Lewisohn, Leonard.	36,190
	Mead, F. S. & Co.	800
	Manning, Mrs. Abby H.	400
	Messervy, Benj. F.	200
	Meredith, J. Morris.	2,000
	Maltman, A. S.	800
	Manning, Francis H.	800
	Moses, Henry C.	240
	Metcalf, Stephen O.	400
	Moseley, Chas. O.	800
	Mawhinney, H. H.	160
	O'Connor, John	160
	Pierce, John H.	800
	Preston, Geo. M.	400
	Prince, Gordon	400
	Perkins, Thos. H.	80
	Reed, Wm. H.	400
	Ray, Jos. G.	400
	Richardson, S. W. for Jas. S. Cumston	800
	Rust, Nancy E.	80
	Sanborn, Geo. E.	100
	Swift, E. C.	800
	Stevens, Horace H.	400
	" Moses T.	800
	" Samuel S.	200
	Smith, Albert O.	400
	Somers, Frank D.	400
	Spaulding, Samuel S.	240
	Towle, Jno. F.	200
	Woodhull, Maxwell	1,200
	Williams, Jeremiah	400
	Woods, Henry	800
	Williams, Harold	400
	Wheeler, Leonard.	240
	Whitney, Henry M.	4,000
	P. K. Dumaresq	20,000

W. H. SHEPARD, *Attorney.*

378 Q. 142. Certificate 141, issued to Homer V. Snow, September 19, 1895: out of what certificate does that come?

A. The other one, to Homer N. Snow, was canceled, I guess. That is the one that took the place of 122; issued to take the place of certificate No. 122, which was canceled.

Certificate 142, for 300 shares, issued to John C. Howe, dated September 19, 1895, for certificate 106.

No. 143, 30 shares, issued to William H. Reed, dated September 19, 1895, for part of certificate No. 115.

No. 144, 20 shares, issued to William H. Reed, dated September 19, 1895, for balance of certificate 115.

No. 145, 25 shares, issued to Hayden, Stone & Company, dated September 19, 1895, for part of certificate 134.

No. 146, 25 shares, issued to Hayden, Stone & Company, dated September 19, 1895, for certificate 134.

No. 147, 30 shares, issued to E. Rollins Morse & Brother, dated September 19, 1895, for part of certificate 23.

No. 148, 20 shares, issued to E. Rollins Morse & Brother, dated September 19, 1895, for certificate 23.

No. 149, 10 shares, issued to Harris & Company, dated September 19, 1895, for part of certificate 91.

No. 150, 10 shares, issued to Gould, Hall & Company, dated September 19, 1895, for certificate 91.

No. 151, 30 shares, issued to Henry Stackpole, dated September 19, 1895, for part of certificate 91.

No 152, 10 shares, issued to Frederick Lewis Dabney, dated September 19, 1895, for certificate 132.

No. 153, 20 shares, issued to Chase & Barstow, dated September 19, 1895, for part of certificate 101.

No. 154, 25 shares, issued to C. A. Putnam & Company, dated September 19, 1895, for part of certificate 101.

No. 155, 25 shares, issued to E. Rollins Morse & Brother, dated September 19, 1895, for part of certificate 101.

No. 156, 40 shares, issued to Gray, Dewey & Company, dated September 19, 1895, for part of certificate 101.

No. 157, 40 shares, issued to Gray, Dewey & Company, dated September 19, 1895, for part of certificate 101.

379 No. 158, 20 shares, issued to Emil W. Hunzingee, dated September 19, 1895, for part of certificate B10.

No. 159, 30 shares, issued to Tucker, Anthony & Company, dated September 19, 1895, for balance of certificate 10B.

No. 160, 15 shares, issued to Harris & Company, dated September 19, 1895, for certificate 95.

No. 161, 25 shares, issued to Charles Head & Company, dated September 19, 1895, part of certificate 90.

No. 162, 10 shares, issued to Richard F. Bolles, dated September 20, 1895, for balance certificate 90.

No. 163, 30 shares, issued to Leland, Towle & Company, dated September 20, 1895, for part of certificate 24.

No. 164, 20 shares, issued to Charles Head & Company, dated September 20, 1895, for balance certificate 24.

No. 165, 30 shares, issued to F. S. Mead & Company, dated September 20, 1895, for part of certificate No. 8.

No. 166, 20 shares, issued to Clement Parker & Company, dated September 20, 1895, for part of certificate 8.

No. 167, 20 shares, issued to Elbridge Torrey, dated September 20, 1895, for sundries.

Q. 143. What is the meaning of "sundries" appearing in the stub of a certificate?

A. Well, when they transfer from one party to another if there is more than one certificate to make up the number of shares that a party buys, they might put it down "sundries;" that is, there are two or more certificates.

(By Mr. LAUTERBACH:)

Q. You aggregate them?

A. Yes.

(By Mr. HEMENWAY:)

Q. If I bought 20 shares and it belonged to you three, you would put it down "sundries"?

A. Yes [continuing to read from the certificate stubs].

No. 168, 25 shares, issued to Mrs. Helen W. Capen, dated September 20, 1895, for part of certificate 137.

No. 169, 40 shares, issued to Mrs. Elizabeth G. Bright, dated September 20, 1895, for part of certificate 137.

No. 170, 10 shares, issued to Mrs. Josephine B. Bright, dated September 20, 1895, for part of certificate 137.

No. 171, 3 shares, issued to Edward W. Capen, dated September 20, 1895, for balance of certificate 137.

380 No. 172, 30 shares, issued to Samuel B. Capen, trustee for Mrs. H. B. Woodman, dated September 20, 1895, for part of certificate 137.

No. 173, 2 shares, issued to Miss Mary W. Capen, dated September 20, 1895.

No. 174, 30 shares, issued to Clement B. Asbury, dated September 20, 1895, for part of certificate 44.

No. 175, 20 shares, issued to William Bassett, dated September 20, 1895, for balance certificate 44.

No. 176, 20 shares, issued to Clement B. Asbury, dated September 20, 1895, for certificate 166, canceled.

No. 177, 25 shares, issued to Clark, Ward & Company, dated September 21, 1895, for certificate 30.

No. 178, 20 shares, issued to Clark, Ward & Company, dated September 21, 1895, for part of certificate 30.

No. 179, 5 shares, issued to Clark, Ward & Company, dated September 21, 1895, for part of certificate 30.

No. 180, 40 shares, issued to Mrs. Caroline H. Klous, dated September 21, 1895, for certificate 156.

No. 181, 25 shares, issued to A. Albert Sack, dated September 21, 1895, for certificate 133.

No. 182, 25 shares, issued to A. Albert Sack, dated September 21, 1895, for certificate 133.

No. 183, 25 shares, issued to A. Albert Sack, dated September 21, 1895, for certificate 133.

No. 184, 25 shares, issued to A. Albert Sack, dated September 21, 1895, for certificate 133.

No. 185, 25 shares, issued to A. L. Sack, dated September 21, 1895, for certificate 133.

No. 186, 25 shares, issued to A. Albert Sack, dated September 21, 1895, for certificate 133.

No. 187, 25 shares, issued to A. Albert Sack, dated September 21, 1895, for certificate 133.

No. 188, 25 shares, issued to A. Albert Sack, dated September 21, 1895, for certificate 133.

No. 189, 20 shares, issued to Leland, Towle & Company, dated September 23, 1895, for balance of certificate 100.

381 No. 190, 25 shares, issued to Paine, Webber & Company, dated September 23, 1895, for part of certificate 46.

No. 191, 25 shares, issued to Tucker, Anthony & Company, dated September 23, 1895, for balance of certificate 46.

No. 192, 45 shares, issued to E. R. Morse & Brother, dated September 23, 1895, for certificate sundries.

No. 193, 20 shares, issued to Julius R. Albrecht, dated September 25, 1895, for part of certificate 159.

No. 194, 10 shares, issued to Thomas L. Manson, Jr., & Company, dated September 25, 1895, for balance of certificate 159.

No. 195, 10 shares, issued to Pfaelzer, Walker & Company, dated September 26, 1895, for certificate 164.

No. 196, 10 shares, issued to Charles Head & Company, dated September 26, 1895, for certificate 164.

Q. 144. Will you now turn to the 100-share certificate book and to the certificates accompanying the same, and give a list of the certificates issued bearing date prior to September 27, 1895?

A. Those certificates, being from No. 1 to No. 127, are as follows:—

No. of Certificate.	No. of Shares.	Name.	Date.
A 1	100	C. H. Bissell,	Sept. 19, 1895.
A 2	100	Wm. A. L. Bazeley,	Sept. 19, 1895.
A 3	100	P. T. Bradley,	Sept. 19, 1895.
A 4	100	Samuel B. Bartholomew,	Sept. 19, 1895.
A 5	100	A. Eldredge,	Sept. 19, 1895.
A 6	100	Wm. F. Fitzgerald,	Sept. 19, 1895.
A 7	100	Foote & French,	Sept. 19, 1895.
A 8	100	Charles Head,	Sept. 19, 1895.
A 9	100	Joseph T. Herrick,	Sept. 19, 1895.
A 10	100	Gustaf Lundberg,	Sept. 19, 1895.
A 11	100	W. B. Mossman,	Sept. 19, 1895.

No. of Certificate.	No. of Shares.	Name.	Date.
A 12	100	Geo. E. Newhall,	Sept. 19, 1895.
A 13	100	O. N. Pierce,	Sept. 19, 1895.
A 14	100	F. & C. S. Smith,	Sept. 19, 1895.
A 15	100	H. C. Wainwright & Co.,	Sept. 19, 1895.
A 16	100	Henry F. Woods,	Sept. 19, 1895.
A 17	100	Henry Woods,	Sept. 19, 1895.
A 18	100	J. Otis Wetherbee,	Sept. 19, 1895.
A 19	100	George E. Newhall, For ctf. No. A 12 cancelled.	
A 20	100	F. and C. S. Smith, For ctf. No. A 14 cancelled.	
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A 21	100	F. & C. S. Smith, For ctf. No. 14 A cancelled.	Sept. 19, 1895.
A 22	100	Charles Head & Co., For part ctf. 35 canc'd.	Sept. 19, 1895.
A 23	100	Charles Head & Co., For part ctf. No. 35 canc'd.	Sept. 19, 1895.
A 24	100	Charles Head & Co., For part ctf. No. 35 canc'd.	Sept. 19, 1895.
A 25	100	Charles Head & Co., For part ctf. 35 canc'd.	
A 26	100	Charles Head & Co., For part ctf. No. 35 canc'd.	Sept. 19, 1895.
A 27	100	E. D. Bangs & Co., For part ctf. 141.	Sept. 19, 1895.
A 28	100	E. D. Bangs & Co., For part ctf. 141.	Sept. 19, 1895.
A 29	100	E. D. Bangs & Co., For bal. ctf. 141.	Sept. 19, 1895.
A 30	100	Wm. H. Reed, For part ctf. 115.	Sept. 19, 1895.
A 31	100	Albert W. Smith, For part ctf. 118.	Sept. 19, 1895.
A 32	100	Albert W. Smith, For part 118.	Sept. 19, 1895.
A 33	100	Albert W. Smith, For part ctf. 118.	Sept. 19, 1895.
A 34	100	Albert W. Smith, For part 118.	Sept. 19, 1895.
A 35	100	Albert W. Smith, For bal. 118.	Sept. 19, 1895.
A 36	100	F. S. Mead & Co., For part 107.	Sept. 19, 1895.
A 37	100	F. S. Mead & Co., For part ctf. 107.	Sept. 19, 1895.
A 38	100	Hayden, Stone & Co., For part 134.	Sept. 19, 1895.

No. of Certificate.	No. of Shares.	Name.	Date.
A 39	100	Hayden, Stone & Co., For part 134.	Sept. 19, 1895.
A 40	100	Hayden, Stone & Co., For part 134.	Sept. 19, 1895.
A 41	100	Hayden, Stone & Co., For part 134.	Sept. 19, 1895.
A 42	100	Hayden, Stone & Co., For part 134.	Sept. 19, 1895.
A 43	100	Hayden, Stone & Co., For part ctf. 134.	Sept. 19, 1895.
A 44	100	Hayden, Stone & Co., For part 134.	Sept. 19, 1895.
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A 45	100	Hayden, Stone & Co., For part 134.	Sept. 19, 1895.
A 46	100	Hayden, Stone & Co., For part ctf. 134.	Sept. 19, 1895.
A 47	100	Hayden, Stone & Co., For part ctf. 134.	Sept. 19, 1895.
A 48	100	Clark, Ward & Co., For part ctf. 96.	Sept. 19, 1895.
A 49	100	Clark, Ward & Co., For part ctf. 96.	Sept. 19, 1895.
A 50	100	Clark, Ward & Co., For part ctf. 96.	Sept. 19, 1895.
A 51	100	Clark, Ward & Co., For part 96.	Sept. 19, 1895.
A 52	100	Clark, Ward & Co., For part 96.	Sept. 19, 1895.
A 53	100	Clark, Ward & Co., For ctf. part 96.	Sept. 19, 1895.
A 54	100	Clark, Ward & Co., For part ctf. 96.	Sept. 19, 1895.
A 55	100	Clark, Ward & Co., For ctf. 96.	Sept. 19, 1895.
A 56	100	Clark, Ward & Co., For ctf. 96.	Sept. 19, 1895.
A 57	100	Clark, Ward & Co., For ctf. 96.	Sept. 19, 1895.
A 58	100	Paine, Webber & Co., For ctf. 88.	Sept. 19, 1895.
A 59	100	Clement B. Asbury, For ctf. 91.	Sept. 19, 1895.
A 60	100	Clement B. Asbury, For ctf. 91.	Sept. 19, 1895.
A 61	100	Clement B. Asbury, For ctf. 91.	Sept. 19, 1895.
A 62	100	Clement B. Asbury, For ctf. 91.	Sept. 19, 1895.

No. of Certificate.	No. of Shares.	Name.	Date.
A 63	100	L. Herbert Taft, For ctf. 101.	Sept. 19, 1895.
A 64	100	L. Herbert Taft, For ctf. 101.	Sept. 19, 1895.
A 65	100	Richard F. Bolles, For part ctf. 90.	Sept. 20, 1895.
A 66	100	Richard F. Bolles, For part ctf. 90.	Sept. 20, 1895.
A 67	100	Philip P. Carleton, For part ctf. 111.	Sept. 20, 1895.
A 68	100	George H. Haskell, For part ctf. 111.	Sept. 20, 1895.
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A 69	100	Frederick W. Alexander, For part ctf. 111.	Sept. 20, 1895.
A 70	100	Edward G. Cook, For cf. 111.	Sept. 20, 1895.
A 71	100	Jackson & Curtis, For ctf. 18.	Sept. 20, 1895.
A 72	100	Tower, Giddings & Co., For ctf. 124.	Sept. 20, 1895.
A 73	100	Elbridge Torrey, For Sundries.	Sept. 20, 1895.
A 74	100	Joshua W. Davis, For sundries.	Sept. 20, 1895.
A 75	100	Richardson, Hill & Co., For ctf. 47.	Sept. 20, 1895.
A 76	100	Richardson, Hill & Co., For ctf. 39.	Sept. 20, 1895.
A 77	100	Clement B. Asbury, For ctf. 123.	Sept. 20, 1895.
A 78	100	Clement B. Asbury, For ctf. 37.	Sept. 20, 1895.
A 79	100	Clement B. Asbury, For ctf. 29.	Sept. 20, 1895.
A 80	100	Clement B. Asbury, For ctf. 46.	Sept. 20, 1895.
A 81	100	Clement B. Asbury, For ctf. 42.	Sept. 20, 1895.
A 82	100	Clement B. Asbury, For ctf. 41.	Sept. 20, 1895.
A 83	100	Clement B. Asbury, For ctf. 27.	Sept. 20, 1895.
A 84	100	Clement B. Asbury, For ctf. 28.	Sept. 20, 1895.
A 85	100	Clement B. Asbury, For ctf. 43.	Sept. 20, 1895.
A 86	100	Clement B. Asbury, For ctf. 6.	Sept. 20, 1895.

No. of Certificate.	No. of Shares.	Name.	Date.
A 87	100	Clement B. Asbury, For Sundries.	Sept. 20, 1895.
A 88	100	Clement B. Asbury, For Sundries.	Sept. 20, 1895.
A 89	100	Clement B. Asbury, For ctf. 123.	Sept. 20, 1895.
A 90	100	Clement B. Asbury, For 123.	Sept. 20, 1895.
A 91	100	Wm. F. Whittemore, For part ctf. 100.	Sept. 23, 1895.
A 92	100	Josiah W. Hayden, For part ctf. 129.	Sept. 23, 1895.
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A 93	100	Josiah W. Hayden, For part ctf. 129.	Sept. 23, 1895.
A 94	100	Josiah W. Hayden, For part ctf. 129.	Sept. 23, 1895.
A 95	100	Ely & Co., For part ctf. 102.	Sept. 23, 1895.
A 96	100	Ely & Co., For part ctf. 102.	Sept. 23, 1895.
A 97	100	Ely & Co., For bal. ctf. 102.	Sept. 23, 1895.
A 98	100	Frank S. Mackenzie, For part ctf. 109.	
A 99	100	Frank S. MacKenzie, For part ctf. 109.	Sept. 23, 1895.
A 100	100	Chas. J. McKenzie, For part ctf. 109.	Sept. 23, 1895.
A 101	100	Chas. J. McKenzie, For bal. ctf. 109.	Sept. 23, 1895.
A 102	100	Frank S. Mackenzie, For ctf. 98.	Sept. 23, 1895.
A 103	100	George W. Griggs, For Sundries.	Sept. 24, 1895.
A 104	100	Joseph G. Ray, For ctf. 116.	Sept. 24, 1895.
A 105	100	Joseph G. Ray, For ctf. 116.	Sept. 24, 1895.
A 106	100	Joseph G. Ray, For ctf. 116.	Sept. 24, 1895.
A 107	100	Joseph G. Ray, For ctf. 116.	Sept. 24, 1895.
A 108	100	Joseph G. Ray, For ctf. 116.	Sept. 24, 1895.
A 109	100	Joseph G. Ray, For ctf. 116.	Sept. 24, 1895.
A 110	100	Peter B. Bradley, For ctf. 3.	Sept. 25, 1895.

No. of Certificate.	No. of Shares.	Name.	Date.
A 111	100	Price & Co., For part ctf. 112.	Sept. 26, 1895.
A 112	100	Price & Co., For part ctf. 112.	Sept. 26, 1895.
A 113	100	Price & Co., For bal. ctf. 112.	Sept. 26, 1895.
A 114	100	James S. Cumston, For ctf. 53.	Sept. 26, 1895.
A 115	100	James S. Cumston, For ctf. 48.	Sept. 26, 1895.
A 116	100	James S. Cumston, For Sundries.	Sept. 26, 1895.
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A 117	100	James S. Cumston, For ctf. 75.	Sept. 26, 1895.
A 118	100	James S. Cumston, For Sundries.	Sept. 26, 1895.
A 119	100	Charles S. Purinton, For ctf. 69.	Sept. 26, 1895.
A 120	100	W. H. Blasdell, For ctf. 103.	Sept. 26, 1895.
A 121	100	Josiah Grout, For ctf. 103.	Sept. 26, 1895.
A 122	100	Josiah Grout, For ctf. 103.	Sept. 26, 1895.
A 123	100	Wm. W. Grout, For ctf. 103.	Sept. 26, 1895.
A 124	100	Wm. W. Grout, For ctf. 103.	Sept. 26, 1895.
A 125	100	Wm. W. Grout, For ctf. 103.	Sept. 26, 1895.
A 126	100	Wm. W. Grout, For ctf. 103.	Sept. 26, 1895.
A 127	100	Wm. W. Grout, For ctf. 103.	Sept. 26, 1895.

Mr. LAUTERBACH: That is admitted, subject to the same objection.

Q. 145. I call your attention to the stub of certificate A4, Samuel B. Bartholomew, particularly to the words on the stub, "Cancelled and issued to T. N." In whose handwriting are those words?

A. Well, I think that is Shepard's.

Q. 146. Will you now turn to that certificate?

A. I produce the original certificate No. A4, dated September 19, 1895, signed by C. H. Bissell, assistant president, and P. K. Dumaresq, assistant treasurer, registered by the Atlas National Bank, the certificate reading to Samuel B. Bartholomew. The certificate is marked in red ink, "Cancelled," and bears no endorsement.

(By Mr. HEMENWAY:)

Q. —. Do the by-laws provide for an assistant president?

A. Yes. They were too busy to sign certificates, and so Mr. Bissell was elected assistant president, and P. K. Dumaresq was elected assistant treasurer.

Q. 147. I call your attention also to the stub of certificate A5, to A. Eldredge, and particularly to the words "Cancelled and issued to T. Nelson, treasurer." In whose handwriting are those words?

A. Mr. Shepard's.

Q. 148. Now, turning to the original certificate A5——

A. I produce herewith the original certificate, which is signed by C. H. Bissell, assistant president, and P. K. Dumaresq,
387 assistant treasurer, registered, "Atlas National Bank," and the name "A. Eldredge," cancelled in red ink, and bearing no endorsement.

Q. 149. I call your attention to the stub of certificate A 13, issued to O. N. Pierce, and to the words "Cancelled and issued to T. Nelson, treasurer;" that is also in Mr. Shepard's handwriting?

A. Yes.

Q. 150. Will you produce the certificate?

A. I produce certificate A 13, dated September 19, 1895, signed by C. H. Bissell, assistant president, P. K. Dumaresq, assistant treasurer, registered by the Atlas Bank, in the name of O. N. Pierce, "Cancelled" in red ink, and bearing no endorsement.

Q. 151. Will you now produce certificate book B, containing 50-share lots, and furnish a list of the certificates issued prior to September 27, 1895?

A. I herewith produce the certificate book B. The 50-share lots are as follows, from B 1 to B 70, inclusive:—

No. of certificate.	No. of shares.	Name.	Date.
B 1	50	Wm. A. L. Bazeley	Sept. 19, 1895.
B 2	50	Edwin M. Dodd	Sept. 19, 1895.
B 3	50	H. S. Goodell	Sept. 19, 1895.
B 4	50	Horatio Newhall	Sept. 19, 1895.
B 5	50	James Ormond	Sept. 19, 1895.
B 6	50	George Whitney	Sept. 19, 1895.
B 7	50	W. P. Winsor	Sept. 19, 1895.
B 8	50	Charles Head & Co. For part ctf. No. 35 canc'd.	Sept. 19, 1895.
B 9	50	Charles Head & Co. For part ctf. No. 35 canc'd.	Sept. 19, 1895.
B 10	50	Charles Head & Co. For part ctf. 35 canc'd.	Sept. 19, 1895.
B 11	50	Charles Head & Co. For ctf. No. 35 canc'd.	Sept. 19, 1895.
B 12	50	Charles Head & Co. For part ctf. No. 35.	Sept. 19, 1895.
B 13	50	Charles Head & Co. For bal. ctf. No. 35.	Sept. 19, 1895.

No. of Certificate.	No. of Shares.	Name.	Date.
B 14	50	E. D. Bangs & Co. For part ctf. 14 (Should be 141)	Sept. 19, 1895.
B 15	50	E. D. Bangs & Co. Fort part ctf. 141.	Sept. 19, 1895.
B 16	50	E. D. Bangs & Co. Fort part ctf. 141.	Sept. 19, 1895.
B 17	50	E. D. Bangs & Co. Fort part ctf. 141.	Sept. 19, 1895.
B 18	50	Wm. H. Reed. For part ctf. 115.	Sept. 19, 1895.
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B 19	50	F. S. Mead & Co. For part ctf. 107.	Sept. 19, 1895.
B 20	50	F. S. Mead & Co. For part 107.	Sept. 19, 1895.
B 21	50	F. S. Mead & Co. For ctf. bal. 107.	Sept. 19, 1895.
B 22	50	F. S. Mead & Co. For bal. ctf. 107.	Sept. 19, 1895.
B 23	50	Hayden, Stone & Co. For part 134.	Sept. 19, 1895.
B 24	50	Hayden, Stone & Co. For part 134.	Sept. 19, 1895.
B 25	50	Hayden, Stone & Co. For part ctf. 134.	Sept. 19, 1895.
B 26	50	Hayden, Stone & Co. For part 134.	Sept. 19, 1895.
B 27	50	Hayden, Stone & Co. For part ctf. 134.	Sept. 19, 1895.
B 28	50	Clark, Ward & Co. For part ctf. 96.	Sept. 19, 1895.
B 29	50	Clark, Ward & Co. For part ctf. 96.	Sept. 19, 1895.
B 30	50	Clark, Ward & Co. For part ctf. 96.	Sept. 19, 1895.
B 31	50	Clark, Ward & Co. For ctf. 96.	Sept. 19, 1895.
B 32	50	Clark, Ward & Co. For bal. ctf. 96.	Sept. 19, 1895.
B 33	50	Richardson, Hill & Co. For part ctf. 120.	Sept. 19, 1895.
B 34	50	Richardson, Hill & Co. For part ctf. 120.	Sept. 19, 1895.
B 35	50	Richardson, Hill & Co. For ctf. 120.	Sept. 19, 1895.
B 36	50	Richardson, Hill & Co. For bal. ctf. 120.	Sept. 19, 1895.
B 37	50	E. Rollins Morse & Bro. For ctf. 23.	Sept. 19, 1895.

No. of Certificate.	No. of Shares.	Name.	Date.
B 38	50	C. H. Bissell..... For part ctf. 1.	Sept. 19, 1895.
B 39	50	C. H. Bissell..... For ctf. bal. 1.	Sept. 19, 1895.
B 40	50	C. A. Putnam & Co..... For part ctf. 88.	Sept. 19, 1895.
B 41	50	Paine, Webber & Co..... For part ctf. 88.	Sept. 19, 1895.
B 42	50	Clement B. Asbury..... For ctf. 91.	Sept. 19, 1895.
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B 43	50	Gray, Dewey & Co..... For ctf. 101.	Sept. 19, 1895.
B 44	50	Chas. Head & Co..... For ctf. 95.	Sept. 19, 1895.
B 45	50	Chas. Head & Co..... For bal. 95.	Sept. 19, 1895.
B 46	50	Richard F. Bolles..... For part ctf. 90.	Sept. 20, 1895.
B 47	50	Tower, Giddings & Co..... For part ctf. 124.	Sept. 20, 1895.
B 48	50	Tower, Giddings & Co..... For part ctf. 124.	Sept. 20, 1895.
B 49	50	Tower, Giddings & Co..... For part ctf. 124.	Sept. 20, 1895.
B 50	50	Tower, Giddings & Co..... For bal. ctf. 124.	Sept. 20, 1895.
B 51	50	Jackson & Curtis..... For part ctf. 38.	Sept. 20, 1895.
B 52	50	Jackson & Curtis..... For bal. ctf. 38.	Sept. 20, 1895.
B 53	50	Chas. Head & Co..... For part ctf. 24.	Sept. 20, 1895.
B 54	50	F. S. Mead & Co..... For bal. ctf. 8.	Sept. 20, 1895.
B 55	50	Samuel B. Capen..... For part ctf. 137.	Sept. 20, 1895.
B 56	50	Clement B. Asbury..... For part ctf. 44.	Sept. 20, 1895.
B 57	50	William Basset..... For ctf. 8.	Sept. 20, 1895.
B 58	50	Josiah W. Hayden..... For part ctf. 129.	Sept. 23, 1895.
B 59	50	Wm. M. Bunting..... For bal ctf. 129.	Sept. 23, 1895.
B 60	50	Kinnicutt & De Witt..... For ctf. 15.	Sept. 24, 1895.
B 61	50	H. C. Wainwright & Co... For ctf. 15.	Sept. 24, 1895.

No. of certificate.	No. of shares.	Name.	Date.
B 62	50	Joseph G. Ray..... For part ctf. 116.	Sept. 24, 1895.
B 63	50	Joseph G. Ray..... For ctf. 116.	Sept. 24, 1895.
B 64	50	Price & Co..... For part ctf. 112.	Sept. 26, 1895.
B 65	50	Price & Co..... For part ctf. 112.	Sept. 26, 1895.
B 66	50	Walter P. Smith..... For ctf. 103.	Sept. 26, 1895.
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B 67	50	Angus H. McLeod..... For ctf. 103.	Sept. 26, 1895.
B 68	50	Stocker Bros. ..... For ctf. 103.	Sept. 26, 1895.
B 69	50	F. T. Dwinell..... For ctf. 103.	Sept. 26, 1895.
B 70	50	Tower, Giddings & Co.... For ctf. 45.	Sept. 26, 1895.

Q. 152. I call your attention to the stub of certificate B3, H. A. Goodell, under date of September 19, 1895, 50 shares. The words thereon, "Cancelled and issued to Thomas Nelson, treasurer," in whose handwriting are they?

A. Mr. Shepard's.

Q. 153. Will you now produce the original certificate No. B3?

A. I herewith produce such certificate. It is signed by C. H. Bissell, assistant president, and P. K. Dumaresq, assistant treasurer; registered by the Atlas Bank, in the name of H. A. Goodell, and marked in red ink "Cancelled." The certificate bears no endorsement.

Q. 154. Will you now produce the certificate issued in place of these certificates of 350 shares, namely, transferred to Nelson from Bartholomew Eldridge, O. N. Pierce, and H. A. Goodell?

A. I herewith produce certificate No. 409, duly signed and registered for 350 shares, dated October 10, 1895, in the name of Thomas Nelson, treasurer. The assignment on the back of the certificate, under date of September 21, 1897, is signed by Thomas Nelson, treasurer, his signature being witnessed by W. A. S. Chrimes. The assignment is to Stackpole & Gay, of the whole 350 shares, E. J. Young being appointed attorney to make the transfer.

Q. 155. Proceeding now in the miscellaneous certificate book I call your attention to certificate 197, and ask you to read the stub of the same.

A. "No. 197, 40 shares, issued to Charles H. Altmiller, dated Sept. 27, 1895, for certificate 140, original subscription."

Q. 156. Certificate 140 being a certificate to P. K. Dumaresq for 99,420 shares?

A. Yes.

Q. 157. Will you now furnish us a list of all the certificates issued under date of September 27, 1895, other than certificate 140 for 99,420 shares?

A. Yes.

No. of certificate.	No. of shares.	Name.	Date.
197	40	Charles H. Altmiller	Sept. 27, 1895.
198	400	D. M. Authony	Sept. 27, 1895.
199	40	John W. Alline	Sept. 27, 1895.
200	40	W. A. L. Bazeley	Sept. 27, 1895.
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201	200	Harold M. Authony	Sept. 27, 1895.
		Cancelled.	
202	1,600	John H. Ball	Sept. 27, 1895.
		Cancelled.	
203	480	Richard F. Bolles	Sept. 27, 1895.
204	800	J. W. Belches & Co.	Sept. 27, 1895.
205	800	S. N. Brown	Sept. 27, 1895.
206	4,000	A. S. Bigelow	Sept. 27, 1895.
207	200	Thomas P. Beal	Sept. 27, 1895.
208	40	W. A. S. Chrimes	Sept. 27, 1895.
209	120	Charles H. Cole	Sept. 27, 1895.
210	640	Henry P. Coe	Sept. 27, 1895.
211	400	Charles H. Cole	Sept. 27, 1895.
212	1,520	Joseph A. Coram	Sept. 27, 1895.
213	1,600	Stephen M. Crosby	Sept. 27, 1895.
214	800	Daniel L. Demmon	Sept. 27, 1895.
215	400	Ely & Co.	Sept. 27, 1895.
216	200	Robert M. Field	Sept. 27, 1895.
217	400	Isaac Fenno	Sept. 27, 1895.
218	800	Robert C. Billings	Sept. 27, 1895.
219	160	H. B. Goodenough	Sept. 27, 1895.
220	800	Charles Head	Sept. 27, 1895.
221	280	Charles Head & Co.	Sept. 27, 1895.
222	650	Timothy E. Hopkins	Sept. 27, 1895.
223	800	Hayden, Stone & Co.	Sept. 27, 1895.
224	400	Zachary T. Hollingsworth	Sept. 27, 1895.
225	80	Albert E. Harding	Sept. 27, 1895.
226	160	N. E. Hollis	Sept. 27, 1895.
227	160	George W. Hollis	Sept. 27, 1895.
228	500	Mrs. Mary L. Jones	Sept. 27, 1895.
229	600	Joseph S. Kendall	Sept. 27, 1895.
230	320	Leland, Towle & Co.	Sept. 27, 1895.
231	200	George H. Lyman	Sept. 27, 1895.
232	36,190	Leonard Lewisohn	Sept. 27, 1895.
		Cancelled.	
233	400	Mrs. Abby H. Manning	Sept. 27, 1895.
234	200	Benjamin F. Messervy	Sept. 27, 1895.
		Cancelled.	
235	2,000	J. Morris Meredith	Sept. 27, 1895.

No. of certificate.	No. of shares.	Name.	Date.
236	800	A. S. Maltman	Sept. 27, 1895.
237	800	Francis H. Manning	Sept. 27, 1895.
238	240	Henry C. Moses	Sept. 27, 1895.
239	400	Stephen O. Metcalf	Sept. 27, 1895.
240	160	H. H. Mawhinney	Sept. 27, 1895.
241	160	John O'Connor	Sept. 27, 1895.
242	400	George M. Preston	Sept. 27, 1895.
243	400	Gordon Prince	Sept. 27, 1895.
244	80	Thomas H. Perkins	Sept. 27, 1895.
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245	400	William H. Reed	Sept. 27, 1895.
246	400	Joseph G. Ray	Sept. 27, 1895.
247	80	Nancy E. Rust	Sept. 27, 1895.
248	800	E. C. Swift	Sept. 27, 1895.
249	400	Horace H. Stevens	Sept. 27, 1895.
250	800	Moses T. Stevens	Sept. 27, 1895.
251	200	Samuel S. Stevens	Sept. 27, 1895.
252	400	Albert O. Smith	Sept. 27, 1895.
253	400	Frank D. Somers	Sept. 27, 1895.
254	240	Samuel S. Spaulding	Sept. 27, 1895.
255	200	John F. Towle	Sept. 27, 1895.
256	400	Jeremiah Williams	Sept. 27, 1895.
257	800	Henry Woods	Sept. 27, 1895.
258	400	Harold Williams	Sept. 27, 1895.
259	240	Leonard Wheeler	Sept. 27, 1895.
260	800	S. W. Richardson agent for James S. Cunston.	Sept. 27, 1895.
261	4,000	Henry M. Whitney	Sept. 27, 1895.
262	20,000	P. K. Dumaresq	Sept. 27, 1895.
263	200	Maxwell Woodhull	Sept. 27, 1895.
264	200	Maxwell Woodhull	Sept. 27, 1895.
265	200	Maxwell Woodhull	Sept. 27, 1895.
266	200	Maxwell Woodhull	Sept. 27, 1895.
267	200	Maxwell Woodhull	Sept. 27, 1895.
268	800	John H. Pierce	Sept. 27, 1895.
269	36,190	Leonard Lewisohn	Sept. 27, 1895.
270	200	Harold H. Anthony	Sept. 27, 1895.
271	1,600	George H. Ball	Sept. 27, 1895.
272	200	Benjamin F. Messervy	Sept. 27, 1895.

Q. 158. Referring to miscellaneous certificate book, comprising certificates 197 to 269, A certificate book, comprising Nos. 128 to 161, and B certificate book, comprising Nos. 72 to 79, all of said certificates being dated September 27, I call your attention in miscellaneous certificate book to certificate No. 201, 200 shares, issued to Harold M. Anthony, dated September 27, 1895, for certificate 140 sundries, and ask you to produce that certificate.

A. I herewith produce the original certificate No. 201. The certificate is dated September 27, 1895, signed by C. H. Bissell, assistant president, and P. K. Dumaresq, assistant treasurer, in the name of

Harold M. Anthony, marked "Cancelled" on the face. It is not registered, and is not endorsed.

Q. 159. I call your attention to the stub No. 202, for 1600 shares, issued to John H. Ball, dated September 27, 1895, for certificate 140 subscription, marked "Cancelled," and ask you to produce the original of that certificate.

A. I herewith produce certificate No. 202. It is dated Sep-
393 tember 27, 1895, signed by C. H. Bissell, assistant president, and P. K. Dumaresq., assistant treasurer, in the name of John H. Ball, and is marked "Cancelled." It is not registered, and bears no endorsement.

Q. 160. I call your attention to the stub of certificate No. 232, for 36,190 shares, issued to Leonard Lewisohn, and marked "Cancelled," dated September 27, 1895, and ask you to produce the original certificate.

A. I produce the original certificate in the name of Leonard Lewisohn for 36,190 shares. The certificate is not signed nor dated, nor registered nor endorsed in any way.

Q. 161. I call your attention to the stub of certificate No. 234, for 200 shares, issued to Benjamin F. Messervy, dated September 27, 1895, and marked "Cancelled," and ask you to produce the original certificate.

A. I herewith produce the certificate. It is signed by C. H. Bissell, assistant president, and P. K. Dumaresq, assistant treasurer, dated September 27, 1895, in the name of Benjamin F. Messervy, and marked "Cancelled." It is not registered nor endorsed.

Q. 162. Will you please produce the original certificate A143?

A. I produce, as requested, the orignal certificate A143, dated September 27, 1895, in the name of Miss Annie R. Anthony, signed by C. H. Bissell, assistant president, and by P. K. Dumaresq, assistant treasurer, registered at the Atlas National Bank. A. On the back of the certificate are endorsed the words, "This stock was unclaimed and unpaid for, and therefore is returned to the treasurer. William H. Shepard, transfer clerk."

Q. 163. Will you also produce certificate A 161, in the name of George E. Sanborn?

A. I produce, as requested, the original certificate A 161, dated September 27, 1895, to George E. Sanborn. The certificate is signed by C. H. Bissell, assistant president, P. K Dumaresq, assistant treasurer, registered by the Atlas National Bank. This certificate bears on the back, in writing, "Oct. 31, 1895. This stock was uncalled for and not paid for, and for that reason returned to the treasurer. W. H. Shepard, transfer clerk."

Q. 164. Will you refer to the transfer book and state out of what certificate the 36,190 shares were taken?

A. Out of certificate 140.

Q. 165. Will you please produce the original certificate No. 269 (miscellaneous), dated September 27, 1895, in the name of Leonard Lewisohn, for 36,190 shares?

A. I herewith produce that certificate dated September 27, 1895, signed by C. H. Bissell, assistant president, and P. K. Dumaresq,

assistant treasurer, registered by the Atlas National Bank, for 36,190 shares. The certificate is endorsed to transfer as follows, the transfer being signed "Leonard Lewisohn, by Adolph Lewisohn, attor-
394 ney," with Sidney Riddlestorffer as witness, on the date of September 28, 1895, and attached thereto is a letter of Lewisohn, which appears to be signed by Adolph Lewisohn, general manager, as follows:

"Lewisohn Brothers, 81 & 83 Fulton Street.

Cable Address 'Lohengrin.'
P. O. Box 1247, New York.

NEW YORK, *Sep. 27th*, 1895.

A S. Bigelow, Esq., Boston, Mass.

DEAR SIR: As arranged over the telephone, we herewith beg to hand you power of attorney and would ask you to have 9,500 shares of the Old Dominion Copper Mining & Smelting Company's stock transferred in the following names:

2,000 shares in the name of Lewisohn Brothers.
1,000 shares in the name of Lewisohn Brothers.
200 shares in the name of Lewisohn Brothers.
2,000 shares in the name of E. L. Oppenheim & Co.
1,000 shares in the name of Waldemar Caspary.
500 shares in the name of E. Lataste.
500 shares in the name of L. Nachmann.
500 shares in the name of H. Wallerstein.
500 shares in the name of Jacob Cahn.
400 shares in the name of J. D. Probst & Co.
400 shares in the name of Ladenburg, Thalmann & Co.
200 shares in the name of C. S. Henry & Co.
200 shares in the name of C. S. Henry & Co.
100 shares in the name of C. S. Henry & Co.

Total 9,500 Shares

Please send the certificates to us as soon as made out and oblige
Very truly yours,

LEWISOHN BROTHERS,
ADOLPH LEWISOHN,
General Manager."

H. E./F.

395 Addresses:

E. Lataste, 64 rue des Mathurins, Paris.
L. Nachmann, 59 William street, New York.
J. D. Probst & Company, 50 Exchange place, New York.
H. Wallerstein, 32 Spruce street, New York.
Waldemar Caspary 502-504 Broadway, New York.
E. L. Oppenheim & Company, 35 New street, N. Y.

Ladenburg, Thalmann & Company, 46 Wall street, New York.
C. S. Henry & Company, 46 St. Mary avenue, London, England.
Jacob Cahn, 50 Broadway, New York.
Lewisohn Brothers, 81-83 Fulton street, New York.

Q. 166. Now, Mr. Altmiller, will you give us a list of the certificates issued out of this certificate No. 269?
A. Yes.

No. of certificate.	No. of shares.	Name.	Date.
278	2,000	Lewisohn Bros.	Sept. 28, 1895.
279	1,000	Lewisohn Bros.	Sept. 28 1895.
280	200	Lewisohn Bros.	Sept. 28, 1895.
281	2,000	E. L. Oppenheim & Co.	Sept. 28, 1895.
282	1,000	Waldemar Caspary	Sept. 28, 1895.
283	500	E. Lataste	Sept. 28, 1895.
284	500	L. Nachmann	Sept. 28, 1895.
285	500	H. Wallerstein	Sept. 28, 1895
286	500	Jacob Cahn	Sept. 28, 1895.
287	400	J. D. Probst & Co.	Sept. 28, 1895.
288	400	Ladenburg, Thalmann & Co.	Sept. 28, 1895.
289	200	C. S. Henry & Co.	Sept. 28, 1895.
290	200	C. S. Henry & Co.	Sept. 28, 1895.
291	26,690	Leonard Lewisohn	Sept. 28, 1895.
A 173	100	C. S. Henry & Co.	Sept. 28, 1895.

Q. 167. I call your attention to the stub of the miscellaneous certificate book No. 419, under date of October 17, 1895, for 22,650 shares, issued to Leonard Lewisohn, for certificate sundries, and ask you in exchange for what certificates this certificate No. 419 was issued?
A. Well, part of 74 and part of 262, or 262 and part of 74.
Q. 168. To the extent of 20,000 shares from certificate 262 and 2650 shares from certificate 74. Now will you produce certificate No. 419?
A. I herewith produce certificate 419 for 22,650 shares, dated October 17, 1895, which certificate is duly signed and registered, and is endorsed under date of September 23, 1897, by Leonard Lewisohn, by Adolph Lewisohn, attorney, as per a letter of September 23, 1897, thereto attached, which is as follows:

396 "Lewisohn Brothers, 81 & 83 Fulton Street,

Cable Address, 'Lohengrin.'
P. O. Box, 1247, New York.

NEW YORK, *Sept.* 23, 1897.

Mr. Thomas Nelson, Secretary, Old Dominion Copper Mining & Smelting Co. Boston, Mass.

DEAR SIR: In accordance with our telephonic conversation with you, we have sent you per Adams Express, prepaid, Certificate No.

419 for 22,650 shares Old Dominion stock in the name of our Mr. Leonard Lewisohn, and for which you will please send us Certificates made out as follows:

Two Certificates of 5000 each	in name of Leonard Lewisohn	10,000
One Certificate of 1000	in name of Arthur David	1,000
Two Certificates of 500 / One Certificate of 50	in name of C. E. Baker	1,050
Six Certificates of 100 each / One Certificate of 1000	in name of Thomas F. Lynch	1,600
One Certificate of 1000	in name of N. E. Daly	1,000
One Certificate of 1000 / Five Certificates of 100 each	in name of Henry Lang	1,500
One Certificate of 500 / One Certificate of 1000	in name of Eugene Scharff	1,500
Two Certificates of 1000 / Six Certificates of 500 each	in name of Theodore Garden	5,000
Total		22,650

You will kindly give this matter your early attention and return these certificates to us. By so doing you will greatly oblige,

Yours truly,

LEWISOHN BROTHERS,
ADOLPH LEWISOHN,
General Manager."

J. R./N.

Q. 169. I call your attention to the stub (miscellaneous) No. 420, to A. S. Bigelow, 27,350 shares, for sundries, marked "Cancelled," and ask you to produce that certificate.

A. I herewith produce that canceled certificate No. 420; it is unsigned, undated, and not registered.

397 Q. 170. I ask you now to produce certificate No. 421 to A. S. Bigelow for 27,350 shares, dated October 17, 1895.

A. I herewith produce that certificate, dated October 17, 1895, duly signed and registered. The certificate bears on itself no endorsement, but there is noted upon it in pencil a memorandum showing the disposition of the 27,350 shares.

Q. 171. I call your attention to the stub of miscellaneous certificate No. 409, for 350 shares, issued October 10, 1895, to Thomas Nelson, treasurer, and ask you to examine the transfer book to ascertain whether that certificate was issued in exchange for the certificates to Bartholomew, Eldredge, Pierce, and Goodell, as above testified to by you?

A. I do not think you can find any transfer for that; they simply canceled the old certificates and issued new ones.

Q. 172. Will you now produce the original of miscellaneous certificates No. 8, to Thomas Nelson, for 16 shares; No. 10, to Henry M. Whitney, 4 shares; No. 11, to Joseph G. Ray, for 4 shares; No. 12, to Leonard Lewisohn, for 4 shares; No. 13, to A. S. Bigelow, for 4 shares, and No. 14, to Moses T. Stevens, for 4 shares?

A. I do not think you can find all of them here. You see, these are the first ones, and if the others remained directors they would be held there for some time. I herewith produce the certificates called for. They are all duly signed and registered, and are endorsed, by the respective parties, under date of September 16 or 18, 1895.

Mr. LAUTERBACH: They appear to be transferred to Dumaresq.

Q. 173. Will you now produce certificate No. 75, issued to Moses T. Stevens, for 4 shares; No. 76, to A. S. Bigelow, for 4 shares; No. 77, to Leonard Lewisohn, for 4 shares; No. 78, to Thomas Nelson, for 16 shares; No. 79, to Edgar Buffum, for 4 shares; No. 80, to Joseph G. Ray, for 4 shares, and No. 81, to Henry M. Whitney, for 4 shares?

A. I do not think you will find any of those here. Those were qualifying shares. They are not here; they are at the office.

[The further taking of this deposition was postponed until Tuesday, the 18th day of October, at the same time and place, and was then resumed, as follows:]

Q. 174. Have you now the certificates called for in Int. 173?

A. Yes. I herewith produce the original certificates. They are all dated September 18, 1895. Nos. 75, 76, 77, 78, 80, and 81 are endorsed by the respective parties in whose names the certificates stood, and are assigned to Thomas Nelson, treasurer; and all of those, except certificate 81, are stamped on the back "Transferred Nov. 4, 1895." The transfer of certificate No. 75 is dated November 2, 1895; that of No. 76, October 31, 1895; that of 77, November 2, 1895; that of No. 78, October 31, 1895; that of 80,
398 November 2, 1895; the transfer on the back of 81 is not dated. Certificate No. 79, to Edgar Buffum, is endorsed by Edgar Buffum, under date of January 17, 1896, to Laurent Oppenheim, and is stamped "Transferred April 8, 1897."

Q. 175. Will you now produce the certificate which was issued to Thomas Nelson, treasurer, for the 36 shares transferred to him from the certificates referred to in Ints. 173 and 174?

A. I herewith produce the original certificate, No. 466, dated November 4, 1895, for 36 shares, to Thomas Nelson, treasurer, under date of September 21, 1897, transferring 25 shares to Stackpole & Gay and 11 shares "to myself."

Q. 176. Will you now produce certificate No. 409, for 350 shares, to Thomas Nelson, treasurer, referred to in Int. 171?

A. I herewith produce the original certificate No. 409, endorsed Thomas Nelson and Thomas Nelson, treasurer, transferring the same, under date of September 21, 1897.

Q. 177. Will you now produce the original certificate issued to Thomas Nelson, treasurer, in exchange for certificate A143 referred to in Int. 161, and A161 referred to in Int. 163?

A. I herewith produce the original certificate No. 465, dated October 31, 1895, in the name of Thomas Nelson, treasurer, for 200 shares. This certificate is endorsed by Thomas Nelson, treasurer,

transferring the same to Stackpole & Gay, under date of September 21, 1897.

Q. 178. Will you now produce the original certificate for 11 shares, issued to Thomas Nelson, treasurer, being the balance remaining of the 36 shares issued to him by certificate 466, after transferring 25 shares to Stackpole & Gay?

A. I herewith produce the original certificate No. 1203, dated September 20, 1897, to Thomas Nelson, treasurer, endorsed by him, under date of September 24, 1897, as follows: "To Stackpole & Gay, 10 shares; to myself, 1 share."

Q. 179. Will you now produce the certificate for 1 share to Thomas Nelson, treasurer, being the balance remaining out of certificate No. 1203 after transferring 10 shares to Stackpole & Gay?

A. I now produce the original certificate No. 1255, dated September 23, 1897, to Thomas Nelson, treasurer, for 1 share, and endorsed by Thomas Nelson, treasurer, assigning this 1 share to Stackpole & Gay.

Q. 180. Referring to the printed circular referred to in Int. 101, of which a copy is annexed to your deposition as Exhibit 6, I ask you whether or not the printing of that circular was paid for by the Old Dominion Copper Mining & Smelting Company.

A. I find that it was.

Mr. LAUTERBACH: All these questions are taken subject to our general objection, are they?

399 Mr. BRANDEIS: Well, I suppose so. I do not know what the general objection is.

Mr. LAUTERBACH: That they are immaterial, incompetent, and irrelevant, and that the witness has no personal knowledge.

Mr. BRANDEIS: That, I think, we cannot have as a general objection.

Mr. LAUTERBACH: No, but I make that objection specifically.

Q. 181. Will you state under what date that circular was paid for?

A. October 30, 1895.

Q. 182. How is it paid for?

A. By check from the Old Dominion Copper Mining & Smelting Company.

Q. 183. Of what amount?

A. With other items, $269.

Q. 184. To whom was that check paid?

A. Well, I suppose it was paid to the Old Dominion Copper Mining & Smelting Company.

Q. 185. That is your handwriting?

A. No, sir, that is T. C. Cummings'.

Q. 186. Who is T. C. Cummings?

A. He used to be a clerk there.

Q. 187. Where is he now?

A. At Towle & Fitzgerald's, 18 Post Office square. I suppose that was paid for by the check of the Montana Mining & Smelting Company.

Q. 188. Explain why your check was made to the Boston & Montana Mining Company; that is, how this account was kept.

A. The Boston & Montana had a general expense book, and the small sundry bills of various companies in which Mr. Bigelow was interested were paid for by petty cash and charged in this book. Then at the end of the month the various charges were itemized on a statement such as you have here, and a check given by that company to the Boston & Montana Company.

Q. 189. Now will you read the statement which you have here to which you have just referred?

A.—

"Old Dominion Copper Mining & Smelting Company.

1895.			
Oct.	5, W. H. A. Parks, transfer book		$16 50
"	7, L. Barta & Co.,—bill		2 25
"	7, W. H. A. Parks, "		38 75
"	15, "	3000 certificates, 6 books	206 75
"	18, "	trial balance book	4 75
	Total		$269 00"

400 (By Mr. LAUTERBACH:)

Q. Where is the item for this circular?

A. The item of $2.25.

Q. 190. Is this paper which you have just read in answer to Int. 189, the original voucher of the Old Dominion Copper Mining & Smelting Company?

A. It is.

Q. 191. Do you know in whose handwriting that voucher is?

A. I think that is Charles H. Coe's; I would not say for sure; I do not know.

Q. 192. Have you, and will you produce, also the original voucher of L. Barta & Company for printing these circulars?

A. I have, and I produce the same.

[Voucher introduced in evidence, as follows:]

"L. Barta & Co. Printers, 144 and 148 High Street.

BOSTON, MASSACHUSETTS, *Oct.* 1, 1895.

In account with Old Dominion Copper & Silver Mining Co.

Sept. 11, 100 ½ note circular, 5½ x 8½ 2.25

Received Payment Oct. 7, 1895.

L. BARTA & CO.,
Per COLLAMORE."

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Q. 193. Have you measured the circular introduced as Exhibit 6, and attached to your deposition, and can you state—if so, please state—what the dimensions of the circular are?

A. I have not measured it, but so far as I saw you measure it, it is 5½ x 8½.

Q. 194. Well, that is the measurement, is it not?

A. Yes.

Q. 195. Will you now give a list of the certificates issued in exchange for certificate 419 in pursuance of the transfer set forth in Int. 168?

A. I herewith present such a list.

No. of certificate.	No. of shares.	Name.
1256	5000	Leonard Lewisohn.
1257	5000	Leonard Lewisohn.
1258	1000	Arthur David.
1259	500	C. E. Baker.
1260	500	C. E. Baker.
B 1384	50	C. E. Baker.
A 1387	100	Thomas F. Lynch.
A 1388	100	Thomas F. Lynch.
A 1389	100	Thomas F. Lynch.

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A 1390	100	Thomas F. Lynch.
A 1391	100	Thomas F. Lynch.
A 1392	100	Thomas F. Lynch.
1262	1000	Thomas F. Lynch.
1263	1000	N. E. Daly.
1264	1000	Henry Lang.
A 1393	100	Henry Lang.
A 1394	100	Henry Lang.
A 1395	100	Henry Lang.
A 1396	100	Henry Lang.
A 1397	100	Henry Lang.
1265	500	Eugene Scharff.
1266	1000	Eugene Scharff.
1267	1000	Theodore Gaden.
1268	1000	Theodore Gaden.
1269	500	Theodore Gaden.
1270	500	Theodore Gaden.
1271	500	Theodore Gaden.
1272	500	Theodore Gaden.
1273	500	Theodore Gaden.
1274	500	Theodore Gaden.

Q. 196. It appears by an examination of the stubs of the miscellaneous certificate book and of certificate book A, and of certificate book B that the stub, in referring to the certificate for which a given certificate is issued, does not distinguish, in giving the num-

ber, between the three certificate books. In what manner can you determine whether a certificate referred to on the stub of any one of these books is an original certificate taken out of the miscellaneous certificate book, or out of A, or out of B?

A. By referring to the transfer book.

Q. 197. Will you compare the stubs of those three certificate books with the transfer book, and furnish a list which shall show as follows:

First, what certificates in the miscellaneous book are issued for certificates in A book and what in B book?

Second, what certificates in A are issued for certificates from the miscellaneous book and what from book B?

Third, what certificates in book B are issued from certificates in miscellaneous book, and what from book A?

Mr. LAUTERBACH: There is no objection to the form of the interrogatory, or to the method of proof, but we object to it because it is immaterial, incompetent, and irrelevant.

A. First. The following certificates in the miscellaneous book were issued for certificates appearing in A book and B book:

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147	E. Rollins Morse & Bro.	for	part	A	23.
148	E. Rollins Morse & Bro.	"	"	A	23.
158	Emil W. Hunzinger	"	"	B	10.
159	Tucker, Anthony & Co.	"	"	B	10.
163	Leland, Towle & Co.	"	"	A	24.
164	Charles Head & Co.	"	"	A	24.
165	F. S. Mead & Co.	"	"	A	8.
176	Clement B. Asbury	"	"	A	8.
174	Clement B. Asbury	"	"	A	44.
175	William Basset	"	"	A	44.
177-78-79	Clark, Ward & Co.	"	"	B	30.
190	Paine, Webber & Co.	"	"	B	46.
191	Tucker, Anthony & Co.	"	"	B	46.
314	Kinnicutt and De Witt	"	"	A	193.
315	J. W. Belches & Co.	"	"	A	193.
316	Tucker, Anthony & Co.	"	"	A	193.
317	Mrs. Eilzabeth G. Bright	"	"	A	193.
318	Parkinson & Burr	"	"	A	193.
319	Pearmain & Brooks	"	"	A	193.
320	William H. Breed	"	"	B	76.
321	James M. W. Hall	"	"	B	76.
322	J. W. Belches & Co.	"	"	A	171.
323	Charles Sprague	"	"	A	171.
324	Charles H. Hooke	"	"	A	171.
325-326	Benjamin F. Messervy	"	"	A	171.
399-400	Richard F. Bolles	"	"	A	199.
401	Charles H. Cole, Jr.	"	"	A	164.
402-403	Charles H. Cole.	"	"	A	164.
425-426	Edward D. Williams.	"	"	B	193.

455	F. S. Mead & Co	"	"	B	61.
459	Charles Head & Co	"	"	B	97.
460	Leland, Towle & Co	"	"	B	97.
485-486	Chas. H. Cole	"	"	B	143.
492	M. Bolles & Co	"	"	A	391.
493	F. S. Mead & Co	"	"	A	391.
496-97-98-98	Mrs. Laura E. Wilkins	"	"	B	227.

Second. The following certificates in A book were issued for certificates from the miscellaneous book and B book:

A 27-28-29	E. D. Bangs & Co	part of	Miscellaneous		141
B 14-15-16-17	E. D. Bangs & Co	"	"	"	141.
A 30	William H. Reed	"	"	"	115.
B 18	William H. Reed	"	"	"	115.
A31-32-33-34-35	Albert W. Smith	"	"	"	118.
A 36-37	F. S. Mead & Co	"	"	"	107.
B 19-20-21-22	F. S. Mead & Co	"	"	"	107.
A 38-47	Hayden, Stone & Co	"	"	"	134.

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B 23-27	Hayden, Stone & Co	part of	Miscellaneous		134
A 48-57	Clark, Ward & Co	"	"	"	96.
B 28-32	Clark, Ward & Co	"	"	"	96.
B 40	C. A. Putnam & Co	"	"	"	88.
B 41	Paine, Webber & Co	"	"	"	88.
A 58	Paine, Webber & Co	"	"	"	88.
A 59-60-61-62	Clement B. Asbury	"	"	"	91.
B 42	Clement B. Asbury	"	"	"	91.
A 63-64	L. Herbert Taft	"	"	"	101.
B 43	Gray, Dewey & Co	"	"	"	101.
A 65-66	Richard F. Bolles	"	"	"	90.
B 46	Richard F. Bolles	"	"	"	90.
A 67-68-69-70	Philip P. Carleton	"	"	"	111.
	George A. Haskell	"	"	"	111.
	Frederick W. Alexander	"	"	"	111.
	Edward G. Cook	"	"	"	111.
A 72	Tower, Giddings & Co	"	"	"	124.
B 47-48-49-50	Tower, Giddings & Co	"	"	"	124.
A 77-89-90	Clement B. Asbury	"	"	"	123.
A 91	William F. Whittemore	"	"	"	100.
A 92-93-94	Josiah W. Hayden	"	"	"	129.
B 58	Josiah W. Hayden	"	"	"	129.
B 59	Wm. M. Bunting	"	"	"	129.
A 95-96-97	Ely & Co	"	"	"	102.
A 102-99	Frank S. Mackenzie	"	"	"	109.
A 100-101	Chas. J. McKenzie	"	"	"	109.
A 104-109	Joseph G. Ray	"	"	"	116.
B 62-63	Joseph G. Ray	"	"	"	116.
B 64-65	Price & Co	"	"	"	112.
A 111-112-113	Price & Co	"	"	"	112.

B 66	Walter P. Smith	"	"	"	103.
A 120	W. H. Blasdell	"	"	"	103.
B 67	Angus H. McLeod	"	"	"	103.
B 68	Stocker Bros	"	"	"	103.
B 69	F. T. Dwinell	"	"	"	103.
A 121-122	Josiah Grout	"	"	"	103.
A123-124-125-126-127	Wm. W. Grout	"	"	"	103.
B 80-81-82-83	C. H. Cole	"	"	"	211.
A 162-163	C. H. Cole	"	"	"	211.
A164-165-166-167-168-169-170	C. H. Cole	"	"	"	212.
A 171-172	Benjamin F. Messervy	"	"	"	272.
B 84	Albert N. Baudin	"	"	"	121.
B 85	H. Stewart Goodell	"	"	"	121.
B 86	Henry Stackpole	"	"	"	121.
A 175-176-177	Henry Stackpole	"	"	"	121.
B 87	John H. Rice	"	"	"	121.
B 178	John L. Rees	"	"	"	121.
A 179-180	James H. Seager	"	"	"	121.
A 181	Chas. H. Rodi	"	"	"	121.
A 174	Albert I. Lawbaugh	"	"	"	121.

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A 182-183-184-185-186	Hayden, Stone & Co	part of	Miscellaneous		223.
B 88-89-90-91-92-93	Hayden, Stone & Co	"	"	"	223.
A 187-188-189-190	Ely & Co	"	"	"	215.
A 191-192-193-194-195	J. W. Belches & Co	"	"	"	204.
B 94-95-96-97-98-99	J. W. Belches & Co	"	"	"	204.
A 196-197-198-199	Richard F. Bolles	"	"	"	203.
B 100	Richard F. Bolles	"	"	"	203.
A 200-201	M. Bolles & Co	"	"	"	254.
A 212-213-214-215	Hayden, Stone & Co	"	"	"	253.
A 216	Joseph F. Green	"	"	"	261.
A 217	William E. Barrett	"	"	"	261.
B 101	William Bunting	"	"	"	256.
A 218-219-220	Jeremiah Williams	"	"	"	256.
B 102	Jeremiah Williams	"	"	"	256.
B 103	Morton Prince	"	"	"	243.
A 221-222-223	Gordon Prince	"	"	"	243.
A 224-225	Elbridge Torrey	"	"	"	210.
A 226	Samuel B. Capen	"	"	"	210.
B 104	Samuel B. Capen	"	"	"	210.
B 105	Joshua W. Davis	"	"	"	210.

A 227	Mrs. Laura E. Wilkins..	"	"	"	210.
A 228	Mrs. Frances M. Perkins..	"	"	"	210.
A 229-230-231-232	Henry D. Hyde.....	"	"	"	213.
A 233-234-235-236	Henry D. Hyde.....	"	"	"	213.
A 237-238-239-240-241-242-243-244	Stephen M. Crosby.....	"	"	"	213.
A 245-246-247-248-249	Charles Head & Co.....	"	"	"	220.
B 120-121-122-123-124-125	Charles Head & Co.....	"	"	"	220.
A 262-263-264	Hayden, Stone & Co....	"	"	"	281.
B 126	Hayden, Stone & Co....	"	"	"	281.
B 127	Herbert H. Barnes.....	"	"	"	281.
A 265 to 274	E. L. Oppenheim & Co...	"	"	"	281.
A 276 to 280	E. L. Oppenheim & Co...	"	"	"	281.
A 286	E. L. Oppenheim & Co...	"	"	"	281.
A 281-282	Richardson, Hill & Co...	"	"	"	260.
B 128 to 138	Spencer W. Richardson..	"	"	"	260.
A 285	Charles H. Altmiller....	"	"	"	85.
B 158	Otis S. Wilbur.....	"	"	"	230.
A 287-288	Leland, Towle & Co.....	"	"	"	230.
B 159	Leland, Towle & Co.....	"	"	"	230.
A 291-292	Thomas B. Eaton.....	"	"	"	273.
A 293	Benjamin F. Stevens....	"	"	"	273.
A 294	George W. Ball.....	"	"	"	273.
A 295-296-297-298	Horace H. Stevens.....	"	"	"	249.
A 299-300	George H. Flint.....	"	"	"	275.
A 301-302	George H. Ball.....	"	"	"	275.
A 303	Kinnicutt & DeWitt.....	"	"	"	364.
B 166-167-168-169	J. W. Belches & Co.....	"	"	"	364.
A 304	Charles T. Baker.....	"	"	"	364.
A 305-306-307-308	Louis G. Schiffer.....	"	"	"	367.

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A 309	Emil Marx.....	part of	Miscellaneous		398.
A 310	Paul Bernhard.....	"	"	"	398.
A 311-312	Sidney Riddlestorffer....	"	"	"	398.
B 178-179	Sidney Riddlestorffer....	"	"	"	398.
A 313-323	John Flynn.....	"	"	"	349.
A 324	William S. Mitchell....	"	"	"	349.
B 189-190	Herbert L. Boyer.....	"	"	"	130.
A 325-326	Herbert L. Boyer.....	"	"	"	130.
B 191	Edward K. Butler.....	"	"	"	252.
B 192	Albert Pratt Smith.....	"	"	"	252.
A 327-328	Albert Oliver Smith.....	"	"	"	252.
A 330 to 339	August Belmont & Co...	"	"	"	279.

A 350-354	Joseph A. Coram	"	"	"	292.
A 357	Joseph A. Coram	"	"	"	292.
A 358 to 365	D. L. Demmon	"	"	"	214.
A 366-367-368	Mrs. Alice Cary Williams	"	"	"	258.
B 194	Albert L. Lincoln, Jr.	"	"	"	258.
A 371	Matthew Luce	"	"	"	429.
B 196-197-198-199	M. Bolles & Co	"	"	"	239.
A 372-373	M. Bolles & Co	"	"	"	239.
A 374	Mrs. Julia Henry	"	"	"	350.
A 375	C. S. Henry Gdn to Cyril Henry	"	"	"	350.
A 376	Sam Lewisohn	"	"	"	350.
A 377	Joseph Rechert	"	"	"	350.
B 202-203	Stephen M. Crosby	"	"	"	448.
A 378-379-380-381	Stephen M. Crosby	"	"	"	448.
A 384-385-386-387	J. A. Coram	"	"	"	450.
B 220 to 229	F. S. Mead & Co	"	"	"	298.
A 388 to 392	F. S. Mead & Co	"	"	"	298.
A 406-407	Imanuel de la Penha	"	"	"	375.
B 250 to 253	Richardson, Hill & Co.	"	"	"	236.
A 408 to 413	Richardson, Hill & Co.	"	"	"	236.
A 418	Leland, Towle & Co	"	"	"	361.
A 419 to 421	John Stanton	"	"	"	361.
A 424 to 431	Curtis & Motley	"	"	"	248.
A 435 to 444	C. Henry Knapp	"	"	"	453.
B 274 to 293	C. Henry Knapp	"	"	"	454.
A 445	Emile Paraf	"	"	"	283.
A 446-447	Mrs. Mary DeFord Bigelow	"	"	"	427.
A 449 to 453	C. Henry Knapp	"	"	"	452.
B 294 to 303	C. Henry Knapp	"	"	"	452.
B 306 to 308	Sutton & Bowen	"	"	"	117.
A 456	Sutton & Bowen	"	"	"	117.
B 309	John F. Souther	"	"	"	369.
A 457	Charles F. Brooker	"	"	"	369.
B 310	Richardson, Hill & Co.	"	"	"	369.
A 458 to 462	C. Henry Knapp	"	"	"	297.
B 311 to 320	C. Henry Knapp	"	"	"	297.
A 463	H. C. Wainwright & Co.	"	"	"	114.
B 321 to 322	Wm. B. Stearns	"	"	"	114.

406 Third. The following certificates in B book were issued for certificates from the miscellaneous book and A book:

B 14 to 17	E. B. Bangs & Co	part of	Miscellaneous		141
B 18	Wm. H. Reed	"	"	"	115
B 19 to 22	F. S. Mead & Co	"	"	"	107
B 23 to 27	Hayden, Stone & Co	"	"	"	134
B 28 to 32	Clark, Ward & Co	"	"	"	96

B 33 to 36	Richardson, Hill & Co..	"	"	"	120
B 37	E. Rollins Morse & Bro..	"	"	A	23
B 38-39	C. H. Bissell.....	"	"	"	1
B 40	C. A. Putnam & Co.....	"	"	Miscellaneous	88
B 41	Paine, Webber & Co....	"	"	"	88
B 42	Clement B. Asbury.....	"	"	"	91
B 43	Gray, Dewey & Co.....	"	"	"	101
B 44-45	Chas. Head & Co.....	"	"	"	95
B 46	Richard F. Bolles.....	"	"	"	90
B 47 to 50	Tower, Giddings & Co...	"	"	"	124
B 51 to 52	Jackson & Curtis.....	"	"	A	38
B 55	Samuel B. Capen.....	"	"	Miscellaneous	137
B 56	Clement B. Asbury.....	"	"	A	41
B 58	Josiah W. Hayden.....	"	"	Miscellaneous	129
B 59	Wm. M. Bunting.....	"	"	"	129
B 60	Kinnicutt & DeWitt....	"	"	A	15
B 61	H. C. Wainwright & Co.	"	"	"	15
B 62-63	Joseph G. Ray.....	"	"	Miscellaneous	116
B 64-65	Price & Co.....	"	"	"	112
B 66	Walter P. Smith.....	"	"	"	103
B 67	Angus H. McLeod.....	"	"	"	103
B 68	Stoker Bros.....	"	"	"	103
B 69	F. T. Dwineli.....	"	"	"	103
B 80 to 83	C. H. Cole.....	"	"	"	211
B 84	Albert N. Baudin.....	"	"	"	121
B 85	H. Stewart Goodell.....	"	"	"	121
B 36	Henry Stackpole.....	"	"	"	121
B 87	John H. Rice.....	"	"	"	121
B 88 to 93	Hayden, Stone & Co....	"	"	"	223
B 94 to 99	J. W. Belches & Co....	"	"	"	204
B 100	Richard F. Bolles.....	"	"	"	203
B 101	William Bunting.....	"	"	"	256
B 102	Jeremiah Williams.....	"	"	"	256
B 103	Morton Prince.....	"	"	"	243
B 104	Samuel B. Capen.....	"	"	"	240
B 105	Joshua W. Davis.....	"	"	"	240
B 106-107	H. C. Wainwright & Co.	"	"	"	187
B 108	H. C. Wainwright & Co	"	"	"	188
B 119	Chas. Head & Co.....	"	"	"	244
B 120 to 125	Chas. Head & Co.....	"	"	"	220
B 126	Hayden, Stone & Co....	"	"	"	281
B 127	Herbert H. Barnes.....	"	"	"	281

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B 128 to 138	Spencer W. Richardson..	part of		Miscellaneous	266
B 155-156	Charles H. Cole, Jr.....	"	"	"	209
B 158	Otis S. Wilbur.....	"	"	"	230
B 159	Leland, Towle & Co.....	"	"	"	230
B 161	Charles G. White.....	"	"	"	276
B 162	Francis Hollis.....	"	"	"	276
B 163	Thomas Hollis.....	"	"	"	276

B 164	James L. Wesson	"	"	"	276
B 165	Arthur Wheelock	"	"	A	199
B 166 to 169	J. W. Belches & Co	"	"	Miscellaneous	364
B 171-172	M. Bolles & Co	"	"	A	244
B 173	R. L. Day & Co	"	"	Miscellaneous	207
B 174 to 176	Thomas P. Beal	"	"	"	207
B 177	Charles H. Cole, Jr	"	"	A	164
B 178-179	Sidney Riddlestorffer	"	"	Miscellaneous	398
B 180 to 183	M. Bolles & Co	"	"	"	224
B 184 to 187	Zachary T. Hollingsworth	"	"	"	224
B 189-190	Herbert L. Boyer	"	"	"	130
B 191	Edward K. Butler	"	"	"	252
B 192	Albert Pratt Smith	"	"	"	252
B 194	Albert L. Lincoln, Jr	"	"	"	258
B 195	William A. L. Bazeley	"	"	"	417
B 196 to 199	M. Bolles & Co	"	"	"	239
B 200-201	Hayden, Stone & Co	"	"	A	262
B 203-202	Stephen M. Crosby	"	"	Miscellaneous	448
B 204 to 216	Frank Seabury & Bro	"	"	"	467
B 220 to 229	F. S. Mead & Co	"	"	"	298
B 233-234	Harry H. Gay	"	"	A	132
B 236	Harry Bronner	"	"	"	281
B 237	Ewald Balthasar	"	"	"	281
B 238	J. W. Belches & Co	"	"	"	391
B 250 to 253	Richardson, Hill & Co	"	"	Miscellaneous	236
B 268	Chase & Barstow	"	"	A	417
B 269	Richardson, Hill & Co	"	"	"	417
B 270	J. W. Belches & Co	"	"	"	255
B 271	Charles Head & Co	"	"	"	255
B 274 to 293	C. Henry Knapp	"	"	Miscellaneous	454
B 306 to 308	Sutton & Bowen	"	"	"	117
B 309	John F. Souther	"	"	"	369
B 310	Richardson, Hill & Co	"	"	"	369
B 311 to 320	C. Henry Knapp	"	"	"	297
B 321-322	Wm. B. Stearns	"	"	"	114
B 323	Chas. B. Porter	"	"	"	580
B 324 to 327	J. B. Stowell & Son	"	"	A	438-439
B 328	Charles H. Cole	"	"	Miscellaneous	479
B 329	Brewster, Cobb & Estabrook	"	"	A	289
B 331	Richardson, Hill & Co	"	"	Miscellaneous	549
B 338 to 339	Ely & Co	"	"	A	97
B 340-341	J. W. Belches & Co	"	"	"	254

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B 345	William W. Bailey	part of Miscellaneous			550-486
B 349	Matthew Luce, Jr	"	"	"	412
B 350	E. R. Morse & Bro	"	"	"	397
B 351 to 355	F. H. Prince & Co	"	"	"	397
B 359	Chas. Head & Co	"	"	A	112

B 360	Paine, Webber & Co.	"	"	"	112
B 363	Ely & Co.	"	"	"	453
B 364	Jackson & Curtis	"	"	"	453
B 365	Chas. Head & Co.	"	"	"	249
B 367 to 372	Charles D. Coffin	"	"	"	119
B 374 to 377	M. Bolles & Co.	"	"	Miscellaneous	437
B 381-382	W. A. L. Bazeley	"	"	A	2
B 383	Charles H. Cole	"	"		
B 384	William W. Bailey	"	"	A 215 & A 535	
B 385-386	Sutton & Bowen	"	"		
B 387-388	William W. Bailey	"	"	A	517
B 391	J. B. Stowell & Son	"	"	"	523
B 395-396	Tower, Giddings & Co.	"	"	"	117
B 397	M. Bolles & Co.	"	"	"	204
B 398	Leland, Towle & Co.	"	"	"	204
B 400 to 411	M. Bolles & Co.	"	"	Miscellaneous	229
B 414-415	J. W. Belches & Co.	"	"	A	442
B 416 to 425	M. Bolles & Co.	"	"	"	490-494
B 431 to 434	J. W. Belches & Co.	"	"		168 & 168
B 441	Chas. H. Cole	"	"	"	353
B 442	J. W. Belches & Co.	"	"	"	353
B 443	Devens, Lyman & Co.	"	"	Miscellaneous	614, 619 & 190
B 444	Devens, Lyman & Co.	"	"	Miscellaneous	376
B 451	D. L. Demmon	"	"	"	445
B 452	Harry H. Gray	"	"	A	144
B 453	Paine, Webber & Co.	"	"	"	144
B 454-455	Chase & Barstow	"	"	"	179
B 458-459	Charles Head & Co.	"	"	"	451
B 452-463	J. W. Belches & Co.	"	"	"	354
B 470 to 473	Hornblower & Weeks	"	"	Miscellaneous	255
B 474	Jackson & Curtis	"	"	A	420
B 476-477	C. Henry Knapp	"	"	Miscellaneous	677 & 566
B 482 to 486	A. L. Sweetser & Co.	"	"	A 549 & 550	
B 487	Sutton & Bowen	"	"	Miscellaneous	399 & 400
B 488 to 491	Devens, Lyman & Co.	"	"	A 592 & 593	
B 497-498	Chas. Head & Co.	"	"	"	180
B 499	Chas. F. Crowell	"	"	"	601
B 501	Leland, Towle & Co.	"	"	"	601
B 342	Mrs. Mary V. Clark	"	"	Miscellaneous	565 & 569

409 [The further taking of this deposition was postponed without date, subject to the right of defendants' counsel to cross-examine.]

[Cross-examination waived.]

CHARLES H. ALTMILLER.

Subscribed and sworn to this 2d day of January, 1905, before me.

GEORGE C. BURPEE,
Notary Public.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET, BOSTON.
TUESDAY, *July* 24, 1906.

Deposition of Charles S. Altmiller Resumed.

CHARLES S. ALTMILLER, having been again duly sworn by E. F. McClennen, Esq., a notary public, in answer to interrogatories propounded by Edward F. McClennen, Esq., of counsel for plaintiff, further deposes and says,—

Q. 198. Your name is Charles H. Altmiller?
A. It is.
Q. 199. You are treasurer of the Old Dominion Copper Mining & Smelting Company?
A. Yes.
Q. 200. You have heretofore testified in this case, on October 11 and October 18, 1904?
A. I have.
Q. 201. On page 19 of that testimony, in the answer to Int. 93, has your attention been called to an apparent error in a footing?
A. It has.
Q. 202. From what source were the figures taken which you gave in the answer to that interrogatory?
A. From the stub of the check book.
Q. 203. Have you that stub of the check book here?
A. I have.
Q. 204. Will you refer again to the stub of the check book, and say whether the items in that answer to Int. 93 are correct?
A. They are.
Q. 205. Now will you compute for us what the footing should be?
A. There should be a gross footing of $79913.87, and a net footing of $7493.87.
Q. 206. Now, Mr. Altmiller, will you refer to your answer, in this testimony of October, 1904, to Int. 184, page 59? Is the answer as there given correct?
A. It is not.
Q. 207. What should the answer be?
A. Boston & Montana Consolidated Copper & Silver Mining Company.
410 Q. 208. That is, this check of the Old Dominion Copper Mining & Smelting Company for this disbursement was given to the Boston & Montana Consolidated Copper & Silver Mining Company, which you have just mentioned?
A. Yes, to the Montana Company.
Q. 209. How long were you connected with Mr. Bigelow's office and with all the companies in which he was interested prior to April, 1902?
A. About fifteen years.
Q. 210. Did you observe the method adopted by those companies in which he was interested, or by him, in their organization, as to the issue of treasury stock?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I did.

Q. 211. Will you describe the method pursued in the issue of treasury stock in the companies in which Mr. Bigelow was interested at the time you were in his office?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant, it being a matter concerning which there could be no habit or usage.

A. At any time when an authorization of treasury stock was made, for the total number of shares authorized a certificate was issued in the name of the treasurer for that number of shares, and from that certificate were issued to the various subscribers to the stock the number of shares they subscribed for, and at the end of each day the total number of shares so issued was deducted from the total number of shares of the treasury stock certificate, and the balance made out for that number of shares.

Q. 212. Did you, on or about June 24, 1902, write Mr. Bigelow a letter?

Mr. HEMENWAY: Objected to as immaterial.

A. I did.

Q. 213. Have you a copy of that letter?

Mr. HEMENWAY: Objected to as immaterial.

A. I have.

Q. 214. Where was that sent to Mr. Bigelow?

Mr. HEMENWAY: Objected to as immaterial.

A. To room 303, Sears building.

Q. 215. Is this a copy of that letter?

Mr. HEMENWAY: Objected to as immaterial.

A. It is.

Mr. MCCLENNEN: I will offer that copy.

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

[The copy of letter offered in evidence reads as follows:]

411 "JUNE 24, 1902.

A. S. Bigelow, Boston, Mass.,

DEAR SIR: On looking through four of the books containing the files of letters of the Old Dominion Copper Mining & Smelting Company, which you sent us on June 13th, 1902, we were surprised to find that a number of letters were taken out of the books before you sent them to us, although we wrote you under date of June 12th, 1902:

'I must also protest against your taking from the books or the files of the Company anything that is in them. There would be nothing in those files that does not properly appertain to the Com-

pany's business, and I believe that the Company is entitled to all the information and assistance which any matter upon its files would give.'

We find that letters received sometime about the following dates have been taken out of the books:

One or more between July 17th and July 24th, 1895.
One or more between Sept. 13th and Sept. 18th, 1895.
One or more about October 5th, 1895.
One or more between Nov. 2nd and Nov. 11th, 1895.
One or more between Nov. 27th and Nov. 29th, 1895.
One about December 7th, 1895.
One or more between Dec. 27th and Dec. 28th, 1895.
One or more between Jan. 8th and Jan. 15th, 1896.
One or more about January 20th, 1896.
One or more about February 24th, 1896.
One or more between March 18th and March 25th, 1896.
One or more about April 1st, 1896.
One or more between December 11th and Dec. 16th, 1896.

We must request you to send these letters to us at once.

Yours very truly,

C. H. ALTMILLER, *Treas.*"

[No cross-examination.]

Subscribed and sworn to this — day of ——, 1906, before me.

——— ———,
Notary Public.

412 [EXHIBIT 1, OCTOBER 11, 1904. G. C. B.]

Minutes of the first meeting of the Old Dominion Copper Mining and Smelting Company, held at the office of the New Jersey Corporations Agency, at No. 243 Washington Street, in Jersey City, on the ninth day of July, 1895, at three o'clock in the afternoon, pursuant to waiver of notice and appointment of the time and place duly signed by all the parties named in the certificate of incorporation.

Present: Messrs. Jesse Lewisohn, Allen W. Evarts, Edgar Buffum, Charles W. Welch, Sidney Riddlestorffer, William V. Rowe and William R. Montgomery, being all of the incorporators and all of the stockholders of the Company.

The meeting was called to order by Mr. Lewisohn and thereupon Mr. Evarts was elected Chairman and Mr. Buffum, Secretary.

Mr. Lewisohn presented a certified copy of the certificate of organziation of the Company and a waiver of notice of the first meeting which were read and by resolution directed to be spread upon the minutes and are as follows:

This is to certify that We, the undersigned, Jesse Lewisohn and Allen W. Evarts, of the City, County and State of New York; Edgar Buffum of Newark in the county of Essex in the State of New Jersey, Charles W. Welch of the City of Brooklyn in the State of New

York, Sidney Riddlestorffer, William V. Roe and William R. Montgomery of the City, County and State of New York, do hereby associate ourselves into a company under and by virtue of the provisions of an Act of the Legislature of the State of New Jersey entitled "An Act concerning corporations" approved April 7, 1875 and the several supplements thereto and acts amendatory thereof for the purposes hereinafter mentioned, and to that end we do by this our Certificate set forth:

First. That the name which we have assumed to designate such Company and to be used in its business and dealings is "Old Dominion Copper Mining and Smelting Company."

Second. That the place in the State of New Jersey where the business of such Company is to be conducted is the City of Jersey City in the County of Hudson. That the principal part of the business of such Company within said State of New Jersey is to be transacted at said Jersey City in the County of Hudson and the places out of said State where the same is to be conducted are the town of Globe and other places in the Territory of Arizona, the City of Boston in the State of Massachusetts, the City of New York, the States of Massachusetts and New York and such other States and Territories of the United States and such foreign countries
413 as shall, from time to time, be deemed necessary or convenient for any of the purposes of the Company.

That the objects for which such Company is formed are the purchase, acquisition and sale of copper and other mines and mining property and the working, operation and maintenance of the same, the holding, purchase and conveyance of real property useful or convenient for the purposes of its business either in or out of the State of New Jersey and the mortgaging or leasing thereof; the construction and maintenance of water works, reservoirs, dams and aqueducts; the erection and maintenance of works, mills, factories, shops and other structures, engaging in and carrying on the business of treating, smelting and refining copper and other ores; manufacturing, buying, selling, and dealing in copper, copper ores and other metals and ores and articles made wholly or in part of the same; issuing bonds, debentures or other obligations and securing the same by mortgage of any of the property, rights and franchises of the Company the acquisition, purchase and sale or other disposition of the stocks, bonds or other securities of other companies; and in general doing all acts and transacting all business necessary for and incident to the objects aforesaid or in any wise connected therewith.

That the portion of the business of such Company which is to be carried on out of the State of New Jersey is the owning and operation of mines and such other part of its business as may be lawful and as may, from time to time, be deemed necessary or convenient by reason of locality or other conditions or circumstances.

That the principal office and place of business of such Company out of the State of New Jersey is to be situated in the town of Globe in the County of Gila in the Territory of Arizona. That such Company proposes to carry on operations in the town of Globe and other places in the Territory of Arizona, the States of Massachusetts and

New York and in such other States and Territories of the United States and in such foreign countries as shall from time to time, be deemed necessary or convenient for any of the purposes of the Company.

Third. That the total amount of the capital stock of such Company is to be three million seven hundred and fifty thousand dollars, divided into one hundred and fifty thousand shares of the par value of twenty five dollars each.

That the amount with which said Company will commence business is one thousand dollars divided into forty shares of the par value of twenty five dollars each as aforesaid.

Fourth. That the names and residences of the stockholders and the number of shares held by each are as follows, to wit:

414 Jesse Lewisohn, of the City, County and State of New York, sixteen shares.

Allen W. Evarts, of the City, County and State of New York, four shares.

Edgar Buffum, of Newark, Essex County, New Jersey, four shares.

Charles W. Welch, of the City of Brooklyn in the State of New York, four shares.

Sidney Riddlestorffer, of the City, County and State of New York, four shares.

William V. Rowe, of the City, County and State of New York, four shares.

William R. Montgomery, of the City, County and State of New York, four shares.

Fifth. That the period at which such Company shall commence is the eighth day of July, One thousand eight hundred and ninety-five and the period at which it shall terminate is the eighth day of July one thousand nine hundred and forty-five.

In witness whereof, we have hereunto set our hands and seals the eighth day of July, one thousand eight hundred and ninety-five.

JESSE LEWISOHN.	[SEAL.]
ALLEN W. EVARTS.	[SEAL.]
EDGAR BUFFUM.	[SEAL.]
CHARLES W. WELCH.	[SEAL.]
SIDNEY RIDDLESTORFFER.	[SEAL.]
WM. V. ROWE.	[SEAL.]
WM. R. MONTGOMERY.	[SEAL.]

STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered that on this eighth day of July one thousand eight hundred and ninety-five, before me the subscriber, a Commissioner of Deeds for the State of New Jersey, personally appeared Jesse Lewisohn, Allen W. Evarts, Edgar Buffum, Charles W. Welch, Sidney Riddlestorffer, William V. Rowe and William R. Montgomery, who I am satisfied are the persons named in and who executed the foregoing certificate and I, having first made known to them the

contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year last aforesaid.

[SEAL.] GEO. H. COREY,
Commissioner of Deeds for the State of New Jersey in New York.

415 [Endorsed.]

"Received in the Hudson Co. N. J. Clerk's office July 8, A. D. 1895 and recorded in the Clerk's Record No. 25 on Page —.
JOHN G. FISHER. *Clerk.*"

"Filed Jul- 8, 1895.
HENRY C. KELSEY,
Secretary of State."

We, the subscribers being all the parties named in the certificate of organization of the "Old Dominion Copper Mining and Smelting Company" do hereby waive notice of the time, place and purpose of the first meeting of said Company and do fix the ninth day of July A. D. One thousand eight hundred and ninety-five at three o'clock in the afternoon as the time and the office of the New Jersey Corporations Agency at Number 243 Washington Street in Jersey City as the place of the first meeting of said Company; and we do also hereby consent that said Company may at such meeting increase its capital stock and the number of shares therein to any amount not exceeding the amount named in the original certificate of organization viz:—three million seven hundred and fifty thousand dollars ($3,750,000.) with the same validity and effect as it might or could so increase the same at a meeting specially called for that purpose, notice of which such meeting we do hereby waive.

Jersey Ci'y, July 8th, 1895.

JESSE LEWISOHN.
ALLEN W. EVARTS.
EDGAR BUFFUM.
CHARLES W. WELCH.
SIDNEY RIDDLESTORFFER.
WM. V. ROWE.
WM. R. MONTGOMERY.

Mr. Lewisohn reported that he had received the sum of one hundred dollars in money each from Messrs. Evarts, Buffum, Welch, Riddlestorffer, Rowe and Montgomery for their subscriptions to the stock of the Company and had in hand the sum of four hundred dollars for his own subscription thereto and now held the total amount thereof viz: one thousand dollars for the use of the Company and he was thereupon by resolution duly passed requested to turn over such amount to the treasurer of the Company when

416 elected.

Mr. Evarts presented a draft of proposed By-laws of the

Company which were read and adopted and directed to be spread upon the minutes and are as follows:—

I. Annual Meetings.

The annual meeting of the Company for the purpose of electing Directors, and for the transaction of such other business as may legally come before the meeting, shall be held at the office of the Company at Jersey City, in the County of Hudson, State of New Jersey, on the first Wednesday of April in each year, at twelve o'clock noon.

II. Special Meetings.

Special meetings of the Company may be called at any time by order of the President or of the Board of Directors, or upon the request in writing of holders of record of one fifth of the outstanding capital stock of the Company.

III. Notices.

Notice of the time and place of all meetings of the Company shall be given by mailing at least ten days before the date thereof, a written or printed notice, addressed to each stockholder of record appearing on the books of the Company at the address given in such books.

IV. Votes and Proxies.

At all meetings of the Company each stockholder shall be entitled to one vote for each share of stock standing in his name on the books of the Company and absent stockholders may vote by proxy authorized in writing.

V. Quorum.

A majority in interest of the stockholders represented either in person or by proxy shall constitute a quorum at all meetings of the Company, and if, at any meeting duly called there is no quorum present, or if for any reason the holders of a majority of the capital stock represented thereat desire to adjourn the meeting, the same may be adjourned from time to time, and no further notice shall be necessary for the holding of such adjourned meeting.

VI. Board of Directors.

The Directors shall be seven in number and shall be chosen by ballot at each annual meeting of the Company after the year 1895, and shall hold their offices for one year and until others are chosen and qualified in their stead. The first Board of Directors shall be chosen at the first meeting of the Company at which these By-laws are adopted, and shall hold office until their successors are chosen

and qualified at the next succeeding annual meeting. At
417 every election the persons receiving the greatest number of votes shall be chosen as Directors, but each must be a stockholder of record at the time of his election. When any vacancy occurs among the Directors or officers by death, resignation, removal or otherwise it shall be filled for the remainder of the year by a majority vote of the remaining Directors. The Board of Directors shall be invested with the management, control and direction of the Company and its affairs. They shall render an account of the annual meetings of the Company showing the condition of its property and financial affairs.

VII. Officers.

The officers shall be a President, a Vice President, a Treasurer and a Secretary, who shall be chosen annually by the Directors and hold their offices until others are chosen and qualified in their stead. All of them must be Directors of the Company. The offices of Secretary and Treasurer may be held by one person. The Directors may also in their discretion appoint and fix the compensation of a General Manager or Superintendent and such other officers, agents and committees with such powers and duties respectively as they may from time to time deem proper.

VIII. Quorum of Board of Directors.

Four of the Directors shall constitute a quorum at all meetings thereof. Regular meetings of the Directors shall be held on the second Wednesdays of the months of January, April, July and October in each year. Special meetings of the Directors may be called at any time by order of the President, or on the written request of any of their number of which one day's notice in writing shall be given.

IX. President.

The President shall be the chief executive officer of the Company. He shall preside at all meetings of the Company and of the Directors. He shall sign all stock certificates and it shall be his duty to exercise a careful supervision over the business and affairs of the Company.

X. Vice President.

The Vice President shall exercise all the authority and perform all the duties of the President during his absence or incapacity.

XI. Treasurer.

The Treasurer shall be the custodian of the funds of the Company and shall deposit the same in its name in such banks or trust
418 companies as the Directors shall direct; he shall sign all checks, drafts, orders or other obligations for the payment or

borrowing of money, and pay out and dispose of the same under direction of the Directors. He shall sign all certificates of stock and perform such other duties as may be prescribed by law, or as shall be from time to time required by the Directors. He shall, if required by the Board of Directors, give a bond for the faithful discharge of his duties in such amount and with such sureties as said Board may require and approve.

XII. Secretary.

The Secretary shall keep the minutes of the meetings of the Directors and of the meetings of the Company, and attend to giving and serving all notices required by law and by these By-laws: he shall affix the seal of the Company to all certificates of stock when signed by the President and Treasurer: shall have the charge and custody of all the books and papers of the Company, subject to the supervision of the Directors, and to the inspection thereof by them at all reasonable times. He shall perform all other duties incident to his office and such as are required by law or as may from time to time be directed by the Directors. He shall be sworn to the faithful discharge of his duties as required by statute.

XIII. Acting Officers.

In the event of the absence or incapacity for any cause, of both the President and Vice President or of the Treasurer or Secretary respectively, the Board of Directors may appoint an acting President, Treasurer or Secretary who shall have and exercise all the powers of such officers respectively during their absence or incapacity.

XIV. Certificates of Stock.

Each holder of stock shall be entitled to a certificate under the seal of the Company signed by the President and by the Treasurer stating the capital stock of the Company, the number of shares into which it is divided, the par value of each share, the number of shares to which such holder is entitled, and the manner in which said certificate is transferable. All certificates shall be issued in order from certificate books and duly numbered and registered in the order of their issue opposite each certificate in the margin of said books: it shall be the duty of the Treasurer to enter the name and address of the owner thereof, and in case of the transfer or cancellation of such certificate, the date of such transfer or cancellation in said margin: and at the time of issue of any certificate it shall be receipted for on said margin by the owner thereof or by his duly authorized agent.

419 Shares may be transferred upon the books of the Company by the holder or owner either personally or by power of attorney on the surrender of the certificates thereof.

XV. Seal.

The seal of the Company shall be circular in form with the words "Old Dominion Copper Mining and Smelting Company" on the circumference, and the figures "1895" in the centre.

XVI. Principal Office.

The Company shall maintain a principal office or place of business at Jersey City in the State of New Jersey, and shall have an agent in charge thereof, and the stock and transfer books of the Company shall be kept in said office for the inspection of all who are authorized to inspect the same, and for the transfer of stock; and the meetings of the stockholders shall be held at said principal office.

XVII. Directors' Meetings, etc.

The Directors may hold their meetings and have an office and keep the books of the Company outside of the State of New Jersey.

XVIII. Amendments.

These By-laws may be altered, amended or repealed by the unanimous vote of the Directors present at any meeting thereof or by a majority vote of all the stockholders of the Company at any annual meeting, or at a special meeting called for the purpose by order of the Directors, of the time, place and object of the holding of which meeting ten days' previous notice shall be given to each stockholder of record, by mailing such notice, addressed to such stockholders at the address given on the books of the Company.

An election of Directors by ballot was then had and the following named persons were duly chosen and declared to be Directors of the Company to hold office until the next regular annual meeting of the Company and until their successors should be chosen and qualified.

Messrs. Jesse Lewis-ohn Allen W. Evarts Edgar Buffum Charles W. Welch Sidney Riddlestorffer William V. Rowe William R. Montgomery.

The following resolution was then duly passed:

Resolved that the Company do and it hereby does increase its capital stock and the number of shares therein to three million seven hundred and fifty thousand dollars in one hundred and fifty thousand shares of twenty-five dollars each the amount
420 authorized by the certificate of organization and that the Directors of the Company be and they hereby are authorized and directed to make such increase and issue the same and make and file the certificate of such increase prescribed by statute.

The meeting then took a recess.

EDGAR BUFFUM, *Secretary.*

Minutes of a Meeting of the Directors of the "Old Dominion Copper Mining and Smelting Company." Held at the Office of the New Jersey Corporation Agency, at No. 243 Washington Street, in Jersey City, on the Ninth Day of July 1895.

Present: Messrs. Jesse Lewisohn, Allen W. Evarts, Edgar Buffum, Charles W. Welch, Sidney Riddlestorffer, William V. Rowe and William R. Montgomery.

Mr. Buffum called the meeting to order and reported that at a meeting of the Company held on the ninth day of July, 1895, at which he had acted as Secretary Messrs. Jesse Lewisohn, Allen W. Evarts, Edgar Buffum, Charles W. Welch, Sidney Riddlestorffer, William V. Rowe and William R. Montgomery had been elected Directors and submitted and read the By-laws of the Company duly adopted at the meeting aforesaid.

The meeting then proceeded to organize and an election of officers was had and the following officers were duly chosen: Mr. Allen W. Evarts, President, Mr. Sidney Riddlestorffer, Vice President, Mr. Jesse Lewisohn, Treasurer, Mr. Edgar Buffum, Secretary.

Mr. Evarts thereupon took the chair as President and the statutory oath was administered to the Secretary and directed to be filed by him.

A seal was produced and its form and style duly approved and an impression thereof was directed to be placed in the minutes and is accordingly made hereon.

A resolution increasing the capital stock passed by the stockholders at the first meeting of the Company was reported and read and directed to be spread upon the minutes and is as follows:

Resolved that the Company do and it hereby does increase its capital stock and the number of shares therein to three million seven hundred and fifty thousand dollars in one hundred and fifty thousand shares of twenty-five dollars each the amount authorized by the certificate of organization and that the Directors of the Company be and they hereby are authorized and directed to make such increase and issue the same and make and file the certificate of such increase prescribed by Statute.

The following resolution was then offered and duly passed:

421 Resolved that the increase of the capital stock of the Company authorized and directed by resolution of the stockholders duly passed at the first meeting of the Company and reported to this meeting and directed to be spread upon the minutes be made and that such increased stock be issued as full paid stock and not subject to assessment in such amounts and in such manner as may be determined hereafter by resolution of this board.

A form of Certificate of Stock was submitted and approved and directed to be spread upon the minutes and is as follows:

Incorporated under the Laws of the State of New Jersey.

No. —. — Shares.

Capital Stock $3,750,000.

Old Dominion Copper Mining and Smelting Company.

Divided into 150,000 shares of $25 each.

This certifies that —— —— is entitled to — shares of the Capital Stock of the Old Dominion Copper Mining and Smelting Company, transferable only on the books of the Company in person or by attorney on surrender of this certificate.

Dated Jersey City, New Jersey, ——, 189—.

—— ——, *Treasurer.* —— ——, *President.*

Mr. Jesse Lewisohn as Treasurer reported that he had the sum of one thousand dollars heretofore received by him for account of the subscription of the original stockholders named in the Certificate of Organization and held the same as Treasurer for account of the Company.

The following resolution was then duly passed:

Resolved that certificates of stock be duly issued to the original subscribers for the amounts of their subscriptions respectively as follows: a certificate for sixteen shares to Mr. Jesse Lewisohn: one for four shares each to Messrs. Evarts, Bulkum, Welch, Riddlestorffer, Rowe and Montgomery.

The following resolution was then duly passed:

Resolved that the Market and Fulton National Bank of the City of New York be selected and named as one of the depositories of the funds of the Company and that the Treasurer deposit the sum of one thousand dollars reported by him as in his hands in said bank.

The following resolution was then duly passed:

Resolved that the proper certificate of the issue of increased
422 capital stock be executed under the seal of the Company by the President and Secretary and filed in the office of the Secretary of State as prescribed by the statutes of the State of New Jersey.

The following resolution was then duly passed:

Resolved that this Company continuously maintain a principal office and place of business within the State of New Jersey and that such office and place of business be at the office of the New Jersey Corporations Agency, Nos. 243 and 245 Washington Street, Jersey City, N. J.

That in said office be kept the stock and transfer books of the Company for the inspection of all who are authorized to see the same and for the transfer of stock.

That the New Jersey Corporations Agency be and hereby is ap-

pointed and duly authorized transfer Agent for this Company in New Jersey.

That Charles N. King (Secretary of the New Jersey Corporations Agency) who resides in Jersey City, New Jersey, and whose office and place of business is 243 and 245 Washington Street in said City be and hereby is appointed the Agent of the Company in charge of its aforesaid business in Jersey City and is designated as the person upon whom process against the corporation may be served within the State of New Jersey.

The meeting then adjourned to meet subject to the call of the President.

EDGAR BUFFUM,
Secretary.

Company Meeting.

JULY 9*th*, 1895.

Upon re-assembling after the recess the Minutes of a meeting of the Directors held in the meantime were read and the following resolution was duly passed:

Resolved that all the acts, proceedings and resolutions of the meeting of the Board of Directors of this Company held this day now reported to and read at this meeting be and the same are hereby in all respects, approved, ratified and confirmed. The meeting then adjourned.

EDGAR BUFFUM,
Secretary.

Minutes of a Meeting of the Directors Duly Called, Held at the Office of Lewisohn Brothers, at 81 Fulton Street, in the City of New York, on the Eleventh Day of July, 1895, *at* 12 *o'clock noon.*

Present: Messrs. Lewisohn, Evarts, Buffum, Welch, Riddlestorffer, and Rowe.

The President Mr. Evarts in the chair.

423 The resignation in writing of Mr. Montgomery as a Director of the Company was presented and read and on motion duly accepted and Mr. A. S. Bigelow of Cohasset, Massachusetts was duly elected a Director in his place and being present took his seat as such.

The resignation in writing of Mr. Rowe as a Director of the Company was presented and read and on motion duly accepted and Mr. Leonard Lewisohn of New York was duly elected a Director in his place and being present took his seat as such.

The resignation in writing of Mr. Welch as a Director of the Company was presented and read and on motion duly accepted and Mr. Henry M. Whitney of Boston, Massachusetts was duly elected a Director in his place.

The resignation in writing of Mr. Jesse Lewisohn as Treasurer was presented and read and Mr. Thomas Nelson was duly elected as Treasurer in his place.

The resignation in writing of Mr. Jesse Lewisohn as a Director of the Company was presented and read and on motion duly accepted and Mr. Thomas Nelson of Boston, Massachusetts was duly elected a Director in his place.

The resignation in writing of Mr. Evarts as President was presented and read, and on motion duly accepted and Mr. Bigelow was thereupon duly elected as President in his place and thereupon took the chair.

The resignation in writing of Mr. Riddlestorffer, as Vice President, was presented and read, and on motion duly accepted.

The resignation in writing of Mr. Riddlestorffer as a Director was presented and read and on motion duly accepted and Mr. Joseph G. Ray of Franklin, Massachusetts was duly elected a Director in his place.

Mr. Evarts presented and read a proposition from "The Old Dominion Copper Company of Baltimore City" as follows:

To the Old Dominion Copper Mining and Smelting Company, a corporation organized and existing under the laws of the State of New Jersey:

The Old Dominion Copper Company of Baltimore City, a corporation organized and existing under the laws of the State of Maryland being the owner of certain mines and mining properties at Globe in the Territory of Arizona described in the annexed Schedule and of machinery, lumber, wood, tools, implements and other personal property for use for and in connection with the operation and maintenance thereof hereby makes the following proposition: To convey, assign and transfer all its property, both real and personal of every kind and nature whatsoever and wheresoever situated by good and sufficient deeds and instruments properly executed so as to
424 confer absolute title thereto to the Old Dominion Copper Mining and Smelting Company upon receiving from said Company one hundred thousand shares of its capital stock to be issued to said Old Dominion Copper Company or to its nominees.

It being understood that the Old Dominion Copper Mining and Smelting Company shall assume all obligations of The Old Dominion Copper Company of Baltimore City incurred since the first day of June 1895, and shall be entitled to all earnings and profits of said Company since that date.

July eleventh 1895.

A. S. BIGELOW, *President.*

A. W. EVARTS, *Secretary.*

Schedule.

First. The Globe Mine, patented by the United States Government to B. W. Reagan on the 18th day of October 1881, by patent recorded in the office of the Recorder of Pinal County, Territory of Arizona on the 19th day of November 1881, to which record reference is made for a fuller description of said Mine.

Second. The Globe Ledge Mine, patented by the United States

Government to Benjamin W. Reagan on the eighteenth day of October, 1881, by patent recorded in the office of the Recorder of Pinal County, Territory of Arizona, on the nineteenth day of November, 1881, to which record reference is made for a fuller description of said Mine.

Third. The Copper Jack Mill Site, of which the location is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 311, and to which record reference is hereby made for a fuller description of said Mill Site, and upon which the Smelting Works, formerly owned by the Old Dominion Copper Mining Co. are situated.

Fourth. The Globe Mill Site; of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at Page 311, to which record reference is hereby made for a fuller description of said Mill Site.

Fifth. The Globe Ledge Mill Site, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 310, to which record reference is hereby made for a fuller description of said Mill Site.

Sixth. The South-east Globe Mine, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 312, and reference is
425 hereby made to said records for a fuller description of said Mine.

Seventh. All of that certain Mining Claim known as the Interloper in Globe District, County of Gila, Territory of Arizona, and recorded in Globe District Records on pages 116 and 117 in Book 3, reference to which will more fully show, being the same property conveyed to William Keyser by Thomas H. Mason, by deed bearing date January 3rd, 1887, and recorded at page 568, Book 2, record of deeds to Mines Gila County, Arizona Territory.

Eighth. The Fraction Mine, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 569, to which record reference is hereby made for a fuller description of said mine.

Ninth. The Alice Mine or lode, located October 10th, 1875, by A. R. Hammond and J. W. Reed and notice of location recorded in Book 1, page 131, Globe District Mining Records (now a part of the records of Gila County) and re-located February 28th, 1879, and notice of location recorded in Book 5, Globe District Mining Records (now a part of the Records of Gila County) on pages 184 and 185, said Mine or Lode being more particularly described in the last mentioned notice of location, as follows, to wit: Commencing at this monument of stones in a gulch, being the centre of Southwest end of claim, and upon which this notice is posted, thence Southeast 300 feet to a monument of stones; thence Northeast 1400 feet to a monument of stones; thence Northwest 300 feet to a monument of stones, being the center of the Northeast end of claim; thence Northwest 300 feet to a monument of stones; thence Southwest 1400 feet to a monument of stones under a tree; thence Southeast 300 feet to the place of beginning, being the same mining claim

conveyed to Michael H. Simpson, deceased, by deed of the Globe City Mining Company dated July 1st, 1884, and recorded with Gila County Deeds to Mines, Book 2, page 227, et seq.

Tenth. The Mining Claim called and known as the Hypatia Mine, situate, lying and being in Globe Mining District, Gila County, Territory of Arizona, and more particularly described in the notice of location, recorded at page sixty-six (66) Book 2, Records of Mines, Gila County Records, to which record reference is made for a more definite description of said Mine: said Mine was formerly known as the South-west Alice Mine, being the same mining claim conveyed to said Michael H. Simpson, lately deceased, by deed of William H. Cook, dated November 18th, 1884, and recorded with Gila County Deeds, Book 2, page 305.

Whereupon Mr. Lewisohn moved and Mr. Evarts seconded the adoption of the following resolutions:

426 Whereas the Old Dominion Copper Company of Baltimore City has made and submitted a proposition to convey all of its property to this Company which has just been presented and read: and

Whereas it is reported and appears that such property is reasonably and fairly worth the par value of the stock proposed to be paid and issued and received therefor.

Resolved: that said proposition be and the same is hereby accepted and that this Company do purchase and acquire all said property upon the terms contained in said proposition and in payment therefor issue one hundred thousand shares of its capital stock to said The Old Dominion Copper Company of Baltimore City or to its nominees, all such stock to be full paid and not subject to assessment: and

Resolved that Messrs. Bigelow and Nelson be appointed a Committee to supervise and carry out the details of such purchase and issue of stock, which were thereupon duly adopted.

Mr. Lewisohn presented and read a written proposition as follows:

To the Old Dominion Copper Mining and Smelting Company:

I hereby offer to convey the following described property now owned and held by me upon receiving thirty thousand shares of the capital stock of the Old Dominion Copper Mining and Smelting Company to be issued to me or to my nominees:

1st. The Old Dominion Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1883 in the United States Land Office at Tucson, Arizona, Entry No. 267, Lot No. 45, situated in Globe Mining District, Gila County, Arizona.

2nd. The New York Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1883, in the United States Land Office at Tucson, Arizona, Entry No. 268, Lot No. 46 in Globe Mining District in Gila County, Arizona.

3rd. The Chicago Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1883, in the United

States Land Office at Tucson, Arizona, Entry No. 269, Lot No. 51 in Globe Mining District, Gila County, Arizona.

4th. The Keystone Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1885 in the United States Land Office at Tucson, Arizona, Entry No. 384, Lot No. 54 in Globe Mining Distr. t, Gila County, Arizona.

5th. A lot or parcel of land situate near the Bloody Tanks
427 and deeded by E. A. Saxe to the Old Dominion Copper Mining Company. Deed recorded in Book 1 of Deeds to Real Estate at page- 126 & 127 in the office of the Recorder of Gila County, Arizona, and reference is hereby made to said record for a fuller description of said parcel of land.

New York, July 11th, 1895.

LEONARD LEWISOHN.

Please issue said 30,000 shares of stock to Mr. A. S. Bigelow & myself.

LEONARD LEWISOHN.

Whereupon Mr. Evarts moved and Mr. Buffum seconded the adoption of the following resolutions:

Whereas Mr. Leonard Lewisohn of the City of New York has made and submitted a proposition to convey certain mining properties in Arizona to this Company which has just been presented and read: and

Whereas it is reported and appears that such properties are reasonably and fairly worth the par value of the stock proposed to be paid and issued and received therefor:

Resolved that said proposition be and the same is hereby accepted and that this Company do purchase and acquire said properties upon the terms contained in said proposition and in payment therefor issue thirty thousand shares of its capital stock to said Leonard Lewisohn or to his nominees all such stock to be full paid and not subject to assessment; and

Resolved that Messrs. Bigelow and Nelson be appointed a Committee to supervise and carry out the details of such purchase and issue of stock, which were thereupon duly adopted.

The following resolution was thereupon on motion duly adopted.

Resolved that Niles S. Bergay of Globe, Gila County, in the Territory of Arizona, be and he is hereby appointed the Agent of the Old Dominion Copper Mining and Smelting Company in and for said Territory, upon whom all notices and processes, including service of summons, may be served, which when so served may be deemed taken and held to be a lawful personal service on said Company for all purposes whatsoever.

And the President and Secretary were requested to attend to the proper filing of a copy thereof in the office of the Recorder of Gila County, Arizona.

The Secretary reported that he had caused the statement of officers, directors, etc., required by law to be filed in the office
428 of the Secretary of State of New Jersey on the 10th instant and had received an official certificate to that effect and that

he had caused to be filed in said office on the same day a certificate as to issue of additional stock.

The resignation in writing of Mr. Buffum as Secretary was presented and read and on motion duly accepted to take effect at close of meeting and Mr. Thomas Nelson was duly elected as Secretary in his place.

EDGAR BUFFUM, *Secretary*

BOSTON, MASS., *July 24th*, 1895.

A called meeting of the Directors of the Old Dominion Copper Mining and Smelting Company was held this day at Room 301 Sears Building, 199 Washington Street, Boston, Mass., at 11 o'clock a. m.

Present: Messrs. Bigelow, Nelson, Whitney and Ray.

The President called the meeting to order and at his request the Secretary read the record of the last Directors' Meeting which was, upon motion, approved.

Mr. Ray presented the resignation in writing of Mr. Evarts as a Director of this Company, which was, upon motion, accepted. Mr. Nelson then presented the name of Mr. Moses T. Stevens of North Andover, Mass., as a Director of this Company to fill the place made vacant by the resignation of Mr. Evarts. Mr. Nelson was appointed to collect, assort and count the votes and he reported the whole number of votes to be four, all of which were for Mr. Moses T. Stevens of North Andover, Mass., and he was declared duly elected.

Upon motion, duly seconded, it was

Voted: To proceed to the election of a Vice President. Mr. Ray was appointed to collect, assort and count the *[votes] and he reported the whole number of votes to be four, all of which were for Mr. Henry M. Whitney and he was declared duly elected.

Upon motion, duly seconded, it was

Voted: That the salary of the President be at the rate of Seventy-five hundred dollars per annum; and that the salary of the Secretary and Treasurer be at the rate of Seventy-five hundred dollars per annum, to date from the time of their appointment.

Upon motion, duly seconded, it was

Voted: That at this and at all future meetings of the Board
429 of Directors each member present be paid the sum of Ten dollars, and that the travelling expenses of non-resident Directors be paid.

Mr. Nelson presented the written resignation of Mr. Niles S. Berray as agent of this Company at their Mines in Arizona, which was, upon motion, voted to be accepted and placed on file.

The following resolution, presented by Mr. Whitney, being duly seconded, was thereupon unanimously adopted.

Resolved that S. A. Parnall of Globe, Gila County, in the Territory of Arizona, be and he is hereby appointed the agent of the Old Dominion Copper Mining and Smelting Company in and for said

[*The word "votes" was ommitted in the records.]

Territory upon whom all notices and processes, including service of summons, may be served, which when so served may be deemed taken and held to be a lawful personal service on said Company for all purposes whatsoever. And the President and Secretary were requested to attend to the proper filing of a copy thereof in the office of the Recorder of Gila County, Arizona.

No other business coming before the meeting it was dissolved.

Attest:

THOMAS NELSON, *Secretary.*

BOSTON, MASS., *Sept. 18th,* 1895.

A called meeting of the Directors of the Old Dominion Copper Mining and Smelting Company was held this day at Room 301 Sears Building, No. 199 Washington Street, Boston, Mass., at 10 o'clock a. m.

Present: Messrs. Bigelow, Nelson, Whitney, Stevens and Ray.

The President called the meeting to order and at his request the Secretary read the record of the last Directors' Meeting which was, upon motion, approved.

Upon motion, duly seconded, it was

Voted: That the By-laws of the Company be and hereby are repealed, altered and amended and are to be as follows:—

By-Laws of the Old Dominion Copper Mining and Smelting Co.

Article 1. Annual Meetings.

The annual meeting of the Company shall be held at the office of the Company in Jersey City in the County of Hudson and State of New Jersey, on the first Wednesday of April in each year at 12 o'clock noon.

430 Article 2. Special Meetings.

Special meetings of the Company may be called at any time by order of the President or the Board of Directors, or upon the request in writing of holders of record of one fifth of the outstanding capital stock of the Company.

Article 3. Notices.

Notice of the time and place of all meetings of the Company shall be given by mailing at least ten days before the date thereof, a written or printed notice, addressed to each stockholder of record appearing on the books of the Company at the address given in such books.

Article 4. Votes and Proxies.

At all meetings of the Company each stockholder shall be entitled to one vote for each share of stock standing in his name on the books of the Company and absent stockholders may vote by proxy authorized in writing.

Article 5. Quorum.

At all meetings of the stockholders, a majority in interest, represented in person or by proxy, shall constitute a quorum; and all meetings may be adjourned from time to time without further notice.

Article 6. Directors.

The Directors shall be seven in number; and all vacancies either among the Directors or officers of the Company, shall be filled by the vote of the remaining members of the Board of Directors.

Article 7. Officers.

The officers shall be a President, a Vice President, a Treasurer and a Secretary, all of whom shall be chosen annually by the Directors. The offices of Secretary and Treasurer may be filled by one person.

Article 8. Treasurer's Bond.

The Treasurer, if required so to do by the Directors, shall execute to the Company a bond in such an amount and with such sureties as shall be approved by the Directors.

Article 9. Powers of Directors.

The Directors shall have the control, management and direction of the affairs of the Company, shall elect and appoint its officers, and determine their duties and responsibilities and fix their compensation.

431 Article 10. Executive Committee.

The Directors may at any time appoint from their number an Executive Committee of three, who shall possess all the powers of the full Board when said Board is not in session.

Article 11. Quorum of Directors.

Four of the Directors shall constitute a quorum at all meetings of the Board.

Article 12. Acting Officers.

In case of the absence of any of the officers of the Company or in case such an officer or officers cannot, for any reason attend to his or their duty, the Board of Directors shall have power to appoint a person or persons to act in the place of such officer or officers with full powers.

Article 13. Seal.

The seal of the Company shall be circular in form with the words "Old Dominion Copper Mining and Smelting Company" in the circumference, and the figures "1895" in the centre.

Article 14. Principal Office.

The principal office shall be in Jersey City in the State of New Jersey.

Article 15. Directors' Meetings.

The Directors may hold their meetings and have an office and keep the books of the Company outside of the State of New Jersey.

Article 16. Amendments.

These By-Laws may be altered, amended or repealed by the unanimous vote of the Directors present at any meeting thereof or by a majority vote of all the stockholders of the Company at any annual meeting, or at a special meeting duly called for the purpose by order of the Directors.

Upon the report of the Committee appointed at a meeting of the Stockholders of the Old Dominion Copper Company of Baltimore City held in New York July 11th, 1895, on motion of Mr. Ray, seconded by Mr. Stevens, it is

Voted: That one hundred thousand (100,000) shares of this Company's full paid stock be issued to Mr. Philip K. Dumaresq.

432 Upon the report of Messrs. Bigelow and Nelson the Committee appointed at the meeting of the Directors of the Old Dominion Copper Mining and Smelting Company, held at New York, July 11th, 1895, on motion of Mr. Ray, seconded by Mr. Stevens, it is

Voted:—That Thirty thousand (30,000) shares of this Company's full paid stock be issued to Messrs. A. S. Bigelow and Leonard Lewisohn.

Upon motion of Mr. Ray, seconded by Mr. Stevens, it was

Voted:—That the Treasurer of this Company is hereby authorized and instructed to issue Twenty thousand (20,000) shares of the full paid Capital Stock of this Company to such parties as have subscribed for the same on their payment of Twenty-five dollars ($25.) per share.

The following preamble and resolution presented by Mr. Whitney, and seconded by Mr. Ray, was unanimously adopted:

"Whereas,—the important work of the President of this company is seriously interfered with by the time taken in signing certificates of Stock,

"Now, Therefore, it is voted, that Mr. C. H. Bissell be and hereby is appointed assistant to the President of this Company with power to sign all Certificates of Stock."

The following preamble and resolution presented by Mr. Whitney, and seconded by Mr. Ray, was unanimously adopted:

"Whereas,—the important work of the Secretary and Treasurer of this Company is seriously interfered with by the time taken in countersigning Certificates of Stock and accepting drafts,

"Now, Therefore, it is voted, that Mr. Philip K. Dumaresq be and hereby is appointed assistant to the Treasurer and Secretary of this Company with power to countersign all Certificates of Stock and to accept all drafts drawn upon the Treasurer of this Company."

No other business coming before the meeting it was dissolved.

Attest:

THOMAS NELSON, *Secretary.*

433 All action taken by Directors at above meeting is fully confirmed and approved of in all respects.

A. S. BIGELOW.
THOMAS NELSON.
M. T. STEVENS.
LEONARD LEWISOHN.
HENRY M. WHITNEY.
JOSEPH G. RAY.
EDGAR BUFFUM.

The undersigned, stockholders of the Old Dominion Copper Mining and Smelting Company, do hereby approve of the action of the Directors shown by the above record of meeting held on the 18th day of September, 1895.

	30,000 Shs.	LEONARD LEWISOHN,
		A. S. BIGELOW.
In pencil	20,000 "	THOMAS NELSON, *Treas.*
	100,000 "	PHILIP K. DUMARESQ.
	150,000 "	

BOSTON, MASS., *November* 24, 1897.

A called meeting of the Directors of the Old Dominion Copper Mining and Smelting Company was held this day at Room 301 Sears Building, No. 199 Washington Street, Boston, Mass., at 11 o'clock a. m.

Present: Messrs. Bigelow, Ray, Stevens and Lewisohn.

The President called the meeting to order.

Upon motion, Mr. C. H. Bissell was appointed Secretary of the Meeting.

At the request of the President, the Secretary read the record of the last Directors' Meeting which was, upon motion, approved.

The President presented the registration of Mr. H. M. Whitney as Director and Vice President of this Company, which was upon motion of Mr. Ray

Voted:—To be accepted and placed on file.

The President presented the name of Mr. E. V. R. Thayer as a director of this Company to fill the place made vacant by the resignation of Mr. Whitney.

Mr. Lewisohn was appointed to collect, assort and count the votes and he reported the whole number of votes to be four, all of which were for Mr. Thayer and he was declared duly elected.

434 The President notified the Board of the death of Mr. Thomas Nelson, Secretary and Treasurer, and one of the

Directors of this Company, which necessitated the filling of the vacancies caused by his decease.

The President presented the name of Mr. W. J. Ladd to fill said vacancies.

Mr. Lewisohn was appointed to collect, assort and count the votes for a Director of this Company, and he reported the whole number of votes to be four, all of which were for Mr. Ladd and he was declared duly elected.

Mr. Lewisohn was appointed to collect, assort and count the votes for a Secretary of this Company, and he reported the whole number of votes to be Four, all of which were for Mr. Ladd and he was declared duly elected.

Mr. Lewisohn was appointed to collect, assort and count the votes for a Treasurer of this Company, and he reported the whole number of votes to be Four, all of which were for Mr. Ladd and he was declared duly elected.

The President then presented to the Board the resignation of Mr. Philip K. Dumaresq as Assistant Secretary and Assistant Treasurer of this Company, which was, upon motion,

Voted:—To be accepted and placed on file. This resignation to go into effect at such time as in the discretion of the President it shall be deemed to be best for the interests of the Company.

The President presented the name of Mr. B. Preston Clark, as Assistant Secretary of this Company, to fill the vacancy caused by the resignation of Mr. Dumaresq.

Mr. Lewisohn was appointed to collect, assort and count the votes, and he reported the whole number of votes to be Four, all of which were for Mr. Clark, and he was declared duly elected; this election to go into effect at such time as in the discretion of the President it shall be deemed to be best for the interests of the Company.

The President presented the name of Mr. B. Preston Clark as Assistant Treasurer of this Company, to fill the vacancy caused by the resignation of Mr. Dumaresq.

Mr. Lewisohn was appointed to collect, assort and count the votes, and he reported the whole number of votes to be Four, all of which were for Mr. Clark, and he was declared duly elected; this election to go into effect at such time as in the discretion of the President it shall be deemed to be best for the interests of the Company.

The President presented the name of Mr. Philip K. Dumaresq as Transfer Agent of this Company, he to have power to sign Certificates of Stock heretofore signed by the Assistant Secretary.

Mr. Lewisohn was appointed to collect, assort and count
635 the votes, and he reported the whole number of votes to be Four, all of which were for Mr. Dumaresq, and he was declared duly elected.

Upon motion of Mr. Ray, duly seconded, it was,

Voted:—That in the absence of either the Transfer Agent or the Assistant to the President, Mr. B. Preston Clark, Assistant Secretary, shall have power to sign all Certificates of Stock in the place of the one so absent, but not to sign for both on the same Certificate.

Upon motion of Mr. Stevens, duly seconded, it was,

Voted:—That beginning with December 1st next, the combined

salaries of the President, Treasurer and Secretary, Assistant Treasurer and Assistant Secretary and Transfer Agent of this Company shall be at the rate of Fifteen thousand dollars ($15,000) per annum, and that the President be and he is hereby authorized to adjust the salaries of said officers as he shall deem to be for the best interests of the Company.

Upon motion of Mr. Lewisohn, seconded by Mr. Stevens, it was

Voted:—That the following resolution be spread upon the records of this Company, and a copy of the same be sent to the family of the late Mr. Nelson.

"Whereas, death has removed our friend and associate, Thomas Nelson, the Directors of the Boston and Montana, Tamarack, Osceola, Old Dominion, Butte and Boston, and Merced Mining Companies, and of the Butte City Water Company, desire to place on record a testimonial of their sorrow and regret, and to express the high esteem in which they each and all held him, as well as their appreciation of his wise counsels, ability and untiring energy in all measures calculated to promote the best interests of the different Companies.

His sterling honesty and christian character endeared him to all who knew him, and his irreparable loss will be deeply mourned by them and his associates, who wish to tender their heartfelt sympathy to his family in its great bereavement."

Upon motion of Mr. Stevens, seconded by Mr. Bigelow, it was

Voted: That the salary paid to Mr. Nelson, the late secretary and treasurer of this Company, be continued at one half the usual rate until April 1st, 1898, and paid to his legal representatives.

No other business coming before the meeting, it was upon motion of Mr. Ray dissolved.

Attest:

A. H. BISSELL,
Secretary of the Meeting.

436 BOSTON, MASS., *December* 16, 1897.

A called meeting of the Directors of the Old Dominion Copper Mining and Smelting Company was held this day at Room 301 Sears Building, No. 199 Washington Street, Boston, Mass., at ten thirty o'clock A. M.

Present: Messrs. Bigelow, Ladd, Ray and Stevens.

The President called the meeting to order, and at his request the Secretary read the record of the last Directors' Meeting, which was, upon motion, approved.

The Secretary then read copy of proposed contract of this Company dated December 16, 1897, with the Gila Valley, Globe and Northern Railway Company.

After discussion, the following resolution was offered by Director Ray:

"Resolved:—That the contract just read dated December 16, 1897, copy of which is hereinafter more fully set out be approved, and that the President and Secretary be and they are hereby instructed to execute the same in behalf of this Company."

This resolution was duly seconded by Director Stevens and unanimously adopted.

The Secretary then read copy of proposed contract of this Company dated December 16, 1897, with the Southern Pacific Company.

After discussion, the following resolution was offered by Director Ray:

"Resolved: That the contract just read dated December 16, 1897, copy of which is hereinafter more fully set out be approved, and that the President and Secretary be and they are hereby instructed to execute the same in behalf of this Company."

This resolution was duly seconded by Director Stevens and unanimously adopted.

No other business coming before the meeting, it was adjourned.

Attest:

W. J. LADD, *Secretary.*

Minutes of the Annual Meeting of the Stockholders of the Old Dominion Copper Mining and Smelting Company of New Jersey, held at the office of the Company, 243-245 Washington Street, Jersey City, New Jersey, on Wednesday, the fifth day of April, 1899, at 12 o'clock noon, pursuant to the following notice, which was read and ordered to be entered in the minutes.

437 "Notice is hereby given that the annual meeting of the stockholders of the Old Dominion Copper Mining and Smelting Company will be held at the office of the Company, 243-245 Washington Street, Jersey City, New Jersey (office of New Jersey Corporations Agency) on Wednesday, the fifth day of April, 1899, at 12 o'clock noon, for the election of a Board of Seven (7) Directors and for all other business that may properly come before the meeting.

The transfer books will be closed for this purpose at the close of business on March 15, 1899, and will be opened in the morning of April 6, 1899.

Dated Boston, Mass., March 10, 1899.

W. J. LADD, *Secretary.*"

There were present in person Mr. George W. Crampton holding 300 shares, and Percy Lansburgh representing by proxy 100,710 shares being a total of 101,010 shares present in person or by proxy, being a majority of the out-standing 150,000 shares of stock issued.

In the absence of the President, Mr. George W. Crampton was, on motion of Percy Lansburgh (representing A. S. Bigelow by proxy) elected Chairman of the meeting, and in the absence of the Secretary, Mr. Charles N. King was, on like motion, elected Secretary of the meeting.

On motion the meeting proceeded to the election of Directors, pursuant to the notice. The chair appointed Robert S. Jordan and Harold J. Hockin Inspectors, who took and subscribed to their oath of office before Augustus C. Kellog, Master in Chancery of New Jersey, which oath was duly filed.

The meeting proceeded to the election by ballot, the polls having been declared open by the Chairman for one hour; nominations for the office were made, and the Inspectors reported that 101,010 votes were cast, all for the following named persons, who were thereupon declared by the Chairman duly elected Directors of the Company for the ensuing year and until their successors are chosen and qualified, to wit: A. S. Bigelow, W. J. Ladd, Joseph G. Ray, Joseph S. Bigelow, E. V. R. Thayer, Leonard Lewisohn and Edgar Buffum.

The report of the Inspectors was ordered filed with the Secretary.

On motion the meeting thereupon adjourned.

CHAS. N. KING,
Secretary of the meeting.

438 BOSTON, MASS., *May* 10, 1899.

A called meeting of the Directors of the Old Dominion Copper Mining and Smelting Company elected at the annual meeting of the stockholders held at Jersey City, New Jersey, April 5th, 1899,—being the first since said election, and for the organization of the Board,—was held this day at room 301 Sears Building, No. 199 Washington Street, Boston, Mass., at ten thirty o'clock a. m.

Present Messrs. A. S. Bigelow, W. J. Ladd, Joseph G. Ray, Leonard Lewisohn and J. S. Bigelow.

Upon motion, Mr. A. S. Bigelow was called to the Chair, who called the meeting to order.

At the request of the Chairman, the Secretary then read the record of the last Directors' Meeting which was upon motion duly seconded approved.

Upon motion of Mr. Ray, seconded by Mr. J. S. Bigelow it was

Voted: To proceed to the election of a secretary.

Mr. J. S. Bigelow was appointed to collect, assort and count the votes, and he reported the whole number of votes to be Five (5), all of which were for Mr. Ladd, and he was declared duly elected.

Upon motion of Mr. Ray, seconded by Mr. J. S. Bigelow, it was

Voted: To proceed to the election of a treasurer.

Mr. J. S. Bigelow was appointed to collect, assort and count the votes, and he reported the whole number of votes to be Five (5), all of which were for Mr. Ladd, and he was declared duly elected.

Upon motion of Mr. Ray, seconded by Mr. J. S. Bigelow, it was

Voted: To proceed to the election of a President.

Mr. J. S. Bigelow was appointed to collect, assort and count the votes, and he reported the whole number of votes to be Five (5), all of which were for Mr. A. S. Bigelow, and he was declared duly elected.

Upon motion of Mr. Ray, seconded by Mr. J. S. Bigelow, it was

Voted: To proceed to the election of a Vice President.

Mr. J. S. Bigelow was appointed to collect, assort and count the votes, and he reported the whole number of votes to be Five (5), all of which were for Mr. J. G. Ray, and he was declared duly elected.

Upon motion of Mr. Ray, seconded by Mr. J. S. Bigelow, it was

Voted: To proceed to the election of an assistant-secretary and as-

sistant treasurer in one person, who shall exercise the powers conferred upon the holder of that office by vote of the Directors at a meeting held September 18, 1895.

439 Mr. J. S. Bigelow was appointed to collect, assort and count the votes, and he reported the whole number of votes to be Five (5), all of which were for Mr. P. K. Dumaresq, and he was declared duly elected.

Upon motion of Mr. Ray, seconded by Mr. J. S. Bigelow, it was

Voted: To proceed to the election of an assistant president, who shall exercise the powers conferred upon the holder of that office by vote of the Directors at a meeting held September 18, 1895.

Mr. J. S. Bigelow was appointed to collect, assort and count the votes, and he reported the whole number of votes to be Five (5), all of which were for Mr. C. H. Bissell, and he was declared duly elected.

The President makes the following statement:—

"Arrangements have been made for the purchase of a large group of mining claims located near Globe, and known as the Continental Group, containing thirteen claims.

"This group contains, already developed, quite large sized ore bodies of copper sulphides, which is the character of ore that has been anxiously sought for in the mines of this Company, not so much for the copper values contained as for the fluxing qualities which will render more economical the treatment of the Old Dominion Ores, and make possible a closer saving of the copper values.

"In order to properly develop these claims, it will be necessary to build about seven miles of railroad, and also to erect a concentrating and converting plant later on. This will call for a large amount of money; and at a meeting of the Directors held May 10, 1899, it was voted to call a special meeting of the stockholders for June 15, 1899, to authorize the increase of the capital stock of the Company to 200,000 shares, by issuing 50,000 new shares, a portion of which, if authorized, are to be offered to the stockholders at par.

"The railroad from Bowie to the Mines at Globe is completed, and the new furnaces are now running smoothly, so that the Company from this time forward should make a handsome profit on its operations. With the new stock authorized, there will be no further need of accumulating these profits towards the creation of a surplus fund to cover future improvements."

"Whereas, it is considered by the Board advisable for the purposes of this Company to purchase a group of mining claims located near Globe known as the Continental Group; and

440 Whereas, for the purchase of such group, developing the same and other necessary expenses, a large amount of money will be needed,

Voted: That is is advisable for the purposes connected with such purchase that the Capital Stock of this Company be increased from one hundred and fifty thousand shares of twenty-five dollars each to two hundred thousand shares, and

Voted: That a special meeting of the stockholders be called for the fifteenth day of June, 1899, at the office of the Company, 243

Washington Street, Jersey City, New Jersey, at 11 o'clock in the forenoon, to consider and act upon the question of making such an increase of the capital stock from one hundred and fifty to two hundred thousand shares, and that notice be sent to all stockholders signed by the President for the Directors.

Upon motion of Mr. Lewisohn, seconded by Mr. Ray, it was

Voted: That the Secretary be and is hereby instructed to have the President's statement sent to the stockholders in the form of a circular, accompanied by a notice for a Special Meeting.

Upon motion, duly seconded, it was

Voted: To adjourn.

Attest:

W. J. LADD, *Secretary.*

JERSEY CITY, NEW JERSEY, *June* 15, 1899.

A special meeting of the Stockholders of the Old Dominion Copper Mining and Smelting Company of New Jersey was held this day at the office of the Company, the New Jersey Corporations Agency, Number Two hundred and forty-three (243) Washington Street, Jersey City, New Jersey, at 11 o'clock in the forenoon, pursuant to a call and notice of such meeting voted by the Directors of said Company at their meeting duly held on May 10, 1899.

Mr. F. M. Stone called the meeting to order, and called the list of stockholders of the Company, and appointed Messrs. Charles N. King and Frank J. Sheehan as Tellers to report how many stockholders were present in person or by proxy. Messrs. King and Sheehan reported that the following stockholders, owning the following number of shares, were present at the meeting in person or represented by their attorneys, constituted by written proxies, which proxies were duly filed, to wit:

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A. S. Bigelow	owning	965	shares, represented by	F. M. Stone
Erick Abrahamson	"	100	" "	" Chas. N. King
Edward H. Jacobs	"	200	" "	" Frank J. Sheehan
Abare, Wilbur L.	"	10	" "	" P. K. Dumaresq
Adams, William F.	"	25	" "	" " " "
Alexander, Noble D.	"	15	" "	" " " "
Ames, James H.	"	10	" "	" " " "
Amory, Copley	"	50	" "	" " " "
Anthony, D. M.	"	200	" "	" " " "
Andrews, Mrs. Susie A.	"	20	" "	" " " "
" J. Munn	"	110	" "	" " " "
Baker, Edward H.	"	40	" "	" " " "
" George F.	"	100	" "	" " " "
Ball, George H.	"	100	" "	" " " "
Barron, Clarence W.	"	5	" "	" " " "
Barnard, Charles	"	10	" "	" " " "
Basset, William	"	555	" "	" " " "
Bancroft, Samuel P.	"	14	" "	" " " "
Ball, Miss Alice W.	"	10	" "	" " " "
Bartlett, Miss Ella A.	"	10	" "	" " " "
Belches, J. W. & Co.	"	585	" "	" " " "
Belcher, Mrs. Mary E.	"	1	" "	" " " "
Bemis, Miss Julia A.	"	75	" "	" " " "
Benjamin, Mrs. Annie L.	"	30	" "	" " " "

Berry, Henry C.	"	5	"	"	"	"	"	"
Benson, Henry P.	"	250	"	"	"	"	"	"
Beney, Frank M.	"	26	"	"	"	"	"	"
Bishop, Arthur W.	"	5	"	"	"	"	"	"
Bice, Edward S.	"	60	"	"	"	"	"	"
Bicknell, John Q.	"	10	"	"	"	"	"	"
Bigelow, Maurice W.	"	100	"	"	"	"	"	"
Blanchard, Miss Rebecca S.	"	10	"	"	"	"	"	"
Blodget, Merritt & Co.	"	50	"	"	"	"	"	"
Blanchard, Frederick	"	75	"	"	"	"	"	"
" Charles F.	"	100	"	"	"	"	"	"
Blackwood, Adam A.	"	20	"	"	"	"	"	"
Bolles, M. & Co.	"	9,455	"	"	"	"	"	"
Bosworth, Homer L.	"	1,500	"	"	"	"	"	"
Bowers, Charles M.	"	15	"	"	"	"	"	"
Bolles, Richard F.	"	450	"	"	"	"	"	"
Borden, Jr., Spencer	"	10	"	"	"	"	"	"
Bradlee, Arthur T.	"	25	"	"	"	"	"	"
Bright, Elizabeth G., Mrs.	"	200	"	"	"	"	"	"
Bright, Sears & Co.	"	2,196	"	"	"	"	"	"
Briggs, Lloyd	"	10	"	"	"	"	"	"
Brown, Samuel N.	"	400	"	"	"	"	"	"
Brown, Riley & Co.	"	860	"	"	"	"	"	"
" Charles H.	"	200	"	"	"	"	"	"
" John P.	"	40	"	"	"	"	"	"
" Maynard P.	"	10	"	"	"	"	"	"

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Brigham, Miss Ella J.	owning	5	shares,	represented	by	P.	K.	Dumaresq
Brown, Frank M.	"	100	"	"	"	"	"	"
Bradley, Oliver B.	"	10	"	"	"	"	"	"
Brayton, William L. S.	"	25	"	"	"	"	"	"
Buffum, George A.	"	150	"	"	"	"	"	"
Burke, John M.	"	400	"	"	"	"	"	"
Burns, Miss Cora A.	"	10	"	"	"	"	"	"
" Mrs. Katherine F.	"	10	"	"	"	"	"	"
" B. Walter	"	15	"	"	"	"	"	"
Burgess, Edward B.	"	50	"	"	"	"	"	"
Burns, Robert	"	15	"	"	"	"	"	"
Burroughs, Arthur E.	"	25	"	"	"	"	"	"
Cady, Alfred E.	"	100	"	"	"	"	"	"
Cammann, Mrs. Mary H.	"	100	"	"	"	"	"	"
Campbell, William H.	"	100	"	"	"	"	"	"
Cannon, Martin J.	"	100	"	"	"	"	"	"
Chase, Leverett M.	"	10	"	"	"	"	"	"
Chase & Barstow	"	3,205	"	"	"	"	"	"
Chaveriat, Narcisse	"	10	"	"	"	"	"	"
Churchill, Miss Nellie L.	"	8	"	"	"	"	"	"
Chandler, George R.	"	40	"	"	"	"	"	"
" Seth D.	"	100	"	"	"	"	"	"
Chase, Anthony T.	"	6	"	"	"	"	"	"
Claflin, Frederick L.	"	10	"	"	"	"	"	"
Clapp, Edwin	"	800	"	"	"	"	"	"
Clark, Frank E.	"	100	"	"	"	"	"	"
" Miss Eleonor V.	"	75	"	"	"	"	"	"
Clement, Parker & Co.	"	705	"	"	"	"	"	"
Cloudman, Marcellus C.	"	200	"	"	"	"	"	"
Clark, John H.	"	10	"	"	"	"	"	"
Clews & Co., Henry	"	100	"	"	"	"	"	"
Clogston, Charles H.	"	5	"	"	"	"	"	"
Clark, John C.	"	200	"	"	"	"	"	"
Cline, Frank	"	20	"	"	"	"	"	"
Clews, James B.	"	250	"	"	"	"	"	"
Clark, Charles A.	"	30	"	"	"	"	"	"
" Mrs. Sarah J.	"	15	"	"	"	"	"	"

Coe, Herbert R.	"	35	"	"	"	"	"	"
" Robert T.	"	30	"	"	"	"	"	"
" Miss Fannie E.	"	25	"	"	"	"	"	"
Cole, Charles H.	"	101	"	"	"	"	"	"
Cottle, Henry C.	"	250	"	"	"	"	"	"
Corbett, James F.	"	550	"	"	"	"	"	"
Cotton & Deckrow	"	5	"	"	"	"	"	"
Crane, Roman A.	"	185	"	"	"	"	"	"
Crosby, Stephen M.	"	450	"	"	"	"	"	"
Crawford, John L.	"	700	"	"	"	"	"	"
Cumston, James S.	"	200	"	"	"	"	"	"
Curtis & Motley	"	4,881	"	"	"	"	"	"
Cushing, Henry W.	"	15	"	"	"	"	"	"

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Cushing, George S.	owning	100	shares,	represented	by	P.	K.	Dumaresq
Culbertson, Miss Emma B.	"	10	"	"	"	"	"	"
Daniels, Joseph E.	"	10	"	"	"	"	"	"
Davis, Joshua W.	"	30	"	"	"	"	"	"
Davidson, Albert L.	"	20	"	"	"	"	"	"
Day, R. L. & Co.	"	1,880	"	"	"	"	"	"
" Charles M.	"	10	"	"	"	"	"	"
Davis, Frederic	"	200	"	"	"	"	"	"
De Loriea, Joseph F.	"	375	"	"	"	"	"	"
Demmon, Daniel L.	"	1,150	"	"	"	"	"	"
Devens, Frank W.	"	10	"	"	"	"	"	"
Derby, Henry C.	"	100	"	"	"	"	"	"
Denison, Charles E.	"	25	"	"	"	"	"	"
Dillaway & Starr	"	2,335	"	"	"	"	"	"
Ditson, Charles H.	"	100	"	"	"	"	"	"
Diviney, Mrs. Margaret	"	3	"	"	"	"	"	"
Dooley, William J.	"	330	"	"	"	"	"	"
Downer & Co.	"	395	"	"	"	"	"	"
Doyle, Thomas L.	"	100	"	"	"	"	"	"
Drury, Mrs. Sarah L.	"	45	"	"	"	"	"	"
Dymock, John S.	"	200	"	"	"	"	"	"
Eaton, Fred S.	"	25	"	"	"	"	"	"
" Warren E.	"	10	"	"	"	"	"	"
Eggleston, Charles B.	"	300	"	"	"	"	"	"
Edgerly & Crocker	"	1,050	"	"	"	"	"	"
Ede, Frederick	"	5	"	"	"	"	"	"
Eliason, Thomas W.	"	100	"	"	"	"	"	"
Elliott, Mark	"	150	"	"	"	"	"	"
Ellson, William J.	"	100	"	"	"	"	"	"
Emery & Tucker	"	300	"	"	"	"	"	"
Estabrook & Co.	"	2,129	"	"	"	"	"	"
Eustis, George P.	"	100	"	"	"	"	"	"
Everett, Charles	"	25	"	"	"	"	"	"
" Fred E.	"	50	"	"	"	"	"	"
" Arthur G.	"	10	"	"	"	"	"	"
Fabens, Benjamin F.	"	50	"	"	"	"	"	"
Faulkner, Joseph	"	200	"	"	"	"	"	"
Fay, Miss Alice A.	"	5	"	"	"	"	"	"
Farley, William A.	"	7	"	"	"	"	"	"
" Mrs. L. Mabel	"	5	"	"	"	"	"	"
Field, Zibeon C.	"	25	"	"	"	"	"	"
" Wm. De Yough	"	10	"	"	"	"	"	"
Fiske, George W.	"	50	"	"	"	"	"	"
Fisk, George R.	"	50	"	"	"	"	"	"
Firth, Jr., Thaddeus	"	10	"	"	"	"	"	"
Finney, Charles E.	"	25	"	"	"	"	"	"
Fletcher, Frank E.	"	100	"	"	"	"	"	"
Flynt, Lyman C.	"	10	"	"	"	"	"	"
Foote & French	"	325	"	"	"	"	"	"
Fowler, Mrs. Helen M.	"	50	"	"	"	"	"	"

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Freeman & Co., F. P.	owning	100	shares,	represented	by	P.	K.	Dumaresq
French, George W.	"	50	"	"	"	"	"	"
Freitag, Joseph K.	"	10	"	"	"	"	"	"
Gerhard, Ludwig	"	10	"	"	"	"	"	"
Gill, Augustus H.	"	12	"	"	"	"	"	"
Gould, George	"	30	"	"	"	"	"	"
" Mrs. Lydia W.	"	10	"	"	"	"	"	"
Grierson, William	"	10	"	"	"	"	"	"
Greenwood, Othello	"	50	"	"	"	"	"	"
" Marcella	"	50	"	"	"	"	"	"
Guild, George A	"	50	"	"	"	"	"	"
Hall, Mrs. Mary D.	"	50	"	"	"	"	"	"
Hannum, James W.	"	50	"	"	"	"	"	"
Hanson, Charles H.	"	100	"	"	"	"	"	"
Hardy, Arthur S.	"	200	"	"	"	"	"	"
" Mrs. Elizabeth B.	"	5	"	"	"	"	"	"
Hayden, Stone & Co.	"	2,436	"	"	"	"	"	"
Haire, Norman W.	"	200	"	"	"	"	"	"
Hanchett, Frank	"	400	"	"	"	"	"	"
Hall, Horace E.	"	100	"	"	"	"	"	"
Halloran, Michael J.	"	100	"	"	"	"	"	"
Hale & Co.	"	15	"	"	"	"	"	"
Harris, Mrs. Mary W.	"	50	"	"	"	"	"	"
Handren, Mrs. Adeline E.	"	8	"	"	"	"	"	"
Hall, Mrs. Mary E.	"	10	"	"	"	"	"	"
Head & Co., Charles	"	805	"	"	"	"	"	"
Hersey, Mrs. Sarah A.	"	100	"	"	"	"	"	"
Hodge, Daniel	"	20	"	"	"	"	"	"
" Joseph	"	10	"	"	"	"	"	"
Hildreth, Reuben E.	"	25	"	"	"	"	"	"
Hodge, Charles J.	"	880	"	"	"	"	"	"
Hoffses, Mrs. Ellen M.	"	100	"	"	"	"	"	"
Hollis, W. Thatcher	"	10	"	"	"	"	"	"
Holden, S. Herbert	"	50	"	"	"	"	"	"
Holt, J. Frederick	"	80	"	"	"	"	"	"
Hornblower & Weeks	"	1,730	"	"	"	"	"	"
Howard, Walter F.	"	25	"	"	"	"	"	"
Howison, William R.	"	15	"	"	"	"	"	"
Holman, John B.	"	30	"	"	"	"	"	"
Hoadley, Miss Charlotte E.	"	10	"	"	"	"	"	"
Holmes, Edmund G.	"	5	"	"	"	"	"	"
Holzberger, Frank	"	28	"	"	"	"	"	"
Holman, William J.	"	20	"	"	"	"	"	"
Howard, Arthur M.	"	8	"	"	"	"	"	"
Holmer, Michael M.	"	100	"	"	"	"	"	"
Hughes, Thomas F.	"	50	"	"	"	"	"	"
Hyde, William L.	"	150	"	"	"	"	"	"
Hyatt, Charles M.	"	75	"	"	"	"	"	"
Jackson & Curtis	"	450	"	"	"	"	"	"
Jenks, Manville	"	50	"	"	"	"	"	"

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Jenks, George	owning	15	shares,	represented	by	P.	K.	Dumaresq
Jennison, Frank J.	"	40	"	"	"	"	"	"
Jones, W. Clifton	"	10	"	"	"	"	"	"
Jordan, August F.	"	50	"	"	"	"	"	"
Kendall, Amos	"	5	"	"	"	"	"	"
" Francis H.	"	15	"	"	"	"	"	"
Kelsey, Frederick	"	50	"	"	"	"	"	"
Kilburn, Mrs. Abbie B.	"	25	"	"	"	"	"	"
Kimball, Miss Lucy J.	"	5	"	"	"	"	"	"
Kneeland, Frederick N.	"	10	"	"	"	"	"	"
Kenehle, Paul	"	11	"	"	"	"	"	"
Lane, Enos H.	"	20	"	"	"	"	"	"

Lawrence, Mrs. Caroline E..	"	10	"	"	"	"	"	"
Lathrop, Joseph H.....	"	50	"	"	"	"	"	"
Lee, Joseph	"	100	"	"	"	"	"	"
" Mrs. Mary A.....	"	100	"	"	"	"	"	"
Lichtenaeur, Joseph M.....	"	25	"	"	"	"	"	"
Lockwod, Homer	"	100	"	"	"	"	"	"
" Mrs. Emmeline D.	"	25	"	"	"	"	"	"
" Thomas S.	"	50	"	"	"	"	"	"
Lodge, William	"	200	"	"	"	"	"	"
Lowenstein, Judel	"	100	"	"	"	"	"	"
Loveland, Winslow	"	50	"	"	"	"	"	"
Maitland, Alexander	"	300	"	"	"	"	"	"
" Leslie	"	5	"	"	"	"	"	"
Manson, Thos. L., Jr. & Co..	"	1,000	"	"	"	"	"	"
Mansfield, Miss Mary.....	"	10	"	"	"	"	"	"
Maitland & Yates.....	"	200	"	"	"	"	"	"
Martel, Charles E.....	"	30	"	"	"	"	"	"
Matheson, Murdock R.....	"	50	"	"	"	"	"	"
Meredith, J. Morris.....	"	300	"	"	"	"	"	"
Messinger, Mrs. Hetty A....	"	5	"	"	"	"	"	"
Metz, Joseph G.....	"	900	"	"	"	"	"	"
Merryweather, Charles	"	90	"	"	"	"	"	"
Meader, Miss Eunice S.....	"	10	"	"	"	"	"	"
Miller, Miss Nellie L.....	"	8	"	"	"	"	"	"
" George E.....	"	25	"	"	"	"	"	"
" Mrs. Sarah J.....	"	7	"	"	"	"	"	"
Mills, Mrs. Emily W.....	"	10	"	"	"	"	"	"
Moore, Frederic H.....	"	300	"	"	"	"	"	"
Moors & Cabot.....	"	1,803	"	"	"	"	"	"
Morison, George B.....	"	20	"	"	"	"	"	"
Morse, E. Rollins & Bro.....	"	2,450	"	"	"	"	"	"
Moseley, F. S. & Co.....	"	4,410	"	"	"	"	"	"
Morgan, William	"	70	"	"	"	"	"	"
" Richard	"	20	"	"	"	"	"	"
Morse, Justin N.....	"	50	"	"	"	"	"	"
McVichie, Donald	"	333	"	"	"	"	"	"
McKechnie, Benjamin F....	"	10	"	"	"	"	"	"
" William T.	"	25	"	"	"	"	"	"

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Nash, Henry A.....	owning	100	shares,	represented	by	P. K.	Dumares	
Nankervis, James L.....	"	200	"	"	"	"	"	"
Neely, Benjamin	"	200	"	"	"	"	"	"
Nelson, Mrs. Hortense C....	"	20	"	"	"	"	"	"
" Henry W., Jr.....	"	25	"	"	"	"	"	"
" Mrs. Sophie L. B....	"	5	"	"	"	"	"	"
Newbigging, Thomas	"	700	"	"	"	"	"	"
Nelson, William H.....	"	200	"	"	"	"	"	"
Nourse, Franklin	"	200	"	"	"	"	"	"
Oakes, Josiah	"	50	"	"	"	"	"	"
O'Connor, John	"	250	"	"	"	"	"	"
Oliver, James F.....	"	20	"	"	"	"	"	"
Olney, Jeremiah	"	1,000	"	"	"	"	"	"
Packer, Miss Mary Cordelia.	"	10	"	"	"	"	"	"
Paine, Webber & Co.....	"	1,576	"	"	"	"	"	"
" Rene	"	100	"	"	"	"	"	"
Parkinson & Burr.....	"	395	"	"	"	"	"	"
Paull & Co., J.....	"	200	"	"	"	"	"	"
Payson, Mrs. Margaret Milliken	"	20	"	"	"	"	"	"
Parsons, Marcus L.....	"	20	"	"	"	"	"	"
Pearce, Mrs. Elizabeth L....	"	50	"	"	"	"	"	"
Perkins, T. H. & Co.....	"	400	"	"	"	"	"	"
Phelps, George	"	200	"	"	"	"	"	"
Phillips, Charles	"	75	"	"	"	"	"	"
Phelps, Peter W.....	"	300	"	"	"	"	"	"
Pickering, John & Moseley..	"	455	"	"	"	"	"	"

Pierce, John H.	"	1,000	"	"	"	"	"	"
Pingree, David	"	50	"	"	"	"	"	"
Pope, Mrs. Emily O.	"	10	"	"	"	"	"	"
" Thomas E.	"	45	"	"	"	"	"	"
Prendergast, James M.	"	700	"	"	"	"	"	"
Preston, John	"	15	"	"	"	"	"	"
Prince, F. H. & Co.	"	3,078	"	"	"	"	"	"
" Mrs. Lillian C.	"	5	"	"	"	"	"	"
Preston, Charles F.	"	10	"	"	"	"	"	"
Prior, Leland F.	"	150	"	"	"	"	"	"
Putnam, W. F. & Co.	"	10	"	"	"	"	"	"
Ray, Joseph G.	"	100	"	"	"	"	"	"
" Charles J. R.	"	10	"	"	"	"	"	"
Raynes, Harry	"	50	"	"	"	"	"	"
Reed, William H.	"	20	"	"	"	"	"	"
Reeder, John T.	"	150	"	"	"	"	"	"
Richardson, William A.	"	200	"	"	"	"	"	"
Richardson, Hill & Co.	"	430	"	"	"	"	"	"
Riddlestorffer, Sidney	"	200	"	"	"	"	"	"
Ring, Constant Q.	"	200	"	"	"	"	"	"
Richmond, Mrs. Deborah H.	"	14	"	"	"	"	"	"
Richards, William F.	"	50	"	"	"	"	"	"
Ripley, Edward J.	"	10	"	"	"	"	"	"

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Robinson, Miss Lucilla	owning	9	shares, represented by P. K. Dumaresq					
" Miss Vena G.	"	2	"	"	"	"	"	"
Rollins, Mrs. Mattie E.	"	100	"	"	"	"	"	"
Root, Charles J.	"	200	"	"	"	"	"	"
Rowe, Thomas	"	200	"	"	"	"	"	"
" Henry M.	"	100	"	"	"	"	"	"
Ronk, Alfred	"	50	"	"	"	"	"	"
Robin, George O.	"	7	"	"	"	"	"	"
Rochester, Montgomery H.	"	25	"	"	"	"	"	"
Robinson, James	"	20	"	"	"	"	"	"
" Calvin F.	"	16	"	"	"	"	"	"
" Joshua D.	"	20	"	"	"	"	"	"
Royce, Frank A.	"	50	"	"	"	"	"	"
Russell, Cyrus W.	"	25	"	"	"	"	"	"
Sampson, Azel E.	"	10	"	"	"	"	"	"
Safford, James S.	"	20	"	"	"	"	"	"
Sawtelle, William H.	"	20	"	"	"	"	"	"
Sawyer, Edward E.	"	50	"	"	"	"	"	"
Schlichting, Rhino	"	20	"	"	"	"	"	"
Seabury, Frank & Bro.	"	4	"	"	"	"	"	"
Seaverns, Franklin T.	"	8	"	"	"	"	"	"
" Almer F.	"	1	"	"	"	"	"	"
Sears, Isaiah C.	"	10	"	"	"	"	"	"
" Mrs. Julia F.	"	10	"	"	"	"	"	"
Shannon, Donald	"	100	"	"	"	"	"	"
Shattuck, Jefferson J.	"	50	"	"	"	"	"	"
" Mrs. Estelle M.	"	10	"	"	"	"	"	"
Sheldon, Horace W.	"	300	"	"	"	"	"	"
Shaw, William	"	25	"	"	"	"	"	"
Sharman, Charles	"	25	"	"	"	"	"	"
Siter, Mrs. Susan H.	"	100	"	"	"	"	"	"
Slater, Horatio N.	"	200	"	"	"	"	"	"
Smith, Arthur A.	"	50	"	"	"	"	"	"
" Albert Oliver	"	100	"	"	"	"	"	"
" Walter F.	"	50	"	"	"	"	"	"
" Edward P.	"	100	"	"	"	"	"	"
" H. Eugene	"	100	"	"	"	"	"	"
" Miss Mary A.	"	10	"	"	"	"	"	"
Snook, James Curtis	"	100	"	"	"	"	"	"
Snow, Charles H.	"	50	"	"	"	"	"	"
Souther, John F.	"	50	"	"	"	"	"	"
Spaulding, Willam B.	"	10	"	"	"	"	"	"

Spiller, Joseph B.	"	50	"	"	"	"	"	"
Spear, John W.	"	150	"	"	"	"	"	"
Stackpole & Gay	"	1,685	"	"	"	"	"	"
Starbuck, Charles	"	10	"	"	"	"	"	"
Stewart, James C.	"	10	"	"	"	"	"	"
Stone, Albert	"	200	"	"	"	"	"	"
Stowell & Son, J. B.	"	15	"	"	"	"	"	"
Stephen, John W.	"	100	"	"	"	"	"	"

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Strong, Mrs. Carrie R.	owning	10	shares, represented by P. K. Dumaresq					
Stone, Frederick G.	"	80	"	"	"	"	"	"
Stowe, Luke S.	"	100	"	"	"	"	"	"
Stoddard, Wm. J.	"	20	"	"	"	"	"	"
Sutton, David	"	200	"	"	"	"	"	"
Sutton & Bowen	"	810	"	"	"	"	"	"
Swallow, A. Moreton	"	100	"	"	"	"	"	"
Sweetser, A. L. & Co.	"	610	"	"	"	"	"	"
" Frank E.	"	250	"	"	"	"	"	"
Taft, Mrs. Lydia B.	"	20	"	"	"	"	"	"
Taylor, Frederick W.	"	200	"	"	"	"	"	"
" James E.	"	100	"	"	"	"	"	"
Tailby, Francis S.	"	30	"	"	"	"	"	"
Farbell, George G.	"	75	"	"	"	"	"	"
Tapley, Amos P.	"	100	"	"	"	"	"	"
Tewksbury, Charles W.	"	120	"	"	"	"	"	"
Thayer, Eugene V. R.	"	10	"	"	"	"	"	"
" Frank H.	"	5	"	"	"	"	"	"
Thompson, Alexander C.	"	25	"	"	"	"	"	"
Tiffany, Charles H.	"	10	"	"	"	"	"	"
Tower, Giddings & Co.	"	1,565	"	"	"	"	"	"
Tourtellotte, L. Holbrook	"	10	"	"	"	"	"	"
Torrey, Alexis	"	200	"	"	"	"	"	"
Trull, Mrs. Martha F.	"	10	"	"	"	"	"	"
Truettner, Louis H.	"	10	"	"	"	"	"	"
Tucker, Anthony & Co.	"	1,090	"	"	"	"	"	"
" Miss Mary P.	"	5	"	"	"	"	"	"
" Charles H.	"	10	"	"	"	"	"	"
Usher, Samuel	"	10	"	"	"	"	"	"
Vanness, Theodore F.	"	400	"	"	"	"	"	"
Vaughn, George T.	"	10	"	"	"	"	"	"
Wainwright, H. C. & Co.	"	4,430	"	"	"	"	"	"
Wales, Miss Lella M.	"	11	"	"	"	"	"	"
Walker, Mrs. Helen M.	"	10	"	"	"	"	"	"
Warren, Nathan	"	30	"	"	"	"	"	"
Wales, Mrs. Mary F.	"	10	"	"	"	"	"	"
Watson, Ashley & Co.	"	25	"	"	"	"	"	"
Walker, James E.	"	10	"	"	"	"	"	"
Weld, A. Davis	"	1,000	"	"	"	"	"	"
" Aaron D's Sons	"	1,000	"	"	"	"	"	"
Wentworth, George A.	"	100	"	"	"	"	"	"
Webster, Granville S.	"	25	"	"	"	"	"	"
Westervelt, Edward C.	"	500	"	"	"	"	"	"
Weld, William E.	"	50	"	"	"	"	"	"
Wheeler, Leonard	"	600	"	"	"	"	"	"
" Mrs. Harriet F.	"	400	"	"	"	"	"	"
Whitney, William E.	"	170	"	"	"	"	"	"
Whelan, William H.	"	50	"	"	"	"	"	"
Wheelock, Arthur	"	50	"	"	"	"	"	"
Wilbur, John	"	25	"	"	"	"	"	"

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Wiley, H. C.	owning	1,076	shares, represented by P. K. Dumaresq					
Wing, Mrs. Ellen E.	"	30	"	"	"	"	"	"
Wise, Mrs. Fidelia	"	50	"	"	"	"	"	"
Williams, Charles H.	"	10	"	"	"	"	"	"

Wind, Howard B.....	"	1	"	"	"	"	"	"
Williams, Clarence R.....	"	50	"	"	"	"	"	"
Wilder, Edward F.....	"	100	"	"	"	"	"	"
Wood, Henry	"	350	"	"	"	"	"	"
" Granby	"	15	"	"	"	"	"	"
Woodhull, Maxwell	"	4,005	"	"	"	"	"	"
Woodman, Charles H.....	"	10	"	"	"	"	"	"
Wortley, Clark S.....	"	55	"	"	"	"	"	"
" Alfred C.	"	5	"	"	"	"	"	"
Wood, Francis W.....	"	10	"	"	"	"	"	"
Wright, Mrs. Helen M. C...	"	10	"	"	"	"	"	"
" William E.	"	10	"	"	"	"	"	"

In all 107,348 shares out of a total of 150,000 shares, the total capitalization of the Company.

The meeting was organized by unanimously choosing Mr. F. M. Stone as Chairman and Mr. P. K. Dumaresq as Secretary.

Mr. King presented to the meeting the affidavit of Mr. Edmund Grinnell showing that according to law in such case made and provided, he had himself served the notice of said meeting by depositing in the Post Office in the city of Boston, Massachusetts, with the legal postage prepaid, on May 12, 1899, at least ten (10) days before June 15, 1899, the date fixed for holding such meeting, a written or printed copy of said notice, addressed to each stockholder of record appearing on the books of the Company at the address given in such books, specifying the objects of the meeting, the vote of the Board of Directors, the time and place, when and where such meeting would be held, and the amount to which it would be proposed to increase the capital stock of the Company; and he presented to the meeting a copy of the notice that had been so sent to each stockholder.

On motion of Mr. King, duly seconded by Mr. Sheehan, it was

Voted:—That a copy of said notice together with a copy of said affidavit be spread upon the minutes of this meeting, which are as follows:

"Room 303, Sears Building,
Boston, *June* 13, 1899.

Edmund Grinnell being duly sworn deposes and says:

That he is Clerk of the Old Dominion Copper Mining and Smelting Company of New Jersey, and that by order of the Board of Directors of said Company, he served the notice of the special meeting of the stockholders of said Company, called for June 15, 1899, of which the annexed is a true copy, upon all the stockholders of said Company in accordance with the law in such case made and provided, at least Ten (10) days before the date of the meeting, to wit: on May 12th, 1899.

That he served said notice himself by depositing on May 12th, 1899, in the Post Office in the City of Boston, Mass., with the legal postage prepaid thereon, a copy of said notice addressed to each stockholder of record to his, her or their Post Office address, as appeared on the books of said Company at the close of business on said May 12th, 1899.

EDMUND GRINNELL.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

On this 13th day of June, A. D. 1899, before me, the subscriber, a Commissioner for the State of New Jersey, resident in Massachusetts, personally appeared Edmund Grinnell, known to me to be the person who signed the foregoing affidavit and made oath that the above affidavit signed by him is true.

In testimony whereof I hereunto set my hand and affix my official seal.

[COMMISSIONER'S SEAL.] CLARENCE H. BISSELL,
Commissioner for the State of New Jersey."

"To the Stockholders of the Old Dominion Copper Mining and Smelting Company:

Notice is hereby given that a special meeting of the stockholders of this Company will be held on Thursday, June 15, 1899, at eleven o'clock in the forenoon at the office of the Company, 243 Washington Street, Jersey City, New Jersey, to consider and act upon the question of increasing the capital stock of the corporation pursuant to the following vote of the Board of Directors passed at their meeting on May 10, 1899, to wit:

'Whereas, it is considered by the Board advisable for the purposes of this Company to purchase a group of mining claims located near Globe, known as the Continental Group; and

'Whereas, for the purchase of such group, developing the same and other necessary expenses, a large amount of money will be needed,

'Voted:—That it is advisable for the purposes connected with such purchase that the capital stock of this Company be increased
451 from One hundred and fifty thousand shares of Twenty-five dollars each to two hundred thousand shares, and

'Voted:—That a special meeting of the stockholders be called for the fifteenth day of June, 1899, at the office of the Company, 243 Washington Street, Jersey City, New Jersey, at eleven o'clock in the forenoon, to consider and act upon the question of making such an increase of the capital stock from One hundred and fifty thousand to Two hundred thousand shares, and that notice be sent to all stockholders signed by the President for the Directors.'

The stock books of the Company for the transfer of stock will be closed from May 20, 1899, to June 15, 1899, both days inclusive.

By order of the board of directors:

A. S. BIGELOW,
President."

Boston, Mass., May 10, 1899.

Mr. Sheehan then read the circular issued from the office of this Company signed by order of the Board of Directors with reference to the proposed plan for the increase of the capital stock of the Company from One hundred and fifty thousand (150,000) shares of Twenty-five ($25.) each to Two hundred thousand (200,000) shares of Twenty-five Dollars ($25.) each.

On motion of Mr. King, duly seconded by Mr. Sheehan, it was Voted:—That a copy of said circular be spread upon the records of the meeting. Said copy is as follows:

"Old Dominion Copper Mining and Smelting Company.

Circular to Stockholders.

Arrangements have been made for the purchase of a large group of mining claims located near Globe, and known as the Continental Group, containing thirteen claims.

This group contains, already developed, quite large sized ore bodies of copper sulphides, which is the character of ore that has been anxiously sought for in the mines of this Company, not so much for the copper values contained as for fluxing qualities which will render more economical the treatment of the Old Dominion ores, and make possible a closer saving of the copper values.

In order to properly develop these claims, it will be necessary to build about seven miles of railroad, and also to erect a con-
452 centrating and converting plant later on. This will call for a large amount of money; and at a meeting of the Directors, held May 10, 1899, it was voted to call a special meeting of the stockholders for June 15, 1899, to authorize the increase of the capital stock of the Company to 200,000 shares, by issuing 50,000 new shares, a portion of which, if authorized, are to be offered to the stockholders at par.

The railroad from Bowie to the mines at Globe is completed, and the new furnaces are now running smoothly, so that the Company from this time forward should make a handsome profit on its operations. With the new stock authorized, there will be no further need of accumulating these profits towards the creation of a surplus fund to cover future improvements.

By order of the board of directors.

A. S. BIGELOW,
President."

On motion of Mr. King, duly seconded by Mr. Sheehan, the following votes were passed by a stock-vote, 107,348 shares voting in favor and no shares voting against the same, out of One hundred and fifty thousand (150,000) shares, the total stock of the Company, to wit:

In accordance with the vote of the Board of Directors passed at their meeting held May 10, 1899.

Voted:—That the Company does hereby increase its capital stock from One hundred and fifty thousand (150,000) shares of Twenty-five dollars ($25.) each, to Two hundred thousand (200,000) shares of Twenty-five dollars ($25.) each, that is from the present capitalization of Three million seven hundred and fifty thousand dollars ($3,750,000) to a capitalization of Five million dollars ($5,000,000.) said additional Fifty thousand (50,000) shares to be disposed of by the Board of Directors.

Voted:—That the President and Secretary are hereby authorized and directed to execute and file for record any and all certificates required by the laws of the State of New Jersey with reference to the increase of the capital stock of the Company as voted at this meeting, and to take any other steps that may be necessary to make the action of this meeting effectual.

Whereupon it was declared that the said votes were passed by more than two-thirds (2/3) of the entire capital stock of this Company according to the law in such case made and provided.

On motion of Mr. King, duly seconded by Mr. Sheehan, it was

453 Voted:—That all acts, matters and things which have been entered into or performed by the Board of Directors are hereby approved, ratified and confirmed.

No other business coming before the meeting, the meeting was then dissolved.

P. K. DUMARESQ,
Secretary of the Meeting.

BOSTON, MASS., *February* 13, 1900.

A meeting of the Directors of the Old Dominion Copper Mining and Smelting Company was held this day at Room 301 Sears Building, No. 199 Washington Street, Boston, Mass., at eleven ten o'clock a. m.

Present: Messrs. A. S. Bigelow, W. J. Ladd, J. S. Bigelow and E. V. R. Thayer.

The President called the meeting to order and at his request the Secretary read the record of the last Directors' Meeting, which was upon motion duly seconded — approved.

The President presented an assignment by Lewisohn Bros. to the United Metals Selling Company, transferring all existing contracts between this Company and Lewisohn Bros., for the sale of copper and other metals, also an assent by this Company to said assignment.

Whereupon, on motion of Mr. Thayer, seconded by Mr. J. S. Bigelow, it was

Voted: That the President and Secretary of this Company be and they are hereby authorized and instructed to sign such papers as may be necessary to transfer to the United Metals Selling Company said contracts now existing between this Company and said Lewisohn Bros.

On motion of Mr. Thayer, duly seconded by Mr. J. S. Bigelow, the following was unanimously adopted as an amendment to the By-laws of this Company, to go into effect immediately, to wit:

"Dividends shall be declared and paid as voted by the Board of Directors."

The President then presented a Bond of Indemnity for $140 from Eva Kildreth Foster of Boston, Mass.; also affidavit in regard to the loss of certificate No. 2857, for one share of the capital stock of the Old Dominion Copper Mining and Smelting Company standing in her name; also letter from Mr. William A. Tucker, of Tucker,

Anthony and Company, Boston, Mass., in relation to the financial standing of the sureties upon said Bond; whereupon, on motion of Mr. Thayer, seconded by Mr. J. S. Bigelow, it was unanimously

454 Voted: That the proper officers of this Company be and they are hereby authorized to issue a duplicate certificate to said Eva Kildreth Foster for said stock.

No other business coming before the meeting, upon motion of Mr. Bigelow, seconded by Mr. Thayer, it was

Voted: To adjourn.

Attest:

W. J. LADD,
Secretary.

BOSTON, MASS., *March* 2, 1901.

A called meeting of the Directors of the Old Dominion Copper Mining and Smelting Company was held this day at Room 301 Sears Building, 199 Washington Street, Boston, Mass., at eleven o'clock a. m.

Present Messrs. A. S. Bigelow, W. J. Ladd, E. V. R. Thayer and J. S. Bigelow.

The President called the meeting to order, and at his request the Secretary read the record of the last Directors' Meeting, which was approved.

Upon motion, duly seconded, it was

Voted: To proceed to the election of a Director to fill the vacancy occasioned by the death of the late Joseph G. Ray.

Mr. Ladd was appointed to collect, assort and count the votes, and he reported the whole number of ballots to be four, all of which were for Mr. C. H. Bissell, and he was declared duly elected.

Upon motion duly seconded, it was

Voted: To proceed to the election of a vice-president to fill the vacancy occasioned by the death of the late Joseph G. Ray.

Mr. Ladd was appointed to collect, assort and count the votes, and he reported the whole number of ballots to be four, all of which were for Mr. E. V. R. Thayer, and he was declared duly elected.

Upon motion of Mr. Thayer, seconded by Mr. J. S. Bigelow, it was

Voted: That the Secretary be and he is hereby authorized and instructed to mail to the stockholders notices for the annual meeting substantially as follows:

"Old Dominion Copper Mining and Smelting Co.

Notice is hereby given that the annual meeting of the stockholders of the Old Dominion Copper Mining and Smelting Company will be held at the office of the Company 243-245 Washington Street, Jersey City, New Jersey (office of New Jersey Corporations
455 Agency) on Wednesday the third day of April, A. D. 1901, at twelve o'clock noon, for the election of a Board of

seven (7) Directors for the ensuing year, and for all other business that may properly come before the meeting.

The transfer books will be closed from March 14, 1901, to April 3, 1901, both days inclusive.

W. J. LADD, *Secretary.*

Dated Boston, Mass., March 6, 1901."

The President stated that the contract with the United Metals Selling Company expired by limitation January 1, 1901, and that since that time we had made a provisional arrangement and contract with said Company and also with the Raritan Copper Works for the refining of our product, subject to ratification by the Directors.

The contracts as provisionally agreed to were then read, and upon motion

Resolved: That the President and Secretary be and are hereby instructed to execute said contracts with such modifications, if any, as they may deem for the best interests of the Company.

Upon motion of Mr. J. S. Bigelow, seconded by Mr. Thayer, it was

Voted: That the President Mr. A. S. Bigelow be and he is hereby authorized to sign checks and accept drafts on this Company during the absence of the Treasurer.

Upon motion of Mr. Thayer, seconded by Mr. J. S. Bigelow, it was

Voted: That the President during the absence of the treasurer, or the treasurer, during the absence of the President, be and is hereby authorized at his discretion to appoint in writing Mr. P. K. Dumaresq to sign as assistant-treasurer the checks of this Company during such time as the President and Treasurer are both absent from the office.

No other business coming before the meeting, upon motion duly seconded, it was

Voted: To adjourn.

Attest:

W. J. LADD, *Secretary.*

JERSEY CITY, NEW JERSEY, *April* 3, 1901.

Pursuant to notice the Annual Meeting of the Stockholders of the Old Dominion Copper Mining and Smelting Company of New Jersey was held this day at the office of the Company, No. 243, Washington Street, Jersey City, New Jersey, at 12 o'clock noon.

The meeting was called to order by Mr. Charles N. King and in the absence of the Secretary Mr. Philip K. Dumaresq was elected Secretary of the meeting.

456 In the absence of the President, Mr. Charles N. King was elected Chairman of the meeting.

The Secretary of the meeting read the call for the meeting with evidence that a copy of the same had been sent to each stockholder in accordance with law.

Mr. N. L. Amster moved that the roll of stockholders be called

for the purpose of ascertaining whether one half of the capital stock of the Company was represented in person or by proxy.

Thereupon the roll of stockholders was called, and it appeared that more than one half of the total outstanding stock of the Company was represented at the meeting in person or by proxy as follows, viz:

Mr. N. L. Amster representing in person.....	1,400 shares
Mr. G. W. Crampton representing in person.....	300 shares
Mr. P. K. Dumaresq representing by proxy.....	85,520 shares
Mr. Charles N. King representing by proxy.....	100 shares
Mr. N. B. McKelvie, representing by proxy, Hayden, Stone & Co.....	4,458 shares
Mr. F. A. Russell, representing by proxy, Mr. C. W. Barron	5 shares
Total	91,783 shares

being a majority of the outstanding 150,000 shares of the capital stock of the Company.

The Chairman of the meeting then read a statement of the operations of the Company signed by the President by order of the Board of Directors, a copy of which he stated was to be mailed to each of the stockholders.

Upon motion of Mr. P. K. Dumaresq duly seconded it was

Voted: That said report be accepted and placed on file.

Upon motion duly seconded the following resolution was adopted:

Resolved that all acts, matters and things entered into and performed by the Officers and Directors of this Company since the organization of the Company, be and they hereby are fully and in all respects ratified, confirmed and approved.

The meeting then proceeded to the election of Directors by ballot, and the Chairman appointed Messrs. Le Grand Bonker and Stephen C. Smith Inspectors. They reported that the total number of votes cast was Ninety one thousand, seven hundred eighty three
457 (91,783) all of which were cast for the following Board of Directors, who were duly chosen and declared to be Directors of the Company to hold office until the next regular annual meeting and until their successors should be chosen and qualified:—

A. S. Bigelow of Massachusetts.
W. J. Ladd of Massachusetts.
Joseph S. Bigelow of Massachusetts.
E. V. R. Thayer of Massachusetts
C. H. Bissell of Massachusetts.
Leonard Lewisohn of New York.
Edgar Buffum of New Jersey.

At 1.15 p. m., no other business coming before the meeting, it was dissolved.

A true record.

Attest:

P. K. DUMARESQ,
Secretary of the Meeting.

BOSTON, MASS., *April* 10, 1901.

A called meeting of the Directors of the Old Dominion Copper Mining and Smelting Company elected at the annual meeting of the stockholders held at Jersey City, New Jersey, April 3, 1901,—being the first since said election and for the organization of the Board,—was held this day at Room 301 Sears Building, No. 199 Washington Street, Boston, Mass., at ten forty-five o'clock a. m.

Present: Messrs. A. S. Bigelow, W. J. Ladd, E. V. R. Thayer, Joseph S. Bigelow and C. H. Bissell

Upon motion, Mr A. S. Bigelow was called to the Chair, who called the meeting to order.

At the request of the Chairman, the Secretary then read the record of the last Directors' meeting, which was approved.

Upon motion duly seconded, it was

Voted: To proceed to the election of a treasurer.

Mr. Bissell was appointed to collect, assort and count the votes, and he reported the whole number of votes to be four (4), all of which were for Mr. W. J. Ladd, and he was declared duly elected.

Upon motion duly seconded, it was

VoVted: To proceed to the election of a treasurer.

Mr. Bissell was appointed to collect, assort and count the
458 votes, and he reported the whole number of votes to be four (4), all of which were for Mr. W. J. Ladd, and he was declared duly elected.

Upon motion duly seconded, it was

Voted: To proceed to the election of a president.

Mr. Bissell was appointed to collect, assort and count the votes, and he reported the whole number of votes to be four (4), all of which were for Mr. A. S. Bigelow, and he was declared duly elected.

Upon motion duly seconded, it was

Voted: To proceed to the election of a vice-president.

Mr. Bissell was appointed to collect, assort and count the votes, and he reported the whole number of votes to be four (4), all of which were for Mr. E. V. R. Thayer, and he was declared duly elected.

Upon motion duly seconded, it was

Voted: To proceed to the election of an assistant secretary and assistant-treasurer in one person, who shall exercise the powers conferred upon the holder of that office by vote of the Directors at the meeting held September 18th, 1895.

Mr. Bissell was appointed to collect, assort and count the votes, and he reported the whole number of votes to be five (5), all of which were for Mr. P. K. Dumaresq, and he was declared duly elected.

Upon motion duly seconded, it was

Voted: To proceed to the election of an assistant-president, who shall exercise the powers conferred upon the holder of that office by vote of the Directors at a meeting held September 18, 1895.

Mr. Bissell was appointed to collect, assort and count the votes, and he reported the whole number of votes to be four (4), all of

which were for Mr. C. H. Bissell, and he was declared duly elected.

Upon motion duly seconded, the following resolutions were unanimously adopted:

"Resolved: That this Corporation hereby appoints the Commissioner of Corporations of the Commonwealth of Massachusetts, or his successor in office, to be its true and lawful Attorney, in and for said Commonwealth, upon whom all lawful processes in any action or proceeding against this corporation in said Commonwealth may be served in like manner and with the same effect as if this Corporation existed therein. And this Corporation hereby stipulates and agrees that any lawful process against it, which is served on its said attorney, shall be of the same legal force and validity as if served on this Corporation. This appointment, and the au-
459 thority of said attorney, shall combine in force so long as any liability remains outstanding against this Corporation in said Commonwealth; and the President and Clerk or Secretary are hereby authorized to execute, in the name of the Corporation, and under its corporate seal, a certificate of authority or power of attorney to the said Commissioner of Corporations in conformity with this resolution and the laws of said Commonwealth."

No other business coming before the meeting, upon motion duly seconded, it was

Voted: To adjourn.

Attest:

W. J. LADD, *Secretary.*

BOSTON, MASS., *October* 17, 1901.

A called meeting of the Directors of the Old Dominion Copper Mining and Smelting Company was held this day at Room 301 Sears Building, No. 199 Washington Street, Boston, Mass., at eleven-twenty o'clock a. m.

Present: Messrs. A. S. Bigelow, W. J. Ladd, J. S. Bigelow, E. V. R. Thayer and C. H. Bissell.

The President called the meeting to order, and at his request the Secretary read the record of the last Directors' meeting, which was approved.

The President presented the resignation of Mr. P. K. Dumaresq as assistant-secretary and assistant-treasurer of this Company, to take effect at the close of business October 31, 1901.

Upon motion, duly seconded, the resignation was accepted and ordered to be placed on file.

On motion, duly seconded, it was

Voted: That Mr. W. A. S. Chrimes be and hereby is appointed assistant-secretary and assistant-treasurer of this Company, to take effect November 1st, 1901, with power to countersign all Certificates of stock, to sign all dividend checks and to accept all drafts drawn upon the treasurer of this Company.

Upon motion, duly seconded, it was

Voted: That the President, during the absence of the Treasurer, or the Treasurer, during the absence of the President, be and is hereby authorized at his discretion to appoint in writing Mr. W. A.

S. Chrimes to sign as assistant-treasurer the checks of this Company during such time as the President and Treasurer are both absent from the office.

The President then presented a bond of indemnity for fourteen hundred (1400) dollars from Towle and Fitzgerald of Bos-
460 ton, Mass.; also affidavit in regard to the loss of certificate No. 6546 for twenty shares of the capital stock of the Old Dominion Copper Mining and Smelting Company standing in the name of E. D. Bangs and Company.

Whereupon, on motion, duly seconded, it was

Voted:—That the proper officers of this Company be and they are hereby authorized to issue at their discretion a duplicate certificate to said E. D. Bangs and Company for said stock.

The President then presented a bond of indemnity for fifteen hundred (1500) dollars for Schofield, Whicher and Company of Boston, Mass.; also affidavit in regard to the loss of certificate No. 7066 for twenty-five shares of the capital stock of the Old Dominion Copper Mining and Smelting Company standing in the name of John P. Roach; also affidavit signed by said Roach declaring that said stock had been sold by him to Schofield, Whicher and Company.

Whereupon, on motion duly seconded, it was

Voted: That the proper officers of this Company be and they are hereby authorized at their discretion to issue a certificate for said 25 shares of stock in the name of said Schofield, Whicher and Company.

No other business coming before the meeting, upon motion duly seconded, it was

Voted: To adjourn.

Attest:

W. J. LADD, *Secretary.*

BOSTON, MASS., *March* 4, 1902.

A called meeting of the Directors of the Old Dominion Mining and Smelting Company was held this day at Room 301 Sears Building, 199 Washington Street, Boston, Mass., at 11.15 o'clock a. m.

Present: Messrs. A. S. Bigelow, W. J. Ladd, J. S. Bigelow and C. H. Bissell.

The President called the meeting to order, and at his request the Secretary read the record of the last Directors' Meeting, which was approved.

The President then presented proof sheets of the Annual Report containing the Directors' Report, (which he read to the meeting) the Superintendent's report and a statement of the business of the Company for the year ending December 31st, 1901, showing a balance of cash assets on that date of $337,206 95/100.

Whereupon, on motion duly seconded, it was,

461 Voted:—That the Treasurer have the Annual Report, substantially as presented at this meeting printed, and a copy of it mailed to each stockholder without delay.

Upon motion duly seconded, it was,

Voted:—That the Secretary be and is hereby authorized and instructed to mail to the stockholders notices for the Annual Meeting substantially as follows:—

"Notice of Annual Meeting of Old Dominion Copper Mining and Smelting Company.

The Annual Meeting of the stockholders of this Company will be held on the second day of April, 1902, at 12 o'clock noon, at the office of the Company, Hudson County National Bank Building, Nos. 243 and 245 Washington Street, Jersey City, New Jersey (office of New Jersey Corporations' Agency) for the purpose of electing a Board of Directors and receiving and acting upon the reports of the officers, and for the transaction of such other business as may lawfully come before the meeting.

In accordance with the laws of the State of New Jersey, no stock can be voted on which has been transferred on the books of the Company, within twenty days next preceding this election.

The transfer books will be closed from March 13, 1902, to April 2, 1902, both days inclusive.

Dated Boston, Mass., March 5, 1902.

W. J. LADD, *Secretary.*"

No other business coming before the meeting, upon motion duly seconded, it was,

Voted:—To Adjourn.

Attest:

W. J. LADD, *Secretary.*

BOSTON, MASS., *March* 25, 1902.

A called meeting of the Directors of the Old Dominion Copper Mining and Smelting Company was held this day at Room 301 Sears Building, No. 199 Washington Street, Boston, Mass., at ten thirty o'clock a. m.

Present: Messrs. E. V. R. Thayer, W. J. Ladd, J. S. Bigelow, Edgar Buffum, and C. H. Bissell.

In the absence of the President, the Vice-President called the meeting to order, and at his request the Secretary read the record of the last Directors' meeting, which was approved.

462 Upon motion duly seconded, it was unanimously

Voted: That Article V of the By-laws is hereby amended to read as follows:

"At all meetings of the stockholders a majority in interest represented in person or by proxy shall constitute a quorum. The President, Vice-President, Treasurer, or in their absence any person named in writing by either of them shall call the meeting to order, and before any business is transacted shall appoint two or more inspectors of election who shall ascertain the amount of stock represented at the meeting in person or by proxy and their report shall be at once presented to the meeting. If a quorum is present, nominations for permanent Chairman and Secretary shall then be made and the temporary chairman shall present the various names to the meeting and call for a stock vote, and shall declare elected persons having a majority of the votes present.

"All meetings at which a quorum is present may be adjourned from time to time by a stock vote without further notice."

No other business coming before the meeting, upon motion duly seconded, it was

Voted: To adjourn.

Attest:

W. J. LADD, *Secretary.*

[EXHIBIT 2, OCTOBER 11, 1904. G. C. B.]

NEW YORK, *December* 1, 1895.

Old Dominion Syndicate, to Evarts, Choate & Beaman, Dr. No. 52 Wall Street.

1895.

July. To fee for advice and services relating to the matter of the purchase of the entire capital stock of the Old Dominion Copper Company of Baltimore City and the transfer of the Company's property to the Old Dominion Copper & Smelting Company, including consultation with and advice and services of Mr. Beaman during negotiation for purchase of stock from the estate of Michael Simpson and William Keyser and others and drawing contracts therefor; attendance of Mr. Beaman in Boston at time of making first payment, attendance of Mr. Evarts in Baltimore
463 upon turning over the management of the old company, drawing certificate of organization of new company, minutes of meetings of its stockholders and directors and other necessary certificates and papers connected with its organization, drawing deed from William Keyser to Leonard Lewisohn, drawing offers to convey property to the new company from Leonard Lewisohn and the old company, resolutions accepting the same and deeds to carry them into effect; procuring and attending to filing of copies of certificates in Arizona, attendance at meetings of the directors of the old and new companies, attending to transcribing minutes, and generally supervising and advising as to all matters involved in the transfer of the property from the old company to the new $7,500.00

To cash disbursements as per statement annexed 189.66

$7,689.66

Received Payment,

EVARTS, CHOATE & BEAMAN.

Statement of Disbursements re Old Dominion Syndicate.

Cert'd copies certificates organization	$3 00	
Recording " "	3 00	
Seal	3 50	
Filing Certf. increase capital stock	5 00	
" list officers &c	1 00	
" copy certif. organization in Arizona	5 00	
Copying and engrossing	22 98	
" minutes in book	9 00	
Telegrams	2 13	
2 copies New Jersey Corporation laws	2 00	
Express	1 45	
Commissioners' fees	3 00	
Expenses to & at Boston	15 00	
" " " Trenton	13 60	
Fee of Baltimore counsel on question of winding up the old company organization	100 00	
		$189 66

464 [Exhibit 3, October 11, 1901. G. C. B.]

Boston, *January 1st*, 1896.

Old Dominion Copper Company to Edward C. Perkins, Dr.

To Professional Services from January 1, 1895, to January 1, 1896, as follows:

Stock of M. H. Simpson Estate.

Examination of the will of Michael H. Simpson and the Probate proceedings on the same.

Examination of the law and opinion that the Executors had a right to transfer the stock standing in the name of the Estate.

Examination of the law and opinion that three out of the four Executors could make the transfer.

Preparing a letter of notice from Leonard Lewisohn to Frank E. Simpson, Lucius W. Smith and William Butler that he had purchased the rights of J. Morris Meredith under a contract between him and the Executors relating to the sale of 17,857 shares of the stock of the Old Dominion Mining Company.

Serving this letter of notice on the various parties.

Consultations with Mr. Shepard in regard to the form of certificate to be issued by the Company.

Consultations with Mr. Nelson in regard to the appointment of an Assistant President and an Assistant Treasurer with powers of signing and countersigning certificates and signing dividend cheques, and opinion in regard to that matter.

General services and opinions in connection with the organization of this Company, including examination of the laws of New Jersey and Arizona, and the various organization papers.

New By-Laws.

Various consultations with Mr. Bissell and Mr. Nelson in regard to drawing new by-laws.

Careful examination of the old by-laws.

Examination of the general law and of the Statutes of New Jersey and of the Articles of Organization in regard to changing the by-laws.

Opinion on the same.

465 Preparation of a set of new by-laws and consultations as to same.

Consultations with Mr. Nelson and Mr. Bissell as to certain changes in draft of by-laws.

Further examination of the law and re-drafting the by-laws as finally passed.

Consultation with Mr. Nelson and Mr. Bissell in regard to meeting of Directors and meeting of Stockholders in regard to what votes should be passed at such meeting.

Preparation of votes to be passed.

Consultation with Mr. Nelson in regard to stock standing in his name on the company's books and advice in regard thereto.

Consultations with Mr. Bissell in regard to signature- of Directors and Stockholders to Records of Company.

Examination of contracts between Lewisohn Brothers and the Company. $1000.00.

Rec'd Paym't.

EDWARD C. PERKINS.

[EXHIBIT 4. OCTOBER 11, 1904. G. C. B.]

Old Dominion Copper Co. in Account with Lewisohn Bros., Dr.

1895.			
Jan'y 18.	To cash. Traveling Expenses Mr. Leonard Lewisohn and Mr. Evarts	67	60
29.	" cash Typewriter Expense	10	00
30.	" Expense a/c Sundry telegrams to Mr. Hyams	50	00
July 8.	" Cash. Incorporation New Jersey. Evarts, Choate & Beaman	750	00
8.	" Cash Mr. Colquhoun. as per " voucher beneath	52	25
9.	" " Deposited Market & Fulton Bank and remitted to T. Nelson.	1,000	00
	" Cash Services Old Colony as per vouchers herewith	175	00
8.	" " Mr. Colquhoun and others as per vouchers herewith	195	60
22.	" Cash Rubber Stamps		40

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Aug.	5,	To Cash L. Barta & Co., as per voucher herewith ..		6 50	
		" " Mr. Colquhoun as per voucher herewith.....		1,000 00	
Nov.	5,	" Wm. Keyser, cash paid by Baltimore Copper Smelting and Refining Co. for a/c Old Dominion Copper Co. as per statement	8,938 00		
		Less amt. due, as per his letter dated June 20, '95.....	1,495 72		
			7,442 28		
		Overcharges collected	705 80	6,736 48	
	6,	" Cash. Examining Title Old Dominion Copper Co. and 9 days' expenses, M. J. Egan.....		350 00	
					10,393 83
		Due L. Bros			6 00
					10,399 83

L. Barta & Co., Printers.

144 and 148 High Street.
Boston Massachusetts. *July* 1, 1895.

In Account with Lewisohn Bros., Box 1247 New York City.

Passenger Elevator at No. 144 High Street.

June 3, 1 Vol. 300 Receipts 2 to p. with stub 1st & 3rd & extra lettering, $6.50.
Received Payment Aug. 6, 1895.

L. BARTA & CO.,
Per COLLAMORE.

Original.

$1000.00 Clifton, A. T., *6th Novr.*, 1895.

Received of Mess. Lewisohn Brothers One thousand Dollars in payment of services rendered in examining and reporting on the property of the Old Dominion Copper Co. of Globe, Arizona.

JAMES COLQUHOUN.

467 The Arizona Copper Company, *Ld.*

Jas. Colquhoun, Gen'l Supt.
J. G. Hopkins, Cashier.
L. Fraissinet, Store Manager.

CLIFTON, ARIZONA, *3rd July*, 1895.

Me-srs. Lewisohn Brothers to James Colquhoun,

for expenses incurred in the examination of the Old Dominion Copper Co.'s property at Globe, Arizona, including part of expenses of 3 officers:—

Railroad tickets, Lordsbuy to Bowie	7 50
Breakfast at Thomas	2 50
Expenses at Globe	1 50
Team from Globe to Thomas	22 00
Pullman car	75
Breakfast at Thomas	3 00
Bill, Bowie Hotel	7 50
	$44 75
Add Railroad tickets, Bowie to Lordsbuy	7 50
	$52 25

The Arizona Copper Company, Ld.

Jas. Colquhoun, Gen'l Supt.
J. G. Hopkins, Cashier.
L. Fraissinet, Store Manager.

CLIFTON, ARIZONA, *October* 28, 1895.

Lewisohn Bros. in Account with J. Egan, Dr.

To examining the title to the Old Dominion Copper Mining Co., and to the passing of an opinion thereon	$300 00
Expenses for nine days	50 00
	$350 00

State of New Jersey, Department of State.

No. 6139. TRENTON, *July* 8, 1895.

Received from Messrs. Evarts, Choate & Beaman Seven hundred and fifty Dollars, the State fee for filing this day Certificate of Organization of Old Dominion Copper Mining and Smelting Company.
$750.

Secretary of State.

468 The Arizona Copper Company, Ld.

Jas. Colquhoun, Gen'l Supt.
J. G. Hopkins, Cashier.
L. Fraissinet, Store Manager.

CLIFTON, ARIZONA, *July 3d*, 1895.

Messrs. Lewisohn Bros., New York.

DEAR SIRS: Enclosed herewith find bills as follows, which we have paid at request of Judge Egan.

May	2, G. M. Allison, Recorder	$122 25
"	24, C. M. Bruce, Sec'y	12 00
Jan'y	7, J. M. Ochoa, Recorder	61 35
		$195 60

for which please send us your draft to order.

I have, as requested, asked Judge Egan to send his own bill direct to you.

Yours truly,

JAMES COLQUHOUN,
Gen'l Sup't.

GLOBE, ARIZONA, *May* 25, 1895.

Col. M. J. Egan to G. M. Allison, Co. Recorder.

To Abstract of Title, The O. D. Copper Co.'s property

Noting 106 Muniments of Title, at 75c	$79 50
110 folios, at 20c	$22 00
Searching Records 20 years, at 1.00	$20 00
Certificate and Seal	$ 75
	$122 25

Received Payment.

G. M. ALLISON,
Co. Recorder.

PHŒNIX, ARIZONA, *May* 24, 1895.

Mr. M. J. Egan to C. M. Bruce, Secretary of the Territory of Arizona, Dr.

Four Certificates of Filing..... $12

Paid.

CHAS. M. BRUCE,
By F. B. DEVEREUX, *Secretary.*

469 FLORENCE, ARIZ., *June 7th*, 1895.

Chas. T. Martin to J. M. Ochoa.

Abstract To Alice Mine	
21 years' search	21 00
16 Monuments	12 00
30 Folios	6 00
Certificate	75
Abstract Globe Mine	
17 years' search	17 00
3 Monuments	2 25
8 Folios	1 60
Certificate	75
	$61 35

Jose M. Ochoa, G. S. H. Drachman, Tucson, Ariz.

Rec'd Florence, Ariz., June 26th, 1895.

JOSE M. OCHOA.

[EXHIBIT 5, OCTOBER 11, 1904. G. C. B.]

Office of Evarts, Choate & Beaman, No. 52 Wall Street.

NEW YORK, *Apl.* 28, 1896.

A. S. Bigelow, Esq., Prest. Old Dominion Copper M. & S. Co., Boston, Mass.

DEAR SIR: We learn from Mr. Brent of Baltimore that he has obtained an order discharging the Receiver of the Old Dominion Copper Co. of Baltimore City and that this completes all that needs to be done in the matter of the formal dissolution of the Company. Mr. Brent encloses to us his bill for services and disbursements in the matter amounting to $344.34 which seems to us to be satisfactory.

Yours very truly,

EVARTS, CHOATE & BEAMAN.

470 [EXHIBIT 6, OCTOBER 11, 1904. G. C. B.]

Old Dominion Copper Mining and Smelting Company.
199 Washington St., Room 303.

Please address P. O. Box 5104.

Oct. 9, 1905
Mr. Nelson said call this unsold.

BOSTON, MASS., *September* 10, 1895.

You are hereby notified that your subscription to 100 shares of the Capital Stock of the Old Dominion Copper Mining and Smelting

Company, at $25.00 per share, amounting to $2500, is payable on Thursday, September 19, 1895. Stock Certificates are now ready and will be issued to subscribers upon the payment by them of the amounts due.

Checks for payment should be drawn on New York or Boston Banks, payable to my order.

THOMAS NELSON,
Treasurer.

To O. N. PIERCE, Esq., Grinnell Mfg. Co., New Bedford, Mass.

[*Over.*]

There was a misunderstanding as to this stock being in my name. I do not care for it.

Yours truly, O. N. PIERCE.
10/5 95

I hereby certify that the foregoing is a true copy of the original deposition of Charles Altmiller taken before me in the case of Old Dominion Copper Mining & Smelting Co. v. Frederick Lewisohn et al., pending in the Circuit Court of the United States for the Southern District of New York, and of the exhibits annexed thereto.

[SEAL.] HOWLAND TWOMBLY,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

471 OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *July* 19, 1905.

Deposition of William Howard Reed.

WILLIAM HOWARD REED, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by E. F. McClennen, counsel for the plaintiff, deposes and says,—

Q. 1. What is your full name?
A. William Howard Reed.
Q. 2. And you reside where?
A. Brookline, Mass.
Q. 3. You are in business in Boston, Mass.?
A. Yes, sir.
Q. 4. In 1885 what was your business, Mr. Reed?
A. Wool broker.
Q. 5. I show you a paper marked "Exhibit 6," of March 21, 1903, of the deposition of Mr. Bigelow in this case——

A. Excuse me, is the date 1903?

Q. 6. No; being an undated paper in 1895. I call your attention to the words, "W. H. Reed, $5,000;" is that in your handwriting?

A. Wool broker?

Q. 7. Have you any recollection of when you signed that paper?

A. No, sir.

Q. 8. Have you any recollection of where you signed that paper?

A. No, sir.

Q. 9. I now show you a paper marked "Exhibit 10, March 27, 1903," of the deposition of Mr. Bigelow, being a paper dated July 18, 1895, and call your attention to the words and figures, "William H. Reed, 400:" is that signed by you?

A. Yes, sir.

Q. 10. Have you any recollection of when and where you signed that?

A. No, sir.

Q. 11. Will you refer to your check stubs and inform us whether, in the summer of 1895, you gave any checks to Albert S. Bigelow?

Mr. HEMENWAY: Objected to as immaterial, incompetent, and irrelevant. This line of testimony is objected to as though the objection was repeated to each question, the objection being in the same general form.

A. Yes, sir; May 27, payment of $700.

Q. 12. That was by a check to whose order?

A. On my stub, "A. S. Bigelow."

Q. 13. And for what was that payment made?

A. I have on my stub, "First payment on subscription of Old Dominion Syndicate, $700."

Q. 14. Now what is the next?

A. June 19, 1895, "Second assessment on Dominion, $1437.91."

Q. 15. That check was made payable also to the same or-

472 der?

A. Presumably; that is the way it is on the stub.

Q. 16. Now the next payment?

A. The next payment, July 16, 1895, "A. S. Bigelow, for balance of subscription on Dominion Copper, $2886.58. This is the total subscription of $5,000 with interest added at 5% from May 28 to July 17." I presume on the balance, but that I don't know.

Q. 17. For convenience, that makes what total by the three checks?

A. That makes the total by the three checks, $5024.49.

Q. 18. Did you during 1895 give to Mr. Nelson any check?

A. Yes, sir.

Q. 19. And when was that, and for what amount, and how was it drawn?

Mr. HEMENWAY: This is also objected to for the same reason as stated.

A. "September 19, 1895. Thomas Nelson, Treasurer, subscription for 200 shares O. D. copper, $5,000."

Q. 20. It appears, Mr. Reed, from the Exhibits 25 and 26 of the deposition of Mr. Hyams, that there was issued to you in September 200 shares, and 400 shares additional, on certificates therefor, of the stock of this company; have you any recollection about the receipt of those?

A. No, sir.

Q. 21. You mean you have no recollection one way or the other about them?

A. No, sir.

Q. 22. Prior to making your first subscription on this Exhibit 6, which we have referred to, had you had any conversation with any one with reference to subscribing?

Mr. HEMENWAY: Objected to as immaterial.

A. I presume that I had.

Q. 23. Do you mean by that that you have no definite recollection of that conversation?

A. No, sir.

Q. 24. Do you remember whether it was stated to you by any one what the terms were by which you were subscribing?

A. No, sir.

Q. 25. Do you remember, as a matter of fact, how many shares of stock you received for your $5000 subscription; that is, your first subscription on Exhibit 6?

A. No, sir.

Q. 26. Did you at any time have any conversation with Mr. Bigelow or Mr. Lewisohn relative to the company or the syndicate?

A. No, sir.

Q. 27. Were you informed by them, or either of them, at any time, that they had taken, or intended to take, any profits for the promotion of this company, or in any other way?

Mr. HEMENWAY: Objected to as leading and immaterial and incompetent?

473 A. No, sir.

Q. 28. Did you at any time in 1895 receive from any source any information relating to the question of any profit in connection with the promotion of this corporation?

Mr. HEMENWAY: Objected to as immaterial, incompetent, and irrelevant.

A. Not to my recollection.

Q. 29. Putting it specifically, do you recollect of having heard from any source in 1895 that Mr. Bigelow or Mr. Lewisohn, or any one connected with them, had taken, or intended to take, 50,000 shares of the stock of the company as a profit, or for their services?

Mr. HEMENWAY: Objected to as immaterial and incompetent.

A. No, sir.

Q. 30. Do you recall having heard anything relating to the general subject matter to which my last question refers?

Mr. HEMENWAY: Objected to as immaterial.

A. No, sir.

Q. 31. Have you at any time been informed of the fact that any profit was taken by the promoters of the corporation?

Mr. HEMENWAY: Objected to as immaterial, incompetent, and irrelevant.

A. No, sir. How do you mean in regard to that; simply newspaper talk?

Q. 32. Well, I mean anything that has come to your attention recently.

A. Directly?

Q. 33. Yes.

Mr. HEMENWAY: Objected to as immaterial.

A. No, sir; except through a newspaper.

Q. 34. Do you recall when that was?

A. The newspaper?

Q. 35. Yes.

A. No, sir; I do not.

Q. 36. Well, could you fix at all the time; whether it is recently or not?

A. No; I saw an account,—I think it was a decision of the court in a newspaper.

Q. 37. That is, a decision in this very case?

A. Yes, sir.

Q. 38. That was some time during the current year?

A. Yes, I should say so.

Q. 39. And that, I understand you, was the first intimation you had of this?

A. Yes, sir.

Mr. MCCLENNEN: That is all.

[Counsel for the defendant reserves the right of cross-examination, and will notify counsel for the plaintiff within a week whether
474 they desire such cross-examination.]

[Counsel for the plaintiff agrees to this, but does not stipulate to produce the witness, and the deposition shall be considered as closed if he is not produced.]

WILLIAM HOWARD REED.

Subscribed and sworn to before me this 12th day of September, 1905.

GEORGE C. BURPEE,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *July* 19, 1905.

Deposition of Samuel N. Brown.

SAMUEL N. BROWN, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by Louis D. Brandeis, counsel for the plaintiff, deposes and says,—

Q. 1. Your full name, Mr. Brown?
A. Samuel N. Brown.
Q. 2. And you reside in Boston?
A. Yes.
Q. 3. And your occupation?
A. Merchant and manufacturer.
Q. 4. What is your business?
A. Scale business.
Q. 5. Fairbanks Scale Company?
A. Yes, sir.
Q. 6. And was that your business in 1895?
A. Always has been.
Q. 7. How many years?
A. Sixty-two.
Q. 8. I call your attention to the paper marked "Exhibit 3," of March 24, 1903, put in evidence in connection with the deposition of Albert S. Bigelow in this cause, and ask you whether the "Samuel N. Brown, $10,000," which appears on that paper is in your handwriting?
A. It is.
Q. 9. Can you recall when your signature was put to that paper?
A. No.
Q. 10. Or where you signed it?
A. No.

475 Q. 11. Do you recall whether or not prior to the signing of your name to that paper you had any conversation with any one in regard to the Old Dominion Syndicate or the proposed organization of the Old Dominion Mining Company?

Mr. HEMENWAY: Objected to as incompetent, irrelevant, and immaterial.

A. I will answer as nearly as I can remember. Mr. Bigelow came to me and asked me if I would like to join in a new copper company, and I presume this was the name of it at that time,—the Old Dominion Copper Company, whatever it may be, and I said "Yes," and I finally settled with him upon agreeing to take $10,000 of the interest in it.

Q. 12. Now have you stated all that you remember of that conversation with Mr. Bigelow?

A. Yes, except that I have an impression that he said that most of their business heretofore in copper had been in Montana, and he was inclined to go into this Old Dominion region on account of being a

little different sort of ore; but that is a very indefinite recollection. That is all I remember about it.

Q. 13. Do you recall whether anything was said in that interview by Mr. Bigelow as to whether or not he, or he and Mr. Lewisohn, were to have any compensation, or to take any special part of the stock for their services in promoting the enterprise?

Mr. HEMENWAY: Objected to.

A. I don't think anything was ever said about it at all; I have no recollection whatever of anything of that sort.

Q. 14. Did you have any conversation with Mr. Bigelow about that time, shortly after the signing?

A. Not that I recollect of.

Q. 15. Now you subsequently paid your contribution of $10,000?

A. Yes, sir.

Q. 16. Can you give us the dates?

A.—

May 27, 1895	$1,400.00
June 19, 1895	2,875.83
July 15, 1895	5,772.35
Making in all	$10,048.18

The $48.18, I take it, included interest; I probably had deferred payments.

Q. 17. Did you subsequently receive certificates of stock representing your interest in the Old Dominion Copper Mining & Smelting Company?

A. Yes, sir.

Q. 18. Have you anything to show when you received those certificates?

A. I don't recollect them at all.

Q. 19. Can't you recall whether or not at any time you heard anything from Mr. Bigelow or from Mr. Lewisohn in regard to
476 their taking a part of the stock of that company as compensation for their services for promoting it?

Mr. HEMENWAY: Objected to as immaterial, incompetent, and irrelevant.

A. No.

Q. 20. Can you recollect whether at any time you heard, whether from them or any one else, that they had taken such stock?

A. No, except as I have seen it in the papers of late.

Q. 21. What do you mean "of late;" within what period?

A. Since the matter was talked about.

Q. 22. That is, since this suit was in litigation?

A. Yes, sir.

Q. 23. Since the suit was begun?

A. I presume it was since then; it was quite lately, in the papers,—only as I have seen it in the newspapers.

Q. 24. And that is within the last year or two?

A. I should say so.

Q. 25. Are you able to state to whom these checks were paid?

Mr. HEMENWAY: Objected to as immaterial.

A. No, I cannot say now.

Q. 26. That is, you have no memoranda here that would enable you to tell?

A. No, I don't think the checks are in existence, but I am not sure; I don't know where to find them.

Q. 27. From what source have you taken this memorandum which you have here?

A. My memorandum book.

Q. 28. Of that date?

A. At the time that those were made.

Q. 29. Is that memorandum book here?

A. Yes. That first one, $1400, is there.

[Witness shows counsel memorandum book.]

Mr. HEMENWAY: Counsel objects to the admission of the memorandum book as being incompetent and irrelevant testimony, to be used as refreshing the witness' memory.

Q. 30. I call your attention——

A. Do you want to see the check stubs?

Q. 31. Yes.

A. The first one, I think, was on the Merchants Bank, and I cannot find that, but this second one is here.

Q. 32. Will you read what appears on the stubs of the check book?

Mr. HEMENWAY: Objected to as immaterial.

A. "June 19, 1895, $2875.83." The check book says, "A. S. Bigelow for Old Dominion Copper Co."

Q. 33. Are you able to say from that stub to whom the check was made payable?

A. Not absolutely, but I should think, from the writing of it, it was A. S. Bigelow—made to A. S. Bigelow; but I am not sure about it.

477 Q. 34. I call your attention now to Exhibit No. 10, dated March 27, 1903, introduced in evidence in connection with the deposition of A. S. Bigelow in this cause, and will ask you whether the following on that paper, "S. N. Brown, 400," is in your handwriting?

A. No, it is not.

Q. 35. Do you know in whose handwriting it is?

A. I do not.

Q. 36. Do you remember whether or not you made any subscription to the Old Dominion enterprise other than the $10,000 which you have testified to?

Mr. HEMENWAY: Objected to as immaterial.

A. No; have no recollection of any.

Q. 37. Do you remember whether or not you took all of the shares that you had a right to take under that subscription?

A. I find on that memoranda 800 shares; and as I have sold 600 and have 200 left, that verifies it.

Q. 38. I will call your attention, Mr. Brown, to a letter of August 19, 1895, from you to Mr. Bigelow, which appears on page 106 of the testimony of Mr. Bigelow in this cause, and a reply to that letter under the date of August 21, and your reply to Mr. Bigelow under date of August 21, 1895, and ask you whether or not those letters were written by you?

A. Yes.

Mr. BRANDEIS: That is all.

Cross-examination.

(By Mr. HEMENWAY:)

X 39. Let me see that memorandum book from which you have testified.

A. [Witness handing book to Mr. Hemenway] I have turned the page down there in three places.

[Mr. Hemenway examines the memorandum book presented by Mr. Brown.]

Mr. HEMENWAY: That is all.

SAMUEL N. BROWN.

Subscribed and sworn to before me this 16th day of September, 1905.

GEORGE C. BURPEE,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

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OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *July* 19, 1895.

Deposition of Richard Fairfax Bolles.

RICHARD FAIRFAX BOLLES, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by Louis D. Brandeis, counsel for the plaintiff, deposes and says:

Q. 1. Your age, residence, and occupation?

A. Forty-nine; stockbroker; my legal residence is Cohasset.

Q. 2. And your business is in Boston?

A. Yes, sir.

Q. 3. I show you the paper marked "Exhibit 6," introduced in evidence as an exhibit, dated March 1, 1903, in connection with the testimony of Albert S. Bigelow, in this cause, and call your attention

to the signature "Richard F. Bolles, $6,000," and ask you whether that is your signature?

A. It is.

Q. 4. Are you able to state when you signed that paper?

A. No; I cannot.

Q. 5. Are you able to state where you signed it?

A. No.

Q. 6. Can you state whether or not previously, or about the time of signing the paper, you had any conversation with Albert S. Bigelow?

A. No.

Q. 7. Can you state whether or not you had any conversation at or about that time with Leonard Lewisohn?

A. Never.

Q. 8. Do you mean by that that you do not recall having any conversation with Mr. Bigelow or Mr. Lewisohn, or that you know that you did not?

A. I think I never saw Mr. Lewisohn but once in my life, and that had nothing whatever to do with any business; I merely happened to meet him.

Q. 9. You were acquainted with Mr. Bigelow?

A. Yes.

Q. 10. And had been long previously to signing that paper?

A. Yes.

Q. 11. Had you any conversation with Mr. Bigelow with relation to your subscription?

A. Not that I recollect.

Q. 12. Did you make the payment called for by the paper?

A. I did; that is, I presume I did; I cannot show you the stub.

Q. 13. Did you receive the certificates of stock?

A. Yes, I think I did.

Q. 14. Can you recall whether, at or about the time that you received the certificates of stock under this subscription, you had information from any source that Lewisohn and Bigelow were to take any part of the stock in the Old Dominion Copper Mining & Smelting Company as compensation for their services?

479 Mr. HEMENWAY: Objected to as incompetnet, immaterial, and irrelevant.

A. I never heard of it.

Q. 15. You say you never heard of it?

A. No, not on or about that time.

Q. 16. Do you mean that you did hear of it subsequently?

A. Afterwards; some time afterwards.

Q. 17. Some time after you had paid your money and received your certificates?

A. Yes, sir.

Q. 18. How long after?

Mr. HEMENWAY: Objected to as immaterial, incompetent, and irrelevant.

A. No; I cannot tell how long.

Q. 19. Do you recall whether or not your subscription was put upon that paper at the invitation of any person?

Mr. HEMENWAY: Objected to as immaterial, incompetent, and irrelevant.

A. I think Matthew Luce called my attention to it.
Q. 20. Mr. Luce died some years ago?
A. Yes, sir, three years ago.
Q. 21. Do you recall what Mr. Luce said in regard to the matter?

Mr. HEMENWAY: Objected to as immaterial, irrelevant, and incompetent.

A. No, I cannot tell exactly, except the company was to be gotten up, and I was invited to subscribe.
Q. 22. What company was to be gotten up?
A. The Old Dominion Mining Company, or the mine was to be purchased that I was invited to underwrite.
Q. 23. Whether anything was said about forming a corporation to take over the mine?
A. I don't remember about that.
Q. 24. Do you recall whether or not, at the time that you made your subscription, you were told that the mine was to be purchased?

Mr. HEMENWAY: Objected to as immaterial, incompetent, and irrelevant.

A. I don't know.
Q. 25. Are you able to fix the date of your first payment?
A. No.
Q. 26. Would you be able to give us that from books and furnish it to the stenographer later?
A. I might possibly have my check stub, and if you could give me the dates I could look that up and see. That is all I can say about that. If you will give me the dates I will see if I have check stubs, and that is all could give you. I have no ledger account.

Mr. BRANDEIS: We will furnish you with the probable dates, and if you will look that up, and you can furnish it later to the stenographer.

480 Cross-examination.

(By Mr. HEMENWAY:)

X 27. Do you remember, Mr. Bolles, just how many shares of stock you got for this subscription to the Old Dominion Syndicate?
A. What do you mean?
X 28. How many shares of stock did you get?
A. I could not tell that from memory: I suppose I received what I subscribed for.
X 29. You have no memory whatever about it, as a matter of fact?
A. No. I don't quite understand your question, Mr. Hemenway.
X. 30. It appears by your subscription here that it was $6000,

and it says, in the heading, "We, the undersigned, propose to form a syndicate to be called the Old Dominion syndicate, and we hereby agree to pay A. S. Bigelow the sums set against our respective names." Now you paid that sum of $6,000?

A. Yes.

X 31. Now the question I asked is, eventually how many shares of stock in a corporation subsequently formed did you receive for your $6000?

A. Exactly what I subscribed for, $6000, I presume.

X 32. That doesn't answer the question. You simply subscribed $6000 to the syndicate, but it does not state here what you were to get for the $6000.

A. I could not tell, except that I received the par of my subscription in stock.

X 33. Did you not receive double your par?

A. I underwrote so much: I understand I underwrote $6000, and there was a commission.

X 34. Here is where you wrote your signature and $6000. Now what I want to know is what you received for your $6000. If you can determine from any memoranda you have,—and as you are going to look up to see when you paid your $6000 by check, you might at the same time look that up.

A. I will look and see, certainly.

Redirect examination.

(By Mr. BRANDIES:)

Q. 35. I call your attention, Mr. Bolles, to another paper, introduced as Exhibit 10, dated July 18, 1895, and to the name, "Richard F. Bolles, 500 shares," on that paper; is that in your handwriting?

A. Yes, sir.

Q. 36. I show you herewith a certificate, No. 203, for 480 shares, to Richard F. Bolles, and appearing to be endorsed by Richard F. Bolles under date of September 28, 1895, and ask you whether that is your signature?

A. Yes, sir.

Q. 37. Do you recall whether or not that certificate of 480 shares is the certificate representing the amount of stock received by you on your subscription paper, first named, of $6000?

A. I should say it was.

181 Q. 38. The subscription stock being issued to you at the rate of $12.50 a share?

A. Yes, I should say it was; that is what it should be.

[On July 20, 1905, Mr. Bolles was recalled, and in reply to interrogatories by Mr. McClennen further deposed and said:]

Q. 39. Since the early part of your testimony have you looked over your check stubs?

A. I have.

Q. 40. From them will you tell me the dates, and the amounts of payments which you made in connection with the Old Dominion

Syndicate, and in connection with your subscription to the Old Dominion stock?

A. On the 28th day of May, 1895, I paid $840; on the 18th day of June I paid $1725. The first one is a Metropolitan Bank check, and this, the second one, is a National Bank of the Republic check. On August 22, 1895, I paid $3481.57. There was one more payment: in September, on the 20th of September, 1895, I paid $6500.

Q. 41. That makes a total, apparently, of $12,547.07?

A. Well, I have not added it.

Q. 42. Your subscription to the syndicate paper was $6000?

A. $6000.

Q. 43. Your subscription to the paper of July 18 was 500 shares?

A. Five hundred shares at $25 a share.

Q. 44. You received in all, including what you said in your first testimony, a certificate of the company which I now show you, No. 203, for 480 shares in your name?

A. Yes.

Q. 45. And certificate No. 90 for 260 shares in your name?

A. Yes.

Q. 46. And those two cretificates are endorsed by you?

A. That is my signature.

Cross-examination de bene:

[In answer to cross-interrogatories put de bene by Mr. Hemenway, of counsel for the defendants, the witness further deposes and says:]

X 47. The first payment of $840 was made to A. S. Bigelow by a check payable to A. S. Bigelow?

A. Yes.

X 48. The second payment of $1725.50 was made June 18, 1895, to A. S. Bigelow?

A. Yes.

X 49. The third payment of $3481.57 was by check made payable to A. S. Bigelow?

A. Yes, on August 22, 1895.

482 X 50. And the payment of $6500 on September 20, 1895, was also made payable to A. S. Bigelow?

A. Yes.

Mr. HEMENWAY: That is all.

RICHARD FAIRFAX BOLLES.

Subscribed and sworn to before me this 16th day of September, 1905.

GEORGE C. BURPEE,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *July* 19, 1905.

Deposition of Charles R. Batt.

CHARLES R. BATT, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by Louis D. Brandeis, Esq., counsel for the plaintiff, deposes and says,—

Q. 1. Your full name?
A. Charles R. Batt.
Q. 2. You are president of the National Security Bank of Boston?
A. I am.
Q. 3. And were president of that bank in 1895, were you?
A. No.—cashier.
Q. 4. Were you a subscriber to the Old Dominion Syndicate?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I should not be able to answer that I was or was not from my memory.
Q. 5. Are you able to testify from any memoranda which you have?
A. Well, I did have some stock, I find, and I did pay some money.
Q. 6. To whom did you pay money?
A. I cannot tell.
Q. 7. Are you able to state when you paid money?
A. I cannot find even when I paid the whole of it, but I think I paid some in June, and some July 19.
Q. 8. I show you herewith certificates numbered 78 and 79, each for 50 shares in the name of Charles R. Batt, and certificate No. 152 for 100 shares in the name of Charles R. Batt, all these certificates being dated Septemebr 27, 1895, and ask you whether the signatures on those certificates are in your handwriting?
A. They are; that is my name, and my writing.
483 Q. 9. I call your attention to Exhibit No. 5, introduced as evidence in this cause, under date of March 24, 1903, as a part of the testimony of A. S. Bigelow, and call your attention to the name on that of "C. R. Batt, by H. H. S., $2500," and ask you in whose handwriting that is?
A. I could not swear to it. I could only guess. I have no doubt about it; I should say Horace H. Stevens wrote it for all these names that are given. H. H. S. stands for Horace H. Stevens, and the nearest I can guess is that Horace H. Stevens suggested that I should do something or other, which I did.
Q. 10. That is, you mean by "doing something or other," making an investment in this syndicate?
A. That is right, whatever it may be.
Q. 11. And these 200 shares of stock which appear in your name under date of September 27, 1895, was stock received by you in pursuance of that subscription?

A. It might or might not have been. I have no reason to doubt it. You might show me somewhere that I bought some stock, but I don't know.

Q. 12. You do know you made some payments in June and July preceding the September when you got the certificates?

A. I do.

Q. 13. What payments do you find you made?

A. I see a payment of $368.94.

Q. 14. What is the date of that?

A. That, I think, is June 24, and July 19, $1443.68. In running my eye over it I do not find anything else. Of course I know I paid for anything I had, but that makes only about $1800.

Q. 15. The balance of the $2500 you do not find any memorandum of?

A. No. And then I find I sold some within twelve days.

Mr. HEMENWAY: That is objected to as inadmissible.

Q. 16. Now I ask you whether or not you had any conversation with A. S. Bigelow at any time?

A. Never.

Q. 17. In regard to this matter?

A. Never.

Q. 18. Or with Leonard Lewisohn?

A. Never.

Q. 19. Or with anybody connected with the promotion of this company other than Mr. Stevens, if he was connected?

A. No, sir; I have no remembrance of anything, or even of any talk with Mr. Stevens.

Q. 20. Do you recall being informed at or about the time you subscribed, or when you paid in your money under this subscription, that A. S. Bigelow or Leonard Lewisohn, or those associated with them, were to take any amount of this stock as compensation for their services in promoting the enterprise?

Mr. HEMENWAY: Objected to as irrelevant, immaterial, and incompetent.

A. I have no remembrance of anything about it.

Q. 21. Did you at any time before testifying here, hear
484 that Bigelow or Lewisohn had taken any part of the stock of this company as compensation for their services in promoting the enterprise?

Mr. HEMENWAY: Objected to as immaterial, irrelevant, and incompetent.

A. Nothing more than a vague reading of something in the paper.

Q. 22. How recently was that reading?

A. I am sure I don't know, it was not of enough moment to me to impress my mind.

Q. 23. Well, I mean was it within a month, or a year, or two years?

A. Perhaps you might say two months.

Q. 24. Within two months?

A. Yes; but it is all indefinite hazy; it meant nothing to me, so I have no memory about it.

Q. 25. Is what you refer to some report of a decision, or reference to a decision, in the case of the Old Dominion Copper Mining & Smelting Company against Bigelow?

A. I really cannot tell you; I don't know anything about it. I do remember indistinctly that there was something about a suit of Mr. Bigelow about Old Dominion. That is all the interest I took in it, and all I cared about it, and I forgot it.

Q. 26. And that is what you refer to now as something you saw within two months?

A. Yes, I think so.

Mr. BRANDEIS: That is all, Mr. Batt.

Mr. HEMENWAY: No questions.

CHAS. R. BATT.

Subscribed and sworn to before me this 6th day of September, 1905.

GEORGE C. BURPEE,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET, BOSTON, *July* 19, 1905.

Deposition of W. B. Mossman.

W. B. MOSSMAN, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by E. F. McClennen, counsel for the plaintiff, deposes and says:

485 Q. 1. What is your full name?

A. W. B. Mossman.

Q. 2. You reside where?

A. In Brookline.

Q. 3. And what is your business?

A. Merchant.

Q. 4. What was your business in 1895?

A. The same.

Q. 5. And your place of business was in Boston?

A. Yes.

Q. 6. I show you, on Exhibit 10, of March 27, 1903, to Mr. Bigelow's deposition, the subscription paper of July 18, 1895, the words and figures, "W. B. Mossman, 100," is that in your handwriting?

A. I should judge so.

Q. 7. And do you recall paying the sum of $2500 in the fall of 1895?

A. I do not recall it.

Q. 8. Do you remember, on seeing that signature, that you did subscribe to stock of this company?

A. This signature here?

Q. 9. Yes.

A. That signature, I think, is mine.

Q. 10. Do you remember when you signed that, or where?

A. No. I have nothing by which I could find any facts in regard to it; so much so that I denied that I had subscribed to it until you proved the contrary to me.

Q. 11. Do you remember having any conversation with Mr. Bigelow or Mr. Lewisohn with reference to the matter?

A. No, I do not.

Q. 12. Were you ever informed by them that they had taken, or proposed to take, any profit in connection with the promotion of this corporation?

Mr. HEMENWAY: Objected to as irrelevant, immaterial, and incompetent.

A. No.

Q. 13. Did you ever learn that fact from any source?

A. No.

Q. 14. You have this morning seen here a certificate for 100 shares issued in September, 1895, to you?

A. Yes, sir, whatever the date was.

Q. 15. And the endorsement on it is in your handwriting?

A. Yes.

Q. 16. And from that it is apparent to you that you received 100 shares?

A. Yes, that is right.

Q. 17. You have no means at present of stating how much you did in fact pay?

A. No, I have no memory about it.

Mr. MCCLENNEN: I think that is all.

Mr. HEMENWAY: No cross-examination.

W. B. MOSSMAN.

Subscribed and sworn to before me this 6th day of September, 1905.

GEORGE C. BURPEE,
Notary Public.

486 *Stipulation.*

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET, BOSTON, *July* 19, 1905.

Deposition of Charles L. Davenport.

CHARLES L. DAVENPORT, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by E. F. McClennen, Esq., counsel for the plaintiff, deposes and says:

Q. 1. What is your full name?
A. Charles L. Davenport.
Q. 2. And you reside where?
A. In Malden.
Q. 3. Your place of business is where?
A. Boston.
Q. 4. What is your business?
A. The salt business.
Q. 5. What is it at the present time?
A. The salt business.
Q. 6. On this paper, marked "Exhibit 10" in the deposition of Albert S. Bigelow, on March 27, 1903, I show you the words, "C. L. Davenport, 120:" is that your handwriting?
A. No, sir; it is not.

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

Q. 7. Do you know whose handwriting it is?
A. No, I do not.
Q. 8. Do you have any recollection of subscribing to the stock of the Old Dominion Copper Mining & Smelting Company?
A. All my transactions were done through Mr. Fitzgerald.
Q. 9. He is a broker?
A. Yes. I think that was done under Leland, Towle & Company after Mr. Fitzgerald went there.
Q. 10. I show you a certificate of stock of the Old Dominion Copper Mining & Smelting Company, No. 100, for 120 shares, September 19, 1895: is the endorsement upon that in your handwriting?
A. It is.
Q. 11. Do you recall that you received 120 shares?
A. Yes, I do.
Q. 12. Do you remember what amount you paid therefor?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

487 A. Twenty-five dollars a share.

Q. 13. In connection with your subscription and the receipt of the stock, did you have any talk with Mr. Bigelow or Mr. Lewisohn?

A. I never saw either of them in my life.

Q. 14. Did you, from any source, hear anything in 1895 with respect to either Mr. Bigelow or Mr. Lewisohn, or any one, taking promoter's profits?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I never heard of it.

Q. 15. Specifically did you hear, from any source, that Mr. Bigelow or Mr. Lewisohn, or any one associated with them, were going to take, or had taken, 50,000 shares, or any other number of shares, as promoter's profits?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I did not.

Q. 16. Or that they intended to or had taken such number, or any other number, of shares for their services as promoters?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I did not.

Q. 17. When, if at all, did you first hear of anything of this kind before this hearing today?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I think I read it in the paper, as near as I can recall.

Q. 18. When was that?

A. It might have been within a year; I did not pay much attention to it, and did not fix my mind on it.

Q. 19. Were the things which you read in the paper, and to which you refer, some references to the suit which has been brought?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

488 A. My impression is that they were.

[No cross-examination.]

CHARLES L. DAVENPORT.

Subscribed and sworn to before me this 6th day of September, 1905.

GEORGE C. BURPEE,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also, that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *July* 19, 1905.

Deposition of Homer V. Snow.

HOMER V. SNOW, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by E. F. McClennen, Esq., counsel for the plaintiff, deposes and says,—

Q. 1. What is your full name?
A. Homer V. Snow.
Q. 2. You reside where?
A. 1661 Beacon street, at the present time.
Q. 3. What is your business?
A. Real estate.
Q. 4. In 1895 what was your business?
A. I was out of business then, sir.
Q. 5. You then resided where?
A. I think at the Nottingham Hotel, in 1895. There was one year I was away from there, in Newbury street; I went back the next year; I forget what year that was.
Q. 6. I show you Exhibit 10 in the deposition of Albert S. Bigelow, March 27, 1903, being a subscription of July 18, 1895, the words "Homer N. Snow, 500:" is that your handwriting?
A. No, sir; I should say not.
Q. 7. That is not your handwriting. Do you recall having authorized a subscription for that amount?
A. Yes. My recollection of the affair, which is very meagre at the present time—I had not thought of it until Mr. Smith called my attention to the fact that I subscribed for this stock through Joseph G. Ray——

[Counsel for defendants objects to the answer as not responsive.]

489 THE WITNESS: I am not sure whether the transaction was completed through Mr. Ray or taken up at the office; but my impression is I paid Mr. Ray for the stock. I have no data to substantiate my statement.
Q. 8. That is simply an impression?
A. That is all.
Q. 9. I show you a certificate of stock of the Old Dominion Copper Mining & Smelting Company, No. 111, for 500 shares, dated September 19, 1895; is the endorsement upon that in your handwriting?
A. That is made in my handwriting, yes, sir.
Q. 10. Do you recall that you did get 500 shares of the stock of the company? A. Yes, sir; I have no doubt about it.
Q. 11. Do you recall what you paid for it?
A. My impression is $25 a share, the par value of the stock.
Q. 12. Mr. Ray is dead?
A. He is dead; yes, sir.
Q. 13. It appearing from the deposition of Mr. Altmiller, the treasurer of the company in this case, that on the stub of the check

book of the company, on September 19 a check of H. V. Snow for $12,500 was deposited for 500 shares, would that affect at all your testimony as to whether you gave the check to Mr. Ray?

A. No, sir; for I really cannot remember whether I gave the check to Mr. Ray. It does not state whether Mr. Ray's endorsement is on that check?

Q. 14. No; it simply appears it was a check you signed.

A. I might have passed the check to Mr. Ray, and I might have passed it to Mr. Bigelow; I cannot say.

Q. 15. In connection with this subscription and the receipt of this stock, did you have any talk with Mr. Bigelow?

A. I do not think so. I think as far as I can remember the entire transaction was with my friend, Mr. Ray, who advised me to buy the stock.

Q. 16. Did you have any talk with Mr. Lewisohn?

A. No; I never met Mr. Lewisohn.

Q. 17. Did Mr. Bigelow say anything to you at any time with reference to taking any promoter's profits or shares for services in forming the corporation?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. Never in the slightest degree.

Q. 18. Did Mr. Ray give you any such information?

490 [Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. Never.

Q. 19. Did you, from any source, hear in 1895 that it was the intention to take, or that there had been taken, any shares, either as a profit or for promoter's services in connection with the promoting or organization of the company?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. Never, sir.

Q. 20. Specifically was it called to your attention in any way that Mr. Lewisohn or Mr. Bigelow had taken 50,000 shares of the stock for any of these reasons?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I have no recollection of anything of the kind, and I am very positive that nothing of the kind ever occurred.

Q. 21. When, if at all, prior to the hearing to-day did this matter come to your attention?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. This hearing? Well, I have heard it during the last—since Mr. Smith's coming into the presidency of the company, perhaps, in an indirect way.

Q. 22. What do you mean by that?

A. That there was some irregularity; I might as well state it in that way.

[Counsel for defendants objects to the answer as incompetent and not responsive.]

Q. 23. It being the fact that Mr. Smith became president in 1902, do I understand that prior to that you had never heard?
A. Prior to that time I had never heard anything of the kind.

By Mr. LAUTERBACH:

Q. Although you knew about it at the time, and say that Mr. Ray advised you to subscribe for and to take so much stock, you took it?
A. I took it on his recommendation and advice; yes, sir.

491 [No cross-examination.]

HOMER V. SNOW.

Subscribed and sworn to before me this 12th day of September, 1905.

GEORGE C. BURPEE,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *July* 19, 1905.

Deposition of Arthur W. Hale.

ARTHUR W. HALE, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by E. F. McClennen, Esq., counsel for the plaintiff, deposes and says:

Q. 1. What is your full name?
A. Arthur W. Hale.
Q. 2. You reside where?
A. Winchester.
Q. 3. Your place of business is where?
A. 53 State street.
Q. 4. Boston, Mass.?
A. Boston, Mass.
Q. 5. In 1895 were you connected with the firm of C. A. Putnam & Company?
A. I was.
Q. 6. I show you Exhibit 10 of the deposition of A. S. Bigelow, March 27, 1903, being a subscription purporting to be dated July 18, 1895, the words "C. A. Putnam & Co., 500;" is that your handwriting?

A. No; that is Mr. Middleton's handwriting.

Q. 7. Was he connected with the firm?

A. He was a partner in it, yes.

Q. 8. I show you a certificate of stock of the Old Dominion Copper Mining & Smelting Company, in the name of C. A. Putnam & Company, No. 111, for 400 shares, endorsed on the back "C. A. Putnam & Co.;" in whose handwriting is that endorsement?

A. Mr. Middleton's.

492 Q. 9. Did you have anything to do with this subscription for this stock?

A. Yes; I think I made all the arrangements with Mr. Bigelow.

Q. 10. Do you have any knowledge of when and where the subscription paper was signed?

A. I do not know about that; I think it was sent into the office and my partner signed it.

Q. 11. Did you, as far as you now recall, see any one other than Mr. Bigelow in connection with this subscription or the organization of this corporation?

A. I think not.

Q. 12. Do you know whether it was before or after this subscription was signed that you saw Mr. Bigelow?

A. Before.

Q. 13. Have you any idea how long before?

A. I cannot remember.

Q. 14. Was it a matter of days, weeks, or months?

A. I really cannot say.

Q. 15. Do you recall anything of the conversation which you had?

A. No; it was so long ago I cannot tell what was said.

Q. 16. Was anything said with reference to Mr. Bigelow and Mr. Lewisohn, or any of those associated with them, taking 50,000 shares of the stock of the corporation either as profits or for promoters' services or otherwise?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I do not remember any conversation of that sort.

Q. 17. Do you remember any conversation with Mr. Bigelow with reference to profits or any number of shares?

A. No.

Q. 18. Or about his taking any compensation in any way?

A. No.

Q. 19. When you say you do not recollect, do you mean that your mind is barren on that subject or that no such conversation took place?

A. What I mean to say is this: I made arrangements with Mr. Bigelow to take this number of shares purely as a speculation, and I went in, as I suppose others did, on the street, believing that it was a good thing and that the prestige of the office would carry it up—purely as a speculation.

Q. 20. Now during the entire year of 1895 did you learn from Mr. Bigelow, or from any source, that it was intended to take any

profit, anything for promoters' services, or that any such profit had been taken by Bigelow and Lewisohn?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

493 A. I might have heard about it, but it did not make any impression on me.

Q. 21. When prior to to-day's hearing did you first hear of any profit having been taken or of any shares having been taken for services?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. In the papers, I think.

Q. 22. Do you now refer to the items that have appeared in the papers relative to this present suit?

A. Yes. I might say this, that in talking with Mr. Belches I remember at the time——

[Counsel for defendants objects to the answer as not responsive and as purely hearsay.]

Q. 23. I will ask you this: Do you recall the price which you paid for this stock?

A. It is so long ago I cannot say certainly, but it was either $20 or $25.

Q. 24. You mean by that $20 or $25 per share?

A. $20 or $25 per share, yes.

Cross-examination:

[In answer to interrogatories propounded by Edward Lauterbach, Esq., of counsel for defendants, the witness further deposes and says:]

X 25. Were you or your firm later on subscribers to the syndicate?

A. No, this is all that we had anything to do with.

X 26. The only transaction?

A. Yes, that is the only thing I know about.

ARTHUR W. HALE.

Subscribed and sworn to before me this 12th day of September, 1905.

GEORGE C. BURPEE,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

494 OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET.
BOSTON, *July* 19, 1905.

Deposition of Samuel B. Capen.

SAMUEL B. CAPEN, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by Louis D. Brandeis, Esq., counsel for the plaintiff, deposes and says,—

Q. 1. What is your full name?
A. Samuel B. Capen.
Q. 2. You are of the firm of Torrey, Bright & Capen?
A. I was; it is now a corporation, of which I am the treasurer.
Q. 3. Formerly it was a firm?
A. Yes.
Q. 4. Of Boston?
A. Yes.
Q. 5. In 1895 you were also a member of that firm?
A. Yes, sir.
Q. 6. I show you an exhibit marked 3, Exhibit No. 3, which was put in evidence on March 24, 1903, in connection with the deposition of Albert S. Bigelow in this case, and I call your attention to the words in this paper in ink "Henry T. Coe," then in pencil, "S. B. Capen," then in ink again "$6000," and ask you in whose handwriting the words that I have read are?
A. "Henry T. Coe" is in his own handwriting; I do not know whose the "S. B. Capen" in pencil is. The figures, I suppose, are Mr. Coe's; they look like it.
Q. 7. I call your attention to another exhibit, being Exhibit 5, which was put in evidence as part of the deposition of A. S. Bigelow, under date of March 24, 1903, in this case; and call your attention to the words "Henry T. Coe by S. B. C., $2000."
A. Yes, that is my own handwriting.
Q. 8. That is your own handwriting?
A. Yes.
Q. 9. You are the "S. B. C." there referred to?
A. Yes.
Q. 10. The words in the witness clause "fourteenth" and "June:" are those also in your handwriting?
A. Yes, sir.
Q. 11. I also call your attention to Exhibit No. 10, which was introduced in evidence in connection with the deposition of A. S. Bigelow on March 27, 1903, and call your attention to the words and figures "Henry T. Coe, six hundred shares, 600:" in whose handwriting is that?
A. That is Mr. Coe's.
Q. 12. Who is Henry T. Coe?
A. He was the bookkeeper of Torrey, Bright & Capen.
Q. 13. Where is Mr. Coe at present?
A. He is on his way from Vermont to Boston; he will be here tomorrow; he is on his vacation.

495 Q. 14. He was then and is now a bookkeeper in the employ of Torrey, Bright & Capen?

A. Yes, sir.

Q. 15. Whether or not you personally had any part in taking the subscription or this interest in the syndicate or in the subscription for the stock referred to in the several papers which were shown to you?

A. Yes, sir, I did.

Q. 16. Now will you tell what part you had?

A. In the first subscription I had personally 50 shares.

Q. 17. If you will pardon me, before you answer that I will ask you whether or not you caused Mr. Henry T. Coe to sign for you on that subscription?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I did, yes, sir.

Q. 18. And why?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. Because this was for six or eight different people, and this paper was to be shown to many people, and I did not care to have my own personal affairs put on a piece of paper; and instead of doing as some people do, act through a broker, I had our clerk do it. It would not have been a fair statement if I had put it that I subscribed for it all, because I had only 50 shares of it. So he signed for us all.

Q. 19. Referring to the paper earliest in date, in which the name of Henry T. Coe, and in pencil "For S. B. Capen, six thousand" appears, which paper is dated May 21, 1895, I will ask you whether prior to the signing by Mr. Coe of that paper you had had any conversation with Mr. Bigelow in regard to taking an interest in the syndicate?

A. I had.

Q. 20. State what that was.

A. I applied to him or to Mr. Nelson for it, I don't know which; I presume to Mr. Bigelow in the first instance. I heard of this mine, so I subscribed, and asked if I might be interested for myself and friends.

Q. 21. Where did you see Mr. Bigelow?

A. At his office.

Q. 22. Was the subscription in Mr. Coe's name for $6000 taken immediately after that interview?

A. Yes, sir.

Q. 23. Whether or not at the time of that interview, or at any time before the making of the subscription, anything was said to you by Mr. Bigelow as to his or Mr. Lewisohn's, or any one associated with him, taking any specific number of shares, or
496 any shares, as compensation for services as promoter or as profits, or promoter's profits?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I have no recollection of any such conversation.

Q. 24. Now whether or not, between the time of the signing of the first paper and the time when you signed, in Mr. Coe's name, the paper dated June 14, 1895, there was anything said to you by Mr. Bigelow that he and Mr. Lewisohn, either of them, or any one associated with them in getting up the company, would take any number of shares as any compensation for services in promotion?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. No, sir.

Q. 25. Whether between that time and the signing of the third paper dated July 18, Mr. Bigelow stated to you anything as to his or Mr. Lewisohn's or any one associated with him, intending to take, or that they had taken as compensation for their services as promoters any number of shares of stock in this company?

A. No, sir.

Q. 26. Or that they would do it?

A. No, sir.

Q. 27. I call your attention to a certificate dated September 27, 1895, No. 210, for 640 shares of stock in the name of Henry T. Coe, which certificate bears an endorsement as follows: "Transferred to Elbridge Torrey, 200 shares; Samuel B. Capen, 160 shares; Joshua W. Davis, 80 shares; Mrs. Laura E. Wilkins, 100 shares; Mrs. Frances M. Perkins, 100 shares."

I also call your attention to certificate No. 137, dated September 19, 1895, for 200 shares, in the name of Henry T. Coe, and to certificate dated September 19, 1895, for 80 shares, certificate No. 138, in the name of H. T. Coe; and on certificate No. 137 an endorsement, H. T. Coe to Samuel B. Capen, trustee, 30 shares; Miss Mary W. Capen, 2 shares; Elbridge Torrey, 120 shares; Samuel B. Capen, 50 shares; Mrs. Helen W. Capen, 25 shares; Miss Elizabeth G. Bright, 40 shares; Miss Josephine B. Bright, 10 shares; Edward W. Capen, 3 shares; and ask you whether any parts of the assignments on the backs of these certificates are in your handwriting?

A. Yes, the fillings in there are mine,—all of these.

Q. 28. That is, all of the names and the number of shares?

A. Yes, all of them.

497 Q. 29. The names and the number of shares which they represent are all in your handwriting?

A. Yes, sir.

Q. 30. Whether or not you acted, in subscribing for an interest in the syndicate and for the shares, as appears by the exhibits,—whether you acted on that occasion for the persons who appear as the transferees of the shares from the assignment of H. T. Coe?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I did.

Q. 31. Now will you state whether the payment for those 280 shares represented by the two certificates 137 and 138, dated September 19, 1895, was made by you?

A. Yes, sir.

Q. 32. To what amount?

A. $7000.

Q. 33. To whom was the check made payable?

A. To Thomas Nelson, treasurer.

Q. 34. Now whether the payment to the syndicate for the interest in the syndicate which was afterwards represented by the 640 shares shown by certificate No. 210 was made by you?

A. I presume it was. There are so many of these different ones I can only trace my own. I have got that here, worked out.

Q. 35. What are the payments that you made personally?

A. You mean from this check book? There are 160 shares that belong to me in the second lot. I paid May 27, $140; June 14, $140—those were 14 per cent of the $2000. Then June 20, 28½ per cent on the $2000, or $575.17; on August 22 I paid the balance of that $2000, or 57½ per cent and interest; $1160.52 is that payment, making a total of $2015.69, which was the whole amount for 160 shares with interest.

Q. 36. To whom were those checks made payable?

A. To A. S. Bigelow, treasurer, or to A. S. Bigelow, not the treasurer.

Q. 37. Whether at any time before any of these payments which you have referred to were made, the certificates which have been shown to you were delivered, anything was said to you by Mr. Bigelow in regard to his taking, or Lewisohn's taking, or any of his associates taking, any shares of stock in this Old Dominion Copper Mining & Smelting Company, or in a company to be formed, as compensation for his profits or services as promoter?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

498 A. No, sir.

Q. 38. Whether or not, at any time prior to the receipt of these certificates by you, any such information or statement of intention was made to you by any one of Mr. Bigelow's — having that intention,—was made to you by any one, or any information came to you from any source to that effect?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. No, sir.

Q. 39. Whether at any time during the year 1895 any such information came to you from any source?

A. No, sir.

Q. 40. When, if ever, prior to your being called upon to testify in this case did you hear that Bigelow, Lewisohn, either of them, or their associates, had taken 50,000 shares, or any number of shares,

as compensation for their profits in connection with their promotion of this company?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I should say within a year or two.

Q. 41. That is, from the new-papers?

A. Yes.

Q. 42. Within a year or two of the present time?

A. Yes, sir.

Q. 43. Was that reference in the papers in connection with litigation that had been brought by the company against Bigelow and Lewisohn?

A. Yes, sir.

Cross-examination:

[In answer to cross-interrogatories propounded by EDWARD LAUTERBACH, Esq., counsel for defendants, the witness further deposes and says:]

X 44. As I understand it, then, you were a subscriber to the syndicate arrangement to the extent of $6000, and to another syndicate subscription to the extent of $2000, and a purchaser of stock to the extent of $7000?

A. I think that is correct; yes, sir.

X 45. This was in about June, 1895?

A. Yes, sir.

X 46. The only one that you saw with reference to these matters was Mr. Bigelow, was it not?

A. I might have seen Mr. Nelson, possibly, and probably Mr. Bigelow together.

499 X 47. And Mr. Nelson was associated with Mr. Bigelow?

A. Yes, sir.

X 48. Did Mr. Bigelow call upon you at that time, or did you call upon him?

A. I called upon him.

X 49. Did he solicit you or did you ask him?

A. I asked him, sir.

X 50. You thought it a favor to be permitted to become a member of the syndicate?

A. Yes.

X 51. Copper-stock subscriptions at that time were thought to be good investments and speculations?

A. Yes.

X 52. And you were content, in making your subscriptions, to have Mr. Bigelow act in the matter as he thought proper?

A. Yes, I had no criticism to make.

X 53. You asked him no question concerning the nature of the investment?

A. Well, probably I asked some question about the mine there.

X 54. And he spoke well of the mine?

A. He did.

X 55. But whether or not he was to make a profit or not was a matter that was immaterial to you?

A. Not immaterial; I supposed when I put my money in I was to make profit.

X 56. And, in fact, you did make a profit, didn't you; I mean that, as to that $6000 and $2000 subscription, you received two for one in securities finally?

A. Yes, my 160 shares, I think, I received two for one.

X 57. That is, assuming the stock to be par, for your $8000 subscription you received 640 shares; now if that had been subscribed for at par you would only have received 320 shares for your participation in the syndicate?

A. Yes.

X 58. And that was entirely satisfactory to you?

A. Yes.

X 59. Your subscription to the $25 a share stock was that made with Mr. Bigelow as well?

A. Yes.

X 60. And you saw him only in respect to that?

A. Yes.

X 61. You had nothing to do with the Old Dominion Copper Company, as such, only with Mr. Bigelow?

A. No.

X 62. And your transactions in all three matters were entirely with him?

A. Yes, sir.

X 63. Did he decline to answer any question that you asked him in respect to the matter?

A. No, sir.

Redirect examination:

[On redirect examination, in answer to further questions by Mr. BRANDEIS, of counsel for plaintiff, the witness further deposes and says:]

500 Q. 64. Do you remember whether you saw Mr. Bigelow after that first interview you had prior to Mr. Coe's signing the paper of May 21,—whether or not you personally saw Mr. Bigelow after that?

A. I could not tell you; I should think I would, the second time.

Q. 65. That is, you think the time that you signed yourself this June 14 paper, when you wrote in a part on the 14th of June?

A. I have no knowledge, but I guess so.

Q. 66. Do you know whether or not you saw Mr. Bigelow subsequently?

A. Probably not when I made the payments.

Q. 67. There was a paper afterwards, the July 18 paper, which was not signed by you, but was signed by Mr. Coe; do you have any recollection of seeing Mr. Bigelow at that time?

A. I have no recollection; no, sir.

SAMUEL B. CAPEN.

Subscribed and sworn to before me this 7th day of September, 1905.

GEORGE C. BURPEE,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *July* 19, 1905.

Deposition of Walter A. S. Chrimes.

WALTER A. S. CHRIMES, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by Louis D. Brandeis, counsel for the plaintiff, deposes and says.—

Q. 1. State your full name, age, residence, and occupation.

A. Thirty-eight; residence, Hingham; occupation, assistant secretary and assistant treasurer of mining companies.

Q. 2. What mining companies are you assistant secretary and assistant treasurer of?

A. Tamarack, Osceola, Ilse Royale, Ahmeek, and Seneca.

501 Q. 3. Are these all mining companies in which Mr. A. S. Bigelow is interested as an officer and stockholder?

A. Yes, sir.

Q. 4. And what was your occupation in 1895?

A. I was clerk in the office of those mining companies.

Q. 5. And were they mining companies controlled by A. S. Bigelow and Leonard Lewisohn?

A. I don't know that they were controlled by them; they were stockholders.

Q. 6. What other companies were there besides the ones you have named?

A. Boston & Montana and Butte & Boston.

Q. 7. And afterwards in the Old Dominion Copper Company?

A. Yes.

Q. 8. How long had you been with Mr. A. S. Bigelow prior to July, 1895?

A. About twelve years.

Q. 9. Twelve years prior to that time; so you have been with Mr. Bigelow twenty-two years?

A. Twenty-two years last January.

Q. 10. And you acted to a certain extent as secretary to him individually, personally, did you not?

A. Yes.

Q. 11. And did at that time—1895?

A. Yes, but in a small way.

Q. 12. But since that time you have to an increased extent?

A. Yes.

Q. 13. To what extent, in 1895, did you have access to, or charge of the books and papers in relation to Mr. A. S. Bigelow's mining enterprises, and particularly that of the Old Dominion Syndicate and Old Dominion Copper Mining & Smelting Company?

A. Mr. Bigelow did not keep any books; I did some writing in his check book. The general books of the office were kept by the other clerks, and I had no control of and knew nothing about them.

Q. 14. What did you have to do with Mr. Bigelow's letter book?

A. Nothing; that is, if you mean by filing away the letters, or copying the letters, I had nothing to do with them; that was done by some boy in the office.

Q. 15. Under you?

A. No, not particularly; things were done under his direction.

Q. 16. What do you mean by "his direction," who is "his"?

A. Mr. Bigelow.

Q. 17. Well, in Mr. Bigelow's absence, the correspondence was conducted by you, was it not?

A. Yes.

Q. 18. Now what books, letter-press copy books, did Mr. Bigelow have at that time, 1895,—keep regularly?

A. Well, he kept an ordinary business man's file.

Q. 19. You mean an ordinary file in which letters received were pasted in?

A. Pasted in, and an ordinary copy book in which letters were copied.

502 Q. 20. How many copy books were kept?

A. I think one; possibly two.

Q. 21. Have you not brought with you here certain letter-press copy books?

A. I have brought a lot of books. I have not looked to see what is in the package yet.

Q. 22. Will you look and let me know what letter-press copy books you have brought here relating to 1895, in which any letters from Mr. Bigelow are copied?

A. There are two [producing two letter-press copy books].

Q. 23. There are two letter books, and how are they designated?

A. One is marked "Letters. 6. Private." The other is marked "Letters. 4. A. S. B."

Q. 24. What is the first and last date in the letter book marked "Letters. 6. A. S. B. Private."?

A. May 29, 1893, is the first. October 20, 1896, is the last.

Q. 25. And are the pages in that book numbered?

A. They are.

Q. 26. What is the number of the first and last page?

A. The first is numbered "1" and the last "728." The last date is October 20, 1896.

Q. 27. Is that letter book indexed?

A. Yes, or partly so.

Q. 28. What do you mean by the statement "or partly so"?

A. Well, I thought there might have been omissions by the person who might have indexed that book.

Q. 29. Are you able to tell from the handwriting who it was who indexed that letter book?

A. No, there are three on the first page.

Q. 30. You mean three different handwritings?

A. Yes, sir.

Q. 31. Do you recognize any of them?

A. No.

Q. 32. Now will you give me the earliest date in the letter book marked "letters. 4. A. S. B.," and the last date; and also the first and last page?

A. Page 1 is December 24, without any year, so I don't know when that was.

Q. 33. Well, will you look at the next date?

A. The next is December 27, 1892, on page 1.

Q. 34. What is the last page in the book?

A. April 15, 1893. That is apparently wrong. I will explain here were little things not relating to business was sometimes put in the back of these books, and had no bearing on business matters. For instance, here is a telegram to Mrs. Bigelow away out of date; so you better take a date at some time when the real business was finished.

Q. 35. Will you look through and let me know the last date on the last page when any matters are regularly copied in the book?

A. February 11, 1897.

Q. 36. Will you state with reference to letter book "4. A. S. B." whether that book is indexed?

A. It is.

Mr. LAUTERBACH: I object to this line of testimony on be-
503 half of the defendant Lewisohn, to the letters of Mr. Bigelow except as they may have been addressed to and received by Mr. Lewisohn and answered by him, as irrelevant and incompetent and immaterial. My objection is to the whole line of testimony.

Q. 37. What is your answer?

A. It is indexed with possibly exceptions or omissions.

Q. 38. Well, are there any omissions from the index, to your knowledge?

A. Not to my knowledge.

Q. 39. Is there in letter book No. 6 any omission from the index, to your knowledge?

A. No.

Q. 40. Will you now turn to the index of letter book "4 A. S. B." to the name of Maxwell Woodhull, and give me the number of the page of letters addressed to Maxwell Woodhull?

A. There is one on page 637, 645, 649, 191, 298, 307, 338, 366, 374, 381, 428, 434, 498, and 544.

Q. 41. Were all of those numbers of pages against the single name of Maxwell Woodhull, or does he appear in several places in the index?

A. He appears in two places, the name appears in two places; the line was filled out and it had to be dropped below here.

Q. 42. Now will you turn to page 191, and let me see the date of that letter?

A. It is a telegram.

Q. 43. A telegram of April 13, 1894?

A. Yes.

Q. 44. Turn now to page 298: that is a letter of what date?

A. Of June 12, 1895. This is the letter which appears in the deposition of A. S. Bigelow, Int. 120.

Q. 45. Now if you will turn to page 307.

A. That is a telegram dated June 15, 1895. This is the telegram referred to in deposition of A. S. Bigelow, Int. 119.

Q. 46. Now turn to page 338.

A. That is a letter dated June 24, 1895, which is as follows:—

"JUNE 24, 1895.

Maxwell Woodhull, Esq., 2035 G St., Washington, D. C.

DEAR SIR: I have yours of June 22nd. Your receipts for the Old Dominion syndicate were made non-negotiable for special purposes, which, however, now longer exists. A copy of agreement made by you with Riggs & Co. was duly received and we are pleased to notify you that we confirm and recognize that agreement and will hold it binding.

Yours truly,

OLD DOMINION SYNDICATE,
By A. S. BIGELOW."

501 Q. 47. Now turn to page 366.

A. A telegram as follows:—

"JULY 26, 1895.

Maxwell Woodhull, care of Chesbrough, 24 State St., New York:

$25 a share cash on or before October 1. Due notice will be given when it is required. A. S. BIGELOW."

Q. 48. Now page 374.

A. This is a letter dated July 31, 1895, appearing on page 81, in Int. 173, in the deposition of A. S. Bigelow in this cause.

Q. 49. Now page 381.

A. Letter dated August 7, 1895, which is as follows:—

"SEARS BUILDING, BOSTON, MASS., *August* 7, 1895.

Maxwell Woodhull, Esq., The Aldine, Spring Lake Beach, N. J.

DEAR SIR: I am in receipt of your favor of August 5 enclosing release from Riggs & Co. of their interest in your subscription to the Old Dominion syndicate. I have made a note of the same upon our books and return you said release herewith.

Yours very truly, A. S. BIGELOW.

Your suggestion anent Tamarack is a good one, but not practical, as I know some of them would not agree to it."

Q. 50. What page of the letter book is this on?

A. 381.

Q. 51. Now will you turn to letter dated August 8 in that letter book? The first one is on page 383.

A. There isn't any letter to Woodhull on that page.

Q. 52. What is the next letter to Woodhull?

A. It appears to be November 18, 1895, by this book, on page 428.

Q. 53. That is a letter written by Mr. Bissell for Mr. Bigelow?

A. It is for him. This letter appears to relate to some mining operations.

Q. 54. Now give me the next letter to Mr. Woodhull.

A. November 26, 1895, on page 434; that is a letter of C. H. Bissell by W. A. S. Chrimes, and relates also, apparently, to mining operations.

Q. 55. Now the next.

A. April 9, 1896, page 498, which is a letter which relates to other matters; it does not relate to Old Dominion matters.

505 Q. 56. Now the next, page 544.

A. Telegram dated July 11, 1896; a telegram of mine to Mr. Woodhull.

Q. 57. Now the next, page 637.

A. Letter dated December 5, 1895, acknowledging receipt of check.

Q. 58. Now page 645.

A. A letter dated December 18, 1896, which does not relate to Old Dominion matters.

Q. 59. Now page 649.

A. Letter dated December 21, 1896. This letter also does not relate to Old Dominion matters.

Q. 60. Now will you turn to this letter book No. 4, and state whether or not from that book any pages have been torn out; and if so, what is the earliest page in the book that has been torn out?

A. There is no way for me to know that except to go through this one page at a time.

Q. 61. I wish you would do it.

A. I find there is no page 88.

Q. 62. Will you give, then, the date of the letter before and after it?

A. The letter preceding is dated July 13, 1893, and the one succeeding is July 18, 1893.

Q. 63. Now if you will proceed.

A. I find an unpaged sheet between 149 and 150 as of the date of about March 6, 1894.

I find an unnumbered page, marked "157A," as of the date of March 23, 1894, between page 157 and 158.

I find another unnumbered page between 521 and 522, numbered 521½, and bears date June 12, 1895.

I find, after page 545, that 546, 547, and 548 are missing, and ap-

parently torn out, between the date of July 17, 1896, and July 20, 1896.

I find a page without a number; I suppose it is 595; the corner is torn off. The date is September 23, 1896.

I find an extra page, numbered in pencil 6050, between 604 and 605, and between September 30, 1896, and October 1, 1896.

I find also an extra page between 655 and 656, which is numbered 655^{a}, between December 31, 1895, and January 4, 1897.

I find that page 657 is apparently missing; it is between January 5, 1897, and January 6, 1897.

There is an extra page numbered in ink 691A, and it is between 690 and 691B, in ink, and between February 11, 1897, and February 13, 1897.

I find that page 694 is missing, and appears to have been torn out. The last letter on page 693 is dated February 11, 1897; the letter on page 695 is dated October 6, 1896.

506 After page 697 the pages have disappeared up to the next page, 715, and that page is dated July 11, 1894; and the previous one, on page 697, is dated October 5, 1896.

There are three pages cut out and one unnumbered page. The next numbered page after 715 is 719, and the date of that is April 1, 1894.

There are again after 719 pages missing up to page 725.

Page 725 has a letter on it dated December 21, 1893.

After page 727 again pages are missing to page 732, and there is on that page a letter dated August 15, 1893.

Pages 733 and 734 are missing. The next is page 735, and the last page is 737 dated April 15, 1893.

After that there are again a number of pages which have been apparently torn out at the end of the book.

Q. 64. Now will you turn to letter book No. "6, A. S. B. Private," and give us the pages appearing in the index of letters to Maxwell Woodhull?

A. Page 92, 210, 214, 216, 220, 222, 228, 233, 235, 238, 240, 241, 263, 270, 278, 280, 308, 304, 326, 332, 338, 354, 360, 378, 382, 390, 410, 412, 414, 421, 432, 435, 443, 449, 474, 495, 559, 587, 601, 609, 649, 659, 680, 689, 697, 717.

Q. 65. What is the last page in the book?

A. 728.

Q. 66. Now will you turn to the first page, 92?

A. That is a letter dated September 11, 1893.

Q. 67. Now turn to the next one, page 210.

A. That is a letter dated June 19, 1894.

Q. 68. Page 214?

A. That is a letter dated June 22, 1894.

Q. 69. Page 216?

A. June 26, 1894.

Q. 70. Page 220?

A. July 6, 1894.

Q. 71. Page 222?

A. July 23, 1894.

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Q. 72. Page 228?
A. August 7, 1894.
Q. 73. Page 233?
A. August 9, 1894.
Q. 74. Page 235?
A. August 10, 1894.
Q. 75. Page 238?
A. Letter dated in lead pencil August 13, 1894.
Q. 76. Page 240?
A. Apparently August 17, 1894.
Q. 77. Page 241?
A. August 24, 1894.
Q. 78. Page 263?
A. October 1, 1894.
Q. 79. Page 270?
A. November 12, 1894.
Q. 80. Page 278?
A. November 27, 1894.
507 Q. 81. Page 280?
A. December 3, 1894.
Q. 82. Page 308?
A. January 16, 1895.
Q. 83. Page 304?
A. On page 304 I find the second page of a letter to Frank B. Prentiss of Philadelphia, relating to the Merced Gold Mining Company, but nothing to Woodhull. I find on page 324 a letter of February 9, 1895.
Q. 84. Page 326?
A. A letter dated in pencil, February 18, 1895.
Q. 85. Page 332?
A. March 23, 1895.
Q. 86. Page 338?
A. March 29, 1895.
Q. 87. Page 354?
A. April 20, 1895.
Q. 88. Page 360?
A. April 23, 1895.
Q. 89. Page 378?
A. May 23, 1895. This letter relates to Boston & Montana and Merced.
Q. 90. Page 382?
A. June 11, 1895. This letter referred to in Int. 115, in the deposition of Albert S. Bigelow.
Q. 91. Page 390?
A. Letter dated June 15, 1895. This is the letter referred to in Int. 119 of the deposition of Albert S. Bigelow.
Q. 92. Page 410?
A. July 1, 1895. This letter refers to Boston & Montana.
Q. 93. Page 412?
A. Letter dated July 6, 1895. This letter also relates to Boston & Montana.

Q. 94. Page 414?

A. Letter dated July 12, 1895. This letter also relates to Boston & Montana and other matters, and not to Old Dominion.

Q. 95. Page 421?

A. July 15, 1895. This is the letter referred to in the deposition of A. S. Bigelow, Int. 175, at page 82.

Q. 96. Page 432?

A. Letter dated July 22, 1895. This is the letter referred to in the deposition of A. S. Bigelow, Int. 175, page 82.

Q. 97. Page 433?

A. Letter dated July 24, 1895. This is the letter referred to in the deposition of A. S. Bigelow, Int. 175, page 82.

Q. 98. Page 443?

A. August 20, 1895.

Q. 99. Will you look through the pages and see if there is any letter between pages 433 and 443?

A. There is no letter in the letter book between pages 433 and 443 addressed to Maxwell Woodhull, and no pages are missing. The letter of August 20, 1895, relates to the general conditions of the market.

Q. 100. Page 449?

A. Letter dated August 22, 1895. This letter also relates to general matters.

Q. 101. Page 474?

A. Letter dated October 24, 1895. This letter relates to Boston & Montana.

508 Q. 102. Page 495?

A. Letter dated November 26, 1895; a letter relating to the copper market.

Q. 103. Page 559?

A. Letter dated February 28, 1896, relating to Tamarack.

Q. 104. Page 587?

A. Letter dated March 23, 1896, and relates to Tamarack, with a postscript with regard to Mr. Woodhull's $15,000 note to the Old Dominion.

Q. 105. Page 601?

A. Letter dated April 30, 1896. This is a letter in which Mr. Bigelow reports on the various mining properties in which Mr. Woodhull is interested. The only paragraph relating to the Old Dominion is as follows:—

"Now, as to Old Dominion, which was the next property which we visited; I was exceedingly well pleased with that property. One sure thing about it is that it is a mine well opened for a number of years ahead and rich, and it is only a question of time when it will come to the front as a good dividend payer. On the comparatively small product which we are making today, we are earning quite a nice profit."

Q. 106. Page 609?

A. Letter dated May 8, 1896, relating to Boston & Montana and other matters, and not relating to Old Dominion.

Q. 107. Page 649?

A. A letter dated June 1, 1895, about Tamarack, Merced, and Butte & Boston.

Q. 108. Page 659?

A. Letter dated June 19, 1896. This letter relates to various matters. The only reference to Old Dominion is as follows:—

"The bears are of course about trying to make a dishonest dollar. They made a drive at Old Dominion the other day and knocked it to $15.50, the price yesterday. As to the value of the property, I have no doubt whatever. It is a large, rich mine well opened up ahead and capable of being worked very cheaply. We had to close down the mines on account of the strike by the men, but in my opinion this is a matter of small importance, and I think we shall be running again next month. In May, with a product of only *of* about 700,000 lbs. we made a profit of $20,000. New furnaces are on the way and should be ready to run next month, by which we can increase our product to from 900,000 lbs. to 1,600,000 lbs. a month, and when run even without the railroad should be able to make from $30,000 to $40,000 profit."

Q. 109. Page 680?

A. A letter dated July 14, 1896, about Boston & Montana.

Q. 110. Page 689?

A. Letter dated July 27, 1896. The only reference to Old Dominion in that letter is as follows:—

509 "Old Dominion looks cheap to me, but, as you know, it is not yet a dividend payer, and the stock will probably fluctuate a good deal until it does become one."

Q. 111. Page 697?

A. A telegram to Woodhull, dated September 10, 1896, which does not relate to Old Dominion.

Q. 112. Page 717?

A. Letter dated September 28, 1896, and does not relate to Old Dominion.

[Recess until 2 p. m. and resumed.]

Mr. LAUTERBACH: Before Mr. Chrimes is further examined, I want to call your attention and his to the fact that you will recall that Mr. Hyams pointed out that among these receipts, among these formal notifications in the month of June, some error must have occurred and some three or four pages eliminated from the book.

Mr. BRANDEIS: Why didn't we find that?

Mr. LAUTERBACH: It was before lunch; we did it unanimously.

* * * * * * *

Mr. BRANDEIS: Mr. Lauterbach calls attention to the fact that Mr. Chrimes, in going over the letter book "4, A. S. G." in the presence of all of us, as to the pages that were missing, omitted to state that the pages between No. 308 and 314 were missing and appear to have been cut out.

Mr. LAUTERBACH: That is right.

Q. 113. Mr. Chrimes, I call your attention to the memorandum

in pencil, June 15, 1895, "pages 309 and 313 were spoiled," the above memorandum in pencil being written on what appears to be the part remaining in the book on page 315. Will you please state in whose handwriting that memorandum is?

A. That is in my handwriting.

Q. 114. Are you able to recall when you made that memorandum?

A. I cannot.

Q. 115. Are you able to state approximately the year within which you made that memorandum?

A. No.

Q. 116. Have you any recollection whatsoever in regard to that memorandum?

A. None whatever.

Q. 117. When did you first see that memorandum, so far as you can remember?

A. About five minutes ago, two minutes ago.

Q. 118. You mean just before Mr. Lauterbach called attention to this fact?

A. I do, just this minute.

510 Q. 119. How do you account for the fact that that memorandum was put upon those pages by you?

A. I cannot account for it.

Q. 120. There is not any other instance in that book, is there, where pages torn out bear any notation of any kind?

A. I do not remember of seeing any when I went through it before.

Q. 121. Can you account in any way for the fact that you did not notice this omission of pages when you went through it before?

A. No.

Mr. LAUTERBACH: It is conceded by all counsel present that all were present and looking over the book while it was being examined by Mr. Chrimes, and while he was giving his testimony, and that no one observed the absence of the pages at that time.

Q. 122. The question you were asked was, "Now will you look through this letter book, and let us know what pages in this letter book are missing 'this letter book' being entitled 'Letters, 6, A. S. B., Private'?"

A. I have been through it.

Q. 123. You have examined it?

A. I have examined it.

Q. 124. Since this question was put?

A. Yes, I examined it after lunch.

Q. 125. Now go ahead.

A. And I find page 4 is out.

Mr. MCCLENNEN: Page 3 being dated May 29, 1893, and page 5 being dated May 29, 1893.

Q. 126. Now go ahead.

A. It was an insertion between pages 8 and 9.

Q. 127. It is between pages 8 and 9, an insertion. What does it consist of?

A. It is evidently something copied in the book.

Q. 128. Being a half page of a letter addressed to J. A. Coram. And pages 243, 244, 245, and 247 from some other letter book, is it not?

A. From some other letter book.

Mr. McCLENNEN: And all bearing date June, 1893.

The WITNESS: Yes.

Q. 129. Now go on.

A. No. 108 is out.

Q. 130. There is a memorandum on the stub of the page between 107 and 109, reading, "One of Mr. Nelson's private letters copied here; see Mr. Nelson's private book." In whose handwriting is that, Mr. Chrimes?

A. I think it is C. H. Bissell's.

Q. 131. What next?

A. There is an insertion at $232\frac{1}{4}$ and $232\frac{3}{4}$—pages appearing that way.

Mr. McCLENNEN: Being a letter dated August 9, 1894.

The WITNESS: Pages 287, 288, 289, and 290 are out.

511 Mr. McCLENNEN: 286 being a letter of December 7, 1894, and 291 being a letter of December 11, 1895.

The WITNESS: 293, 294, and 295 are out.

Mr. McCLENNEN: 292 being a letter of December 21, 1894, and a letter of December 29, 1894.

The WITNESS: Pages 300 and 301 are out.

Mr. McCLENNEN: 299 being a letter of January 2, 1895, and 302 a letter of January 3, 1895.

The WITNESS: There is an insertion at $418\frac{1}{2}$.

Mr. McCLENNEN: That being a letter of July 15, 1895, to Brewster & Company.

The WITNESS: About carriages. After 728, which is the last page, there are a number of pages missing.

Q. 132. Will you look now at the pages covering the period from August 1 to August 10, 1895, and see whether there is any letter to Maxwell Woodhull that has not been indexed?

A. I find no such letter to Maxwell Woodhull; I do find letters written by Mr. Bigelow to others, written August 5 and August 8.

Mr. HEMENWAY: That is not responsive.

Mr. BRANDEIS: All right. I will put a question.

Q. 133. Do you find any letters of Mr. Bigelow on August 5 or August 8, 1895, in this book?

A. I do, on pages 438, 439, and 440.

Q. 134. And the next letter to that is dated August 15, on page 441. Now, Mr. Chrimes, the letter of August 5, which I refer to as being on page 438, is a letter appearing in the deposition of A. S. Bigelow, Int. 181; then, I ask you, is not there a letter of August 7, 1895?

A. I do not see any.

Q. 135. You mean to say: I do not find it in that book; but there is in the letter book marked "A. S. Bigelow, Letters, 4," a letter of

August 7 to Mr. Grant, which appears also in the deposition of Mr. Bigelow at Int. 181?

A. Yes; I should say yes.

Q. 136. Is there not, Mr. Chrimes, some other letter book of Mr. Bigelow's in which letters relating to the matters connected with the Old Dominion may have been copied?

A. Not that I know of.

Q. 137. There were kept in the same office other letter books, were there not, at the same time that these letter books cover?

A. Yes.

Q. 138. What other letter books?

A. Books of other companies, the other mining companies.

512 Q. 139. What letter-press copy books were at that time in use in the office?

A. I should say there might have been fifteen or twenty.

Q. 140. Where are those letter books?

A. In the safe in the Sears building, I suppose.

Q. 141. And those were all letter books relating to different companies in which Mr. A. S. Bigelow was interested?

A. Yes.

Q. 142. And in which you acted in connection with him in one capacity or another?

A. Yes.

Q. 143. Has any examination been made in any of those letter books to see whether there is copied in any one of them a letter of August 8, 1895, from Mr. Bigelow to Mr. Woodhull, relating to the issue of 20,000 shares of the stock of the Old Dominion Copper Mining & Smelting Company?

A. I do not know.

Q. 144. You do not know? You do not know whether any investigation has been made by any one?

A. I do not.

Q. 145. Have you made any investigation of any of these books?

A. No, I have not.

Q. 146. Have you made any search other than in these two letter books which you have produced to-day, "Letter book No. 4, A. S. B." and "Private letter book No. 6, A. S. B."?

A. I have not looked that up.

Q. 147. Was there, during the time that these two letter books were in use, so far as you know, any other letter book which appeared as "A. S. Bigelow," or "A. S. B. letter book," specifically?

A. Why, this one, No. 4.

Q. 148. Other than those two?

A. No.

Q. 149. Have you made any search to ascertain whether there was or not?

A. No, I have not.

Mr. LAUTERBACH: I recall that Mr. Hyams said he did have search made for another book.

Mr. BRANDEIS: I understand, but he did not testify that Mr. Chrimes had made search.

Mr. LAUTERBACH: You never produced that letter book, Mr. Brandeis? I am speaking from recollection.

Mr. BRANDEIS: No.

Q. 150. Will you take each of the letter books covering the period of 1895, which are in the office at Sears building, between July 1 and September 1, 1895, and see whether there is not copied in those letter books a letter from Mr. Bigelow to Maxwell Woodhull dated August 8, 1895, acknowledging the receipt of a letter from
513 Mr. Woodhull of August 7, 1895, begining as follows, substantially, "I received your letter of the 7th. You are right in presuming the 20,000 shares which has been offered to be treasury stock." And will you, in making that examination, take note of the description of each letter book as shown customarily by the designation of the book, and also if you find such letter, produce the letter book containing such letter, produce that letter book?

A. Yes.

Mr. LAUTERBACH: Have we the Woodhull letter in evidence?

Mr. BRANDEIS: No; that I want to call for.

Mr. LAUTERBACH: Was the actual letter produced from them to us?

Mr. BRANDEIS: No. He was asked for that, I do not know whether he has found it since.

Q. 151. And will you also, in examining those, look into the index of each of those letter books for letters addressed to Mr. Woodhull, to make sure whether or not there is in the letter book a letter to him bearing date August 8, as well as making specific investigation of the pages covering the letters between the dates named—July 1 and October 1?

A. Yes.

Q. 152. And also note whether between the dates named there are any pages which have been torn from the letter book, and make note of all of those so as to be able to testify in regard thereto after your examination is completed?

A. Yes, I will.

Q. 153. Now, Mr. Chrimes, will you also make search among the letters of Mr. Bigelow, to Mr. Bigelow, to see whether there is among them any letter to Maxwell Woodhull dated August 2, 1895, and if found, produce such letter; and if you do not find the same, be able to state fully what search you have made for the letter?

A. Yes.

Mr. LAUTERBACH: I think if you were to show us a letter with what purports to be Mr. Bigelow's signature, we would admit it for what it is worth. If there appears to be a letter of August 8, 1895, purporting to contain his signature, then if you have the letter which called out that letter of August 8, there you are.

[Examination of the witness suspended and subsequently resumed.]

The WITNESS: My duty between now and the — of next month is not only to make out four thousand or more checks and accounts, which must be done and handed back to the dividend clerk

to be sent out, but, in addition, to take care of Mr. Bigelow's estate, of Mrs. Bigelow's estate, and attend to the other daily work concerning the transfer of certificates that come into the office. Now if you want me to hunt this up carefully, it is a physical impossibility for me to do it until after that. For instance, Mr. Ladd is
514 going away shortly, about the 1st of August, for a few weeks; Mr. Bigelow is going away and will not be back until September, which leaves me alone in the office there, and it will be impossible for me to take up this thing for more than a month.

Mr. BRANDEIS: Well, we must give you the time which you require to make the investigation thorough and complete so that when you come to testify you will be able to testify as to having made a thorough investigation.

Mr. LAUTERBACH: Will you limit the time as far as you can, as to dates? You have now made it from——

Mr. BRANDEIS: From July till October.

Mr. LAUTERBACH: Those are the dates you have fixed.

Mr. BRANDEIS: Well, Mr. Chrimes, we must recognize that you have this work to do and that you have to do it.

The WITNESS: There is nobody else to do it.

Mr. BRANDEIS: You go on and do it as fast as you can.

The WITNESS: It is a matter of business; it involves four thousand or five thousand different people.

Q. 154. Now, Mr. Chrimes, what have you had to do, if anything, in the way of the care of letter books and other papers in connection with Mr. Bigelow's office, relating to the Old Dominion Syndicate and the Old Dominion Copper Mining & Smelting Company?

A. Very little.

Q. 155. At the time the testimony of Mr. Bigelow was taken in this case, you will recall that you brought to our office, from the offices of Mr. Bigelow, these papers. What had you had to do with collecting the papers then?

A. Well, Mr. Bigelow, I believe, told me to get what Old Dominion letter books, papers, and so on that there were in the office, and to put them in piles, which I did. Then I was ordered to bring them down here, which I did; meantime they were kept in the safe in one particular place.

Q. 156. Where had they been before you collected them then?

A. Well, if I remember right, they were kept formerly in letter files in the general office in the Sears building.

Q. 157. Were they kept separate and apart from other papers?

A. Well, only so far as,—for instance, in a bookcase, Old Dominion might have had one and A. S. Bigelow might have another, and so on.

Q. 158. Did you find all of these at that time together?

A. I do not know; I do not remember.

515 Q. 159. Did you yourself at that time make any examination of these letters or papers?

A. I did not.

Q. 160. Who did make an examination of them after you had

collected, in a general way, all that you believed related to that matter?

A. Well, I should say possibly I did go through these letter books, I think, and put in these slips; I think I did put in these little slips.

Q. 161. Did you act under the instructions of Mr. Hyams in that?

A. I think I did.

Q. 162. Was it he or you who made the investigation at that time into all the papers there were relating to this case?

A. I think we did it together.

Q. 163. You worked with him?

A. Yes.

Mr. LAUTERBACH: That is after you requested us to go over them?

Q. 164. Well, do you recall whether or not the collection of the papers and investigation made by you was after you were requested, or Mr. Bigelow was requested, to appear and produce these papers for the purpose of an investigation?

A. I think it was.

Q. 165. Or did you make it earlier?

A. I think it was after the books had been here once.

Q. 166. That is, you did not make any investigation until the books were first produced by Mr. Bigelow?

A. Not that I remember.

Q. 167. Do you recall at any time of making specific search for a letter from Mr. Woodhull, dated August 7, 1895, to Mr. Bigelow?

A. I do not.

Q. 168. Or for the copy of a letter on August 8, from Mr. Bigelow to Mr. Woodhull?

A. No.

Q. 169. Will you now tell me, as well as you can remember, who were the boys or clerks who would have to do with the filing of the letters in 1895 in Mr. Bigelow's office?

A. I could not tell you; there have been so many in and out there since, I do not remember who was there then.

Q. 170. You do not remember who did the work of filing at that time?

A. I do not.

Q. 171. Are any of those who were there in 1895 there in the office now?

A. I should say not. There are only three boys there now and I think they were not there in 1895; but it was the boys' work to file letters in those years.

Q. 172. Who are the boys who are there now?

Mr. LAUTERBACH: They have become men since, I suppose.

516 A. I meant boys when I said "boys." There are three boys there now.

Q. 173. Let me put it in another way: Are there any men there now who were boys in the office in 1895?

A. Well, Mr. Brandeis, I will tell you who there were there in 1895, as far as I can remember; there were C. H. Bissell and J. H. Beal. You mean the clerks, of course, out in the general office?

Q. 174. Yes. Shepard was there?

A. Yes, but he is not there now. I think those are the only two who are there now in the office.

Q. 175. Who assisted you in getting the papers and books together at the time you collected them for Mr. Bigelow's deposition?

A. I think all hands did. I told the clerks to go to work on it to help me get them out.

Q. 176. Who were the ones who helped you?

A. I could not tell you.

Q. 177. You do not know who they were?

A. I do not know; probably Bissell.

Q. 178. What are the names of the boys or men, whoever they were, who might have helped you in the work of getting together the books and the papers?

A. I think Bissell may have been the most active.

Q. 179. Yes, but Beal may have helped you?

A. Yes.

Q. 180. Were not there any of the younger men who helped you?

A. I do not think so.

Q. 181. Do you know who the boys are now who are in subordinate positions who may have been there when you collected these books and papers?

A. There are only two men or two boys, call them what you will, who were in the office in 1895, besides myself; that is Mr. Bissell and Mr. Beal. I think the rest are all newcomers, and the others who were there before have passed out.

Q. 182. What I am referring now to is: I want to find out who the persons were, regardless of when they came into the office, who helped you at the time you collected these books and papers for Mr. Bigelow's deposition?

A. I do not think anybody did; possibly Mr. Hyams might have helped me, Mr. Bissell and Mr. Beal. I do not think of anybody else.

Q. 183. Have you here the letter books containing, or which are supposed to contain, the letters relating to the Old Dominion Syndicate, letters received by Mr. Bigelow?

A. I do not know. I have two or three letter books here, but what they contain I do not know.

Q. 184. Will you take these letter books now and make search in those letter books, and see whether you find in them a letter from Mr. Woodhull to Mr. Bigelow, under date of August 7, 1895?

517 Mr. LAUTERBACH: Mr. Hyams went all through that, you know; but, of course, you are entitled to inquire.

Mr. BRANDEIS: These letter books were not so arranged that there might not have been some error. Cross-examination, I suppose, of this witness will give us the information.

Mr. LAUTERBACH: Yes. And that being so, there will be no further witnesses to-day.

Mr. BRANDEIS: No.

Mr. LAUTERBACH: Then I might catch the 5 o'clock train?

Mr. BRANDEIS: Why, certainly.

A. [Having examined a letter book.] This book is up to December 23, 1895, and I do not find any such letter.

Q. 185. When does it begin?

A. I have been through book "No. 25 private, A. S. Bigelow," and find no such letter.

Q. 186. You mean you find no letter of Woodhull to Bigelow of August 7, 1895?

A. Yes.

Q. 187. Did you find in this letter book any letter from Woodhull dated August 7, 1895?

A. I think I did.

Q. 188. Was that letter addressed to some person other than Mr. Bigelow?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. It was.

Q. 189. Did that letter have any reference to the Old Dominion enterprise?

A. I did not read the letter, and therefore do not know.

Q. 190. Was the letter addressed to Thomas Nelson?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I do not know.

Q. 191. Do you mean to say that you did not make any investigation as to whom that letter was addressed to?

A. I mean I do not know whether it was addressed to Thomas Nelson personally, or to Thomas Nelson, treasurer; that is what I meant by my answer.

Q. 192. It was addressed to either Thomas Nelson personally, or to Thomas Nelson as treasurer?

518 [Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I think it was.

Q. 193. Thomas Nelson was treasurer of the Old Dominion Copper Mining & Smelting Company, was he not?

A. I think so.

Q. 194. Now will you produce that letter?

Mr. HEMENWAY: I prefer that Mr. Lauterbach should have an opportunity to make any objection that he wishes to make before the letter is produced.

Mr. BRANDEIS: You mean by that, Mr. Hemenway, that you decline to permit the letter to be produced at all, or merely that you desire to reserve all objections?

Mr. HEMENWAY: No, I say I will not produce it at this time.

Q. 195. Is it not a fact, Mr. Chrimes, that that letter contained a reference to 20,000 shares of treasury's stock?

[Counsel for defendants objects to the question as incompetent, irrelevant, and immaterial.]

A. I don't know, Mr. Brandeis; I did not read the letter.

Q. 196. Will you examine the letter and see whether or not it does not relate to the Old Dominion Syndicate, or to the Old Dominion Copper Mining & Smelting Company?

Mr. HEMENWAY: Until I have consulted with Mr. Lauterbach, I decline to submit the letter to the examination of the witness, at this time.

Q. 197. You stated that you found in the files letters from Mr. Woodhull, two on August 5, one on August 7, one on August 19; will you produce those letters?

A. By consent of counsel.

Mr. BRANDEIS: Do counsel consent to those letters being produced?

Mr. HEMENWAY: Not at the present time.

Mr. BRANDEIS: On what ground do you decline to have the letters produced?

Mr. HEMENWAY: Because the letters are incompetent, irrelevant, and immaterial; and also for the reason that Mr. Lauterbach is especially interested in this testimony, and that he ought to be allowed to see these letters before they are submittd to counsel on the other side or to the witness for production, these books not being in the custody of this witness. So far as any letters are addressed to Mr. Lewisohn or addressed to Mr. Bigelow, those I will produce,—written on those dates.

519 Q. 198. Is this book in which you found the letter from Mr. Woodhull dated August 7, 1895, to Thomas Nelson or to Thomas Nelson, treasurer, which I am asking you to produce and which Mr. Hemenway has refused to permit you to produce,—was this book containing that letter brought up by you to this examination as in response to the request to produce all letters and books relating to the Old Dominion matter?

A. I think it was.

Q. 199. Well, you know it was, don't you? That is one of the books which you physically brought in your bag to this office, is it not?

A. It was to-day, and I think it was on the other days.

Q. 200. It certainly was brought here to-day?

A. Yes, I brought it to-day.

Q. 201. And that same book was here when Mr. Bigelow was examined, was it not?

A. I believe so.

Q. 202. And that letter was in it at that time, was it not?

A. I do not know whether it was or not; I suppose it was.

Mr. HEMENWAY: I desire to state that the witness brought these books at my suggestion to this office for my use; that the notice was given to me requesting him to produce these books; that the witness does not produce them in accordance with that notice, but in accordance with my request, the books being the private books of Mr. Bigelow; and I do not feel authorized to submit any books or

papers that are absolutely incompetent, irrelevant, and immaterial at the present time,—in my opinion.

Mr. BRANDEIS: Do you claim this letter is absolutely immaterial and incompetent?

Mr. HEMENWAY: I do, at present.

Mr. BRANDEIS: Do you claim that it is the property of Mr. Bigelow?

Mr. HEMENWAY: I do not know.

Mr. BRANDEIS: It has been produced from Mr. Bigelow's possession, has it not?

Mr. HEMENWAY: It has not.

Mr. BRANDEIS: Where has this letter come from?

Mr. HEMENWAY: This letter was found in Mr. Bigelow's office and I decline to be further interrogated by counsel at this time.

Q. 203. I call your attention Int. No. 589 in the deposition of A. S. Bigelow and a conversation and remarks of counsel there following.

A. Are you talking to me?

Q. 204. Yes, I am calling your attention to this, as follows:—

520 "Will you make further search in your letter book for a copy of a letter of August 8, 1895, also for the original letter of August 7, 1895?

"Mr. LAUTERBACH: I think he has already made answer that he has made search and that he has no other letter.

"Mr. BRANDEIS: I still believe that the search is not complete.

"Mr. HEMENWAY: It is a matter that is not material.

"The WITNESS: How is the letter signed, Mr. Brandeis?

"Mr. LAUTERBACH: This is mythical."

I ask you now Mr. Chrimes, whether you made search at that time, when Mr. Bigelow was being examined, for a letter from Mr. Woodhull of August 7?

A. I do not know. I do not think so. I simply went through that letter book, and I do not think I searched for any particular letter.

Q. 205. Is that the letter book in which are contained the letters which were produced, having been received by Mr. Bigelow from Mr. Woodhull?

Mr. HEMENWAY: How does he know when he was not there at all?

A. I do not know.

Mr. HEMENWAY: And I further say that if you have any letter from Mr. Bigelow on August 8, 1895, we will admit it at once and avoid all this search and all these questions.

Mr. BRANDEIS: Well, we have here a letter of August 7 from Mr. Woodhull, which is apparently a letter of August 7, which we desire to get, and you do not admit it at once, on the contrary, after having received that letter, you have sedulously refused to admit it. That does not give promise of your admitting anything unless you are obliged to.

Mr. HEMENWAY: Your remarks are entirely unnecessary. The letters of Woodhull are not admissible against Mr. Bigelow or Mr. Lewisohn's representatives unless they were received by them and answered. You assume to have the answer by your course of conduct. We do not know of and have not found such an answer; if you have in your possession any letter written by Mr. Bigelow we will not put you to the trouble of proving it, but admit it forthwith; and my declining to admit Mr. Woodhull's letters to a third person in no way connected with Mr. Bigelow, as far as this suit is concerned, is not a warrant for saying that I will refuse to admit a letter . . . by Mr. Bigelow to Mr. Woodhull.

Mr. BRANDEIS: Do you now state, and wish the court to understand, that Thomas Nelson was in no way connected with
521 Mr. Bigelow in relation to the Old Dominion Syndicate, or the Old Dominion Copper Mining & Smelting Company, or in relation to the stock of the Old Dominion Copper Mining & Smelting Company which Mr. Bigelow and Mr. Lewisohn took and for which the Old Dominion Copper Mining & Smelting Company is now seeking redress in the court?

Mr. HEMENWAY: My statement is on record and I decline further discussion.

Mr. BRANDEIS: I call the attention of counsel for Mr. Bigelow and Mr. Lewisohn to the fact that Thomas Nelson was the treasurer of the Old Dominion Copper Mining & Smelting Company on August 7, 1895; that he was a director of the company; that he was associated with Mr. Bigelow, and that he received, as appears by the testimony of Mr. Bigelow and of Mr. Hyams, 1240 out of 50,000 shares of stock which are the subject of this suit and of the other suits brought against Bigelow and the Lewisohn estate for the recovery of stock wrongfully taken by the promoters, and again ask Mr. Hemenway whether he desires the court to understand that a letter addressed by Mr. Woodhull, a subscriber to the syndicate and to the treasury stock, and relating to the treasury stock, is a matter which is incompetent, irrelevant, and immaterial?

Mr. HEMENWAY: I fail to see how a statement which is made by counsel can in any way make these declarations of Mr. Woodhull, either in writing or orally, admissible in this case.

Mr. BRANDEIS: I will put one more question in relation to the search:

Q. 206. When you make that search for letters in the letter books connected with the Bigelow offices, referred to in Int. 153, will you also search for any letter or letters under date of August 8, 1895, addressed to Mr. Woodhull, signed by any one, either in the name of Mr. Bigelow or any other name, relating to the Old Dominion Syndicate, or the Old Dominion Copper Mining & Smelting Company, or which appear to be in answer to any letter of Woodhull to Thomas Nelson or to Thomas Nelson, Treasurer, dated August 7, 1895, which you have seen to-day in your examination here, which Mr. Hemenway has declined to permit you to produce?

A. I will.

Mr. BRANDEIS: I further request that this letter being written and addressed to Thomas Nelson, treasurer, should be delivered to the present officers of the Old Dominion Copper Mining & Smelting Company, or to us, as its counsel, and herewith demand the delivery of that letter as being the property of the company and not the property of Mr. Bigelow or of any one whom Mr. Hemenway is authorized to represent. Have you anything to say to that,
522 Mr. Hemenway?

[Mr. Hemenway makes no reply and Mr. Brandeis requests the stenographer to read the demand to Mr. Hemenway.]

[The last preceding paragraph of this record was read by the stenographer.]

Mr. BRANDEIS: Mr. Brandeis further calls Mr. Hemenway's attention to the fact that the letter which he demands, as above stated, is a letter of Woodhull to Nelson, dated August 7, 1895, as to which Mr. Chrimes has just testified.

Q. 207. Mr. Chrimes, Mr. Nelson is dead, is he not?
A. He is.
Q. 208. How long has he been dead?
A. I do not know.
Q. 209. Well, about how many years?
A. I should say about seven; I do not remember the date, Mr. Brandeis, any nearer than that; I think about seven years.

[The further examination of Mr. Chrimes was postponed to a date not fixed.]

OFFICE OF BRANDEIS & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *October* 27, 1905.

[The taking of the deposition of Walter A. S. Chrimes was resumed, Mr. Brandeis continuing his direct examination.]

Q. 210. Will you now produce the letter of August 7 from Mr. Maxwell Woodhull to Mr. Nelson, which you found in the course of your examination of the letter book at your examination on July 19?
A. Shall I do it, Mr. Hemenway?

[At this point the examination of the witness was suspended for a short time, and upon being resumed Int. 210 and answer were read by the stenographer.]

Mr. HEMENWAY: Your answer to that may be—you have asked me the question—the letter is not in my possession.

THE WITNESS: I haven't the letter to produce, and therefore cannot produce it.

Mr. HEMENWAY: I have the letter in my possession on the table before me.

Mr. BRANDEIS: Mr. Hemenway, will you now produce that letter of August 7, 1895, so that I may put it in evidence?

Mr. HEMENWAY: The defendant produces the letter, but objects

to its admissibility, on the ground that it is incompetent, irrelevant, and immaterial, it being a letter written by Maxwell Woodhull to Thomas Nelson, Esq., neither Woodhull nor Nelson being
523 parties to this suit.

Mr. BRANDEIS: I offer in evidence the letter, subject, of course, to defendant's objection. The letter is as follows:

"The Aldine,

Spring Lake Beach, N. Jersey,

AUGUST 7*th*, 1895

Thomas Nelson, Esquire, Treasurer, &c., Old Dominion Syndicate, Boston, Mass.,

DEAR Mr. NELSON: I beg to acknowledge the receipt of your letter of the 6th of August, in which you say:

'We have changed our minds somewhat since then' (when I was last in Boston, August 1st) 'and have pretty much decided—in fact, I suppose we have decided, as it has been left to me to settle—to give up all our rights to the 20,000 shares which we subscribed for in the first place. Now, under these circumstances, I think it is only right to let you increase your subscription to the amount you had intended and requested. Will you please let me know how much that was as soon as possible, as I have to make up my mind about the allotment right off.'

I presume these 20,000 shares are the treasury shares intended to be sold to produce the necessary $500,000 of cash working capital. Is it not so?

In reply to your letter of the 6th I beg to say that I wished when in Boston to subscribe for six hundred shares (600) additional, and, therefore now subscribe firm for six hundred shares (600 shares) additional to my former subscription, to this issue of 20,000 shares of treasury stock of Old Dominion Syndicate stock. This subscription will give 1800 shares.

I am exceedingly sorry that I did not know of this arrangement on August 1st as I had my money arrangements then made to pay for the additional Old Dominion stock. On learning that the subscription was closed, I at once, i. e., before leaving Boston, last Thursday, bought 300 shares of Rock Island, and I have also bought 300 shares C. B. & Q. through Riggs & Co., taking out of my collateral with them my Old Dominion receipts in order to make said purchase. This purchase of 600 shares of R. R. stock within the past few days will make it necessary for me to have as much time as you can give me to arrange for the money to pay you for the six hundred shares of Old Dominion herein subscribed for.

I am going to Narragansett Pier on Thursday, August 15, whence, after settling my mother and sister for a few weeks' stay I
524 shall go West on my usual yearly trip. I shall probably have to run on to Boston to arrange money matters to pay for these new shares of Old Dominion, but don't want to do so before I go hence on the 15th of August for Narragansett Pier, as I should have so soon to retrace my steps.

Please therefore telegraph me tomorrow latest date at which payment on this six hundred share subscription, amounting to $15,000 can be made, and write me fully in the premises, by the same day's mail.

Please note the subscription of my young cousin, Mr. Oswald N. Cammann for (15) fifteen shares Old Dominion Syndicate. I presume that he can get this stock under the present issue.

When will the Old Dominion stock certificates be ready for issue? It's very difficult to do anything with the receipts in the way of collateral. It will be a decided convenience to have the certificates issued as soon as possible.

I am arranging all my money matters so that I can go West a little after the middle of the month. Can you tell me what Dividend Boston & Montana will pay in November? With the increased price of copper, I don't suppose there is any doubt about the December Tamarack dividend.

Very truly yours,

MAXWELL WOODHULL."

Q. 211. Have you found, Mr. Chrimes, a copy of the letter of August 8, addressed to Mr. Woodhull, which contains the reply to this letter of August 7?

A. No, sir.

Q. 212. Have you made any search for such letter?

A. I have.

Q. 213. Will you now describe in detail exactly what search you have made since your examination on July 19 for the letter or copy of the letter of August 8?

A. I will say, Mr. Brandeis, that my wife has been very sick all summer, and I took her away for a month to Europe. A copy of my testimony was given to me on the 4th of October, and, having been away a month, naturally I was busy, and I didn't get to work on it till the 10th of October. I made some notes as I went along, which I have here.

I commenced by numbering our various receptacles for books, and I numbered the different receptacles, and called them cases, from 1 to 6. I also numbered four safes, and called them 1, 2, 3, and 4. I began by counting the books in the different cases. I found 91 books in No. 1, and a miscellaneous lot of certificate books, but no letter books in No. 2 receptacle.

525 Q. 214. Were there any letter books in No. 1?

A. 91 of various kinds, mostly letter books; there were 91 books by count. In case No. 3 there were 207 books and letter books; in No. 4 there were 3 books; in No. 5 there were 50 books, and in No. 6 there were 38 books.

Q. 215. By "books" you mean letter books in each instance, I suppose?

A. Yes; letters copied and received.

Q. 216. Were all the books letter books?

A. No. Some were certificate books; there might have been one or two, or a dozen, but they were principally letter books, and they

concerned the Tamarack, the Tamarack agent's book, Kearsarge Mining Company books, Butte Water Company books, Tamarack-Osceola Manufacturing Company; Merced Gold Mining Company, Iroquois Copper Company, Lake Superior Smelting Company.

This is as of October 10. I searched Tamarack book No. 34 from July 1, 1895, to August 19, 1895, and found nothing. I also examined No. 35 Tamarack from September 2 to September 30. Those were both letter books in which were pasted letters received, and they contained nothing on the subject.

October 10. Examined No. 12, letters received, Tamarack-Osceola Copper Manufacturing Company, from July, 1895, to September, 1895, and found nothing.

October 10. Examined Merced No. 2, July, 1895, to September, 1895; found nothing. "Examined books between above dates as fast as found"—that is the note I made as I went along.

October 10. Examined No. 11, Tamarack letters received July to September, 1895. Letters to Woodhull April to October, 1895, pp. 187, 218, 233, 361, 387, 521, 711. Found an extra unnumbered page between 523 and 524, which had been numbered 523½. Nothing concerning O. D. in any of above letters for Woodhull. Spent two and a half hours to-day in research.

The next day is October 12. Continued search of books in case No. 1. Examined Butte Water book, letters received, No. C, between July and September, 1895; found nothing. Examined clerk Tamarack No. 2, July to September, 1895; found nothing. Examined Merced No. 1, received July 1 to 13, 1895; found nothing. Examined Kearsarge No. 5, received; found nothing.

October 12. Examined Iroquois Copper Company, letters received, No. 1; nothing found. Spent about four hours to-day in research, particularly looking for a letter from Woodhull to A. S. Bigelow, dated August 7, 1895. Finished case No. 1.

The next date is October 13. Began on case No. 2; mostly old certificate books; nothing bearing on the subject.

Began on case No. 3,—contains Laurium, Dollar Bay,
526 Hancock & Calumet Railroad, Albany & Boston, Osceola, Beaver Mining Company, Detroit & Lake Superior Copper Company. Examined Osceola, letters received, No. 13, and Osceola received, No. 14, July to September, 1895; found nothing. Examined Osceola clerk's, No. 10; found nothing between July and September. Examined Iroquois letters; no number on book; contained copies of letters July to September, 1895; found nothing.

October 13. Still working on case No. 3. Examined agent Kearsarge No. 2, July to September, 1895; found nothing. Examined clerk's No. 2, Kearsarge, July to September, 1895; found nothing. Examined Tamarack, Nos. 30 and 31, letters received; found nothing. Examined Tamarack Junior, letters copied, No. 2. Letters to Woodhull on pages 217 and 378, the first being date November 6, 1891, signed by A. S. Bigelow, president; the second being dated January 23, 1893, from T. Nelson. Found nothing from June 28, 1895, to September 5, 1895. There were no pages missing, neither were there any insertions.

Working on case No. 3. Examined letters copied, No. 14, Osceola, June 29, 1895, to September 3, 1895. No letters indexed to Woodhull, and none copied between June 29 and September 3, 1895. No pages missing and no insertions.

Finished with No. 3 and began work in safe No. 1. Didn't find any letter books dated July to September, 1895.

October 13. Began work in safe No. 2; finished this safe. Didn't find any letter books bearing date July to September, 1895. Spent four hours to-day in research.

October 16. Search began with case No. 4; finished with No. 4; found nothing. Began on No. 5, between June 30, 1895, and September, 1895. Hulbert Mining Company, letters received, no number; found nothing. Letters received, letter A, Butte City Water Company, July 2, 1895, to September 3, 1895; nothing indexed to Woodhull between those two dates, and found nothing. No pages missing and no extra pages. In case No. 5 the books principally were letters received and copied, A. S. B., G. M. H., Tamarack-Osceola Manufacturing Company, advices of sales of wire, etc.; nothing found. Finished with No. 5.

October 16. Began on No. 6. Contains principally letters in files later than 1895, and also letters copied, Osceola, Tamarack, Isle Royale, Ahmeek, Butte Water, Merced, W. J. Ladd, Laurium, Seneca, Boston & Lake Superior Mineral Land Company, Kearsarge, and Lake Superior Smelting Company. Examined Lake Superior Smelting Company, July to September, 1895, letters copied, No. 1; nothing indexed to Woodhull; nothing missing nor inserted
527 between those dates. Examined letters copied, No. 3, Kearsarge; nothing indexed to Woodhull in book, and no letters copied between above dates.

October 16. Still on No. 6. Examined letters copied, No. 2, Tamarack-Osceola Copper Manufacturing Company; nothing indexed to Woodhull. Page 551, letter of G. Stellway, treasurer, to W. H. Rowe, dated August 29, 1895, had been torn out and pasted in between pages 549 and 550. Found nothing relating to Old Dominion. Examined letters copied, Dollar Bay Land & Improvement Company; back binding of this book had been removed; found nothing in relation to Woodhull between July and September.

Examined letters copied Boston & Lake Superior Mineral Land Company, without number; nothing found between July and September.

Still on No. 6, October 16. Examined Merced letters copied; back binding of book removed. Found letters indexed to Woodhull on pages 25, 27, 53, 131, 195, 255, 296, 361, 411, 580, 589, 634, 638, 641 660, 666. The only letter to Woodhull between July 1 and September 4, 1895, was one dated August 6, 1895, signed "Thomas Nelson, by Bissell." This letter was marked "Cancelled" in two places across the face, and had not been indexed, and appeared on page 374. There were no pages missing and no insertion between above dates.

October 16. Still on No. 6. Found nothing further, and finished with No. 6. Examined vault in 311; nothing bearing on subject there. Examined vault in 309; nothing bearing on subject here

excepting books which had been brought to the hearings. Spent about four hours in research to-day, and I have made a note at the bottom: "I can think of no other receptacle for books, and therefore discontinue my search."

Q. 217. Do you wish to be understood as saying that you have examined all of the books that are in the Bigelow offices, or the offices of the companies with which Mr. Bigelow is connected, which cover the year 1895?

A. I have done so.

Q. 218. And that you have examined all of those books specifically to see what letters there were between July, and October 1 to Maxwell Woodhull?

A. I have examined all the books in that office.

Q. 219. Do you wish to be understood as testifying that the only copy of any letter that was sent to Maxwell Woodhull that you found, during that period, was this letter of August 6, 1895, signed "Thomas Nelson, by Bissell," and which you said was marked "Cancelled"?

A. During that search, yes.

Q. 220. What do you mean by saying "During that search"?

A. During the search which I have referred to in these notes.

528 Q. 221. What other letters have you found at any other time than during this recent search?

A. Have you any reference to the letters which were found in these books here?

Q. 222. You mean by that the books which have been previously introduced in evidence?

A. I will state that I haven't touched those books since we left here.

Q. 223. When you say that you haven't touched those books since you left here, you refer to letter-press copy books marked "A. S. B. letters 4," and "A. S. B. private letters 6," now shown you?

A. I refer to the letter books which have been brought here to-day; those are a part of them, I suppose.

Q. 224. There is another letter book here marked on the back "Merced;" do you refer, also, to that letter book?

A. That is one that contains the letter which is marked "Cancelled," that I referred to in my notes.

Q. 225. Was that letter of August 6, which you say was marked "Cancelled," the only letter in the letter book marked "Merced," which you have now before you, that is addressed to Mr. Woodhull?

A. That is the only letter to Woodhull that I found relating to Old Dominion in that book.

Q. 226. Were those marks in the book now before you put in by you,—the papers marking places, were they put in by you?

A. The only mark which I put in is this mark which is beside page 374, where the letter to Woodhull is.

Q. 227. Will you now turn to that letter to Woodhull of August 6, and show me the letter?

A. Certainly.

[Counsel for defendant objects to the showing of the letter to counsel, but as a matter of courtesy allows him to inspect it.]

Mr. BRANDEIS: I offer that letter in evidence.

[Counsel for defendant objects to the admissibility of the letter as incompetent, irrelevant, and immaterial, being correspondence between other parties than parties to the suit.]

Mr. BRANDEIS: The letter is as follows:—

"BOSTON, MASS., *August 6th*, 1895.

Maxwell Woodhull, Esq., The Aldine, Spring Lake Beach, New Jersey.

MY DEAR SIR: I remember you wished to increase your subscription to the Old Dominion, over and above what you
529 had a right to take from your original subscription, and, if I remember rightly, we told you that we could not allow you to do it as there would not be any stock to divide up.

We have changed our minds since then and have pretty much decided,—in fact, I suppose we have decided, as it has been left to me to settle,—to give up all our rights to the 20,000 shares which we subscribed for in the first place. Now, under these circumstances, I think it is only right to let you increase your subscription to the amount that you had intended and requested. Will you please let me know how much that was as soon as possible, as I have to make up my mind about the allotment right off.

Yours very truly,

THOMAS NELSON,
By BISSELL."

[Across the face of the letter is written "Cancelled" "Cancelled."]

Q. 228. Is this Merced letter book indexed?

A. Yes.

Q. 229. This letter of August 6 is on page 374?

A. Yes.

Q. 230. On what page is the next letter to Mr. Woodhull?

[Objected to as immaterial.]

A. By the index it is 411.

Q. 231. What is the date of that next letter?

A. July 8, 1896.

Q. 232. What search did you make, prior to October 10, for letters bearing in any way upon this controversy?

A. No search excepting that which we made at the last hearing.

Q. 233. You mean at the hearing on July 19?

A. Yes.

Q. 234. When you were examined?

A. Yes.

Q. 235. Hadn't you, previous to that time, made an examination, either alone or in connection with some other person, of the books and papers relating to Old Dominion Syndicate or Old Dominion Copper Mining & Smelting Company matters?

A. I don't know as I made any examination of any papers.

Q. 236. Did you have anything to do with any papers; and if so, what,—or books, of course?

A. I think there was a search made for some letters, and I believe I assisted in putting some of those papers in at those various pages; what they were I am unable to say.

Q. 237. Did you make that examination alone or in connection with some other person?

A. I believe Mr. Hyams and I did that together.

530 Q. 238. When did you do it?

A. A short time after we were asked to produce these books, I believe; soon after this suit was started.

Q. 239. Did you at that time examine any letter-press copy book except those marked "A. S. B., No. 6, private," and "A. S. B., letters 4"?

A. Did I look at any others?

Q. 240. Yes, at that time.

A. No, I don't think I did.

Q. 241. Why not?

A. I don't know why I didn't.

Q. 242. Why did you select those books for your examination?

A. Which? Those which are on the table now?

Q. 243. The letter-press copy book marked "A. S. B., 4," and the letter-press copy book marked "A. S. B., private No. 6."

A. I don't think I had any hand in the selection of them.

Q. 244. Who did select those books for examination?

A. I don't know.

Q. 245. By whom were they handed to you for examination?

A. My recollection is that they were never handed to me.

Q. 246. Where did you get them?

A. I believe they were on a table in Mr. Bigelow's office; I believe we went through them there.

Q. 247. You were invited by Mr. Hyams to go through them with him?

A. Either Mr. Hyams or Mr. Bigelow, I don't know which.

Q. 248. And those are the only letter-press copy books that you had examined prior to October 10?

A. I think so; I don't remember any others.

Q. 249. Now were there among the books which you examined on October 10 and subsequently, any letter books of Thomas Nelson?

A. I don't remember seeing a letter book of Thomas Nelson in any of those cases. I believe I made a note of every book that there was in those cases as I went along.

Q. 250. Do you recall that Thomas Nelson had any letter book, or used any book for making copies of letters written by him, other than the books in the office which you examined October 10 and subsequently, and these two letter books marked "A. S. B. No. 4" and "A. S. B. private No. 6," covering this period of 1895?

A. I know that years ago he had a private letter book, of course.

Q. 251. What has become of that private letter book?

A. How do I know? Mr. Nelson has been dead for seven or eight years, and I presume the executors of his estate took those things which belonged to him which were in the office.

Q. 252. You have no knowledge on that subject?

A. No.

Q. 253. So far as you know, the letter book has not been removed from the office since this suit was begun?

531 A. I have not seen the letter book. I don't know anything about whether it was removed since, or before, or whether the executors took it when he died. I have no knowledge whatever of Thomas Nelson's private letter book, in relation to its removal.

Q. 254. When did you last see it, so far as you can remember?

A. I don't know; I haven't any idea.

Q. 255. I show you now a printed circular marked "Exhibit 6, Oct. 11, 1904," which is a paper put in evidence in connection with the deposition of Mr. Charles H. Altmiller, and ask you whether you recall that circular, or the circular of which that is a sample?

[Objected to as immaterial.]

A. I do not, Mr. Brandeis.

Q. 256. Do you see anything on that circular which is in your handwriting?

A. Why, yes.

Q. 257. What?

A. That writing and that writing, and that and that.

Q. 258. Will you read the words that are in your handwriting?

A. "Mr. Nelson said call this unsold."

Q. 259. That is written in red ink?

A. Written in red ink: "100," "$2500," "Are now ready."

Q. 260. What else?

A. "O. N. Pierce, Grinnell Mfg. Co., New Bedford, Mass."

Q. 261. That circular was made out by you originally—the blank was filled in by you, was it not?

A. Yes.

Q. 262. And subsequently the words, "Mr. Nelson said call this unsold," were written by you, and was recording the statement made by Mr. Nelson to you and the instructions which he gave you?

A. I presume so.

Q. 263. Do you know Mr. O. N. Pierce?

A. I do not.

Q. 264. Or his handwriting?

A. I do not.

Q. 265. Do you recall whether you filled out blanks in the other circulars which were sent out in that form to subscribers to stock in the Old Dominion Copper Mining & Smelting Company?

A. I do not remember.

Q. 266. Was that a part of your duty at that time?

A. I think it may have been.

Q. 267. You think it was, do you not?
A. I cannot say. In other words, I don't know whether I worked alone on those or not, Mr. Brandeis.
532 Q. 268. That is, either you alone, or you in connection with somebody else, sent out these notices?
A. Yes.
Q. 269. Of which that is a sample,—notices to subscribers, of which that is a sample?
A. Yes.
Q. 270. Who was the other person, or persons, who worked with you, if you didn't do it alone?
A. I think likely Mr. Bissell did.
Q. 271. I wish to ask you now as to whether or not you know of the deaths of certain persons who have appeared on this list as subscribers to the syndicate or to the stock. J. O. Weatherbee?
A. Dead.
Q. 272. Do you know about when he died?
A. I should say about two years ago.
Q. 273. W. W. Grout?
A. General Grout is dead; he died at least four years ago.
Q. 274. Horace Stevens?
A. Horace Stevens is dead. I should say he died two years ago.
Q. 275. R. C. Billings?
A. Robert C. Billings died three years ago.
Q. 276. R. M. Field?
A. Field died about four years ago, at least.
Q. 277. Isaac Fenno?
A. Isaac Fenno has been dead for five years, I should say.
Q. 278. Gordon Prince?
A. Gordon Prince has been dead four or five years.
Q. 279. Joseph Rechert?
A. Five or six years.
Q. 280. George H. Ball?
A. Less than two years.
Q. 281. H. C. Moses?
A. I don't know whether he is dead or not.
Q. 282. Moses T. Stevens?
A. I don't know whether he is dead or not.
Q. 283. Samuel S. Stevens?
A. I don't know whether he is dead or not.
Q. 284. W. A. Tower?
A. I don't know him.
Q. 285. Of Tower, Giddings,—Col. W. A. Tower. Henry Woods?
A. He has been dead about three years, I should say.

[This deposition is kept open for cross-examination, or for any further examination by plaintiffs, if, after it is written out, plaintiffs wish to put additional questions.]

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

533 OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *October* 27, 1905.

Deposition of Henry Wood.

HENRY WOOD, being first duly sworn by Howland Twombly, Esq., is answer to interrogatories propounded by Louis D. Brandeis, counsel for the plaintiff, deposes and says,—

Q. 1. State your full name, residence, and occupation.

A. Henry Wood; Cambridge; literary work; I am an author.

Q. 2. What was your occupation in 1895?

A. The same.

Q. 3. I show you a paper marked "Exhibit 10, March 27, 1903," being a paper attached to the deposition of A. S. Bigelow in this cause, the paper itself being dated July 18, 1895, and purporting to be a subscription for the stock of the Old Dominion Mining & Smelting Company, and call your attention particularly to the name "Henry Wood one hundred shares (100)" on that paper, and ask you whether that is your signature?

A. Yes, sir.

Q. 4. Where did you write your name and the subscription?

[Objected to as immaterial.]

A. I think that was at Mr. Bigelow's office; that is my recollection.

Q. 5. In the Sears building?

A. Yes, sir.

Q. 6. Did you subsequently take the one hundred shares of the stock for which you subscribed?

[Objected to as incompetent, irrelevant, and immaterial.]

A. Yes, sir.

Q. 7. How was the payment for that stock made; whether by check or in cash?

[Objected to as incompetent, immaterial, and irrelevant.]

A. One check for five hundred and one for two thousand.

Q. 8. Are the two canceled checks now shown you the checks which you gave, to which you have just referred?

[Objected to as incompetent, immaterial, and irrelevant.]

A. These are the checks.

Mr. BRANDEIS: I now introduce in evidence these checks and read them into the record as follows:

534 [Objected to as incompetent, immaterial, and irrelevant.]

"$500. SEPTEMBER 17, 1895.

Boston Safe Deposit & Trust Co.

Pay to the order of Thomas Nelson, Treasurer, Five hundred dollars.
No. 807. HENRY WOOD."

It is endorsed: "For deposit only to account of Old Dominion Copper Mining & Smelting Co., P. K. Dumaresq, Assistant Treasurer." It is marked "Paid, Boston Safe Deposit & Trust Co."

"$2,000. SEPTEMBER 21, 1895.

Boston Safe Deposit & Trust Co.

Pay to order of Thomas Nelson, Treasurer, Two thousand dollars.
No. 809. HENRY WOOD."

This checks is endorsed: "For deposit only to account of Old Dominion Copper Mining & Trust Co., P. K. Dumaresq, Assistant Treasurer," and is marked "Paid," and canceled.

Q. 9. I show you now what purports to be a letter from you, dated September 17, 1895, addressed to Thomas Nelson, treasurer, and ask you whether that letter is in your handwriting?
A. It is; yes, sir.
Q. 10. The whole of it?
A. Yes, sir; written from Wentworth Hall, Jackson, N. H.
Q. 11. Will you read that letter in evidence?

[Objected to as immaterial, irrelevant, and incompetent.]

A. [Reading:]

"WENTWORTH HALL, JACKSON, N. H.,
September 17, 1895.

Thomas Nelson, Treasurer.

DEAR SIR: I enclose check for $500 towards the 100 shares of Old Dominion subscribed for by me. I expect to return to the city on Friday and will call on Saturday and pay the balance and get the certificates.

Yours truly,
HENRY WOOD,
Of The Warren, Roxbury."

535 I lived in Roxbury at that time; I moved to Cambridge five years ago.
Q. 12. You did subsequently secure the certificate?
A. Yes, sir.
Q. 13. I now hand you certificate No. A17 for 100 shares of Old Dominion Copper Mining & Smelting Company's stock, standing in the name of Henry Wood, the certificate being dated September 19, 1895, and ask you whether that is the certificate that you received?

[Objected to as incompetent, immaterial, and irrelevant.]

A. It is the original certificate.

Q. 14. And that is your endorsement on the certificate?

A. Yes, sir.

Q. 15. Did you, prior to subscribing for that stock, have any conversation with Mr. Bigelow or Mr. Lewisohn in relation to your subscription?

A. I don't think I ever met Mr. Lewisohn. I think I had a little conversation with Mr. Bigelow, naturally. As to the details of that conversation, I don't remember much

Q. 16. Were you acquainted with Mr. Bigelow before you made that subscription?

A. Somewhat, yes, sir; I met him a few times.

Q. 17. Whether or not, before making the subscription, Mr. Bigelow stated to you anything as to his, or his and Mr. Lewisohn's, or his and his associates, purporting to take a block of this stock, 50,000 shares, or any number of shares of this stock, as compensation for their services or otherwise in getting up the company?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I don't think I inquired especially about the inside matters of the company. I bought the stock, thinking it was a good investment, on general principles, and I had had stock in Mr. Bigelow's companies before. If I did, I have no recollection of finding out the inside details or history of that stock; I have no recollection of it now.

Q. 18. Did you at any time hear that Mr. Bigelow and Mr. Lewisohn and his associates had taken a large block of this stock for themselves?

[Objected to as incompetent, immaterial, irrelevant, and leading.]

A. Do you mean previous to the subscription?

Q. 19. Yes, first, whether previous to the subscription?

A. No; I have no recollection of knowing about it previous to the subscription.

Q. 20. Did you at any time subsequent to the subscription hear anything to that effect?

[Objected to as incompetent, irrelevant, and immaterial.]

536 A. More recently from the papers and general notoriety; of course, I have heard of this difficulty, but not being interested in the company at present, I haven't looked into it at all, only in a very general way.

Q. 21. Then you first heard anything to that effect since you ceased to be interested in the company?

A. Yes, sir, so far as I remember.

Q. 22. When did you cease to be interested in the company?

A. In 1891 I sold the last share of stock I had.

[No cross-examination.]

[It is agreed that the original checks may be returned to Mr. Wood, and they are returned to him.]

Subscribed and sworn to before me this — day of November, 1905.

——— ———,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *October* 27, 1905.

Deposition of Stephen M. Crosby.

STEPHEN M. CROSBY, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by Louis D. Brandeis, counsel for the plaintiff, deposes and says,—

Q. 1. State your full name, residence, and occupation?

A. Stephen M. Crosby; 364 Marlborough street, Boston; no occupation.

Q. 2. What was your occupation in 1895?

A. I was president of the Massachusetts Loan & Trust Company.

Q. 3. And had been before that?

A. For several years; yes, sir.

Q. 4. When did you cease to be president of that company?

A. I am nominally still president, because the organization is kept alive, but I am not in any active management of matters.

537 Q. 5. I show you a paper marked "Exhibit 3, March 24, 1903," being an exhibit put in evidence in connection with the testimony of A. S. Bigelow in this cause, the paper being dated May 21, 1895, and call your attention to the words and figures on that paper, "Stephen M. Crosby $10,000:" is that in your handwriting?"

[Objected to as immaterial.]

A. It seems to have been originally different. That is my signature, but as to the amount against it, I don't know anything about that.

Q. 6. That is, you mean by that to say you don't know whether the figures, $10,000, are in your handwriting or not?

A. I think they are not. My signature and handwriting is $20,000.

Q. 7. I call your attention now to another paper, marked "Exhibit 5, March 24, 1903," being an exhibit put in evidence with the deposition of A. S. Bigelow in this cause, and which exhibit is dated June 14, 1895, and call your attention again to the name and words "Stephen M. Crosby, Ten thousand dollars," and ask you whether that is in your handwriting?

[Objected to as immaterial.]

A. It is.

Q. 8. All of it?

A. It is all of it in my handwriting, yes.

Q. 9. Did you subsequently make the payment in pursuance of that subscription?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I did.

Q. 10. Are you able to state what payments you made?

A. I haven't any list of them nor any checks.

Q. 11. Did you receive the certificate or certificates for stock in the company in pursuance to this subscription?

[Objected to as immaterial, incompetent, and irrelevant.]

A. I did; yes, sir.

Q. 12. I now show you certificate No. 213, for 1600 shares of stock in the name of Stephen M. Crosby, and ask you whether that is a certificate of stock received by you in pursuance of that subscription?

[Objected to as immaterial.]

A. It is.

538 Q. 13. And is the endorsement, "Stephen M. Crosby," in your handwriting?

A. It is.

Q. 14. And the date, September 30?

A. It is.

Q. 15. Referring now to the subscription paper bearing date May 21, 1895, the earlier of the two subscription papers, being Exhibit 3, are you able to state where you signed that paper?

[Objected to as immaterial.]

A. I have no distinct recollection where that was signed.

Q. 16. Do you remember whether or not, prior to signing that paper, you had any conversation with Mr. Bigelow or Mr. Lewisohn in relation to your subscription to the enterprise?

[Objected to as incompetent, irrelevant, and immaterial.]

A. No, I have no recollection.

Q. 17. Referring now to the other subscription paper, marked "Exhibit 5," which was referred to as being of date of June 14, 1895, I ask you whether you recall where, or under what circumstances, you signed that second subscription paper?

[Objected to as immaterial, incompetent, and irrelevant.]

A. No, none whatever.

Q. 18. Do you remember whether or not, prior to the signing of that second paper, you had any conversation with Mr. Bigelow or Mr. Lewisohn in relation to the enterprise?

[Objected to as incompetent, irrelevant, and immaterial.]

A. No, I have no distinct recollection at all.

Q. 19. Did Mr. Lewisohn or Mr. Bigelow, at any time prior to

the signing of either of those papers, say anything about their purposing to take 50,000 shares, or any number of shares, of the stock of this company as compensation for their services in promoting the syndicate or promoting the company, or anything to that effect?

[Objected to as incompetent, irrelevant, and immaterial.]

A. No; I have no recollection of any such statement.

Q. 20. Did any such information come to you from any source prior to your signing either of those subscription papers?

539 [Objected to as incompetent, immaterial, and irrelevant.]

A. No.

Q. 21. Did any such information come to you from Mr. Lewisohn or Mr. Bigelow, or any other source prior to your paying the money under these subscriptions?

[Objected to as incompetent and immaterial.]

A. No.

Q. 22. Did any such information come to you from Mr. Lewisohn or Mr. Bigelow, or any other source prior to your receiving the certificate for the stock in the company?

[Objected to as incompetent, irrelevant, and immaterial.]

A. No.

Q. 23. Has any such information come to you at any time since?

A. Yes.

Q. 4. When?

[Objected to as immaterial.]

A. I should think some two or three years ago. I think I heard it first from Mr. Smith, who had then become president of the Old Dominion Copper Mining & Smelting Company.

[The answer is objected to as being mere hearsay.]

Q. 25. You were personally acquainted with Mr. Bigelow?

A. Yes.

Q. 26. Met him from time to time?

A. Yes.

Q. 27. Both before and after the subscription and the payment of the money and the receipt of the certificate?

A. Yes.

[No cross-examination.]

Subscribed and sworn to before me this — day of November, 1905.

_____,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

540 OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *October* 27, 1905.

Deposition of Edwin M. Dodd.

EDWIN M. DODD, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by Louis D. Brandeis, counsel for the plaintiff, deposes and says:

Q. 1. State your full name, residence, and occupation.

A. Edwin M. Dodd; wool broker; present residence at Hotel Charlesgate; permanent residence, Providence.

Q. 2. What was your residence and occupation in 1895?

A. Residence at Providence, and occupation the same.

Q. 3. I hand you herewith a paper marked "Exhibit 10, March 27, 1903," being an exhibit put in evidence in connection with the testimony of A. S. Bigelow in this cause, being a subscription paper dated July 18, 1895, for stock of the Old Dominion Copper Mining & Smelting Company at $25 a share, and call your attention specifically to the name and words and figures, "Edw. M. Dodd, by Matthew Luce, fifty (50) shares," and ask you whether you are the Edwin M. Dodd referred to in that subscription?

A. I am, yes.

Q. 4. And did Mr. Luce make that subscription on your behalf with your authority?

[Objected to as immaterial.]

A. He made a subscription by my authority.

Q. 5. For 50 shares; and you subsequently took and paid for the shares?

A. I subsequently took and paid for some shares. My papers are all in Providence and I couldn't be certain whether the number was 50; it probably was. It was a comparatively small number of shares I took and paid for.

[Objected to as immaterial and incompetent.]

Q. 6. I show you now a certificate of stock in the Old Dominion Copper Mining & Smelting Company marked "B No. 2," in the name of Edwin M. Dodd, dated September 19, 1895, for 50 shares, which certificate is endorsed "Edwin M. Dodd, September 27, 1895," and ask you whether that is the certificate which you received?

[Objected to as immaterial.]

541 A. That is my signature on the back of it, so it must be.

Q. 7. Did you, prior to the time of making that subscription, hear from Mr. Bigelow or Mr. Lewisohn, or from any other source, that they, or any of them, or their associates, were purposing to take 50,000 shares, or any number of the shares, of the stock in the company, or had taken any such shares in the stock of the company, as compensation for their services in forming the company or otherwise?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I did not.

Q. 8. Did you hear from Mr. Bigelow or Mr. Lewisohn, or from any other source, any such information at any time prior to the paying of the money under that subscription?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I did not.

Q. 9. Or at any time prior to your getting the certificate?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I did not.

Q. 10. Have you ever heard from Mr. Bigelow or Mr. Lewisohn any information to that effect?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I never have.

Q. 11. Have you heard from any source, since obtaining the certificate, that Mr. Bigelow, Mr. Lewisohn, and their associates had taken 50,000 shares, or any large number, or any shares, as compensation for their services, or alleged compensation for their services, in forming the syndicate or company, or in that connection?

[Objected to as incompetent, irrelevant, and immaterial.]

A. Not until within a week or ten days, when I first heard of this suit.

[No cross-examination.]

——— ———.

Subscribed and sworn to before me this — day of November, 1905.

——— ———,
Notary Public.

542 *Stipulation.*

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET, BOSTON, *October* 27, 1905.

Deposition of William A. Rust.

WILLIAM A. RUST, being first duly sworn by Howard Twombly, Esq., in answer to interrogatories propounded by Louis D. Brandeis, counsel for the plaintiff, deposes and says:

Q. 1. Please state your name, residence, and occupation.

A. William A. Rust; residence, at the present time, East Bridgewater; president Freemans National Bank.

Q. 2. Freemans National Bank of Boston?

A. Yes, sir, Freemans National Bank of Boston.

Q. 3. What was your occupation in 1895?

A. The same.

Q. 4. I call your attention to a paper marked "Exhibit 10, March 27, 1903," being a paper put in evidence as an exhibit in connection with the deposition of A. S. Bigelow in this cause, which paper itself is dated, Boston, July 18, 1895, and is an agreement to subscribe for stock of the Old Dominion Copper Mining & Smelting Company at $25 a share; and I call your attention particularly to the words and figures, "Nancy E. Rust, per W. A. R., forty shares (40)," and ask you whether that is in your handwriting?

A. Yes, sir.

Q. 5. And the "W. A. R." indicates who?

A. Myself.

Q. 6. And Nancy E. Rust is Mrs. Rust, your wife?

A. It was; she is not living.

Q. 7. Are you able to state where that paper was signed by you?

[Objected to as immaterial.]

A. I don't know, sir, where.

Q. 8. Was the stock subscribed for by you in Mrs. Rust's name taken and paid for?

[Objected to as immaterial.]

A. Yes, sir.

543 Q. 9. I show you now a certificate of the Old Dominion Copper Mining & Smelting Company, No. 247, for eighty shares, in the name of Nancy E. Rust, being a certificate dated September 27, 1895, and endorsed by Nancy E. Rust, witness, W. A. Rust, and ask you whether that is a certificate which you received in pursuance of that subscription?

A. I presume it must be; I don't know anything why it isn't. I don't recollect whether I bought any other or not, but I presume it is.

Q. 10. The endorsement is in Mrs. Rust's name?

A. Yes, sir.

Q. 11. And the witness is yours?

A. Yes, sir.

Q. 12. And that is your handwriting?

A. Yes, sir.

Q. 13. You were acquainted at the time of making that subscription with Mr. A. S. Bigelow?

A. Yes, sir.

Q. 14. Did you know Mr. Lewisohn?

A. No, sir.

Q. 15. Did you hear from Mr. Bigelow at any time, or from Mr. Lewisohn, or from any one associated with them, anything to the effect that Mr. Bigelow, Mr. Lewisohn, or they and their associates, or any of them, were purposing to take 50,000 shares, or any block

of this stock for their own services, or otherwise, in connection with the promotion of this enterprise?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I never did.

Q. 16. Did you have any such information from any source at any time prior to the paying in of the money?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I did not.

Q. 17. Or at any time prior to the receiving of the certificate?

[Objected to as incompetent and immaterial.]

A. No, sir.

Q. 18. Have you at any time since receiving the certificate had any information, or heard anything to that effect?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I have never known anything about it except what I have seen in the papers the last few days, and when your man came up to see me.

544 Q. 19. When did you first hear, so far as you know, anything to that effect?

[Objected to as immaterial.]

A. I saw in the paper that there was a suit commenced; that is the first I knew anything about it.

Q. 20. That was some two or three years ago?

A. Oh, no, sir. I didn't know it then; only lately.

Q. 21. Some months ago?

A. I should think it was a few weeks ago I saw it in the paper.

Q. 22. Do you refer to the report in the paper of the decision of our Supreme Court one day?

A. No; I don't know anything about any decision at all. I only saw by the paper something about a suit against Mr. Bigelow and Mr. Lewisohn; I don't know whether that has anything to do with this or not, but I supposed it was from what you said.

Q. 23. That was the first information you had from any source in regard to this matter?

A. Yes, sir; I didn't know anything about it at all.

[No cross-examination.]

——— ———.

Subscribed and sworn to before me this — day of November, 1905.

———,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET, BOSTON, *October* 27, 1905.

Deposition of Edwin C. Swift.

EDWIN C. SWIFT, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by Louis D. Brandeis, counsel for the plaintiff, deposes and says:

Q. 1. State your full name, residence, and occupation.

A. Edwin C. Swift; my residence is Beverly, Mass.; I am in the beef business.

545 Q. 2. What was your occupation in 1895?

A. The same.

Q. 3. I call your attention to a paper marked "Exhibit 6, March 24, 1903," being a paper put in evidence in connection with the deposition of Mr. A. S. Bigelow in this cause, and particularly to the words and figures, "E. C. Swift 10,000," signed to that paper, and ask you whether that signature is your handwriting?

[Objected to as immaterial.]

A. Yes, sir.

Q. 4. I call your attention also to a paper marked "Exhibit 10, March 27, 1903," being a paper put in evidence in connection with the deposition of A. S. Bigelow in this cause, which paper is dated Boston, July 18, 1895, and purports to be a subscription to the stock of the Old Dominion Copper Mining & Smelting Company at $25 a share, and call your attention particularly to the words and figures signed to that paper, "E. C. Swift, 1000," and ask whether that is in your handwriting?

A. Yes, sir.

Q. 5. I now show you a certificate in the Old Dominion Copper Mining & Smelting Company, dated September 19, 1895, No. 119, for 1000 shares in the name of E. C. Swift, and purporting to be endorsed "E. C. Swift," and ask you whether the endorsement is in your handwriting?

A. Yes, sir.

Q. 6. I also show you a certificate in the Old Dominion Copper Mining & Smelting Company for 800 shares, No. 248, in the name of E. C. Swift, dated September 27, 1895, and endorsed in the name of E. C. Swift, and ask you whether that endorsement is in your handwriting?

A. Yes, sir.

Q. 7. Did you pay for and take the stock coming to you under the two subscriptions which have been called to your attention?

[Objected to as immaterial.]

A. So far as I know; yes, I suppose I did.

Q. 8. And those two certificates which I have just shown you are the certificates which were delivered to you in pursuance of those subscriptions?

A. It appears so.

Q. 9. Were you, prior to the taking of the first of those subscriptions, acquainted with Mr. A. S. Bigelow?

A. Yes, sir.

Q. 10. And Mr. Lewisohn?

A. Well, I don't think so; I never met Mr. Lewisohn but once, and that wasn't on business—just happened to meet him, and was introduced to him.

546 Q. 11. Do you recall under what circumstances you made the first of those subscriptions?

A. No, sir; I do not.

Q. 12. Or under what circumstances you made the second of the subscriptions?

A. No, sir.

Q. 13. Nor where the paper was signed?

A. No, sir.

Q. 14. Did Mr. Bigelow, prior to your making the first of those subscriptions, say anything to you about its being the intention of himself and Mr. Lewisohn to take 50,000 shares, or any number of shares, of stock of this company as compensation for his services, or otherwise than as a subscriber?

[Objected to as immaterial and irrelevant.]

A. I have no memory of any such thing.

Q. 15. Was any such information given to you by Mr. Bigelow, or any one else, prior to your making the second subscription?

[Objected to as incompetent, immaterial and irrelevant.]

A. I have no memory of any thing of the kind.

Q. 16. Or prior to your paying in the money under either of those subscriptions?

[Objected to as incompetent and irrelevant.]

A. I have no memory of anything of the kind.

Q. 17. Did you, at any time subsequent to the paying in of the money and to the receiving of the certificates, hear from Mr. Bigelow, or from any other source, that Messrs. Bigelow and Lewisohn had taken 50,000 shares, or any large number of shares, of the stock in the company as alleged compensation for their services, or otherwise than as subscribers?

[Objected to as incompetent, immaterial and irrelevant.]

A. I have no memory on the subject.

Q. 18. I asked you whether you at any time had heard this?

[Objected to as immaterial.]

A. If I ever did, I don't remember it.

Q. 19. Have you heard anything recently, I mean? You have heard it talked of recently, haven't you?

547 [Objected to as incompetent, immaterial, and irrelevant.]

A. I haven't heard anything more than has been in the papers.

Q. 20. And that which has been in the papers is what you have

seen within the last two or three years, since Mr. Bigelow went out of the management?

A. I should think it was very recent.

Q. 21. I show you what purports to be a letter signed by E. C. Swift, under date of September 24, 1895, and ask you whether that is your signature?

A. Yes, sir.

Q. 22. Will you read that letter?

[Letter objected to as incompetent, immaterial, and irrelevant.]

A. [Reading:]

"SEPTEMBER 24, 1895.

Thomas Nelson, Esq.

DEAR SIR: I am in receipt of your favor of the 23rd acknowledging the receipt of check for $25,000, and handing me certificate for 1000 shares of Old Dominion Copper Mining & Smelting Company stock.

Yours truly,

E. C. SWIFT."

Q. 23. Have you the letter to which that refers, the letter from Mr. Nelson?

A. I have made diligent search for it, but have not been able to find anything.

Q. 24. I call your attention now to a letter in the letter press copy book of the Old Dominion Copper Mining & Smelting Company, purporting to be dated September 23, 1895, which letter reads as follows:

[The admission of this letter is objected to because it is incompetent, irrelevant, and immaterial, and as being correspondence between others than the parties to this suit.]

"E. C. Swift, Esq., Ames Bldg., Boston, Mass.

DEAR SIR: Your late favor covering check for $25,000 to pay for 1000 shares of stock of Old Dominion Copper Mining & Smelting Company was duly received. We enclose you herewith certificate No. 119 in your name for one thousand (1000) shares of this Company's stock. Please acknowledge receipt.

Yours truly,

THOMAS NELSON, *Treasurer*,
By BISSELL."

548 —and ask you whether that is the letter which your letter of the 24th acknowledges the receipt of?

A. I presume it is.

Q. 25. And certificate No. 119 for 1000 shares, shown you a few moments ago, is the certificate referred to in that letter, and which you then acknowledged the receipt of?

A. I presume so.

[No cross-examination.]

—— ——.

Subscribed and sworn to before me this — day of November, 1905.

——— ———,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically: also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *October* 27, 1905.

Deposition of David M. Anthony.

DAVID M. ANTHONY, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by Louis D. Brandeis, counsel for the plaintiff, deposes and says:

Q. 1. State your full name, residence, and occupation.
A. David M. Anthony; Fall River, Mass.; provision dealer.
Q. 2. What was your business in 1895?
A. Provision dealer.
Q. 3. I call your attention to a paper marked "Exhibit 6, March 24, 1903," being an exhibit put in evidence in connection with the deposition of A. S. Bigelow in this cause, the paper itself being dated 1895, purporting to be a subscription to a syndicate called "The Old Dominion Syndicate," and call your attention specifically to the words and figures, "D. M. Anthony, 5000," and ask you whether that is in your handwriting?
A. I should say it was.
Q. 4. And I will ask you in whose handwriting the name "Harold H. Anthony, 5000" is?
A. That is my son, and I should say that was my writing.
549 Q. 5. Do you recall under what circumstances and where your signature to that paper was given?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I could not bring it to mind at all.
Q. 6. Did you subsequently make payments and receive stock in pursuance of that subscription?

[Objected to as immaterial.]

A. I couldn't say from memory.
Q. 7. I show you now a certificate in the Old Dominion Copper Mining & Smelting Company, No. 86, for 200 shares, in the name of D. M. Anthony, the certificate being dated September 19, 1895, and purporting to be endorsed by D. M. Anthony, and ask you whether that is in your handwriting?
A. Yes, sir, I should say so.
Q. 8. And I also show you certificate No. 198, in the Old Dominion Copper Mining & Smelting Company, for 400 shares in the

name of D. M. Anthony, and purporting to be endorsed "D. M. Anthony," and ask you whether that is in your handwriting?

A. Yes, sir.

Q. 9. And were those certificates received by you in pursuance of your subscription to the syndicate or to the stock of that company?

A. Well, from the evidence here I should presume so; I couldn't say from memory. It has all passed from my memory.

Q. 10. I show you a letter dated October 2, 1895, purporting to come from the office of D. M. Anthony, wholesale provisions, 83 Davol street, Fall River, and ask you in whose handwriting that letter is?

A. That is my writing.

Q. 11. Will you read that letter, please?

[Objected to as incompetent, immaterial, and irrelevant.]

A. [Reading:]

"FALL RIVER, MASS., *October 2nd*, 1895.

Thomas Nelson, Esq., Treasurer.

DEAR SIR: Yours of October 1st containing check for $5000 to my order came to hand this a. m. Thanks for the same.

Very truly yours,

HAROLD H. ANTHONY."

550 Q. 12. I call your attention now to a letter under date of October 1, 1895, being a copy in the letter-press copy book of the Old Dominion Copper Mining & Smelting Company, and ask whether that is the letter to which the letter of October 2 refers?

[Objected to as incompetent, immaterial, and irrelevant, and as correspondence between parties other than parties to this suit.]

A. Yes.

Q. 13. Will you read that letter?

A. [Reading:]

"OCTOBER 1, 1895.

Harold H. Anthony, Esq., Box 13, Fall River, Mass.

DEAR SIR: Enclosed you should find check of the Old Dominion Copper Mining & Smelting Company to your order for $5,000. Please acknowledge receipt.

Yours truly,

THOMAS NELSON, *Treasurer.*
By BISSELL."

Q. 14. Were you, prior to the signing of that subscription paper, acquainted with Mr. A. S. Bigelow?

A. I don't think I was; I don't think I had ever met him at that time.

Q. 15. Did you, prior to signing that subscription paper, receive any information from him or Mr. Lewisohn, or from any other person that Messrs. Bigelow and Lewisohn and their associates, or

any of them, had taken, or purposed to take, 50,000 shares, or any number of shares, or any profits for promoting this Old Dominion Copper Mining & Smelting Company?

[Objected to as incompetent, immaterial, and irrelevant.]

A. No, sir; I have no recollection of it.

Q. 16. Did you get any such information from any source prior to the payment of the money under that subscription, or any of the money?

[Objected to as incompetent, immaterial, and irrelevant.]

A. No, sir.

Q. 17. Did you get any such information from any source prior to the receipt of the certificates of stock in the company?

551 [Objected to as immaterial, irrelevant, and incompetent.]

A. No, sir.

Q. 18. Have you, since the receipt of the certificates, received any information from any source that Messrs. Bigelow and Lewisohn and their associates had taken 50,000 shares, or a large block of the stock, on account of the promotion of the company, or otherwise, for their services?

[Objected to as incompetent and irrelevant.]

A. Nothing except what I have seen in the public prints recently, since this company came in possession.

Q. 19. You mean by that since the change of management from Mr. Bigelow?

A. Yes, sir.

Q. 20. And since Mr. Smith became president of the company?

A. Yes, sir. Perhaps I ought to say in this case of my son, that he was a minor at that time and I was his guardian, and this was really my transaction, although it was done in his name for certain purposes. That is merely an explanation.

[No cross-examination.]

____ ____.

Subscribed and sworn to before me this — day of November, 1905.

____ ____,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *October* 27, 1905.

Deposition of George Marshall Preston.

GEORGE MARSHALL PRESTON, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by Louis D. Brandeis, counsel for the plaintiff, deposes and says,—

Q. 1. State your full name, residence, and occupation.

A. George Marshall Preston; 91 Bedford street, Boston; dry-goods commission merchant.

552 Q. 2. You are of the firm of Faulkner, Page & Company?

A. Faulkner, Page & Company.

Q. 3. What was your occupation in 1895?

A. Just the same.

Q. 4. I show you a paper marked "Exhibit 4, March 24, 1903," being a paper introduced in evidence in connection with the deposition of Albert S. Bigelow in this cause, which paper itself is dated May 24, 1895, and is a subscription paper to the formation of the Old Dominion Syndicate, so called, and ask you whether you are the George M. Preston whose name is appended to that paper?

A. Well, all I can say is, I suppose so; I don't know of any other George M. Preston; but I don't know anything more than that. I don't know anything about it.

Q. 5. Will you look at certificate No. 242 in the Old Dominion Copper Mining & Smelting Company, for 400 shares in the name of George M. Preston, dated September 27, 1895, and, turning to the back of the certificate, purporting to be endorsed by George M. Preston?

A. That is my signature.

Q. 6. That is your signature?

A. Yes, sir, that is my handwriting in the date there. I filled that in. That is my handwriting, and that is my signature, but further than that I don't know anything about it.

Q. 7. The dating you refer to is the 21st of May?

A. Yes, I mean that date there, that is my handwriting, at the same time I signed that signature. That is all I can say.

Q. 8. You were acquainted with Matthew Luce?

A. Yes.

Q. 9. Did you, through Matthew Luce, subscribe for or take stock in the Old Dominion Copper Mining & Smelting Company?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I don't know.

Q. 10. Are you acquainted with Mr. Albert S. Bigelow?

A. Yes.

Q. 11. Were you prior to 1895?

A. Yes.

Q. 12. Were you well acquainted with Mr. Luce?

A. Oh, very.

Q. 13. Did Albert S. Bigelow, or Leonard Lewisohn, or any one else, so far as you can remember, inform you at any time prior to your endorsing that certificate No. 242, that Mr. Bigelow and Mr. Lewisohn, and their associates, had taken, or proposed to take, 50,000 shares, or any number of shares, of stock in this company as compensation, or on account of their having promoted it?

[Objected to as irrelevant, immaterial, and incompetent.]

553 A. No, sir.

Q. 14. Did you get any information prior to that time, in any way, to that effect, or any information relating to any profits which Messrs. Bigelow and Lewisohn, and their associates, purposed taking for themselves in this connection?

[Objected to as immaterial, incompetent, and irrelevant.]

A. Not that I remember. No, I will answer, no.

Q. 15. Did you, at any subsequent time, hear anything from Mr. Bigelow, or Mr. Lewisohn, or from any other source, as to their having taken 50,000 shares of stock, or any large number of shares or any special profits on account of their acting as promoters or otherwise in connection with this Old Dominion Copper Mining & Smelting Company?

[Objected to as immaterial and irrelevant and incompetent.]

A. No; I haven't heard anything.

Q. 16. Did you hear anything recently on the subject?

[Objected to as immaterial.]

A. Oh, yes, recently.

Q. 17. Then you meant you had not heard until recently?

A. No.

Q. 18. How far do you go back by the use of the word "recently"?

A. About the time that this matter came up; I don't know whether it was a year ago. It was since this matter was started, brought up, whatever it was.

Q. 19. That is, since this litigation was begun?

A. Yes, since this litigation was begun. I don't remember hearing anything before.

[No cross-examination.]

——— ———.

Subscribed and sworn to before me this — day of November, 1905.

——— ———,

Notary Public.

554 *Stipulation.*

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

OFFICE OF BRANDEIS, DUNBAR & NUTTER,
161 DEVONSHIRE STREET,
BOSTON, *October* 27, 1905.

Deposition of James F. Ormand.

JAMES F. ORMAND, being first duly sworn by Howland Twombly, Esq., in answer to interrogatories propounded by Louis D. Brandeis, counsel for the plaintiff, deposes and says:—

Q. 1. State your full name, Mr. Ormand.
A. James F. Ormand.
Q. 2. Your residence?
A. 1087 Boylston street, now. I have been living in Brookline and have moved into town.
Q. 3. Your occupation?
A. Carriages and carriage man, corner Beacon street and Tremont and the Hotel Bellevue.
Q. 4. What was your occupation in 1895?
A. The same thing.
Q. 5. Did you, in 1895, and prior to that time, know Mr. A. S. Bigelow?
A. I have known him since he was a child.
Q. 6. Did you subscribe for certain stock of the Old Dominion Copper Mining & Smelting Company?
A. I don't remember; if I did it couldn't have been for a great deal.
Q. 7. Do you recall whether or not you subscribed for 50 shares of stock in that company, or any small amount of stock in that company?

[Objected to as immaterial]

A. I may, but I don't remember. I wouldn't be apt to remember.
Q. 8. Have you absolutely no recollection?
A. No, none whatever.
Q. 9. As to whether you subscribed for the stock?
A. I don't think so. I might have bought some for a flyer, or something of that sort, and sold it again, but I don't think I ever did. I may have, too, but I don't think so.

[The examination of the witness is suspended while search is made for his certificate.]

555 *Depositions of Witnesses Taken at St. Johnsbury in the State of Vermont on the 14th Day of December, 1905, Before George C. Frye, Notary Public, and by Agreement of Counsel, for use in the Above-entitled Cases.*

Present:

Alfred Hemenway, Esq., of Boston, Attorney for Alfred S. Bigelow.

Eugene Treadwell, Attorney for Frederick Lewisohn, et als.

Edward F. McClennen, Attorney for Old Dominion Copper Mining & Smelting Company.

Deposition of Josiah Grout.

I, JOSIAH GROUT, being duly sworn, on oath depose and say, in answer to interrogatories propounded by Mr. McClennen, as follows:—

Q. 1. Mr. Grout, what is your full name?

A. Josiah Grout.

Q. 2. And you reside where?

A. Derby, Vt.

Q. 3. You are the brother of William W. Grout?

A. William W. Grout was my brother.

Q. 4. And he is now deceased?

A. Yes.

Q. 5. And when did he die?

A. He died October 7, 1902.

Q. 6. You were the executor of his estate?

A. I am the executor; I am the administrator, not executor—administrator.

Q. 7. I show you, Mr. Grout, a letter in the file of the complainant company, dated September 13, 1905——

A. [Interrupting:] 1895, you mean.

Q. 8. [Continuing:] 1895, purporting to be signed by William W. Grout; do you recognize that as being in the handwriting of your brother?

A. I should say that is his handwriting.

Mr. McCLENNEN: That I will offer.

Mr. HEMENWAY: The defendants object to the admission of this letter on the ground that it is incompetent, immaterial, and irrelevant, being apparently correspondence with a third party not interested in the action.

Mr. McCLENNEN: The letter reads as follows:—

"ST. JOHNSBURY EAST, *Sept. 13th*, 1895.

Thomas Nelson.

MY DEAR SIR: I have your call for money for Old Dominion stock on the 19th inst. I start for Chattanooga Park dedication in
556 the morning, but have arranged with Barton National Bank to send you check for $12,500.00 in payment of 500 shares

to be issued in my name and sent by mail to above Bank, Barton, Vt. The other 500 shares to be issued as follows:

100 shares to William H. Bissell
50 shares to A. H. McLeod.
50 shares to Stocker Brothers.
50 shares to F. T. Dwinell
200 shares to Josiah Grout and
50 shares to W. P. Smith.

I have arranged with these gentlemen to make payment directly to you. If I were to be at home would collect and send to you, but in my absence thought best to let them send direct to you. If they fail to make payment, on my return in about ten days will attend to it.

If you want the residence of these men it is as follows: W. H. Blaisdell, Jay, Vt., A. H. McLeod, St. Johnsburg, Vt., W. P. Smith, St. Johnsbury, Vt., Stocker Brothers, Danville, Vt., Josiah Grout, Derby, Vt., F. T. Dwinell, Boston, Mass., 50 State St.

Very truly yours,

WILLIAM W. GROUT."

Mr. McCLENNEN: I now offer the reply of the company's letter book.

Mr. HEMENWAY: Defendants object to reply as incompetent, immaterial, and irrelevant.

Mr. McCLENNEN: The reply from page 87 of the letter book reads:

"SEPT. 21, 1895.

Hon. Wm. W. Grout, St. Johnsbury East, Vt.

DEAR SIR: Your favor of Sept. 13th was duly received. We received checks from the different gentlemen as noted in your letter, with the exception of Mr. Dwinell who has called and made arrangemens to pay which are satisfactory.

Enclosed you should find certificate for 1000 shares stock of the Old Dominion Copper Mining and Smelting Company in your name. The subscription being in your name, it was necessary to issue the stock to you.

557 Please fill in the names you wish the stock transferred to and sign and return the certificate, and we will do the needful.

Yours very truly,

THOMAS NELSON, *Treas.*
By BISSELL."

Q. 9. Mr. Grout, I show you the canceled certificate of the complainant company, No. 103, dated September 19, 1895, for 10,000 shares——

DEPONENT [Interrupting:] 1000.

[Continuing:] 1000 shares in the name "W. W. Grout:" do you recognize the endorsement on that as being in the handwriting of your brother?

A. Yes, sir.

Mr. HEMENWAY: Object to that as immaterial, incompetent, irrelevant.

Mr. MCCLENNEN: Certificate offered in evidence and marked "Complainant's Exhibit 1, of December 14, 1905."

Q. 10. Mr. Grout, I show you, from the company's file, a letter of September 25, 1895: do you recognize the signature to that as being in the handwriting of your brother?

A. Yes, sir, the whole letter is in his handwriting.

Mr. MCCLENNEN: The letter I will offer——

Mr. HEMENWAY: Defendants object to the admission of said letter because it is incompetent, irrelevant, and immaterial.

Mr. MCCLENNEN: And it reads as follows:

"SEPT. 25, 1895.

Thomas Nelson.

DEAR SIR: Enclosed find certificate for 1000 shares Old Dominion Copper Co., with 500 shares transferred to different parties whose addresses you have in my letter of a former date and probably from the parties themselves, to whom you had best send certificates directly.

The transaction will leave 500 shares still in my name, which will thank you to send to me at St. Johnsbury East, Vt.

Very truly yours,

WILLIAM W. GROUT."

Mr. MCCLENNEN: From the company's letter-press copy book, page 100, I offer a letter of September 27, 1895, to Hon. William W. Grout.

Mr. HEMENWAY: Defendants object to the admission of said copy of said letter because it is incompetent, irrelevant, and immaterial.

Mr. MCCLENNEN: Are you purposing to insist on the fact that it is a copy as an objection?

558 Mr. HEMENWAY: Insist on everything.

Mr. MCCLENNEN: The letter reads as follows:

"SEPT. 27, 1895.

Hon. William W. Grout, St. Johnsbury East, Vt.

DEAR SIR: We enclose you herewith certificates of this company's stock in your name as follows, viz:

No. A 123 100 shares.
No. A 124 100 shares.
No. A 125 100 shares.
No. A 126 100 shares.
No. A 127 100 shares.

Please acknowledge receipt.

Yours truly,

THOMAS NELSON, *Treas.*
By BISSELL."

Q. 11. Mr. Grout, have you, since your appointment as administrator, taken possession of the papers left by your brother?

A. Yes, sir.

Q. 12. Have you found among them the originals of these two letters which I have just—copies of which I have just put in, from the company's letter book?

A. No, sir, I have not.

Q. 13. As far as you know are the originals now in existence?

A. I do not know that they are.

Q. 14. I show you a letter from the company's letter file, dated September 17, 1895: is this in your handwriting?

A. Yes, sir, it is.

Mr. McCLENNEN: This letter I offer.

Mr. HEMENWAY: Defendants object to admission of said letter because it is incompetent, irrelevant, and immaterial.

Mr. McCLENNEN: The letter reads as follows:

"DERBY, VT., *Sept.* 17, 1895.

MY DEAR SIR: Enclosed I hand you check for $2500.00 signed by Mary H. Bates, payable to me and duly endorsed to you. This to apply on 200 shares Old Dominion Copper stock which my brother, W. W. Grout, has written you about.

559 I expected the balance to cover this transaction would be in your hands before this but not hearing as I should if such were the case, I fear it is not. I expected the stock to be issued Oct. 1, so to meet Sept. 19th hurries matters some.

If it will answer, and I trust it will, I will see that the bal. reaches you in a few days, say by the middle of next week. If this will not answer, let me know and I will arrange accordingly.

When you issue the stock please put it in 50 share certificates, and put 100 shares in the name of Charles K. Bates and the other 100 shares in my name.

I am, truly,

JOSIAH GROUT.

Thomas Nelson, Sears Building, Boston, Mass."

Q. 15. Mr. Grout, I show you a copy, on page 102 of the company's letter-press copy book, dated September 27, 1895, and addressed to you: is the original of that now in your possession?

A. Well, I can't find it.

Q. 16. You can't find it?

A. No. I don't find any of the correspondence relating to that transaction, or to Old Dominion transactions, and other stock matters.

Q. 17. Does that answer refer to your brother's correspondence as well as your own?

A. Yes; I have looked the papers over; I do not think anything from my brother's ever came into my hands—these letters.

Mr. McCLENNEN: This copy I will offer.

Mr. HEMENWAY: Defedants object to the admission of letter-press copy of said letter as being immaterial, irrelevant, and incompetent.

Mr. MCCLENNEN: The letter reads as follows:

"SEPT. 27, 1895.

Josiah Grout, Esq., Derby, Vt.

DEAR SIR: We enclose you herewith certificates of this company's stock in your name as follows, viz: No. A 121, 100 shares, No. A 122, 100 shares.

Please acknowledge receipt.

Yours truly,

THOMAS NELSON, *Treas.*
By BISSELL."

560 Q. 18. I show you, Mr. Grout, from the company's letter file, a letter of September 9, 1895: is that in your handwriting?

A. No, that is September 23.

Q. 19. September 23, I beg your pardon, 1895.

A. Yes, sir, that is my handwriting.

Mr. MCCLENNEN: That I will offer.

Mr. HEMENWAY: Defendants object to the admission of this letter as incompetent, immaterial, and irrelevant.

Mr. MCCLENNEN: The letter reads as follows:

"DERBY, VT., 9/23/95.

Thomas Nelson, Sears Building, Boston, Mass.

DEAR SIR: You by this time have the $5000.00 for 200 shares Old Dominion Copper stock which you were to issue subject to my order, as my brother, W. W. Grout, wrote you, or you should have.

If you have, please send the stock as I wrote you in my last. Check M. H. Bates $2500.00, check H. K. Dewey $2500.00, $5000.00.

Truly,

JOSIAH GROUT."

Q. 20. I now show you the company's canceled certificates of stock, one hundred each, Nos. A 121 and A 122, dated September 26, 1895, in the name of Josiah Grout, one endorsed to Payne, Webber & Company, and the other to Mrs. Mary H. Bates; are the signatures to those two endorsements yours?

A. I should say so, sir. You mean assignments there, do you?

Q. 21. The signatures to the assignments yours?

A. Yes.

Mr. HEMENWAY: The admission of said certificates now offered is objected to as immaterial, incompetent, irrelevant.

Mr. MCCLENNEN: The certificates are offered in evidence, and marked respectively, "Complainant's Exhibits 2 and 3, of December 14, 1905."

Q. 22. In your letter of September 17, Mr. Grout, you refer to the enclosure of a check for $2500 of Mary H. Bates: was such a check sent?

A. Yes, sir.

Mr. HEMENWAY: Objected to as immaterial.

Q. 23. In your letter of September 23, you refer to a check of M. H. Bates, for $2500. I assume that is the same check.

A. I should say so; yes, sir.

Q. 24. You also refer in that letter to another check of $2500, of H. K. Dewey: who was H. K. Dewey?

A. Cashier of the Barton National Bank.

561 Q. 25. And prior to writing that letter had you arranged with him for the sending of such a check?

A. I had.

Mr. HEMENWAY: Objected to as immaterial.

Q. 26. I show you a letter of September 18, 1895, purporting to be signed by H. K. Dewey, cashier, and on the letter paper of the Barton National Bank; do you recognize that as being in Mr. Dewey's handwriting?

A. I do, sir.

Mr. MCCLENNEN: That letter I offer.

Mr. HEMENWAY: Objected to as incompetent, irrelevant, and immaterial.

Mr. MCCLENNEN: The letter reads as follows:—

"BARTON NATIONAL BANK, BARTON, VT., *Sept.* 18, 1895.

Thomas Nelson, Esq., Treas., 199 Washington St., Room 303, Boston, Mass.

DEAR SIR: At the request of Hon. William W. Grout I enclose my check for twelve thousand five hundred dollars ($12,500.00), for which please send me 500 shares of Old Dominion Copper Mining and Smelting Co., issued in name of William W. Grout, of Barton, Vermont;

Also my check for two thousand five hundred dollars ($2500.00), for which please send me 100 shares of Old Dominion Copper Mining and Smelting Company, issued in name of W. H. Blaisdell, of Jay, Vt.

Also my check for two thousand five hundred dollars ($2500.00), for credit on account of Major Josiah Grout, of Derby, Vt. He told me — had written you about it.

Please own receipt. If you do not, send stock by first mail.

Yours truly,

H. K. DEWEY, *Cashier.*"

Mr. MCCLENNEN: From the company's letter-press copy book, page 90, I offer letter of September 23, 1895, to H. K. Dewey.

Mr. HEMENWAY: Copy of letter is objected to as incompetent, immaterial, and irrelevant.

Mr. McCLENNEN: The letter as follows:—

562 "SEPT. 23, 1895.

H. K. Dewey, Esq., Barton National Bank, Barton, Vt.

DEAR SIR: Your favor of 18th inst. with checks as stated, was duly received. The subscription to the stock being in the name of Gen. Grout, it was necessary that the stock be first issued to him. This has been done, and the stock forwarded to him, with the request that he make an assignment to Mr. Blaisdell, and also an assignment to Josiah Grout. In due course certificates will be mailed to those gentlemen.

Yours truly,

THOMAS NELSON, *Treas.*,
By BISSELL.

Q. 27. Mr. Grout, what was the first that you had to do in any way with the stock of the complainant company?

Mr. HEMENWAY: Objected to as immaterial and irrelevant.

A. Why, the first I had to do was getting those shares, one hundred for myself and one hundred for the Bates—Charkes K. Bates or Mary H. Bates, whichever name it was put in; it wouldn't make any difference.

Q. 28. With whom did you have whatever negotiations resulted in your taking that stock?

Mr. HEMENWAY: Objected to as immaterial.

A. The negotiations for securing the stock was with my brother, William W. Grout. The details of paying were with the Barton Bank and the officers of the company in Boston.

Q. 292. Having regard to the date of your letter of September 17, 1895, can you inform me about when you had these negotiations with your brother?

Mr. HEMENWAY: Objected to as immaterial.

A. Well, before that time, I should say.

Q. 30. Are you able to state whether it was a considerable period or a short period?

A. No, not very long.

Q. 31. And was this negotiation with your brother in writing or by conversation?

Mr. HEMENWAY: Objected to as immaterial.

A. Well, some features of the negotiations were by conversation, and there might have been some correspondence. I am not sure about that.

563 Q. 32. So far as it was by correspondence, if at all, is that correspondence in existence?

A. No, not to my knowledge.

Q. 33. Will you state, as nearly as you can at this length of time, the language of the correspondence and the conversations?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I really have no recollection as to correspondence, and so cannot give any of it. The conversation was that it was——

Mr. HEMENWAY: The conversation is objected to as immaterial, incompetent, irrelevant.

A. (Continuing:) That it was a good thing it was on the ground floor, or near enough to the first floor to be interesting, and he assured me that he was going to take some of the stock, and thought I wouldn't lose anything if I did.

Q. 34. And you arranged to take two hundred shares; one hundred for yourself and one hundred for Bates?

A. Yes, sir.

Q. 35. Did your brother inform you as to his sources of information?

Mr. HEMENWAY: Objected to as incompetent, immaterial, irrelevant.

A. Yes, so far as I knew—or change that, strike that out, please. So far as——

Mr. HEMENWAY: One moment; you have answered the question.

Q. 36. What did he state to you as his sources of information?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. He stated that his information came from the Bigelow office in Boston.

Q. 37. Did he state with any more particularity as to person from whom he got his information?

A. Well, Mr. Bigelow.

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. (Continuing:) He is the oracle that he consulted, and in which he seemed to have a great deal of confidence,—or in whom.

Mr. HEMENWAY: Answer objected to as incompetent, irrelevant.

Q. 38. Can you, at this length of time, state with any more particularity what your brother informed you that Mr. Bigelow had stated to him?

Mr. HEMENWAY: Objected to as incompetent, irrelevant, and immaterial.

A. I think I have, in substance, covered pretty much the conversation that I had with him antedating the taking of the stock. Of course, there would be very much more to the talk by way of filling, but I have given what I should regard the upshot of the conversation.

Q. 39. Did you receive from your brother, from Mr. Bigelow, or

from any other source, prior to acquiring the stock, any in-
564 formation as to whether or not Mr. Bigelow, or any of the other promoters, had taken any profit in connection with the organization of the company, or intended to take any such profit?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. In answer to that I will say that I was given to understand in that conversation that I was invited into the charmed circle, and all of the perquisites, emoluments, etc., were merged in the intrinsic value of the stock; that nobody had any shearings from any source whatever in it.

Mr. HEMENWAY: Objected to as wholly incompetent.

A. [Continuing:] That is the way it came to me, sir; that is the way I understood it.

Q. 40. To be more specific, was your attention called by any one to the fact, or were you informed of the fact, that Mr. Bigelow and Mr. Lewisohn, or either of them, had taken, or purposed to take, 50,000 shares of the capital stock of the company, or any part thereof, by way of a profit, or by way of compensation for the services or labor connected with the organization or bringing out of the company?

Mr. HEMENWAY: Objected to as incompetent, immaterial, irrelevant, and leading.

A. I know nothing about Mr. Bigelow or his house receiving anything for promoting the Old Dominion project, never heard any intimation of the kind before—I will take that back, never heard any direct intimation.

Q. 41. Prior to taking your stock had you received any intimation of this kind indirectly?

Mr. HEMENWAY: Objected to as incompetent, immaterial, irrelevant.

A. No, no, not before taking the stock; I had no intimation of the kind whatever, of that character.

Q. 42. Did you have any information at any time prior to taking your stock as to whether or not the amount for which the company should be organized had or had not at any time been changed from the amount originally projected by the organizers or promoters?

Mr. HEMENWAY: Objected to as incompetent, immaterial, irrelevant, and leading.

A. I do not recall that I had any such information or intimation of any such.

Q. 43. Had you any information as to the manner in which, or the terms upon which, the properties had been obtained with which to capitalize the company?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Well, I think that was all recited to me, as my brother
565 always took pains to go into such details, but I shouldn't want to undertake to give any of it in a general way, it is so vague just at this moment in my mind, in my memory.

Q. 44. Well, so far as your recollection will permit, will you state anything that was said upon that subject?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Well, one thing I was told was that the property had been always a paying property and purchased by the Bigelow syndicate or Bigelow folks for, I should say, a million dollars. That may be a wrong statement of the amount, but I think that was—that is my recollection, I think that was the sum—and then it was to be organized and in its new form issue stock of which I was advised to take some, and that is about as particular as I would care to be now unless you are able to refresh my memory, for my memory sometimes does glow upon such subjects as the old embers are raked over. The fire is pretty much out, as far as I know.

Mr. HEMENWAY: Answer objected to as incompetent.

Q. 45. Did you ever have any conversations directly with Mr. Bigelow or with Mr. Lewisohn relative to this matter?

A. Never saw either of the men.

Mr. MCCLENNEN: That is all, Mr. Hemenway.

Mr. HEMENWAY: No cross-examination.

JOSIAH GROUT.

STATE OF VERMONT,
Caledonia County, ss:

At St. Johnsbury this 14th day of December A. D. 1905 personally appeared the above-named Josiah Grout, and made oath to the truth of the foregoing statement by him subscribed before me.

GEORGE C. FRYE,
Notary Public.

Deposition of Frank D. Stocker.

I, FRANK D. STOCKER, being duly sworn, on oath depose and say, in answer to interrogatories propounded by Mr. McClennen, as follows:—

Q. 1. Your full name is?

A. Frank D.

Q. 2. And you reside where?

A. In Danville.

Q. 3. And you, in 1895, were one of the partners in Stocker Brothers?

566 A. Yes, sir.

Q. 4. In connection with the acquisition of stock by you in the Old Dominion Copper Mining & Smelting Company, do you,

recall whether you had any conversations with any one other than Mr. McLeod?

Mr. HEMENWAY: Objected to as immaterial.

A. No, I do not.

Q. 5. Will you state, as far as you can recall, what your conversations with Mr. McLeod were?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I never had much to say to him about it anyway, but I did talk it over and done the most of the talking with him.

Q. 6. Did you have any conversation with General Grout concerning the matter?

A. No, I don't know as I ever met him.

Q. 7. Or with Mr. Bigelow or Mr. Lewisohn?

A. No.

Q. 8. At the time the stock was acquired did you have any information concerning the organization of the company?

A. No, sir.

Q. 9. Did you know or receive any information relative to the taking of fifty thousand shares, or any other number of shares, of the capital stock of the company, or of the intention to take them, by Mr. Bigelow or Mr. Lewisohn, or any one else, by way of a promoters' profit or in return for services rendered?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. No.

Q. 10. When, if at all, did you ever receive any information on this subject?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I don't know as I ever knew anything about it.

Mr. MCCLENNEN: That is all.

Mr. HEMENWAY: No questions.

FRANK D. STOCKER.

STATE OF VERMONT,
Caledonia County, ss:

At St. Johnsbury this 14th day of December A. D. 1905 personally appeared the above-named Frank D. Stocker, and made oath to the truth of the foregoing statement by him subscribed before me.

GEORGE C. FRYE,
Notary Public.

567 *Deposition of Fred B. Stocker.*

I, FRED B. STOCKER, being duly sworn, on oath depose and say, in answer to interrogations propounded by Mr. McClennen, as follows:—

Q. 1. What is your full name?
A. Fred B. Stocker.
Q. 2. You reside where?
A. At Danville.
Q. 3. You are a member of the firm of Stocker Brothers?
A. I am.
Q. 4. And were in 1895?
A. Yes, sir.
Q. 5. And of whom did that firm then consist?
A. Of Fred B. Stocker and Frank D. Stocker.
Q. 6. I show you, from the company's letter file, a letter of September 18, 1895; in whose handwriting is that?
A. That is in mine.

Mr. MCCLENNEN: The letter I will offer.

Mr. HEMENWAY: Defendants objected to the admission of said letter because it is incompetent, irrelevant, and immaterial.

Mr. MCCLENNEN: The letter reads:

"DANVILLE, VT., *Sept.* 18, 1895.

Thomas Nelson, Treas.

DEAR SIR: Enclosed find check of $1250.00 for 50 shares Old Dominion as per instructions of W. W. Grout.

Yours &c.,

STOCKER BROTHERS."

Mr. MCCLENNEN: From the company's letter-press copy book, page 92, I offer a letter of September 23.

Mr. HEMENWAY: Defendants object to the admission of this letter-press copy of letter, because incompetent, irrelevant, and immaterial.

Mr. MCCLENNEN: The letter reads as follows:

"SEPT. 23, 1895.

Stocker Brothers, Danville, Vt.

GENTLEMEN: Your favor of 18th inst. covering check for $1250.00, to pay for fifty (50) shares of the Old Dominion Copper Mining and Smelting Company, was duly received. Certificate will be forwarded to you in a few days.

Yours very truly,

THOMAS NELSON, *Treas.*
By BISSELL."

568 Q. 7. Have you the original of the letter a copy of which I have just read?

A. I might be able to find it, but I hardly think so.

Q. 8. Is this the check referred to in the two letters just read?

A. It is.

Mr. HEMENWAY: Defendants object to the admissibility of said check, because incompetent, irrelevant, and immaterial.

Mr. McCLENNEN: The check reads on the face as follows:—

"DANVILLE, VT., *Sept* 18, 1895.

No. — Caledonia National Bank.

Pay to the order of Thos Nelson, Treas. $1250. One thousand and two hundred fifty No /100 Dollars.

STOCKER BROTHERS."

Has stamped on its face: "Caledonia National Bank, paid Sept. 24, 1895, Danville, Vt."

Reads upon its reverse side: "For deposit only to account of Old Dominion Copper Mining and Smelting Co., Thomas Nelson, Treas. For collection for account of Atlas National Bank of Boston, Benj. P. Lane, Cashier."

All upon the back, except the words "Thomas Nelson," being in rubber stamp print.

Check offered, and marked "Complainant's Exhibit 4, of December 14, 1905."

I now offer from the company's letter-press copy book, page 101, a letter of September 27, 1895.

Mr. HEMENWAY: Defendants object to said letter-press copy, because incompetent, irrelevant, and immaterial.

Mr. McCLENNEN: The letter reads:

"SEPT. 27, 1895.

Stocker Brothers, Danville, Vt.

GENTLEMEN: We enclose you herewith certificate No. B68 in your name for fifty (50) shares of this company's stock.

Please acknowledge receipt.

Yours truly,

THOMAS NELSON, *Treas.*
By BISSELL."

Q. 9. I show you, from the company's letter file, a letter of September 26, 1895; is that in your handwriting?

A. It is.

569 Mr. HEMENWAY: Letter objected to as incompetent, immaterial, and irrelevant.

Mr. McCLENNEN: The letter reads:

"DANVILLE, VT., *Sept.* 26, 1895.

Thomas Nelson, Treas.

DEAR SIR: Yours with certificate enclosed, for fifty shares Old Dominion Copper Mining stock, received.

Yours, &c., STOCKER BROTHERS."

Q. 10. I show you the canceled certificate B No. 68, for fifty shares of the capital stock of the Old Dominion Copper Mining & Smelting Company, in the name of Stocker Brothers: is the signature to the transfer on the back of this in your handwriting?

A. It is.

Mr. MCCLENNEN: The certificate is offered in evidence and marked "Complainant's Exhibit 5, of December 14, 1905."

Mr. HEMENWAY: Objected to as immaterial.

Q. 11. With whom, Mr. Stocker, did you have the negotiations which led to your procuring this stock?

A. I think it was through A. H. McLeod.

Q. 12. Of St. Johnsbury?

A. I think it was.

Q. 13. Having regard to the date of the first letter put in, of September 18, 1895, when, as nearly as you can state, did you have your negotiations?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I do not think I could tell anything only the records, from memory.

Q. 14. Was it a matter of days or weeks prior to that?

Mr. HEMENWAY: Objected to as immaterial.

A. I should say we was talking about it for some little time.

Q. 15. Were your negotiations wholly oral or were they to some extent by correspondence?

Mr. HEMENWAY: Objected to as immaterial.

A. I think it was oral.

Q. 16. As nearly as you can state at this length of time, what were the conversations which you had?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I think that Mr. McLeod told us that Mr. Grout had such a number of shares that he was going to have of the Old Dominion Copper Company, and that we could have some if we wished. I think that was about the conversation.

Q. 17. Did he tell you anything about the terms of issue, or the organization?

570 Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. The price was to be 25, which was par for the stock, and I

think he told us that it was a very rich mine; it would be a good stock to buy.

Mr. HEMENWAY: Answer objected to.

Q. 18. Did he give you any information, one way or the other, as to whether there were to be any promoters' profits or compensation for services in connection with the issue?

A. I don't think so.

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

Q. 19. Did he tell you anything relating in any manner to that subject?

Mr. HEMENWAY: Objected to as immaterial and incompetent.

A. I don't think he did.

Q. 20. Did you have any conversations, prior to acquiring your stock, with anyone beside Mr. McLeod?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I don't think I did.

Q. 21. Did you have any conversations with either Mr. Lewisohn or Mr. Bigelow prior to acquiring your stock?

A. Did not.

Q. 22. Did you know or have any information to the effect that Mr. Bigelow and Mr. Lewisohn, or any of them, or any one connected with them, either had taken or purposed to take fifty thousand shares, or any other number of shares, of the stock of the company as a promoters' profit, or in return for any services rendered?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I did not.

Q. 23. When, if at all, did anything of this nature ever come to your attention?

Mr. HEMENWAY: Objected to as incompetent, immaterial.

A. I think when we read it in the papers. It was discussed in the papers.

Q. 24. And as nearly as you can fix it, what was the date?

Mr. HEMENWAY: Objected to as immaterial.

A. I should say it was when the present president, Mr. Smith, isn't it, took hold of the company.

Q. 25. Do you remember whether or not, in connection with your acquisition of the stock, the term "ground floor" was used?

Mr. HEMENWAY: Objected to as immaterial, incompetent, and leading.

A. We supposed we was getting as low as any one, that was about all; the price as low as any one had the stock.

Mr. HEMENWAY: Objected to as incompetent.

571 Q. 26. Without stating any supposition of yours, can you state anything by way of conversation on that subject, if there was any conversation on that subject?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I couldn't remember the conversation we had now.

Q. 27. Prior to acquiring your stock, were you informed from any source as to whether there had at any time been any change in the amount for which the company was to be organized?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I don't quite understand that question.

Q. 28. At any time prior to acquiring your stock, were you informed as to whether there had been any change in the plan of organization with respect to the amount for which the company should be capitalized?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I had not.

Mr. MCCLENNEN: That is all.

Mr. HEMENWAY: No questions.

FRED B. STOCKER.

STATE OF VERMONT,
Caledonia County, ss:

At St. Johnsbury this 14th day of December, A. D. 1905 personally appeared the above-named Fred B. Stocker, and made oath to the truth of the foregoing statement by him subscribed.

Before me,

GEORGE C. FRYE,
Notary Public.

Deposition of Angus H. McLeod.

I, ANGUS H. MCLEOD, being duly sworn, on oath depose and say, in answer to interrogatories propounded by Mr. McClennen, as follows:

Q. 1. Your first name, Mr. McLeod, is?

A. Angus H.

Q. 2. You reside where?

A. St. Johnsbury.

Q. 3. And resided there in 1895?

A. Yes.

Q. 4. Your business was then what?

A. Milling business, grain and feed.

Q. 5. The business of Stocker Brothers at that time was what?
A. Well, they were farmers, and sold grain, feed, and so on, and they owned part of the stock in our mill at that time.
572 Q. 6. I show you a letter of September 18, 1895, from the company's letter file: is that written by you?
A. Yes, sir.

Mr. McCLENNEN: The letter I will offer.
Mr. HEMENWAY: Defendants object to the admissibility of the letter on the ground of its incompetency, immateriality, and irrelevancy.
Mr. McCLENNEN: The letter reads as follows:—

"ST. JOHNSBURY, VT., *Sept.* 18, 1895.

Thomas Nelson, Treas., Boston, Mass.

DEAR SIR: By instruction of W. W. Grout I enclose you my check No. 601 for $1250.00, to pay for 50 shares Old Dominion Copper stock.
Kindly make out two certificates of 25 shares each to Angus H. McLeod, St. Johnsbury, and send same by mail.
Yours truly,

A. H. McLEOD.

P. S.—What has struck Merced? Is it likely to go much lower?
A. H. McLEOD."

Mr. McCLENNEN: From the company's letter-press copy book, page 90, I offer letter of September 23, 1895.
Mr. HEMENWAY: Objected to as incompetent and immaterial.
Mr. McCLENNEN: The letter reads:

"SEP. 23, 1895.

A. H. McLeod, Esq., St. Johnsbury, Vt.

DEAR SIR: Your favor of September 18th, with check for $1250. to pay for 50 shares stock of the Old Dominion Copper Miniing and Smelting Company, was duly received.
The subscription to the stock being in the name of General Grout, it was necessary that the stock be first issued to him. This has been done and the stock forwarded to him with the request that he assign 50 shares in your favor. When this has been done, we will forward certificate in your name.
Only 60 shares of Merced sold at 32. It is held at 38 to 40 today.
Yours truly,

THOMAS NELSON, *Treas.*
By BISSELL."

573 Q. 7. Is this the check referred to in the two letters?
A. Yes.

Mr. HEMENWAY: Objected to as immaterial.
Mr. McCLENNEN: The check reads on its face,—

"ST. JOHNSBURY, VT., *Sept.* 18, 1895.

No. 601.

The First National Bank.

Pay to the order of Thomas Nelson, Treas., $1250.00 Twelve hundred fifty and No/100 Dollars.

A. H. McLEOD."

It is stamped on the face: "First National Bank, Paid Sept. 24, 1895, St. Johnsbury, Vt." On the back appears this: "For deposit only to account of Old Dominion Copper Mining and Smelting Co., Thomas Nelson Treas. For collection for account of Atlas National Bank of Boston, Benj. P. Lane, Cashier. Endorsement guaranteed, Atlas National Bank," all of which is in rubber-stamp type, except the words written, "Thomas Nelson."

[The check is offered and marked "Complainant's Exhibit 8, of December 14, 1905."]

From the company's letter-press copy book, page 101, I offer a letter.

Mr. HEMENWAY: Objected to as incompetent, immaterial.

Mr. MCCLENNEN: It reads as follows:

"SEPT. 27, 1895.

Angus H. McLeod, Esq., St. Johnsbury, Vt.

DEAR SIR: We enclose you herewith certificate No. B 67 in your name, for fifty (50) shares of this company's stock.

Please acknowledge receipt.

Yours truly,

THOMAS NELSON, *Treas.*,
By BISSELL."

Q. 8. Have you, Mr. McLeod, the original letters, the two of which I have just read copies from the company's letter book?

A. I couldn't say whether I have got them or not; I haven't looked for them. If they were the milling company's letters—I ain't so particular of my own letter—I think I could find them.

Q. 9. I show you, from the company's letter file, the letter of September 28, 1895: is that written by you?

A. Yes.

574 Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

Mr. MCCLENNEN: The letter reads as follows:

"ST. JOHNSBURY, VT., *Sept.* 28, 1895.

Thomas Nelson, Treas., Boston, Mass.

DEAR SIR: Your favor of 27th at hand, with certificate No. B 67, for fifty (50) shares of the Old Dominion Copper Mining and Smelting Co. stock.

Yours truly, ANGUS H. McLEOD."

Q. 10. I show you a canceled certificate, B No. 67, for fifty shares of the capital stock of the Old Dominion Copper Mining & Smelting Company, in the name of Angus H. McLeod, dated September 26, 1895: is the signature to the transfer on the back of this in your handwriting?

A. Yes.

Mr. McCLENNEN: The certificate I offer.

Mr. HEMENWAY: Objected to as immaterial.

Mr. McCLENNEN: It is marked, "Complainant's Exhibit 9, of December 14, 1905."

Q. 11. Mr. McLeod, having regard to the date of your letter of September 18, 1895, when did you have the negotiations which led to your acquiring this fifty shares of stock?

Mr. HEMENWAY: Objected to as immaterial.

A. Well, it was a very short time before; I couldn't say, it might have been a week or ten days, or two or three days.

Q. 12. With whom did you have them?

A. General Grout.

Mr. HEMENWAY: Objected to as incompetent and immaterial.

Q. 13. Did you have any conversations with any one beside General Grout on the subject of stock in this company?

Mr. HEMENWAY: Objected to as incompetent and immaterial, irrelevant.

A. I don't think it.

Q. 14. Did you have any correspondence on the subject other than the remittances to the company?

A. Not as I remember of, at all.

Q. 15. What, as nearly as you can recall it, were the conversations that you had with General Grout?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Well, the general, about that time, had been very successful in his stock investments, and it was quite natural for the
575 directors in the bank at our meetings to talk stocks to him a little, although we wasn't in the habit of buying any stock to speak of at all, and among other things, at the time, they were reorganizing the Old Dominion Company, and he said that he had a block of stock we could have, and, I don't know as I remember how he expressed it, but he made us understand that we were on the ground floor,—might not have said it in *that* words, but there was no profit to anybody, that we were getting in as cheap as anybody was. We had confidence in him, so we were getting in as cheap as he was anyway, and we had the impression that he had the inside, because he was a heavy buyer of stocks,—I know of the time when he had a million dollars' worth of stock, so we had a good deal of confidence in the general at that time.

Mr. HEMENWAY: Object to the answer as incompetent and immaterial.

Q. 16. Did he inform you anything as to the real source of his information?

Mr. HEMENWAY: Objected to as incompetent, immaterial, irrelevant.

A. His sources of information was from Mr. Bigelow, he said. He used Mr. Bigelow's name.

Q. 17. Now, recurring again to the conversation, and without going into the matters which aroused your confidence, will you state, as nearly as you can, what was said?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Well, I don't know as I can repeat just what was said exactly, as it was some time ago, but he had this block of stock, and he said any of us directors could have part of it. I told him I would take 50 shares and thought the Stocker Brothers would take 50 shares.

Q. 18. What did he tell you, if anything, that Mr. Bigelow had said to him?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Well, I don't think I can state anything that he said that Mr. Bigelow had said to him.

Q. 19. What, as nearly as you can state it, in substance, did he say as to the terms upon which you could come in?

Mr. HEMENWAY: Objected to as incompetent, immaterial, irrelevant.

A. We could come in on the same terms as he did.

Q. 20. And what did he say, if anything, as to the terms upon which he was coming in?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Well, that we was getting the stock as he was getting the stock; as cheap as anybody.

576 Q. 21. Did you know, or did General Grout or any one else inform you, that Mr. Bigelow or Mr. Lewisohn, or any one else, had taken, or intended to take, 50,000 shares, or any other number of shares of the capital stock of the company, either as a promoters' profit, or in return for services rendered, or otherwise?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. No, sir.

Q. 22. When, if at all, did you first receive any information upon that subject?

Mr. HEMENWAY: Objected to as immaterial.

A. I didn't get any information until we got it through the press; I think sometime about the time that they changed and Smith got to be president, along about that time somewhere, I can't tell when; it was through the Boston papers that it was first intimated to me.

Mr. McCLENNEN: That is all.

Mr. HEMENWAY: No questions.

ANGUS H. McLEOD.

STATE OF VERMONT,
Caledonia County, ss.

At St. Johnsbury this 14th day of December A. D. 1905 personally appeared the above-named Angus H. McLeod, and made oath to the truth of the foregoing statement, by him subscribed.

Before me,

GEORGE C. FRYE,
Notary Public.

Deposition of Walter P. Smith.

I, WALTER P. SMITH, being duly sworn, on oath depose and say in answer to interrogatories propounded by Mr. McClennen, as follows:

Q. 1. What is your full name, Judge?
A. Walter P. Smith.
Q. 2. You are the judge of probate?
A. I am.
Q. 3. And you held that office in 1895?
A. Yes, I did.
Q. 4. You reside at St. Johnsbury?
A. Yes.
Q. 5. I show you, from the company's letter file, letter of September 18, 1895: is that in your handwriting?
A. It is.

Mr. McCLENNEN: The letter I offer.

Mr. HEMENWAY: The defendant objects to the admissibility of this letter on the ground of its incompetency and irrelevancy.

Mr. McCLENNEN: It reads as follows:

577 "Office of Probate Court, District of Caledonia,
Walter P. Smith, Judge.

ST. JOHNSBURY, VT., *Sept. 18th,* 1895.

Thomas Nelson, Treas.

DEAR SIR: I herewith send you my check $1250.00, for 50 shares of Old Dominion Copper stock. This is by direction of Gen. W. W. Grout who informs me that you have been informed that a certificate of 50 shares is to be sent to me.

Yours truly,

WALTER P. SMITH."

Q. 6. Have you the check that was enclosed in that letter?
A. I have. [Check produced.]

Mr. McCLENNEN: This check upon its face——

Mr. HEMENWAY: The defendants object to the admissibility of the check on the ground of its incompetency and irrelevancy.

Mr. McCLENNEN [reading]:

No. 1162. "ST. JOHNSBURY, VT., *Sept.* 18, 1895.

The First National Bank pay to the order of Thomas Nelson Treas $1250.00, Twelve hundred and fifty Dollars.

WALTER P. SMITH."

It has stamped on the face: "First National Bank, Sept. 24, 1895, Paid, St. Johnsbury, Vt."

It has stamped upon the back: "For deposit only to the account of Old Dominion Copper Mining and Smelting Co., Thomas Nelson, Treas. For colection for account of Atlas National Bank of Boston, Benj. P. Lane, Cashier. Endorsement guaranteed by Atlas National Bank," all of which is in rubber-stamp type except the words, "Thomas Nelson," written.

The check is marked "Complainant's Exhib't 6, of December 14, 1905."

I offer, from the company's letter-press copy book, page 93, a letter of December 23, 1895.

Mr. HEMENWAY: Objected to as incompetent, irrelevant, and immaterial.

Mr. McCLENNEN: The letter reads:

578 "SEPT. 23, 1895.

Walter P. Smith, Esq., St. Johnsbury, Vt.

DEAR SIR: Your late favor covering check for $1250.00, to pay for fifty (50) shares stock of the Old Dominion Copper Mining and Smelting Company, was duly received. Certificate will be forwarded to you in a few days.

Yours truly,

THOMAS NELSON, *Treas.*,
By BISSELL."

Mr. McCLENNEN: From the company's letter-press copy book, page 100, I offer letter of September 27, 1895.

Mr. HEMENWAY: Objected to as incompetent and immaterial.

Mr. McCLENNEN: The letter reads:

"SEPTEMBER 27, 1895.

Walter P. Smith, Esq., St. Johnsbury, Vt.

DEAR SIR: We enclose you herewith certificate No. B66, in your name, for fifty (50) shares of this Company's stock.

Please acknowledge receipt.

Yours truly,

THOMAS NELSON, *Treas.*,
By BISSELL."

Q. 7. Have you in your possession, Judge Smith, the originals of the two letters, copies of which I have just read?

A. I am unable to say. I haven't been called upon to look for them; I am not able to say whether I can find them or not.

Q. 8. I show you canceled certificate of the complainant, B No. 66, for fifty shares of its capital stock, in the name of Walter P. Smith, dated September 25, 1895; is the signature to the transfer thereon in your handwriting?

A. It is.

Mr. McClennen: The certificate is offered in evidence.

Mr. Hemenway: Objected to as immaterial.

Mr. McClennen: And marked "Complainant's Exhibit 7, of December 14, 1905."

Q. 9. Having regard to the date of your letter of September 18, 1895, can you recall approximately the time of the negotiations which led to your acquiring this stock?

579 Mr. Hemenway: Objected to as immaterial.

A. Well, a few days before; I am unable to state the exact length of time.

Q. 10. And with whom did you have them?

Mr. Hemenway: Objected to as immaterial.

A. Gen. W. W. Grout.

Q. 11. Did you have—were they conducted by correspondence or conversation?

A. Conversation.

Q. 12. Did you have any conversations, as far as you recall, with any other persons relative to the matter?

Mr. Hemenway: Objected to as immaterial.

A. Relative to the negotiations?

Q. 13. Yes.

A. No.

Q. 14. What, as nearly as you can state, were the conversations?

Mr. Hemenway: Objected to as incompetent, immaterial, and irrelevant.

A. The conversation that I had with General Grout was upon the occasion of a meeting of the directors at the First National Bank. After the business of the meeting was ended, and as we were about going away, General Grout said something about the Old Dominion Company. Just how the conversation began I am unable to say. It may have been that something was said about stocks generally, and this matter came up. As I remember it now, he said that there had been, or was to be, a reorganization of the Old Dominion Company, and that he was going to take some stock himself, and that there was an opportunity for some of the rest of us to have some if we would like it.

Q. 15. Do you recall whether he gave you any further informa-

tion in that conversation, or in any other conversation, as to the organization of the company?

Mr. HEMENWAY: Objected to as incompetent, irrelevant, immaterial.

A. No, I think not. The conversation was brief, and he gave us to understand that it was a good opportunity to get in.

Mr. HEMENWAY: Answer objected to.

Q. 16. Did he state to you anything about the terms upon which you could come in?

Mr. HEMENWAY: Objected to as incompetent, immaterial, irrelevant, and leading.

A. Except that we could now get the stock at $25 a share.

Q. 17. Did he inform you anything with respect to the terms upon which others were to get the stock?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

580 A. Don't remember that he did.

Q. 18. Did you have any conversations about this matter with any one except General Grout?

Mr. HEMENWAY: Objected to as immaterial.

A. Do you mean as to the taking of stock in the company?

Q. 19. Yes, or as to anything connected with its organization?

Mr. HEMENWAY: Objected to as incompetent, immaterial.

A. Mr. McLeod, as I remember it, was present. I might have passed a few words with him in regard to taking some of the stock. I remember of telling General Grout at the time that I would take 50 shares.

Q. 20. Did you know, or were you informed, that Mr. Bigelow and Mr. Lewisohn, or either of them, or any one else, had taken, or purposed to take, 50,000 or any other number of the shares of the capital stock of the company, by way of promoters' profits, or in return for services rendered, or otherwise?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. No.

Q. 21. Was any information given to you in any way bearing upon that subject?

Mr. HEMENWAY: Objected to as immaterial.

A. Nothing whatever.

Q. 22. When, if at all, did you ever learn that anything of that character had occurred?

Mr. HEMENWAY: Objected to as incompetent and immaterial.

A. I don't think I ever heard anything about it until after President Smith came into office and this matter was agitated.

Mr. McClennen: That is all.

Mr. Hemenway: No questions.

Mr. McClennen: It is understood that the objections made by Mr. Hemenway are also made by Mr. Treadwell on behalf of Mr. Lewisohn.

WALTER P. SMITH.

State of Vermont,
Caledonia County, ss:

At St. Johnsbury this 14th day of December, A. D. 1905, personally appeared the above named Walter P. Smith, and made oath to the truth of the foregoing statement, by him subscribed.

Before me:

GEORGE C. FRYE,
Notary Public.

581 Taken Before Howland Twmobly, Esq., Notary Public at 161 Devonshire Street, Boston, Mass., May 22, 1906.

Appearances:

Louis D. Brandeis, Esq., and E. F. McClennen, Esq., for the plaintiff.

Eugene Treadwell, Esq., and Alfred Hemenway, Esq., for the defendants.

George C. Burpee, stenographer.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

Deposition of Joseph S. Bigelow.

Joseph S. Bigelow, being first duly sworn by Howland Twombly, Esq., a notary public, in answer to interrogatories propounded by L. D. Brandeis, Esq., counsel for the plaintiff, deposes and says:

Q. 1. Please state your name, residence, and occupation?

A. Joseph S. Bigelow; Cohasset; vice-president of the Webster & Atlas Bank.

Q. 2. What was your occupation in 1895?

A. I had none.

Q. 3. And subsequent to that time until 1902?

A. In 1897 I became president of the Atlas Bank.

Q. 4. And remained president of it until its consolidation recently with the Webster Bank?

A. Yes.

Q. 5. You were for several years a director in the Old Dominion Copper Mining & Smelting Company?

A. I was a director of it.

Q. 6. Do you remember when you became a director?

A. I cannot. I have no record of it.

Q. 7. Did you at any time while you were a director of that company know that the company had a cause of action against Mr. Albert S. Bigelow and Mr. Leonard Lewisohn?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I do not know that it was at the time I was a director. I knew there was a cause of action at some time; I do not know whether it was during that time or not.

582 Q. 8. What do you refer to by saying you knew there was a cause of action?

A. I saw in a paper I read there was something going on; what, I did not know, because I did not know anything about it.

Q. 9. That is, you refer to a suit that was commenced against Albert S. Bigelow?

A. A suit commenced against Mr. Lewisohn and Mr. Bigelow.

Q. 10. Was that suit that was commenced the first you ever knew or heard of any cause of action or any claim against them?

[Objected to as incompetent, irrelevant, and immaterial.]

A. The first I ever knew of it.

——— ———.

Subscribed and sworn to this — day of ———, 1906, before me.

——— ———,

Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

Deposition of Clarence H. Bissell.

CLARENCE H. BISSELL, being first duly sworn by Howland Twombly, Esq., a notary public, in answer to interrogatories propounded by L. D. Brandeis, Esq., counsel for the plaintiff, deposes and says:

Q. 1. Please state your full name, age, residence, and occupation?

A. Clarence H. Bissell; residence, Winthrop, Mass.

Q. 2. What is your occupation?

A. I am clerk in the office of various mining companies at 303 Sears Building.

Q. 3. Mining companies with which Mr. Albert S. Bigelow is connected?

A. Yes.

Q. 4. How long have you been in the employ of those companies, or of Mr. A. S. Bigelow?

A. Well, something over thirty years.

Q. 5. Have you been during all that time in practically the same capacity, as clerk?

A. Practically, yes.

Q. 6. You were for some time a director in the Old Dominion Copper Mining & Smelting Company, were you not?

A. I do not recollect as to that.

583 Q. 7. That is, you do not recall that you ever were a director in that company?

A. I could not swear that I was; no.

Q. 8. You were in some way connected with the Old Dominion Copper Mining & Smelting Company or acted in relation to the company as clerk, or otherwise, were you not?

[Objected to as incompetent, irrelevant, and immaterial.]

A. Yes.

Q. 9. When did you cease to act in whatever capacity you did act?

A. Well, I think at the time the company left our office.

Q. 10. You say at the time the company left your office?

A. I think the date was in 1902.

Q. 11. Did you at any time prior to that, or when the company left your office, as you express it, know of the company's having any cause of action against Albert S. Bigelow or Leonard Lewisohn, or the estate of Leonard Lewisohn?

[Objected to as incompetent, irrelevant, and immaterial, and also as leading.]

A. I saw something of it in the papers.

Q. 12. You mean that you refer to the suits that were commenced against Mr. A. S. Bigelow and the Leonard Lewisohn estate?

A. I do not know that they were commenced at that time.

Q. 13. Well, you refer to whatever was published in the paper after the change in management, when Mr. Charles S. Smith became the president of the company, do you?

A. That is my recollection.

Q. 14. Prior to what you saw in the papers that you have just testified about, did you have any knowledge of any cause of action against Mr. A. S. Bigelow, Mr. Leonard Lewisohn, or Mr. Leonard Lewisohn's estate?

[Objected to as incompetent, irrelevant, and immaterial.]

A. No.

[No cross-examination.]

——— ———.

Subscribed and sworn to this — day of ———, 1906, before me.

———,
Notary Public.

584 *Stipulation.*

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

Deposition of J. Morris Meredith.

J. MORRIS MEREDITH, being first duly sworn by Howland Twombly, Esq., a notary public, in answer to interrogatories propounded by E. F. McClennen, Esq., counsel for the plaintiff, deposes and says,—

Q. 1. Mr. Meredith, what is your full name?

A. James Morris Meredith.

Q. 2. And you reside where?

A. I am a resident of Boston; I am living in Topsfield.

Q. 3. And your business is what?

A. Real estate, trustee, agent, and broker.

Q. 4. You had something to do, did you not, with the original acquisition from the Simpson estate of the Old Dominion mine?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I sold the mine for Mr. Simpson.

Q. 5. Have you any correspondence relating to those transactions?

A. All I could find was some copies——

Mr. HEMENWAY: The question is, "Have you any?"

The WITNESS: I have some.

Q. 6. Will you refer to such as you have been able to find, and inform us of the earliest date that you find?

[Objected to as immaterial.]

A. April 29, 1905.

Q. 7. To whom and by whom was that letter written?

[Objected to as immaterial.]

A. By me to Mr. Leonard Lewisohn.

Q. 8. Mr. Meredith, you said April 29, 1905?

A. Yes.

Q. 9. Did you [in] fact mean that, or in 1895?

A. In 1895.

Q. 10. Will you read that letter?

[Objected to as incompetent, irrelevant, and immaterial; and I should like to see the letter.]

585 A. Well, before I show it to anybody, I should like to make a remark about it myself. It is marked "Private," and I really do not see why I should be compelled to bring in my private correspondence to you gentlemen. There is nothing I want to hide about it, and I presume there is nothing very material. It is a private communication from me to Mr. Lewisohn; it is marked "Private," and I brought it up here because I was summoned. I do not know that you have any right to this communication. There is nothing that will hurt one side or do the other side any good in it, so far as I can see. At the same time, it is rather extraordinary that I should be asked to produce it.

Q. 11. Well, Mr. Meredith, to relieve you of any feeling of embarrassment on that subject, I show you a letter of Mr. Lewisohn to you of April 29, 1895, which has already been inroduced in evidence in New York and is marked "Exhibit 162:" is the letter to which you have just referred in your answer the same letter?

[Objected to as immaterial.]

A. I do not know. [Inspecting letter.] Oh, that has nothing to do with this matter at all.

Mr. HEMENWAY: That letter was objected to in the testimony taken in New York.

The WITNESS: That refers——

Mr. HEMENWAY: No, no, there is no question.

Q. 12. You say that is not the same letter?

A. That letter applies to an entirely different subject, and has nothing to do with or to say about the Old Dominion, or anything in connection with it.

Mr. MCCLENNEN: That is Exhibit 162.

Q. 13. Now I show you a copy of a letter of yours of April 30, 1895, introduced in evidence and appearing on page 5 of the testimony of Mr. Hyams. That is a letter to Leonard Lewisohn, of April 30, 1895, from you.

A. You have probably got a copy.

[Letter shown to witness.]

Mr. HEMENWAY: The defendant objects to the admission of this letter, or any portion of its contents, it being correspondence between Mr. Meredith and Mr. Lewisohn, neither of whom are parties to this suit against Mr. Bigelow.

The WITNESS: That appears to be the one.

Q. 14. In this letter which you have now read, namely, that of April 30, 1895, you say, "Your favor of yesterday re-
586 ceived:" is the letter which you have spoken of as a confidential communication the letter therein referred to?

[Objected to as incompetent, irrelevant, and immaterial.]

A. No. When I said the letter was private, it was a letter from myself to Mr. Lewisohn, not one from him.

Q. 15. Have you the letter from Mr. Lewisohn referred to as of "yesterday," in this your letter of April 30, 1895?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I cannot find it. You see, this was private business of my own, and whilst I used the copy book of the firm to copy my letters, the letters I received got mixed up and they are where I cannot put my hand on them.

Q. 16. Does the letter which you have characterized as confidential, of April 29, 1895, relate to the matter of the Old Dominion mine?

[Objected to as incompetent, immaterial, and irrelevant.]

A. It does. As I said before, I can see no harm in showing it, but simply it was correspondence betwen him and myself; it is nothing that will do you any good or the other side any harm, that I can see.

Q. 17. So that you have no personal objection?

A. I have no personal objection, nor do I know that anybody else has any objection, to showing, it, only I did not know that a broker was compelled to show his correspondence in these things; but I am not a lawyer and do not know anything about it.

Q. 18. If it be a fact that under the rules of law a broker is compelled to do it, you have no objection to doing it?

A. I have no objection.

Q. 19. Then I will ask you to produce the letter.

A. Well, on the theory that the law does compel me to?

Q. 20. Let me assure you that it is a fact that the law does compel you to produce it, provided it is relative to the inquiry.

A. All right. I will take your assurance.

Mr. McCLENNEN: This letter of April 29, 1895, we will offer in evidence, and it reads as follows——

Mr. HEMENWAY: The defendant objects to this letter from Mr. Meredith to Mr. Lewisohn as being incompetent, immaterial, and irrelevant, having no relation whatever to the issues in this case, and being correspondence between Lewisohn and Meredith,
587 parties other than parties to the suit. And, in order to save time, with Mr. Brandeis' permission, I would like to make the same objection to all the correspondence between Mr. Meredith and Mr. Lewisohn other than correspondence that is brought home to the attention of Mr. Bigelow, if there be any such.

Mr. BRANDEIS: We accept that general objection.

Mr. McCLENNEN: The letter reads as follows:—

"Private."

APRIL 29TH, —5.

Leonard Lewisohn, Esq., Fulton St. New York.

DEAR SIR: Concerning the property you want me to get hold of, the owner of five sevenths did not sell as I supposed. He is a valued client of mine and we manage some large real estate interests here for him. I have been with him for an hour today.

He cautioned me not to talk with the Bigelow crowd as he apparently has been imbued in Baltimore with the same absurd jealousy and fear.

Something is going on in the way of negotiations now and I have reason to believe Mr. Dodge is in it.

However to day everything is open and I could buy the property or at least five sevenths with an agreement on my part to take the remaining two sevenths if offered, provided no one suspected to whom it was going and Baltimore did not hear of it until accomplished. It is needless to caution you to keep from saying a word to anyone on this subject at present.

The owner expects to leave here in four days to go out there and

I ought to see him again before he goes and know exactly what to say to him.

The mine is shut down awaiting the completion of the S. P. railroad branch which is being built in to it.

If you are really in want of this property now is the time but let no one know it or hear you speak of it.

Wire me early tomorrow where to meet you on the arrival of tomorrow's three o'clock shore line train which gets in about nine and after an hour's talk with you I must return on the midnight train as I must be in Boston Wednesday.

Of course this is only in case you need me.

I ought to be instructed just what to say to him before he goes.

Yr's Very Truly,

J. M. MEREDITH."

588 Q. 21. Mr. Meredith, as far as you now recall, what, if anything, had occurred between you and Mr. Lewisohn prior to this letter relating in any way to the possible acquisition of the Old Dominion mine?

[Objected to as incompetent, irrelevant, and immaterial.]

A. He had asked me in New York whether I knew that Mr. Simpson had sold his interest in the Old Dominion. I told him that I did not think he had, because I thought Mr. Simpson would have told me if he had; I should have heard of it. And I gathered from him—I do not know whether he told me or I asked him—that it was a property that he would be interested in. And I came to Boston and saw Mr. Simpson, and then wrote Mr. Lewisohn about it. That is my recollection.

Q. 22. And this letter which has just been read was what you wrote?

A. Yes.

Q. 23. I show you Exhibit 1, March 24, 1903, of Mr. Bigelow's deposition, a paper dated April 30, 1895, and signed by Mr. Simpson; is that in your handwriting?

[Objected to as immaterial.]

A. Yes, sir, it is.

Q. 24. Do you recognize that paper as being the option or bond referred to in your letter of April 30, 1895, which you have just read, which appears on page 5 of Mr. Hyams' deposition, by a copy?

[Objected to as immaterial.]

A. Yes, to the best of my belief, it is.

Q. 25. In that same letter you speak of instructions of the morn- from Mr. Lewisohn by telephone; do you have any recollection of that telephone conversation which you had on the morning of April 30 before obtaining this option from Mr. Simpson?

[Objected to as immaterial.]

A. No, sir, I do not.

Q. 26. Have you any recollection, in view of the letters and the option, of the subject to which the conversation related?

[Objected to as incompetent, irrelevant, and immaterial.]

589 A. If there was such a conversation over the telephone it would have applied to that option, undoubtedly.

Q. 27. Just what the details were you have no recollection of?

A. No.

Q. 28. In the letter of April 30 you speak also of the conversation with Mr. Simpson which resulted in your obtaining this option: will you state the substance of that conversation with Mr. Simpson as far as you now recall it?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I cannot recall anything more than what is in that letter; and that I do not recall. I simply see that I have written it.

Q. 29. Are you prepared to say that is a correct recital of the conversation which occurred?

[Objected to as immaterial, incompetent, and as leading.]

A. — and impertinent, I should say. I have stated that. I am not in the habit of writing things that are not correct.

Q. 30. Do not understand my question as insinuating the contrary. In view of the rules of procedure, we have to get the facts down.

A. All right, sir.

Q. 31. Now I will put it in this form: Refreshing your recollection from the letter of April 30, will you state, as thereby refreshed, what the conversation was?

[Objected to as immaterial and irrelevant.]

A. I can simply state that I have no doubt that the conversation occurred as stated in this letter.

Mr. McClennen: I will now offer the letter of Mr. Meredith to Mr. Lewisohn of April 30, 1895, which reads as follows:—

Mr. Hemenway: Objected to for the reasons heretofore stated.

Mr. McClennen: [Reading:]

"April 30th, —5.

Leonard Lewisohn, Esq., Fulton St., New York.

Dear Sir: Your favor of yesterday rec'd. In accordance with your instructions of this morning over the telephone I sent for Mr. Simpson who was out of town at his mill and he only arrived late this afternoon too late to consult you or anyone. I found it harder than I supposed to pin him down, he showed a strong desire before committing himself to consult with some one, due as he stated it that giving an option might ruin another negotiation under way.

590 My reply was that it appeared that he had got to ruin one or the other, that my instructions were to settle the matter for ever at my first interview and that I could not allow him even to use the Long Distance. If I left without a bond he could be sure he would never hear from my people again.

My acquaintance with him permitted me to be a little more severe than otherwise.

After two hours he has given me a bond copy of which I enclose.

We had to write it ourselves as neither of us wanted to leave the other for fear of the Long Distance.

If any of the details or the form are very objectionable wire me tomorrow, 'form of bond impossible' and send me by night's mail a form drafted by your lawyer and I will try and get him to change it. Mr. Simpson is a fair minded man and I believe he will be perfectly reasonable with me.

He goes west in two days leaving his power of attorney at his office.

He says that the Company has got on hand actual surplus of over $350,000 in copper cash and notes receivable which are really undeclared dividends and that he will not include this in the sale.

He has nothing else connected with this Company except an interest in a store which is a private enterprise.

The provisions for delay in transfer is because it might turn out that he would have to apply to the Probate Court but there is no one to consult but himself.

I think some of your warm friends on the street will be much troubled if this sale is completed.

You may send me your check for the two thousand dollars.

He expects an expert to be sent by me at once to the mine so as to report within the fourteen days, you will know if this is necessary.

He has no idea who my people are.

If I have done wrong in anything correct me. It was a difficult matter.

Yr's Very Truly,

J. M. MEREDITH."

Q. 2. What is the next, Mr. Meredith, that you now find in the order of date in the correspondence?

[Objected to as immaterial.]

A. To Mr. Lewisohn; May 16.

591 Q. 33. Let me call your attention to a letter introduced in the deposition of Mr. Hyams at page 7, and dated May 1, 1895, written from the Somerset Club, and see——

A. This [referring to copy in hand of witness] is dated May 16, from the Somerset Club.

Q. 34. Do you recall the letter of May 1?

[Objected to as immaterial.]

A. I do not recall anything about it; although I have no doubt it is quite possible such a letter was written; I have no copy of it.

Q. 35. To do away with any uncertainty, I show you the original of this letter of May 1, 1895; do you recognize that as your handwriting?

A. Yes, I recognize my handwriting and my signature.

Mr. McCLENNEN: This letter of May 1, 1895, I will offer.

Mr. HEMENWAY: Objected to for the reasons heretofore stated.

Mr. McCLENNEN: It reads as follows:—

"SOMERSET CLUB, BOSTON, *May* 1, '5.

Leonard Lewisohn, Esq., Fulton St., New York.

DEAR SIR: Your favor over the telephone today was duly received. Mr. Simpson, not feeling very well, did not come to town today, so this afternoon I had to go out to his house at Saxonville to see him. My form of bond was of course unsatisfactory, but knowing him to be a thoroughly honorable man, and having asked him verbally about many of the points you suggest, I deemed it better to lock him in with an unsatisfactory bond, rather than to let him talk to Baltimore, and I still think I was right. He shows every willingness this afternoon to put the bond in any form that is absolutely fair. He agrees that of course the corporation of which you buy the shares owns all the mines, smelters, furnaces, buildings, mining tools and other appurtenances, also all the ores on dump or in process, copper bottoms, and so forth, and that all he wishes to reserve from the sale is any finished copper product, such as pig copper or ingot copper, cash or notes receivable which have been in the company's possession before this time, the total not to exceed in any case over $350,000, so-called company surplus. The clause about legal delivery of the stock from his father's estate was put in by prudence. Tomorrow I consult an attorney as to
592 whether it is not in his power to absolutely deliver it. I think it is. He agrees with me that this must be put in such shape that no outside influence can interfere; but, when it comes to terms, he not knowing, you understand, who my people are, refuses longer time, in doing away with satisfactory endorsements; as he expresses it, he either runs the mine or sells it; and $100,000 cash is nothing to him if he loses the control of the mine and then has to take it back. He remarks that if my people are as strong as I state them, the terms named are ample. He agrees to be in New York with me on Friday and sign any new bond from which day the fourteen days shall run, but insists that he must go West Friday night and that after that day he cannot change the terms of the bond. Therefore you must consult your attorney and have him ready on Friday to prepare a bond, and he and I can again see Mr. Simpson without his disclosing you in the matter at all.

Telephone me tomorrow if this is all right, and I will wire you about his father's will. I should not be surprised if he believes the purchasers to be Anaconda & Calumet & Hecla, who buy to whip Montana and Tamarack.

Yours very truly,

J. MORRIS MEREDITH."

Q. 36. I now show you Exhibit 2, March 24, 1903, of the deposition of Mr. Bigelow, an option between the Simpson estate and yourself of May 4, 1895; do you recall the fact of obtaining a second option?

[Objected to as immaterial.]

A. There was some paper which Mr. Beaman in New York prepared on the day Mr. Simpson was in New York, and it was

executed by Mr. Simpson at the Waldorf, I think, or one of the hotels, in the evening. Whether it was this option or not I do not know.

[Answer objected to as incompetent, irrelevant, and immaterial.]

Q. 37. Was the paper to which you refer, which was executed by Mr. Simpson at the Waldorf, some form of option upon the Old Dominion stock?

[Objected to as immaterial.]

A. It was some form to take the place of the one he had signed when I was here in Boston.

[Answer objected to as incompetent, irrelevant, and immaterial.]

593 Q. 38. That is the one of April 30?

A. Yes.

Q. 39. I show you a letter of May 6, 1895, appearing to be from you to Mr. Lewisohn: is that in your handwriting?

[Objected to as immaterial.]

A. Yes, that appears to be my signature and my handwriting.

Mr. McClennen: This I will offer.

Mr. Hemenway: Objected to for the reasons heretofore stated as to the other correspondence.

Mr. McClennen: It reads as follows:—

"Office of Meredith & Grew, 15 Congress St., Boston, Mass.

Boston, *May* 6, 1895.

Leonard Lewisohn, Esq., Fulton St., New York.

My Dear Sir: Mr. Butler did not find Mr. Keyser at Old Point Comfort and was to follow him to Baltimore hoping to return to Boston tomorrow morning. I have secured the third executor's signature to the option, and have written Mr. Beaman to that effect. Mr. Bigelow has agreed to let me have, or rather take and pay for a small share of his interest in this venture. I only mention this to show my desire to aid your side of the copper business. I think I can help you on the railroad situation with Mr. Huntington. His private secretary, Mr. Tweed, formerly a partner of Evarts, Southmayd & Choate, I have known for years, and our relations are always of the pleasantest. Mr. Johnson wires me that the senior of the banking house cannot be reached for a day or two more. I will consult with you on this on Wednesday when I shall be in New York. To-night Mr. Hyams is to coach me thoroughly on the railroad situation. My rough idea is to try and get a five years' contract before the option is closed. It will greatly strengthen the situation and enhance the value of the property. But we will talk this over when I meet you.

All comes to those who know how to work for it. Believe me,

Yours truly,

J. MORRIS MEREDITH."

594 Q. 40. In this letter, Mr. Meredith, you have referred to the fact that Mr. Bigelow has agreed to let you "have or rather take and pay for a small share of his interest in this venture:" have you any recollection of how long, prior to May 6, 1895, you had had any conference with Mr. Bigelow on this subject?

[Objected to as immaterial.]

A. My recollection is that after the option——

Mr. HEMENWAY: He simply asks for the time.

The WITNESS: I cannot give the time.

Q. 41. Can you give me the time by reference to any of the transactions?

[Objected to as immaterial.]

A. I think I can.

Q. 42. Well, will you do so?

A. When the option was in Mr. Lewisohn's hands that I had obtained from Mr. Simpson, the commission was stated in the option. Mr. Lewisohn thought he ought to have part of it. I demurred to that. When I came to Boston I told Mr. Bigelow of that. He said that he would give me an interest if I put the money into it, and that under those circumstances he did not believe Mr. Lewisohn would again make his request for part of that commission, which I agreed to.

[Answer objected to as irresponsive and irrelevant.]

Q. 43. From what source had you learned that Mr. Bigelow was interested in this plan?

[Objected to as immaterial.]

A. Oh, I had talked with Mr. Bigelow about it ever since Mr. Lewisohn first spoke to me about it.

Q. 44. Well, do you mean by that before the acquisition of the option?

A. I do not remember, but I think it extremely likely.

Q. 45. Did you learn from Mr. Bigelow what his interest was in the enterprise?

[Objected to as immaterial.]

A. I do not remember.

Q. 46. Do you remember whether he at the time told you what portion he was to have?

[Objected to as immaterial.]

595 A. I do not remember.

Q. 47. Referring back to your letter of April 29, in which you outlined the possibility of doing something with Mr. Simpson, do you recall whether or not at that writing you had talked with Mr. Bigelow at all about the matter?

[Objected to as leading.]

A. I do not recall any such talk.

Q. 48. Have you any means of fixing how many times you had conferred with Mr. Bigelow, prior to this letter of May 6, which has just been read, relating to the agreement to permit you to contribute to the enterprise?

[Objected to as immaterial and leading.]

A. My recollection is that I went into Mr. Bigelow's office every day after I got working on this, when I was in Boston.

Q. 49. Did you confer with him there on these occasions?

A. I suppose so.

Q. 50. Apart from the conferences at his office, do you remember whether you had any telephone communication from Lewisohn?

A. I cannot recall that—eleven years ago.

Q. 51. Do you remember whether or not—do you remember where you conducted your telephone communications with Mr. Lewisohn referred to in these letters we have just been reading?

[Objected to as immaterial.]

A. I do not.

Q. 52. Do you remember whether any of those were from Mr. Bigelow's office?

[Objected to as immaterial.]

A. Probably they were.

Q. 53. You refer in your letter of May 6, just read, to the fact of Mr. Butler's not finding Mr. Keyser: do you remember the arrangement which led to Mr. Butler's attempting to find Mr. Keyser?

[Objected to as immaterial and irrelevant.]

A. Mr. Butler went down to Baltimore for some purpose, undoubtedly to see Mr. Keyser: it would be a mere surmise for me to try to remember exactly why he went.

596 Q. 54. Do you remember by whom it was arranged that he should go?

[Objected to as immaterial.]

A. No, I cannot say by whom: no, I could not say.

Q. 55. Do you remember when the possibility of acquiring Mr. Keyser's interest was first discussed by you, either with Mr. Lewisohn or Mr. Bigelow?

[Objected to as immaterial and as leading, and as assuming a fact not yet proven.]

A. I think it is mentioned in the original bond: I am not sure. You have got it, and I have not.

Q. 56. Let me call to your attention, Mr. Meredith, the fact that the original options of April 30 and May 4, while containing a provision that the purchasers must buy Keyser's share if he so elects, do not contain a provision compelling Keyser to dispose of his share.

A. No.

Q. 57. Having that in mind, will you state the first you recollect

with reference to any effort being made, if any there was, to get Mr. Keyser to sell?

[Objected to as immaterial.]

A. The only thing I remember is there came a time when Mr. Keyser said he would sell, provided he did not have to pay me my commission; and there was a trade made with me, so that I should not insist upon that commission. When that was, I do not know, whether one of these letters will state or not. On June 10 I wrote to Mr. Lewisohn, reciting what he was to give me on that account.

Q. 58. But you have no present recollection of the beginning of the negotiations which led to that?

A. No. May 25, I telegraphed, "Keyser does not care to consult other owners two sevenths until option is acted upon," so I suppose he had not expressed whether he would or would not take it by May 25.

Q. 59. Is this letter of May 7, appearing to be from you to Mr. Lewisohn, written by you?

[Objected to as immaterial.]

A. It is.

Mr. McCLENNEN: That letter I offer. It reads as follows:

Mr. HEMENWAY: That is objected to for the reasons before stated.

Mr. McCLENNEN [reading]:

597 "Office of Meredith & Grew, 15 Congress St.

BOSTON, *May* 7, 1895.

Leonard Lewisohn, Esq., P. O. 1247, New York.

DEAR SIR: Your favor of yesterday enclosing check to my order for the $2000 paid out by me under agreement of May 4, received with thanks. I shall hope to see you tomorrow, and will call at the office. My hotel will be the Waldorf.

Yours very truly,

J. MORRIS MEREDITH."

Q. 60. After this letter, Mr. Meredith, am I right that the next letter you find is May 16?

[Objected to as immaterial.]

A. To Mr. Lewisohn?

Q. 61. To Mr. Lewisohn.

A. Yes.

Q. 62. May I have that?

A. [Copy produced.]

Mr. McCLENNEN: This letter I will offer.

Mr. HEMENWAY: Objected to for the reasons heretofore stated as to the other correspondence.

Mr. McCLENNEN [reading]:

"Somerset Club, Boston.

MAY 16, '5.

DEAR SIR: Your kind favor of yesterday received and I have delayed answering until I came up town. At all times business suggested by you will receive my closest attention. I will be in New York next Tuesday and look into the matter of the Alabama coal company with pleasure.

Mr. Simpson goes west on Saturday and Mr. Butler wishes you could give the endorsements on the notes and guarantee before then so that he could pass on them before leaving. I should think you and Mr. A. S. Bigelow would be ample. I will see Mr. Bigelow in the morning and have him call you up.

Mr. Keiser telegraphed today for a ten days option Old Dominion to run from May 28th if you do not take it and it was given to him. I hope the report from Arizona will be favorable.

Hoping to see you on Tuesday, I remain very truly and with thanks.

J. M. MEREDITH.

L. Lewisohn Esq."

598 Q. 63. What is the next letter to Mr. Lewisohn?
A. May 17

[Copy exhibited.]

Mr. MCCLENNEN: This letter I offer.

Mr. HEMENWAY: Objected to for the reasons heretofore stated.

Mr. MCCLENNEN [reading]:

"MAY 17, '5.

Leonard Lewisohn, Esq., Post Office box 1247, New York.

DEAR SIR: Mr. Simpson agrees that your notes endorsed by Lewisohn Bros. Co. and Albert S. Bigelow will be satisfactory to the Executors of his father's Estate.

But as to the guarantee to take the minority he prefers Mr. Kaiser to pass on this and I have written under his direction to Mr. Kaiser for his approval. I have no doubt it will be all right. They want the papers to pass at the Old Colony Trust Company here in Boston.

Mr. Simpson desires me to assure you that the only reason for his consenting to give ten days option after the 28th was that Mr. Kaiser was under obligations to do so when asked and that Mr. Simpson under the circumstances could not refuse.

Y'rs Very Truly,

J. M. MEREDITH."

Q. 64. Up to this date, May 17, 1895, Mr. Meredith, had you had any correspondence with Mr. Keyser?

[Objected to as immaterial.]

A. Up to the 17th?

Q. 65. Up to the 17th.

A. I have no copy of any before the 17th.

Q. 66. What is the first correspondence that you had with Mr. Keyser?

[Objected to as immaterial.]

A. On the 17th [exhibiting a copy].

Mr. McCLENNEN: This letter I will offer.

Mr. HEMENWAY: The letter is objected to for the reasons before stated and for the reason that Mr. Keyser is in no way interested in any of these suits at present pending in regard to these matters.

599 Mr. McCLENNEN: The letter reads as follows:

"MAY 17TH, '95.

Wm. Kaiser, Esq., Kaiser Building, Baltimore, Md.

MY DEAR SIR: Under the option for the Old Dominion Copper Mining Co. given me by Mr. F. E. Simpson and assigned by me to Mr. Leonard Lewisohn, Mr. Simpson has agreed that Mr. Leonard Lewisohn's notes endorsed by Lewisohn Bros. Co. and Mr. Albert S. Bigelow will be satisfactory to the Executors of his father's Estate. But as to the guarantee to be given to take any part of the minority offered within sixty days he prefers to have you decide, as it is of more interest to you than to him.

Will you kindly wire me on receipt of this if the above three names will be satisfactory to you.

I think it possible that if you also notified me at once that the two sevenths be tendered I could get the parties to agree to take them at the same time, of course with the understanding that they should at once control the board of directors.

But this is only an idea of my own to make things as pleasant as possible for you.

I remain with respect.

Y'rs very truly,

J. MORRIS MEREDITH."

Q. 67. Have you any recollection, Mr. Meredith, whether you had seen Mr. Keyser in this matter prior to the writing of this letter on May 17, 1895?

[Objected to as immaterial.]

A. I have none, sir.

Q. 68. Up to this date had you any correspondence with Mr. Bigelow?

[Objected to as immaterial.]

A. May 16 is the first letter that I find a copy of to Mr. Bigelow.

Mr. McCLENNEN: That letter I offer.

[Objected to as immaterial.]

Mr. McCLENNEN: The letter reads as follows:

600 "MAY 16TH, 1895.

DEAR BIGELOW: Enclosed is seventy dollars being my share amounting to ($25,000) twenty five thousand dollars of the $2000 paid for option in the Old Dominion Copper Mining Company deal.

Y'rs very truly,

J. M. MEREDITH."

A. S. Bigelow, Esq.

Q. 69. Mr. Meredith, I show you Exhibit 20, May 5, 1903, accompanying Mr. Bigelow's deposition, a so-called underwriting agreement of May 25, 1895; is the signature thereto, "J. Morris Meredith, $25,000," yours?

[Objected to as immaterial.]

A. Yes, that is my signature.

Q. 70. Is the $25,000 interest therein mentioned the one to which you refer in your letter of May 16 to Mr. Bigelow?

[Objected to as immaterial.]

A. Yes, undoubtedly.

Q. 71. Now, in order to date, what is the next letter that you have, either to Mr. Lewisohn, to Mr. Bigelow, or to Mr. Keyser?

[Objected to as immaterial.]

A. What date are we at now?

Q. 72. The 17th of May. We have had the one of the 17th of May.

A. May 20, to Mr. Keyser [exhibiting copy].

Mr. MCCLENNEN: This letter I will offer.

Mr. HEMENWAY: Objected to as irrelevant, incompetent, and immaterial.

Mr. MCCLENNEN: The letter reads as follows:

"MAY 20TH, '5

Wm. Keyser, Esq., Keyser Build'g, Baltimore, Md

DEAR SIR: Your favor of the 18th received. Altho' everybody supposed that you would desire to retire, I personally am reluctant to cause inconvenience to any gentlemen in a trade where I might be looked upon as an outsider.

I shall be in New York at the Holland House tomorrow and if you will kindly wire me there tomorrow where and when to meet you either in New York or Baltimore as early as possible I will
601 endeavor to keep the appointment. I think after a personal interview I can arrange things to please you all and I hope to be considered a well doer rather than a nuisance. I remain,

Y'rs very truly,

J. MORRIS MEREDITH."

Q. 73. What is the next letter in order of date to Mr. Lewisohn, to Mr. Bigelow, or to Mr. Keyser?

[Objected to as immaterial.]

A. I think there is one to each of them on the 25th, if I am not mistaken. I think you will find it there.

Mr. McCLENNEN: I offer a letter of Mr. Meredith to Mr. Bigelow of May 25, 1895.

Mr. HEMENWAY: Objected to for the reasons heretofore stated.

Mr. McCLENNEN: It reads as follows:

"MAY 25, '5.

A. S. Bigelow, Esq.

DEAR SIR: Enclosed you have check for thirty five hundred dollars on a/c of my share in the Old Dominion Copper Mine Co. purchase.

Y'rs very truly,

J. MORRIS MEREDITH."

Mr. McCLENNEN: I offer a letter from Mr. Meredith to Lewisohn Brothers of May 25, 1895.

Mr. HEMENWAY: Objected to for the reasons heretofore stated.

Mr. McCLENNEN: It reads:

"MAY 25, '5.

Lewisohn Bros. Co., Fulton Street, New York:

Keyser does not care to consult other owners two seven this until option is acted upon assures me if sale is made there will be no captious opposition nor any delay in transfer of property control to new owners. If you get telegram from Hyams tomorrow entitled you repeat to me Somerset Club Boston there is so little time show this to Beaman.

J. M. MEREDITH."

602 Q. 74. Was that a letter or a telegram, Mr. Meredith? A. It looks like a telegram.

Mr. McCLENNEN: I will offer a letter from Mr. Meredith to Mr. Keyser dated May 25, 1895.

Mr. HEMENWAY: Objected to for the reasons heretofore stated.

Mr. McCLENNEN: The letter reads as follows?

"MAY 25, '5.

Wm. Keyser, Esq., Keyser Building, Baltimore, Md.

DEAR SIR: Your favors of May 23rd and 24th both received with my best thanks.

We have not yet received expert reports from the mine but shall no doubt by Monday.

I remain,

Y'rs very truly,

J. MORRIS MEREDITH."

Q. 75. In a letter to Mr. Keyser of May 20 you refer to your intention to be at the Holland House in New York on the following day, and in your telegram to Lewisohn Brothers you refer to Mr. Keyser's not desiring to consult the other owners until the option is

acted upon; do you recall what course you did in fact pursue so far as Mr. Keyser was concerned?

[Objected to as immaterial, incompetent, and irrelevant.]

A. I know that at some time I saw Mr. Keyser at the Holland House in New York; I cannot tell you whether on just that date or not.

Q. 75. Do you know whether it was at that conversation that you learned that he did not care to consult the other owners?

[Objected to as immaterial and leading.]

A. I cannot tell you.

Q. 77. It has appeared in the testimony of Mr. Bigelow, at page 173, that a letter was written by Lewisohn Brothers to Adolph Lewisohn, as follows:

603 "NEW YORK, *May 24th*, 1895.

Adolph Lewisohn, Esq., London.

DEAR SIR: Mr. Meredith got back from Baltimore yesterday and had a conference of a couple of hours' duration with Mr. Keyser, but is none the wiser as to whether this gentleman intends to let us have his two-sevenths of the Old Dominion or not. He intimates that if we make it a different company with a higher capitalization, he would probably not remain in; but he had not decided and is not compelled to decide for sixty days. Having three directors out of five, they control; and we would have to get one of those directors to our side—otherwise they would have the running of the company until next February when a meeting will be held and new directors appointed.

We will have to take our chances on this matter, and we hope he will act fairly.

Mr. Lieberman of Arizona is one of the directors, we understand, and Mr. Leonard Lewisohn believes we will be able to win him over, and Mr. Simpson also promised to help us in gaining our point there, and it is probable that this matter will right itself in course of time as it is not likely that Keyser will be very mean when there is not much for him to gain thereby.

Very truly yours,

LEWISOHN BROTHERS,
LEWISOHN,
General Manager."

Do you recall whether you had more than one meeting with Mr Keyser?

Mr. HEMENWAY: The defendant objects to that part of this interrogatory which incorporates the so-called letter from "Lewisohn Brothers, Lewisohn, General Manager," to Adolph Lewisohn as being incompetent, immaterial, and irrelevant, the letter itself being objected to, and the next interrogatory having no relation to this letter, apparently, said letter having not yet been proven, and it

being between other parties than those to the suits to which Mr. Bigelow is a party; and the last part of the interrogatory is objected to as immaterial.

A. I remember of seeing him at the Holland House, New York, I remember of going to Baltimore and going to the Keyser building, to the office; whether I saw him there or whether I saw somebody else, I have no recollection to-day.

604 Q. 78. Do you remember which visit was first, to the Holland House or to the Keyser building?

[Objected to as immaterial.]

A. I do not.

Q. 79. Do you remember on one or the other of these occasions discussing with Mr. Keyser on the question of his disposition of his two sevenths?

[Objected to as leading and immaterial.]

A. I do not.

Q. 80. Will you relate, as far as you can, what was said between you and Mr. Keyser on those two occasions?

[Objected to as immaterial, irrelevant, and incompetent.]

A. If my recollection is right, at the interview at the Holland House Mr. Keyser said he would be down town in the course of the morning, and he would see Mr. Beaman. I think those two gentlemen had an interview, and that is all that I can remember about it.

Q. 81. Now as to the occurrence in Baltimore?

A. I do not recall what transpired there.

Q. 82. Recurring again to your telegram of May 25, wherein you say, "Keyser does not care to consult other owners' two sevenths until option is acted upon assures me if sale is made there will be no captious opposition," have you any means of fixing where you received that information?

A. I have not.

Q. 83. Do you recall whether or not you received it from Mr. Keyser?

[Objected to as immaterial.]

A. I do not recall anything about it.

Q. 84. Do you have means of stating from what place this telegram was sent?

[Objected to as immaterial.]

A. What date was that?

Q. 85. May 25.

A. Why, it was evidently copied in our office in Boston, so I suppose it was sent from there.

Q. 86. Do you mean, by your earlier answer as to the conversation at the Holland House, to say there was no conversation there

605 beyond the simple statement made?

A. Oh, I cannot say that. If I recall right, we sat down there and had a chat; what transpired, I cannot remember.

Q. 87. Let me call your attention to some particular things. Do you recall whether anything was said by Mr. Keyser in either of these places with reference to not desiring to disturb the other owners of the two sevenths interest until it was known whether the option was to be acted upon?

A. I have no recollection of it now.

Q. 88. Do you recall whether you had any conference with either Leonard Lewisohn or Jesse Lewisohn about conferring with Mr. Keyser?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I do not suppose at that time I was ever in New York without seeing Mr. Leonard Lewisohn if he was in New York. That is all I can tell you.

Q. 89. Do you recall whether or not you reported to Mr. Lewisohn on those occasions the substance of your conversations with Mr. Keyser?

[Objected to as immaterial.]

A. I do not recall doing so. No doubt I did.

Q. 90. Do you recall whether or not your conference, if any, in Baltimore had considerable duration, perhaps two hours?

[Objected to as immaterial.]

A. No, I cannot remember.

Q. 91. Do you recall whether or not, in any such conversation, you discussed with Mr. Keyser the possibilty of his taking stock if a different company with a higher capitalization was formed?

[Objected to as incompetent, irrelevant, immaterial, and leading.]

A. I cannot remember those talks—it was eleven years ago—except that I see something on paper that reminds me, my mind is a blank about it.

Q. 92. Well, does seeing on paper this statement that "Mr. Meredith got back from Baltimore yesterday and had a conference of a couple of hours' duration with Mr. Keyser, but is none the wiser as to whether this gentleman intends to let us have his two sevenths of the Old Dominion or not. He intimates that if we make it a different company with a higher capitalization, he would probably not remain in," assist your recollection as to anything?

606 Mr. HEMENWAY: I object to this method of attempting to assist the recollection of the witness, as such a thing would be impossible, it being from a typewritten letter between other parties.

A. I do not think it would be fair to say that reading that letter refreshes my memory of a fact. I have no doubt Mr. Lewisohn wrote what was true, but it does not refresh my memory to know that he did write it.

Q. 93. Well, seeing that Mr. Lewisohn did write Mr. Adolph Lewisohn, as he did, cannot you assist us a little as to what the transactions were? Of course you are better informed than we are.

Mr. HEMENWAY: Objected to as incompetent, irrelevant, and immaterial, the witness having already answered the question that his memory is in no wise refreshed, only stating that he thinks that what Mr. Lewisohn there wrote would be true. That does not enable him to swear to it as of his own memory.

A. All of my recollection about that whole matter with Mr. Keyser is this: that the impression I got was that Mr. Keyser was very indignant that this mine had been sold, that the five sevenths had been sold, and that he was very much disappointed, as he represented to me; that when he found he could not stop it, it became a serious question in his mind what to do with regard to the minority, and that it was some time before I knew what his final decision was going to be. Beyond that, I cannot undertake to say that I knew anything that passed in his mind or that was said to me in regard to the matter.

Q. 94. You recall the fact that, in the process of handling this matter, a new Old Dominion Copper Mining and Smelting Company was formed?

[Objected to as immaterial and incompetent.]

A. My recollection of all that is that Mr. Beaman, as I understood it, was in consultation with Mr. Bigelow as to what they were going to do; and, whilst it is possible that certain parts of those things were mentioned in my presence and told me, I did not pay much attention to what was being done. I felt that there was going to be a profit. My interest in it only came out of the commission I had made, and whatever those gentlemen felt was the right thing to do, that was all that I cared for.

Q. 95. In those early days you were in frequent consultation with them, were you not?

A. Oh, I think I was in the office nearly every day when they wanted me.

Q. 96. And as the various developments came, do you have any recollection of their causing any surprise to you?

[Objected to as immaterial, incompetent, and altogether irrelevant.]

607 A. No, I do not remember anything that surprised me at all. The only thing I can remember is that for quite a long time all the evidence that I had with regard to what was coming to me was a little penciled memorandum; I remember of wishing it was in writing, but did not care to ask for it.

Q. 97. Is that memorandum still in existence?

A. No.

Q. 98. That was destroyed, was it?

A. I suppose so. I suppose it was destroyed. I have not got it.

Q. 99. Do you remember whether it stated the number of shares that you were to have?

[Objected to as immaterial.]

A. As I remember, it was a little piece of paper that jotted down the number of shares for each purpose which were coming to me.

Q. 100. What were the different purposes stated?

Mr. HEMENWAY: That is objected to as immaterial. If there is any such paper in existence, he has not looked for it yet, and therefore he cannot state from memory.

A. As I remember it, there was the amount of shares coming to me for the $25,000 subscription: the amount of shares coming to me for Mr. Lewisohn's interest in compromising my commission on the minority, and the amount of shares coming to me from Mr. Bigelow on the same.

Q. 101. Do you remember at all when you learned of the fact that the company had organized,—the new company?

[Objected to as immaterial.]

A. I do not remember.

Q. 102. Do you remember whether you knew at the time of the fact of the organization when it occurred?

A. I suppose I should have, yes; I should think so.

Q. 103. As nearly as you can state, how long prior to that had you known of the project to organize a new company?

Mr. HEMENWAY: He has not testified yet that he knew of the project to organize a new company. For that reason I object to the assumption of that fact in the interrogatory; also because it is immaterial and irrelevant.

A. I cannot remember, honestly.

Q. 104. Do you remember now whether at any time you discussed with any one connected with the Old Dominion venture the possibility of a new corporation?

608 [Objected to as immaterial and misleading.]

A. I think they told me in the office always what they were doing when I went in there. I think undoubtedly, although I do not have any distinct recollection, that they were telling me that they were doing this; I have no doubt that I was told. I only mean by my previous remark to say I did not pay serious attention to it, as I should have under other circumstances; I felt that Mr. Beaman, Mr. Bigelow, and Mr. Lewisohn were fully capable of doing the right thing, and whatever they said was perfectly satisfactory to me.

Q. 105. In the course of their conversation with you do you recall whether or not either Mr. Lewisohn or Mr. Bigelow mentioned the fact of a new corporation to you?

A. I do not recall it, but I have no doubt it was told me.

Q. 106. Have you any recollection of what information you were supplied with, if any, to enable you to discuss the matter with Mr. Keyser when you saw him?

[Objected to as immaterial, and as assuming a discussion with Mr. Keyser which does not yet appear to have taken place.]

A. I recall no such discussion with Mr. Keyser in regard to any new company.

Q. 107. In view of your telegram of May 25, are you not able to state whether you had any discussion with Mr. Keyser that went into the detail of this Old Dominion venture?

[Objected to as incompetent, irrelevant, and immaterial.]

A. There is nothing in that telegram that leads me to suppose that there was any discussion about the future of the property sold.

Q. 108. Are you able to state any fact or occurrence which led you to report that Mr. Keyser did not care to consult the other owners of the two sevenths?

[Objected to as immaterial, incompetent, and irrelevant.]

A. I do not recall. It looks as if I had been instructed to find out whether he would not consult the owners, but I do not recall the matter.

Q. 109. Have you any recollection of any fact which led to your going to Baltimore to see Mr. Keyser?

[Objected to as immaterial.]

A. I have not.

609 Q. 110. At the time (namely, May 23, 1895), have you any recollection of any other person than Mr. Lewisohn or Mr. Bigelow with whom you were dealing as parties in interest in this matter?

[Objected to as incompetent, irrelevant, and immaterial.]

A. There was Mr. Nelson, Mr. Hyams, Mr. Butler, on Mr. Simpson's behalf: I think Mr. Simpson was away at that time, I am not quite sure.

Q. 111. Having in mind the people whom you have mentioned as parties in interest, if it shall appear to be the fact that you had conversation with Mr. Keyser in Baltimore on May 23, 1895, dealing with the subject of the possibility of creating a different company with a higher capitalization, are you able to state whether that proposal came from yourself or from some of those men with whom you were dealing?

[Objected to as incompetent, irrelevant, immaterial, and as purely a conjectural question.]

A. I could not answer that. I do not know of any such conversation: I do not recall any such conversation that occurred between myself and Mr. Keyser: if it did occur, I do not recall what it was, and I certainly, under those circumstances, cannot attempt to recall who told me to do it.

Q. 112. Are you prepared to say at the present time that the subject of the formation of a new corporation to acquire these properties had not been discussed between you and Mr. Bigelow, or Mr. Lewisohn, prior to May 23, 1895?

[Objected to as immaterial.]

A. I could not say it one way or the other.

Q. 113. Do you remember whether at the time you received the memorandum which you have described, in which your interest was set forth in terms of shares, you knew whether it related to the new corporation or the existing old corporation?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I must have known it related to the new company.

Q. 114. You knew, then, it related to the new company?

A. I must have.

Q. 115. Have you any means of stating from what source you got that information?

[Objected to as immaterial.]

610 A. Through Mr. Bigelow or Mr. Nelson or Mr. Hyams, or all three of them.

Q. 116. When you gave your underwriting of $25,000, about which you have testified, what, if any, information did you have relative to the way in which that money was to be used or in which it was proposed that it should be used?

[Objected to as incompetent and immaterial.]

A. I cannot recall at present; I cannot recall what information I had at the time.

Q. 117. Can you recall any information that you had at that time?

A. Only that that $25,000 went in on the same conditions that what Mr. Bigelow took, or what anybody else took, did, as far as the purchaser of the Old Dominion was concerned.

Q. 118. Had you any information as to the way in which the Old Dominion was to be acquired?

[Objected to as immaterial, irrelevant, and incompetent.]

A. I suppose I had, as I have stated before, but I have no recollection. I was perfectly satisfied that the detail as proposed by these gentlemen would be honest and satisfactory, and I have no doubt that they told me, but I cannot recall now what they said, or what they did not say, after eleven years.

Q. 119. Do you recall whether anything was ever said by them, or either of them, with reference to your acquiring stock in the Old Dominion Company?

[Objected to as immaterial, irrelevant, and incompetent.]

A. No, I cannot remember that.

Q. 120. Do you recall anything being said by any of them with reference to increasing the capital of the Old Dominion Company?

[Objected to as immaterial and incompetent.]

A. I know that there were many talks and many statements of what they proposed to do that were held in my presence, but I can no more remember the details than you can remember as to who was at your christening.

Q. 121. Well, without attempting to exhaust all the facts that may have been discussed, I ask you with reference to this one: do you recall any discussion with reference to increasing the capital of the Old Dominion Company?

[Objected to as incompetent and irrelevant.]

A. No, I do not.

611 Q. 122. You do not recall any?

A. No.

Q. 123. Do you remember any discussion at any time with Mr. Bigelow or Mr. Lewisohn with reference to shutting down the mine?

[Objected to as immaterial and irrelevant.]

A. Why, I think when I was in Globe, Ariz., there was some conversation about whether to wait for a new smelter or whether to go running the mine without.

(By Mr. HEMENWAY:)

Q. Was Mr. Bigelow or Mr. Lewisohn in Globe with you?

A. Yes, at some time Mr. Bigelow invited me to go out on a trip through the Northwest, and we went down to Globe afterwards; when it was I cannot tell you at this time.

Q. 124. Was it after the acquisition of the property?

A. I should say it was.

Q. 125. Do you recall whether you had any knowledge of an intention to shut down the mine between the time that the Simpson interest was acquired and the time when the Keyser interest was acquired?

[Objected to as incompetent and immaterial.]

A. I cannot remember.

Q. 126. Do you recall whether in any of your conversation with Mr. Keyser anything was said with respect to the terms upon which he might or might not remain interested in the Old Dominion?

[Objected to as incompetent and immaterial.]

A. Nothing only what these letters say or refer to; I remember nothing more.

Q. 127. At the time of the acquiring of these options were you aware of the method which had been pursued by Mr. Bigelow and Mr. Lewisohn in other similar enterprises?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I think not.

Q. 128. Had you known of the fact of their acquiring other mining properties before this?

[Objected to as immaterial and irrelevant.]

A. I knew they were very largely interested in mines; they must have acquired them.

612 Q. 129. Did you know anything about the method which had been pursued by them in increasing those enterprises?

[Objected to as immaterial and irrelevant.]

A. I think not.

Q. 130. Had you been engaged in any way in any of these other enterprises?

[Objected to as immaterial, irrelevant, and leading.]

A. I do not remember of any.

Q. 131. Did you have any knowledge at the time of the acquiring of these options as to the capital stock of the Old Dominion Company?

[Objected to as immaterial and irrelevant.]

A. I cannot recall whether I did or not.

Q. 132. Did you have anything to do with the Old Dominion Syndicate, so-called?

[Objected to as leading and immaterial.]

A. What do you call "the Old Dominion Syndicate"? I do not know exactly what you refer to.

Q. 133. Did you know of anything being formed at about the time of the acquiring of these options, or soon thereafter, called the Old Dominion Syndicate?

[Objected to.]

A. I notice in one of these letters where I send some money to the "Old Dominion Syndicate, P. O. Box 5104, Boston, A. S. Bigelow, Esq." That was the address where the letter went.

Q. 134. Have you any recollection of what the Old Dominion Syndicate was?

[Objected to as immaterial.]

A. No, I cannot follow those individual things.

Q. 135. Do you know whether you had anything to do with it yourself?

A. If the purchase of the Old Dominion mine has anything to do with it, if the $25,000 turned in in the way I turned it in has anything to do with it, if the receiving in lieu of my commisson on the minority *an* interest had anything to do with it, then I had; otherwise, it is entirely obscure to my mind.

613 Q. 136. Do you remember whether at the time those options were acquired, the Old Dominion mine was in question or not?

[Objected to as immaterial and irrelevant.]

A. No, I cannot remember.

Q. 137. You have no knowledge on that subject?

A. I undoubtedly knew whether it was or not at the time; I cannot recall now which way it was.

Q. 138. At the time you were making this comparatively large investment, did you have any knowledge whether you were investing in a mine that was to operate or in a mine that was to be idle?

[Objected to as immaterial, irrelevant, and incompetent.]

A. I knew I was investing in a thing that was to be managed by the Bigelow office, and managed with the ability they had always shown in all their other things; whether that meant it was to run immediately, or to shut up immediately, I did not know anything about.

Q. 139. Did you have any knowledge at this period of the way in which you might expect to obtain any profit out of this investment for yourself?

[Objected to as immaterial and incompetent.]

A. I had examples in the Boston & Montana, Tamarack, and several other companies which had been prosperous; I suppose this would be prosperous in the same way.

Q. 140. That is, in the same way as the Boston & Montana and Tamarack?

[Objected to as immaterial and incompetent.]

A. I knew they had been very profitable corporations, and I suppose this investment was to be one equally prosperous.

Q. 141. Had you been informed by either Mr. Lewisohn or Mr. Bigelow that it was proposed to deal with this in the way they had been dealt with?

[Objected to as incompetent, irrelevant, and immaterial, and as leading.]

A. I do not think they made any comparison with the others.

Q. 142. What information had you received from either
614 of them which enabled you to suppose that the enterprise was of any such character as Boston & Montana or Tamarack?

[Objected to as immaterial and incompetent.]

A. I heard it from Mr. Lewisohn and from Mr. Hyams both, that they considered there was great value in this mine.

Q. 143. At the time that you received the memorandum stating what you were to have as your share, do you know whether or not the present Old Dominion Copper Mining & Smelting Company had been organized?

[Objected to as immaterial.]

A. I cannot recall the dates now so as to tell you that.

Q. 144. Well, when you received that memorandum, do you recall whether there was already a new corporation in existence?

A. I could not tell you, honestly, whether this new corporation had been formed at that time or not. I remember the fact that I had for a long time in my pocket a little piece of paper that told me I was entitled to a certain number of shares, and I held that until I got my certificates, which came in afterwards.

Q. 145. Were the certificates which you received, as stated in the memorandum, as you recall?

[Objected to as immaterial.]

A. Undoubtedly.

Q. 146. Was that memorandum made at the time of your agreement with Mr. Bigelow, or subsequently?

[Objected to as immaterial.]

A. Oh, I think afterwards, some time afterwards.

Q. 147. Do you remember how long after?

A. I cannot.

Q. 148. And you cannot remember whether at the time it was made the corporation was already organized?

Mr. HEMENWAY: That question has already been asked and answered several times, and I think it is unfair to the witness to repeat it, and unfair in the time it takes to repeat it so often.

615 Q. 149. Mr. Meredith, what effort has been made to secure any letters that you have received from Mr. Lewisohn, Mr. Bigelow, or Mr. Keyser?

A. The copy letter books of these letters were easily found because they were in our safe, and they were numbered, and I have kept them there for convenience since. My recollection is that the letters that I received were not put with the Meredith & Grew letters; they were put with some papers of my own, and those papers,—I have moved three or four times since, and I do not know where to go to look for them, and I do not know how to find them; it might mean two or three weeks' hard work hunting into old papers, and then not finding them after all. If I knew where they were, I would just as soon refer to them.

Q. 150. Do you remember some time ago having a conversation with Mr. Brandeis about this matter?

[Objected to as immaterial.]

A. Yes, he came into my office about it.

Q. 151. Did the conversation relate to some of the same matters that I have referred to?

[Objected to as immaterial.]

A. Yes, he seemed to want to find out all he could, if I remember right. He was quite liberal in asking questions.

Q. 152. Do you remember whether in the course of that interview anything was said as to your recollection of the intention to form a new corporation?

[Objected to as immaterial.]

A. I cannot remember what I said at that meeting.

Q. 153. Do you remember whether that particular thing was discussed in any way?

A. I do not remember.

Q. 154. This interview with Mr. Brandeis was some years back, was it not?

A. Yes, I should think it was.

Q. 155. Somewhat nearer the events that we are inquiring about?

A. Why, it seems to me, I do not recall whether I had ever heard

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that there was any such question before he came to me, and whether I had I cannot remember, but it was about the first time that I had heard that there was some trouble involved in this matter that Mr. Brandeis called; whether he told me of it first or whether I had known of it before he came, I do not know, but I think it was while it was just fresh to my mind.

616 Q. 156. Do you remember whether he asked you whether you had had a conversation with Mr. Keyser in which Mr. Keyser had said that if a different company was formed with a higher capitalization he would probably not remain in?

Mr. HEMENWAY: Objected to as incompetent, irrelevant, and as a conversation between Mr. Brandeis and the witness, having nothing to do with the issues in this case.

A. I do not remember.

Q. 157. Do you remember whether at that time you said, in substance, that this remark, namely, "that if we make it a different company with a higher capitalization, he [Keyser] would probably not remain in," was a remark which Keyser made to you at the time you were seeing him about getting the option?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I cannot remember anything in regard to my conversation with Mr. Brandeis, unless it is that he had some notes on a piece of paper and he began and asked me questions right along. I was perfectly willing to tell him anything that I knew, but what I told him and what I did not tell him I cannot remember and cannot say what it was. I did not keep notes of the conversation; he probably did.

Q. 158. Do you mean that your mind is a blank as to whether or not you told Mr. Brandeis this remark as to a new corporation with a larger capital was made in one interview or another?

A. It is. I cannot tell you at all.

Q. 159. Is it possible, then, that you may have stated that to Mr. Brandeis?

[Objected to as immaterial and incompetent.]

A. I suppose everything is possible in this world.

Q. 160. I mean possible in view of the facts and your knowledge of them.

[Objected to as incompetent, immaterial, and purely conjectural.]

A. I could not answer that question; I have got nothing to go by.

Q. 161. Well, let me call to your attention, Mr. Meredith, these facts; you would not have stated to Mr. Brandeis a thing which was not so?

[Objected to as incompetent, immaterial, and an improper way of trying to get in Mr. Brandeis' version of this transaction.]

A. I think I could assent to that last statement, that I should not have said anything that was not true.

617 Q. 162. Well, it is in the light of that that I am asking you in the form I do, whether it is possible that you stated to Mr.

Brandeis this remark of Mr. Keyser's, that he would not come in if they made it a different corporation with a larger capitalization?

[Objected to, the counsel's calling on him being of no consequence.]

A. I think that is referred to in these letters; I do not know what I told him, but I think there is a letter where I said that.

Q. 163. Now I am merely asking you, in the light of these things, if you will state what your recollection is on that subject?

A. My only recollection is that which I see and feel sure of; that is all that I can tell you. I think it was a letter to Mr. Lewisohn, was it not, where I say that? We have read it this morning, I am sure.

Mr. HEMENWAY: There is no such letter.

Q. 164. Have not you in mind the letter to Mr. Lewisohn?

Mr. HEMENWAY: That letter has not been put in evidence yet, and the only thing he has in mind is the frequent statement of counsel in his examination.

Mr. MCCLENNEN: Just note an objection to Mr. Hemenway's characterization of the witness' reference.

Q. 165. Is not the letter which you have in mind the one which I have read, Mr. Meredith, in which occurred the statement, "Mr. Meredith got back from Baltimore yesterday, and had a conference of a couple of hours' duration with Mr. Keyser, but is none the wiser as to whether this gentleman intends to let us have his two sevenths of the Old Dominion or not. He intimates that if we make it a different company with a higher capitalization, he would probably not remain in"?

[Objected to as immaterial and incompetent.]

A. I suppose it was, but I cannot tell you whether it was or not. It shows the danger——

Mr. HEMENWAY: He has not completed his answer.

The WITNESS: It shows the danger of trying to surmise that you do remember. I should have sworn that there was a letter in these letters from me to Mr. Lewisohn, in which I stated that Mr. Keyser would not go in. Now that I come to look, there is not. So I am going to be a little cautious in what I swear to.

Q. 166. Am I right in gathering from that last answer that it was your recollection that you had written to Mr. Bigelow that?

A. No. No, I am not prepared to say that.

618 Q. 167. Do you remember whether you conferred with Jesse Lewisohn at any time with reference to this matter?

[Objected to as immaterial, incompetent, and irrelevant.]

A. I always saw Mr. Leonard Lewisohn if he was there. Whether or not I called at Fulton street some day when Mr. Leonard Lewisohn was not there, and saw either Mr. Jesse or Mr. Adolph Lewisohn, I cannot tell you; it would have been possible for me to have done that, but my regular person was Mr. Leonard Lewisohn.

Q. 168. And you have no recollection, then, of whether any of your interviews with Mr. Keyser were reported to Mr. Jesse Lewisohn?

A. I cannot recall.

Q. 169. What is the next letter that you have after May 25?

A. To anybody?

Q. 170. Yes; that is, to Mr. Lewisohn, Mr. Bigelow, or Mr. Keyser.

[Objected to as immaterial.]

A. June 10, to Mr. Leonard Lewisohn, there is something to Mr. Keyser, possibly, before that; June 10, to Mr. Lewisohn, I think that is the one, if I have not made a mistake.

Mr. McClennen: The letter of June 10 I will offer.

Mr. Hemenway: Objected to as incompetent, immaterial, and irrelevant.

Mr. McClennen: It reads as follows:—

"June 10, '5.

Leonard Lewisohn, Esq., of Lewisohn Bros. Co., Fulton St., New York.

Dear Sir: According to our understanding by Telephone today, I am to have for surrendering all claim to commission on the two sevenths minority stock in the Old Dominion Copper Co. deal fourteen, four hundred & fifty third (14/453rd) parts of any profit coming to you or those under you taking the 453/1000 interest in the entire deal and I also get for the same reason a similar interest of fifteen thousand dollars in the Boston pool profits.

Kindly write me a line agreeing to this.

Yr's Very Truly,

J. MORRIS MEREDITH."

This is what Messrs. Bigelow and Nelson think is fair and it was suggested by them."

619 Q. 171. Do you know whether or not at that time the pencil memorandum that you have mentioned was or was not in existence?

A. I could not say; I could not say whether it was or not. I do not know when those certificates came out, when the certificates were really delivered.

Q. 172. Did the pencil memorandum precede or follow the coming out of the certificates?

[Objected to.]

A. Certainly it preceded it.

Q. 173. Do you know anything with respect to the method proposed for obtaining cash working capital for this enterprise?

[Objected to as incompetent, irrelevant, and immaterial.]

A. As I say, at the time there was undoubtedly lots of things told

me, but feeling that I was not the one to judge of them I accepted them as being all right, and I did not load my mind with that detail.

Q. 174. Do you remember whether or not you were aware that it was proposed to have a cash capital of $500,000?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I cannot state any figures at all.

Q. 175. Do you remember whether you were aware at the time that there was to be anything done about securing cash capital?

A. I cannot imagine a mine started without any cash capital.

Q. 176. But you think you have no recollection with respect to it?

A. I do not.

Mr. McClennen: I think that is all.

Mr. Hemenway: Doubtless there may be some questions that Mr. Lauterbach will want to ask him on cross-examination.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

620 *Deposition of William J. Ladd.*

William J. Ladd, being first duly sworn by E. F. McClennen, Esq., a notary public, in answer to interrogatories propounded by L. D. Brandeis, Esq., counsel for the plaintiff, deposes and says,—

Q. 1. Please state your name, residence, and occupation.

A. William J. Ladd; residence, Newton, Mass.; occupation, treasurer of several copper companies.

Q. 2. Are those copper companies in which Mr. Albert S. Bigelow is an officer or stockholder?

A. Yes.

Q. 3. What companies are they?

A. The Tamarack Mining Company, Osceola Consolidated Mining Company, Isle Royale Copper Company, and the Ahmeek Copper Company.

Q. 4. What was your occupation in 1895?

A. I was comptroller of the Chicago, Burlington & Quincy Railroad Company.

Q. 5. When did you first become connected with the Old Dominion Copper Mining & Smelting Company?

A. I think it was the latter part of November or the 1st of December in 1897.

Q. 6. What was your connection with that company at that time?

A. I was secretary and treasurer.

Q. 7. And a director?

A. Yes, and a director.

Q. 8. Had you been a stockholder of that corporation before that time?

A. No, sir.

Q. 9. How long did you continue to hold the office of secretary, treasurer, and director?

A. Well, until the company was moved away from the office; I should think it was—I do not remember just when it was—1902.

Q. 10. That is, at the time when Mr. Charles S. Smith became president of the corporation?

A. Yes.

Q. 11. Did you at any time while you were a director of the Old Dominion Copper Mining & Smelting Company know that the company had a cause of action against Albert S. Bigelow and Leonard Lewisohn?

Mr. HEMENWAY: Objected to as assuming a fact not proven and as being a leading question.

A. No, I do not remember anything of the kind.

Q. 12. What, if any knowledge, did you have in relation to any cause of action, if any there was, against Albert S. Bigelow and Leonard Lewisohn, or either of them, while you were a director or other officer of the Old Dominion Copper Mining & Smelting Company?

A. I do not remember of having any.

621 Q. 13. Did you at the time that you became treasurer and director of the Old Dominion Copper Mining & Smelting Company, connect yourself also with other companies in which Mr. Albert S. Bigelow was then largely interested?

Mr. HEMENWAY: Objected to as immaterial, incompetent, and irrelevant.

A. Yes.

Q. 14. With what other companies?

Mr. HEMENWAY: Objected to as immaterial.

A. Tamarack, Osceola, Boston & Montana, Butte & Boston—I think they were all in our office at that time—and Isle Royale.

[No cross-examination.]

——— ———.

Subscribed and sworn to this — day of ———, 1906.
Before me.

——— ———.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

Deposition of Charles S. Smith.

CHARLES S. SMITH, being first duly sworn by E. F. McClennen, Esq., a notary public, in answer to interrogatories propounded by E. F. McClennen, Esq., counsel for the plaintiff, deposes and says,—

Q. 1. Your full name?

A. Charles S. Smith.

Q. 2. You reside where?

A. Lincoln, Mass.

Q. 3. You are president of the Old Dominion Copper Mining & Smelting Company?

A. I am.

Q. 4. And have been such since April, 1902?

A. Yes.

Q. 5. Before that time you had never held office in the company?

A. Never.

Q. 6. But had been a stockholder?

A. Yes.

Q. 7. I show you certificate A-21 for 100 shares of the stock of this company, dated September 19, 1895, issued in the name of F. and C. S. Smith, purporting to be endorsed in those names; is the endorsement in your handwriting?

A. It is.

Mr. MCCLENNEN: That certificate I will offer.

Mr. HEMENWAY: Objected to as immaterial.

[The certificate A21 is marked "Exhibit 1, G. C. B., July 24 1906."]

622 Q. 8. On Exhibit 10 of the deposition of Albert S. Bigelow in this case, among other subscribers, it has appeared that there is the name of F. and C. S. Smith for 100 shares: have you in the course of these hearings, seen that document?

A. I have.

Q. 9. And is that subscription in your handwriting?

A. It is.

Q. 10. It has appeared among the checks received by the Old Dominion Copper Mining & Smelting Company, in the list in evidence, that there was one for F. and C. S. Smith for $2500: was that yours?

A. It was in pay for my stock, but it was not my check.

Q. 11. It was not your check?

A. No.

Q. 12. Since this certificate of September 19, 1895, how continuously have you been a stockholder in the Old Dominion Copper Mining & Smelting Company?

A. I have been a stockholder continuously since.

Q. 13. Did you, at the time of signing the subscription or receiving or paying for the stock for which this certificate A21 was issued, have any knowledge as to the intention of Mr. Albert S. Bigelow or Mr. Leonard Lewisohn with reference to the taking of any

profits or compensation for services in connection with the organization of the company or otherwise?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I had no knowledge of the fact.

Q. 14. Had you any knowledge that they, or either of them, had taken any profit either in stock or otherwise, or any compensation for their services?

Mr. HEMENWAY: Objected to as incompetent, irrelevant, and immaterial.

A. Not until some years later.

Q. 15. Had you at that time any knowledge that Mr. Albert S. Bigelow and Mr. Leonard Lewisohn, or either of them, had taken, or intended to take, 50,000 shares of the capital stock of this company either by way of compensation for services, or as profits or otherwise?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant, because the question assumes a fact not proven, and is leading.

A. I had no knowledge.

Q. 16. In view of the objection which is made to the question just asked, I will put this question: Had you at any time in 1895 any knowledge that Mr. Albert S. Bigelow or Mr. Leonard Lewisohn, or either or both of them, had taken, or intended to take, 50,000 shares of the capital stock of this corporation, or any part thereof, either as compensation for services, or as profits or otherwise, if such be the fact?

Mr. HEMENWAY: Objected to as immaterial, incompetent, and irrelevant.

623 A. I had no knowledge.

Q. 17. What was the first time, if ever, at which you acquired any such knowledge?

Mr. HEMENWAY: Objected to as immaterial, incompetent, and irrelevant; also as leading and involving the assumption of a fact not proven.

A. Some time in 1901.

Q. 18. Can you fix with any certainty the time in 1901 when you first had any information on this subject?

Mr. HEMENWAY: Objected to for the same reasons that the last interrogatory was objected to.

A. My impression is it was in the latter part of 1901, on reading Walker's Copper Mines of the Southwest that I first learned of the distribution of the original stock, and I think that was published in the latter part of 1901, if I remember correctly.

Mr. HEMENWAY: The answer is objected to as incompetent.

Q. 19. When was the next stockholders' meeting after you got this information?

A. In April, 1902.

Q. 20. And that was the meeting at which you became a director and president of the company?

A. Yes.

Q. 21. On getting this information in the latter part of 1901, did you take any steps with relation to the company?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I did.

Q. 22. What did you do?

Mr. HEMENWAY: Objected to as incompetent.

A. I went to the property, the first thing, in Arizona; then I issued a circular to stockholders in connection with the company; went to New Jersey, and got a list of the stockholders; and cooperated with Towle & Fitzgerald, who were large stockholders, to get proxies to use at the annual meeting.

Mr. HEMENWAY: The answer is objected to as incompetent.

Q. 23. And the purpose for which those steps were taken, and those proxies were acquired, was what?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. To get control of the company.

[No cross-examination.]

Subscribed and sworn to this — day of ——, 1906, before me,

Notary Public.

624 *Stipulation.*

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

Deposition of Eugene V. R. Thayer.

EUGENE V. R. THAYER, being first duly sworn by Howland Twombly, Esq., a notary public, in answer to interrogatories propounded by Louis D. Brandeis, Esq., counsel for the plaintiff, deposes and says,—

Q. 1. Your full name?

A. Eugene Van Rensselaer Thayer.

Q. 2. Your residence and occupation?

A. Lancaster, in this state, Massachusetts. I am trustee of my father's estate.

Q. 3. Your office is in Boston?
A. At 50 State street.
Q. 4. What was your occupation in 1895, and from then on?
A. Well, I was trustee, in the same position——
Q. 5. —that you are now?
A. Yes.
Q. 6. You were from some time in 1895 to 1902 a director of the Old Dominion Copper Mining & Smelting Company, were you not?
A. Yes.
Q. 7. Do you recall how long you were a director of the company?
A. No, I cannot; I should say four or five years; but I would not swear to it without looking up.
Q. 8. Did you, at the time that you were a director of that company, know that the company had a claim or cause of action against Albert S. Bigelow and Leonard Lewisohn?
A. No, I did not.
Q. 9. When did you first hear anything to that effect?

[Objected to as incompetent, irrelevant, and immaterial.]

A. I do not know; I saw it in the paper some long time after I was a director.
Q. 10. That is, after the management changed from Mr. Bigelow to Mr. Charles S. Smith?
A. Yes.
Q. 11. Your first knowledege in relation to the matter was what you learned from the public press after the suit was begun?
A. Yes.

[No cross-examination.]

——— ———.

Subscribed and sworn to this — day of ——, 1907, before me.

———, ———,
Notary Public.

625 *Interrogatories Taken on Behalf of the Plaintiff and Answers by John Stanton.*

1. State your name, age, residence, and occupation, and how long you have been engaged in your present occupation. A. John Stanton; seventy-three; New York; I am engaged in copper mining; fifty years. I am at present the president of a number of copper-mining companies at Lake Superior and elsewhere,—namely, the Wolverine Copper Mining Company, the Mohawk Mining Company, the Baltic Mining Company, the Atlantic Mining Company, the Winona Copper Company, the Michigan Mining Company, etc.
2. State whether or not you were acquainted with the late Leonard Lewisohn and how long you had known him. A. I was. About ten years now.
3. State whether or not you recall the formation of the Old

Dominion Syndicate, so called; and if so, state what that syndicate was. A. I do. I was told by Mr. Leonard Lewisohn, in his office, that his firm had bought the Old Dominion mine, and asked what I thought of its value. He told me further that he had paid a million of dollars for it. I told him I thought it was a very good purchase. "Would you like to become interested in the purchase to a small extent?" "Oh," I said, "I do not mind chipping in say $5000,—who are with you?" "Well," he said, "our firm, Mr. Bigelow, and we have let in Mr. Beaman, our counsel, and possibly one or two others." I said, "I suppose this is with the understanding that I come in on the same basis that you do." "All right," he says, "exactly what we pay, you shall have your proportionate share," and "Shall I send you a check?" I said: "No, we will call on you as the payments are to be made," he said. When they did call I paid, on June 6, 1895, $700; on July 23, $1445.28; on August 1, $2892.55, making a total of $5037.83. As I remember it that amount was to cover interest. I know nothing more of the formation of any syndicate than just that conversation.

4. State whether or not you became a subscriber to the so-called Old Dominion Syndicate; and if so, at what time. A. I do not remember the date, but it was in 1895, shortly before I made my first payment, say the latter part of May or early part of June.— I have no way of fixing a date of that conversation, as I made no memorandum of it. Yes, verbally so.

5. If you state that you did become a subscriber to the Old Dominion Syndicate, so called, state whether or not your agreement to subscribe was oral or in writing. If in writing, please annex hereto the original writing or a copy thereof, if in your possession. If the agreement was oral, state with whom it was
626 made. If it was made with Leonard Lewisohn, state what the agreement was, and what was said at the time of making said agreement as to the purpose for which said syndicate was formed, and what its operations would be. A. Entirely oral. I never saw any writing in regard to the syndicate. Leonard Lewisohn. I do not know that any purpose was stated; of course, it was understood that it was to go into a corporation and be worked; but it was not so definitely stated,—simply that I had interest to that extent in the purchase whatever was done with it. All that was said was simply to join us in the purchase to the extent of that interest.

6. If you state that you became a subscriber to the Old Dominion Syndicate, state what the amount of your subscription was, and when payments were made by you under said subscription. A. I have already answered that question by my answer to the third interrogatory.

7. If you state that you became a subscriber to the Old Dominion syndicate, state whether, as a member of said syndicate, you afterwards received stock in the Old Dominion Copper Mining & Smelting Company; and if so, what amount of stock you received and when. A. I did receive stock in the Old Dominion Copper Mining & Smelting Company.—400 shares. I do not remember the exact

date, but the approximate date must be some time in November, 1895.

8. State whether or not you had any conversation with Leonard Lewisohn concerning your subscription, the formation of said syndicate, and the distribution of stock in the Old Dominion Copper Mining & Smelting Company; and if so, state the date of such conversation, and what said conversation or the substance thereof was, as nearly as you can remember. A. I cannot remember that I had any conversation with Leonard Lewisohn about it, but I had with some member of the firm along in the summer of 1895,—I think it was Adolph Lewisohn,—I cannot fix the date,—in which he stated that it was the purpose of the syndicate to organize a company with a capital of $2,500,000, and to sell the mine to that company for $2,000,000, and the balance of the stock, or $500,000, to be paid into the treasury for working capital, and asking if that was satisfactory to me, to which I replied "Perfectly so." I had *not* other conversation, to the best of my recollection, concerning my subscription, the formation of said syndicate, or the distribution of stock of the Old Dominion Copper Mining & Smelting Company, either with Leonard Lewisohn or with any other member of the firm of Lewisohn Brothers.

9. State whether or not you had any correspondence with Leonard Lewisohn or Lewisohn Brothers in relation to the Old Dominion Syndicate or its operations. If so, state the date of each such
627 letter and annex hereto the original letters, or, if and so far as said originals are not in your possession, or you are unwilling to annex the same, annex copies hereto. A. I had. On December 5, 1895, I wrote to Messrs. Lewisohn Brothers at 81 Fulton street, New York, and on December 5, 1895, I received their reply to that letter. I have with me, and produce, the press copy of my letter, being page No. 628 in such press letter copy book, under the date of December 5, 1895. I also have with me and produce the original letter from Lewisohn Brothers dated December 5, 1895, and signed "Lewisohn Brothers" in typewriting, and then Leonard Lewisohn's signature as general manager. This original letter was in reply to my letter to them. I do not care to annex the original press copy sheet to my deposition, nor the original reply received from Lewisohn Brothers, but I produce and annex to my deposition copies of said letters and mark them "Exhibits A and B," respectively.

My attention was called to the fact that my certificates were in a company with a capital of $3,750,000 instead of a capital of $2,500,000, as I had supposed, and my letter was written to Lewisohn Brothers in order to get an explanation of the increase of capital. I dropped the matter right there.

10. If, in answer to the preceding interrogatory, you have not already stated that you wrote Lewisohn Brothers a letter under date of December 5, 1895, state whether or not you wrote them a letter under that date; and if you have not already produced and annexed said letter, or a copy thereof, to your answer, please state whether or not the copy of letter under date of December 5, 1895,

annexed hereto marked 1 is not a copy of such letter. A. I have already stated that I did write them a letter under that date. I have already produced and annexed a copy of such letter, but I will say further that the letter annexed hereto marked 1 is a true copy of such letter.

11. If, in answer to interrogatory No. 9, you do not state that you received from Lewisohn Brothers a letter under date of December 5, 1895, please state whether it is not a fact that you did receive a letter from them under said date, and whether the letter so received was not signed by Leonard Lewisohn, and, if you have not already produced and annexed said letter, or a copy thereof, to your answer, please state whether the copy of letter hereunto annexed, marked 2, is not a copy of such letter. A. I have already stated that I did receive a letter from them under the date of December 5, 1895. I have already stated that the letter so received was signed by Leonard Lewisohn, general manager. I have already produced and annexed a true copy of such letter, and I will further state that the copy of the letter hereto annexed, marked 2, is a true copy of such letter.

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No. 1.

DECEMBER 5TH, 1895.

Messrs. Lewisohn Brothers, 81 Fulton St., New York.

DEAR SIRS: Referring to the interest of $5,000, that I took in the Syndicate for purchase of the "Old Dominion" mine, which interest was stipulated to be on exactly the same basis of cost and distribution of stock in the Company to be organized to take over the property to you and your associates, all to be on the same footing pro-rata.

I have now to say that I am informed that in addition to the allotment of stock on the basis of $2,500,000, capital in which you have handed me 200 shares, as well as the 200 shares for which I subscribed at $25. per share, there has been another allotment of 50,000 shares to the purchasing syndicate, making the entire capital of the Company $3,750,000.

I have not yet received my share of this allotment, which would be in the proportion that $5,000. bears to $4,000,000, or 250 shares.

This matter has, no doubt, been overlooked by you, and I now call your attention to it.

Very truly yours,

JOHN STANTON.

No. 2.

DEC. 5TH, 1895.

Mr. John Stanton, City.

DEAR SIR: In reply to your favor of the 5th instant, would say that you have received exactly the same amount of stock as any party who subscribed to the original syndicate. You can inquire in Boston—where the distribution was made—and you will find that this is a fact.

The balance of 50,000 shares has been devoted towards promoting and other expenses.

Very truly yours,

LEWISOHN BROTHERS.

L. L./F

Exhibit 228.

629 *Objections to Interrogatories for the Deposition of John Smith.*

The defendant objects to Ints. Nos. 3, 4, 5, 7, 8, 9, 10, and 11, for the reason that they are immaterial, irrelevant, and incompetent. The defendant also objects to Int. No. 6 for the reason that it is immaterial, irrelevant, and incompetent, and because it calls for an oral statement of the contents of a written instrument, if it was in writing.

Cross-interrogatories:

The defendant, without waiving his objections to the direct interrogatories, propounds the following cross-interrogatories to said John Stanton:

Cross-int. 1. Did you receive any letter or letters from said Albert S. Bigelow? If so, please annex said letters or copies thereof to your answer to these interrogatories.

A. Never. I have none such.

Cross-int. 2. Did you not ask said Leonard Lewisohn to permit you to become a subscriber to the syndicate, if there was one to which you subscribed?

A. He offered it to me, as I have already stated in my answers to the direct interrogatories. I have not been a stockholder in the Old Dominion Copper Mining & Smelting Company since 1st May, 1896.

JOHN STANTON.

Before Willoughby L. Webb, Esq., Commissioner.

NEW YORK, *February* 4, 1903.

Pursuant to notice, parties met this day at the office of the commissioner, No. 63 Wall Street, New York city.

Appearances:

Messrs. Brandeis, Dunbar & Nutter (by Mr. Brandeis) for plaintiff.
Messrs. Long & Hemenway (by Mr. Hemenway) for defendant.
Edward Lauterback, Esq., for the defendant, and for Albert, Walter, and Frederick Lewisohn.

It is stipulated between the parties that Albert F. Dawson shall be employed as stenographer, and that he shall furnish three copies of the minutes, the expense thereof to be paid one half by each side, the successful party to tax the share paid by him as part of the costs.

630 WALTER LEWISOHN, sworn for plaintiff:

Direct examination by Mr. BRANDEIS:

Q. 1. State your full name, age, and occupation.

A. Walter Lewisohn; age, twenty-three; banker.

Q. 2. You are one of the executors of Leonard Lewisohn, are you not?

A. I am.

Q. 3. And you have been acting as such since April, 1902?

A. Yes, sir.

Q. 4. As executor of Leonard Lewisohn, you have in your possession, or under your control, have you not, the books and papers relating to the estate of Leonard Lewisohn?

A. Yes, sir.

Q. 5. And have also access to all the books and papers of the firm of Lewisohn Brothers?

A. Yes, sir.

Q. 6. That firm of Lewisohn Brothers consisted of whom at the time of the death of Leonard Lewisohn?

A. Of Mr. Leonard Lewisohn, Frederick Lewisohn, and myself.

Q. 7. And Frederick Lewisohn is your brother?

A. Yes, sir.

Q. 8. How old is he?

A. Twenty-one.

Q. 9. When was the firm consisting of your father and yourself and brother formed?

A. I don't know the exact date, but it was around January or February, 1902.

Q. 10. Who were the members of the firm doing business under the name of Lewisohn Brothers prior to January, 1902, when the new firm was formed?

Mr. LAUTERBACH: I might state here that just prior to that, a few months, I think, prior to the formation of the partnership to which this witness refers, the firm of Lewisohn Brothers consisted of Mr. Leonard Lewisohn only, and some three or four months before that had acquired the interest of Mr. Adolph Lewisohn in the firm Lewisohn Brothers, Adolph Lewisohn then retiring from the firm. Before that period, and for some years, the firm of Lewisohn Brothers consisted of Leonard and Adolph Lewisohn.

Mr. BRANDEIS: In 1895 Jesse had 5 per cent interest, hadn't he?

Mr. LAUTERBACH: He had some interest in the profits of the firm.

Mr. BRANDEIS: But was not a partner.

Mr. LAUTERBACH: I don't think he was a partner. Prior to 1895 Jesse had a 5 or 10 per cent interest, I think, in some of the transactions of Lewisohn Brothers, but we will get that correct for you subsequently. I don't know whether it was in all their business or just some of it; at any rate, he was not a partner.

631 Mr. BRANDEIS: But you can get the exact information, can you?

Mr. LAUTERBACH: Precisely. I will get that for you definitely and accurately.

Q. 11. Then you and your brother, either as executors or survivors of the firm of Lewisohn Brothers, are in possession of all the books and papers both of Leonard Lewisohn and of Lewisohn Brothers covering this period from 1895 and subsequent?

A. I don't know whether we are in possession of all of them.

[Examination of this witness is suspended for the present, and it is agreed that the hearing may be adjourned to Tuesday next, February 10, at 10 A. M., at which time counsel for defendant will produce the witnesses Frederick, Walter, Albert, and Adolph Lewisohn, and in the mean time further search will be made for additional letters, papers, etc.]

[After the adjournment, in pursuance of Mr. Lauterbach's request to specify books, papers, etc., the following letter was sent to Mr. Lauterbach by Mr. Brandeis:]

"63 WALL STREET,
NEW YORK, *February 4th*, 1903.

Edward Lauterbach, Esq., 22 William Street, New York City.

MY DEAR MR. LAUTERBACH: In pursuance of your suggestion, I call your attention to the following papers which do not appear to be among those which you handed me for inspection this morning, and which we should like to have produced by the executors and Mr. Adolph Lewisohn at the adjourned day, February 10th, at 10 A. M.

First. All of the letters relating to these matters received from A. S. Bigelow, Hyams, William Keyser, R. Brent Keyser and Mr. J. Morris Meredith, and from the various persons who were subscribers to the Old Dominion Syndicate and to the Company's issue of stock of the Old Dominion Company.

Second. Copies of all letters to those subscribers to the syndicate and to the Company's issue of stock and copies of additional letters which passed between Mr. Bigelow, Mr. Hyams, Mr. Meredith and the Keysers.

You will find upon looking over these, I think, that there are other letters of which copies are not found on the first search.

Third. If Leonard Lewisohn, or Lewisohn Brothers, kept copies of their letters, in any letter press copy books, I should like to have a careful examination made of both the firm's and private letter books covering the year 1895.

632 Fourth. The original papers bearing upon the transaction including the original option of the Simpson Estate to Meredith, dated, I think, April 30th, the contract of the Simpson Estate and Meredith dated May 4th, the contract with Keyser, the Syndicate agreement and any further agreement between Mr. Bigelow and the Lewisohns.

Fifth. All papers relating to the properties sent by Mr. Keyser to Mr. Lewisohn including lists of property of which copies were sent by Mr. Lewisohn to Mr. Bigelow or to Mr. Hyams.

Sixth. All statements of account rendered between the Lewisohns and Bigelow, also the account of Mr. Meredith, also the ledger account and all other entries in the books of the Lewisohns relating to payments and receipts on account of this property, and the operation of the Syndicate, the stock received by the Lewisohns and the disposition of the other stock, and of the Lewisohn's stock and proceeds thereof.

Seventh. All other papers bearing upon the matter which may be found.

Yours truly,

LOUIS D. BRANDEIS.

Kindly acknowledge receipt to Boston."

NEW YORK, *February* 10, 1903, 10 A. M.

[Met pursuant to adjournment.]

[Present: Same as before.]

Mr. BRANDEIS: Have you any definite information, Mr. Lauterbach, with regard to Lewisohn Brothers?

Mr. LAUTERBACH: I find that in 1895, when these transactions went on, the firm of Lewisohn Brothers did not exist: it was the corporation of Lewisohn Brothers. The firm was afterwards started, but at the time of the formation of the syndicate it was Lewisohn Brothers, a corporation. That is the only information I have.

WALTER LEWISOHN, resumed:

(By Mr. BRANDEIS.)

Q. 11. Who has charge of the papers belonging to the estate of Leonard Lewisohn, and of the old firm that did business under the name of Lewisohn Brothers, besides yourself?

A. My brother Frederick.

Q. 12. Any one else?

A. Well, you ask two questions there. The executors have charge of the matters pertaining to the estate of Leonard Lewisohn;
633 probably Frederick and myself are the only ones that have charge of the matters pertaining to Lewisohn Brothers.

Q. 13. What persons besides you two have charge of those papers?

A. Nobody has charge.

Q. 14. Who are the clerks in your employ who have custody, or have access especially, to those papers?

A. They have no access.

Q. 15. They are entirely in your custody?

A. We are the only ones who have access to them.

Q. 16. That is, the executors, and, so far as Lewisohn Brothers are concerned, yourself and your brother Frederick?

A. Yes.

Q. 17. My inquiries relate, so far as I refer to Lewisohn Brothers, to the papers of the firm, the concern doing business under the

name of Lewisohn Brothers during your father's lifetime, and not the present firm?

A. In some matters the other executors would also have charge of some of Lewisohn Brothers, in so much as they have to do with the estate of Leonard Lewisohn—in other words, it would be called Lewisohn Brothers in liquidation.

Q. 18. And indeed the other executors would have equal access with yourself and your brother Frederick?

A. Yes, sir.

Q. 19. As a matter of fact are all those old papers kept at your office, 11 Broadway?

A. We really haven't got many papers.

Q. 20. But so far as there have been,—for instance, those which have been produced by Mr. Lauterbach on February 4, and this morning: from what place are those papers taken?

A. Well, there is no one special place.

Q. 21. 11 Broadway, are they kept at your office there?

A. There are some papers there.

Q. 22. What other place are the papers kept; what other source were these papers which were produced taken from?

A. Well, wherever we had any idea they were.

Q. 23. Now will you just state how much you did yourself in searching for these papers which have been produced?

A. I went all through the offices, wherever in 11 Broadway we had any idea those papers existed.

Q. 24. What method of filing or preserving papers has been adopted, especially in your office, with reference to a particular subject like the Old Dominion Syndicate or the Old Dominion Company—in other words, are all papers relating to a general matter kept together or are they kept chronologically or alphabeti-
634 cally; what method is adopted or has been adopted?

A. So far as that is concerned, why, there are so many things, and as the estate has not been wound up, it is almost impossible to have everything systematized because the subjects are so numerous and as the firm of Lewisohn Brothers in liquidation has not been wound up,—all things are not all together, probably, just kept separately.

Q. 25. What was the method of filing away the papers which existed, which you found, when you began to investigate this matter?

A. I don't know of any special method.

Q. 26. Were all Old Dominion papers filed away together?

A. I don't know exactly.

Q. 27. Did you personally make a search, or did you have somebody else do it?

A. I personally made the search and I also had some of the other parties in our office search, and this [pointing to a party in the room] gentleman searched also.

Q. 28. Who is this gentleman you refer to?

A. Ferdinand Rahaeuser.

Q. 29. Whom else besides Mr. Rahaeuser did you have to assist you in making this search?

A. My brother, I think.

Q. 30. Which brother?

A. Fred.

Q. 31. Whom else?

A. I don't know who else, or, I think, Mr. Albert Lewisohn and Mr. P. S. Henry; they did as much as they could, and of course all the other men in our employ that were asked to help us did all they could.

Q. 32. Whom did you ask to help you of the men in your employ?

A. Ferdinand.

Q. 33. That is Mr. Rahaeuser?

A. Yes, he was about the only one besides ourselves that knows anything about it.

Q. 34. That had made a search?

A. Yes, sir.

Q. 35. When did you make the search?

A. Right along every day as much as we could.

Q. 36. Where did you search for these papers? I mean in what files, in what boxes.

A. Well, in different offices.

Q. 37. What offices are they to which you refer?

A. Our offices which are in 11 Broadway.

Q. 38. You mean the office of Lewisohn Brothers?

A. Yes, sir.

Q. 39. You searched there?

A. Yes.

Q. 40. Now in what manner are the old papers of Lewisohn Brothers, to which I assume you have just referred, filed away or packed away?

A. I don't know as there is any particular manner about it.

635 Q. 41. Are the papers relating to any one year filed together or packed away? As the letters,—for instance, the papers for the year 1895?

A. No, I don't think there are any, pretty nearly; I would not say exactly that way, but I guess pretty nearly they were in that way.

Q. 42. That is, filed away by the year?

A. Yes, sir.

Q. 43. Aside from filing away by the year, was there a filing away of the papers in relation to different matters in which Lewisohn Brothers were interested? There were a great many of these matters, were there not?

A. In relation to what? In relation to just one thing or the Old Dominion?

Q. 44. In relation to everything; there were a good many different matters in which Lewisohn Brothers were interested, were there not?

A. Yes, sir.

Q. 45. What method was taken of arranging and disposing of papers in these several matters?

A. I have forgotten exactly.

Q. 46. When did you begin to search for the letters that were called for by the subpœna here with reference to the Old Dominion—where did you go to search for them?

A. I went in a desk where they were kept and in different departments where we kept certain rooms we had for these matters.

Q. 47. Now in what rooms did you find the letters which have been produced by Mr. Lauterbach?

WITNESS: What was the number of the room, Mr. Rahaeuser?

Mr. RAHAEUSER: 320.

Q. 48. They were all in the same room, were they?

A. I forget whether they were all in the same room or not.

Mr. RAHAEUSER: Practically all; the majority of them were in room 320.

Mr. BRANDEIS: What other room were they in?

Mr. RAHAEUSER: 320, the room of Lewisohn Brothers, proper.

Mr. LAUTERBACH: You mean in the main room?

Mr. RAHAEUSER: Yes, sir.

Mr. BRANDEIS: Do you mean your main office?

Mr. RAHAEUSER: Yes, sir.

[The examination of this witness is suspended for the present and it is agreed that Mr. Ferdinand Rahaeuser may be examined under this commission with the same effect as if done under the order, such as has been issued to take the examination of other witnesses.]

636 FERDINAND L. RAHAEUSER, sworn.

Direct examination by Mr. BRANDEIS:

Q. 49. Give your full name, age, and residence.

A. Ferdinand L. Rahaeuser; age, twenty-five years; residence, New York.

Q. 50. How long have you been connected with the business of Lewisohn Brothers?

A. Since August, 1895.

Q. 51. What was your occupation from time to time in connection with this business?

A. Clerk.

Q. 52. In what department?

A. Telephone.

Q. 53. Telephone clerk?

A. Yes, sir.

Q. 54. Have you been continuously telephone clerk since that time?

A. Yes, sir.

Q. 55. What, if anything, have you had to do with the filing away of papers?

A. I have filed the letters away from December, 1895.

Q. 56. And in addition to the current filing of the letters have you had the disposition of the letters?

A. No, sir.

Q. 57. Who has disposed of them after they were filed away, after the letters were filed away?

A. I have filed them away for the last two years.

Q. 58. From the time when you began to file, which I understand was in December, 1895, until you ceased, who had charge of the final disposition of the letters that were filed?

A. We used to file them away and then transfer them into boxes and the boxes we would put in the vault.

Q. 59. When was this transfer made from the files to the boxes?

A. About the 1st of July and the 1st of January.

Q. 60. What, if anything, did you have to do with the transferring to the boxes of the letters or any other papers on the 1st of January, 1896?

A. I put them in the boxes and then put them in the vault.

Q. 61. Did you put these letters and papers all together in all the various matters of Lewisohn Brothers?

A. Yes, sir.

Q. 62. No matter what department of business it related to?

A. Certain portions I put away and the other portions were put away by Mr. Faint.

Q. 63. Is he still with Lewisohn Brothers?

A. No, sir.

Q. 64. Do you know his first name?

A. No, sir.

Q. 65. Do you know what his business is now?

A. He was a stenographer.

Q. 66. How long is it since he left Lewisohn Brothers?

A. About a year ago.

637 Q. 67. Have you seen him since that time?

A. Yes, sir.

Q. 68. Can you give us any information as to where he is, or what his address is?

A. I cannot.

Q. 69. You say that you had to do with putting away all the papers in that certain department; which papers did you have to do with putting away; the papers relating to the Old Dominion matters?

A. I don't know, only the incoming mail I filed.

Q. 70. That is all you filed?

A. Yes, the incoming mail.

Q. 71. Who filed away copies of the letters that were sent out?

A. Mr. Faint, I believe; I won't swear to that.

Q. 72. How were they filed away; all together?

A. Alphabetically.

Q. 73. I mean if there was a letter, for instance, from Mr. Bigelow and a letter to Mr. Bigelow, wouldn't they be filed together, a copy of the letter to Mr. Bigelow and the letter from Mr. Bigelow?

A. The letter from Mr. Bigelow is filed in one place, and the letter to Mr. Bigelow is filed in another.

Q. 74. And when they were put away in boxes, were they put away in the same, or different, boxes?

A. Different boxes.

Q. 75. Did you have to do with the putting away of the letters that came from Mr. Bigelow?

A. I put away those letters.

Q. 76. That is, you put those letters away regularly?

A. Filed them away as they came in the next morning.

Q. 77. That is, beginning with December you filed those letters as they came in?

A. Yes, sir.

Q. 78. Did you also pack up those letters as of the 1st of January or the 1st of July, and put them away in the boxes?

A. Yes, all of them.

Q. 79. You had nothing whatever to do with the copies of the letters which went out to Mr. Bigelow?

A. No, sir.

Q. 80. That was all done by Mr. Faint at that time?

A. Yes, sir; he filed them.

Q. 81. And put them in the boxes, too?

A. Yes, sir.

Q. 82. Were the boxes of the incoming letters put away in the same place as the boxes of the outgoing letters or copies of letters?

A. In the same room.

Q. 83. But in separate boxes?

A. Yes, sir.

Q. 84. And have been kept in separate boxes since?

A. Yes.

Q. 85. And in the same boxes in which they were originally?

A. Yes, sir.

Q. 86. So far as 1895 and 1896 letters are concerned?

A. Yes.

638 Q. 87. Who had charge of filing the letters and papers; who put them in the boxes before you took charge of them in December, 1895?

A. Arthur Mairs.

Q. 88. And is he now connected with Lewisohn Brothers?

A. No, sir.

Q. 89. How long was he connected with Lewisohn Brothers?

A. I could not tell you how long he was connected with them.

Q. 90. When was he last connected with them?

A. December, 1895.

Q. 91. And he left their employ at that time?

A. Yes, sir.

Q. 92. When you put away the letters in January, 1896, say, you put away the letters also which Mairs had been filing up to December?

A. Yes, sir.

Q. 93. From July to December?

A. Yes.

Q. 94. And when you made the search, as I understand, in room 320, Lewisohn Brothers' room, for the letters and papers relating to the Old Dominion matter, did you find those letters and papers to be separate and apart from other letters and papers in regord to other matters in which Lewisohn Brothers were interested during this period from July, 1895, to January, 1896?

A. What do you mean by "separate and apart"?

Q. 95. Were they all in one file, or were they in separate files?

A. That is not all together; all the papers were not together; there were different papers there of different sorts of businesses and transactions.

Q. 96. I mean this: Lewisohn Brothers were connected with a large number of different transactions, of which Old Dominion was one; is not that the fact?

A. Yes, sir.

Q. 97. Were the papers relating to Old Dominion matters mixed up with papers in the other matters?

A. Yes, sir.

Q. 98. All being in one daily file?

A. What do you mean by "one daily file"?

Q. 99. All the letters, say, of the 10th of December, you filed one after another, although they related to different matters?

A. No, sir; they were all arranged alphabetically.

Q. 100. Now in the alphabetical arrangement of these letters, would you have, say, the letters from persons beginning with the letter A covering the whole half year together?

A. Yes, sir.

Q. 101. When you finally filed them away?

A. Yes, sir.

Q. 102. Then, as of the first of January, you rearranged all the letters that had come in during the six months?

A. Only transferred them to a box.

Q. 103. But do you mean you had some different files of letters; first there were letters of the alphabet?

A. What do you mean?

639 Q. 104. I want to know how you went about it.

A. If a letter came in for A it was filed under A; if it was Ba it was filed under B, and if it was Ca it was filed under C.

Q. 105. Covering the whole period of six months?

A. Yes, sir.

Q. 106. So that you filed the letters away in the same file, although probably the letters related to entirely different matters, filing one after another, is that the way?

A. Yes, sir.

Q. 107. And is that the way it was always done?

A. Yes, sir.

Q. 108. And is that the way in which you found the file when you searched for it the other day to produce the papers here?

A. There were dozens of files gone through that day; it was not one file.

Q. 109. What do you mean by "dozens of files"?

A. We looked over all of 1895 files to see if there was anything relating to Old Dominion there.

Q. 110. Do you mean to say you looked at every letter?

A. Everything relating to Old Dominion.

Q. 111. How could you tell whether it related to Old Dominion until you had read the letter?

A. I didn't have to read the whole contents; the top would indicate whether it was Old Dominion or not.

Q. 112. Do you wish to be understood as testifying that you did look at every letter which was received by Lewisohn Brothers, or Leonard Lewisohn or Mr. Adolph Lewisohn during this year, 1895, that is in your possession?

A. That I read every one?

Q. 113. That you looked at every letter for the purpose of seeing whether or not it related to Old Dominion matters?

A. Yes, sir, all those that are in the separate room now.

Q. 114. Are there any letters that were received which have been taken out of that separate room?

A. I don't know anything about that.

Q. 115. Now it appears that from the letters which were produced by Mr. Lauterbach that there is not a single letter from Mr. Albert S. Bigelow. Do you wish to be understood as testifying that in those files there was not a single letter from Mr. Bigelow relating to Old Dominion matters?

A. I haven't seen any.

Q. 116. Did you find any letters from Albert S. Bigelow in those files?

A. Only those that are there.

Q. 117. But there is not a single one here from him?

A. Then there wasn't any there.

Q. 118. Where is the file of letters?

A. File of what letters?

640 Q. 119. From Albert S. Bigelow?

A. I don't know where that is.

Mr. LAUTERBACH: He didn't say there was any such file.

Q. 120. Have you any recollection that Albert S. Bigelow ever wrote a letter to Leonard Lewisohn or Lewisohn Brothers during the year 1895?

A. No, I can't recall back that far who signed the letters. I just took the signatures of the letters and filed them in the proper place, but whether it was Bigelow or any one else I don't know.

Q. 121. Do you now wish to be understood as testifying that in these files of letters which you examined you did not, according to the best of your recollection, see any letter from Albert S. Bigelow?

A. That is the files I examined in the last two or three weeks?

Q. 122. Yes.

A. No, there were no letters from A. S. Bigelow.

Q. 123. Now I want to ask you where the letters from A. S. Bigelow are kept?

A. I don't know where they are kept.

Q. 124. Do you know where they were kept formerly?

A. There have been three or four transfers made.

Q. 125. What transfers have been made?

A. I mean in regard to moving.

Q. 126. Tell me what transfers have been made.

A. The letters used to be kept down at the Produce Exchange building; then they were taken up to 81 Fulton street, on the second floor.

Q. 127. Was 81 Fulton street Lewisohn Brothers' office?

A. Yes, sir.

Q. 128. How long did they remain there?

A. I can't say exactly how long; then the letters were transferred to the third floor of No. 81 Fulton street, and then they were transferred down to No. 11 Broadway.

Q. 129. Where they now are?

A. Yes, sir.

Q. 130. In the course of those removals were all the various boxes in which the letters were kept moved each time, so far as you know?

A. No. The whole contents of the vault were removed; all the papers were removed, the boxes were not disturbed.

Q. 131. What kind of boxes are they in which these letters of 1895 were?

A. Small wooden boxes, or pasteboard boxes, 10x12, with a wooden back.

Q. 132. How many boxes did you examine containing letters for the year 1895?

A. I examined all the boxes.

Q. 133. How many, about, were there?

A. I can't tell you.

Q. 134. Approximately?

A. It would be hard for me to say. I would not say how many, for the simple reason that some of the boxes run from January 1 to the 7th, and then from the 7th to the 15th, and some from the 15th to the 28th, and some from the 28th of January to
641 about the 4th of February. I could not tell you how many boxes there were. If there was one box there must have been about seventy boxes, at least.

Q. 135. Take this box that runs from January 1 to 7th.

Mr. LAUTERBACH: He didn't say that they run exactly from January 1 to the 7th.

Mr. BRANDEIS: I am assuming the dates as an example of the letters that Lewisohn Brothers, or Leonard Lewisohn, received during that time went into that single file, and were arranged alphabetically in that particular box, were they?

A. Yes, sir.

Q. 136. Then the next file, if it was a single one, the next box was from the 7th to the 15th, that would run along just the same

way with the letters of the alphabet and all matters in that particular box?

A. Yes, sir.

Q. 137. Consequently, if Lewisohn Brothers, or Leonard Lewisohn, wanted to turn back to any particular matter of the correspondence they had no other way of doing it except to pull out each box from the beginning, and look through until he came across the particular letters that bore upon that matter?

A. That is the way I understood it.

Q. 138. That is the way you understand the filing was done?

A. Yes, that is the way it was in my time.

Q. 139. I am referring to this time from 1895 to 1896, with which you are familiar, I understand, to a certain extent?

A. Yes, sir.

Q. 140. Now, in these various movings of the papers which you refer to, do you recall any box of papers that were disposed of at any particular place?

A. What do you mean by "disposed of?"

Q. 141. Separated from the rest of the boxes.

A. Not that I know of. I didn't have charge of the moving.

Q. 142. Did you have charge of filing away all letters addressed to Mr. Leonard Lewisohn, personally, as distinguished from Lewisohn Brothers?

A. Some of them I filed away.

Q. 143. Did you file away those letters in the same place you did Lewisohn Brothers' letters, or did they go into separate files?

A. I think they were in the same files.

Q. 144. With the Lewisohn Brothers?

A. With the Lewisohn Brothers.

Q. 145. And were put away in the same boxes as part of the whole?

A. I believe so, yes.

612 Q. 146. Now in the examination which you made during the last two or three weeks in searching for letters, did you find any letters from Mr. G. M. Hyams?

A. Relating to what?

Q. 147. Any letters at all from G. M. Hyams?

A. I have seen some relating to routine business.

Q. 148. Did you see any letters of any kind relating to Old Dominion?

A. No, not as I know of. I didn't look at the signatures of the letters. All the letters that I looked at that related to Old Dominion I looked at the top; looked at the top to see how they were headed. I never looked at the signatures of the letters.

Q. 149. You mean of Mr. Hyams?

A. Mr. Hyams or any one else.

Q. 150. Do you mean to say you read each letter sufficiently to tell whether it related to the Old Dominion matter or not?

A. Yes, sir.

Q. 151. Were you familiar with Old Dominion matters so that you could determine whether it related to them or not?

A. You could tell when a letter started off about "Cathos," specifications of copper regarding shipments, or anything like that, that it did not relate to Old Dominion.

Q. 152. Who aided you in making this investigation?

A. I practically made it alone at room 320. I was the only one.

Q. 153. What search did you make in the general office?

A. I didn't make any search in the general office, only of those papers laying around there. A few boxes laying around loose.

Q. 154. What boxes were?

A. One or two boxes laying around there with old papers in.

Q. 155. What kind of old papers?

A. Relating to cotton and one or two other things.

Q. 156. You didn't look among the papers relating to cotton for the purpose of finding Old Dominion papers?

A. We looked through all the boxes.

Q. 157. Do you mean to testify you looked through every box of papers there is in Lewisohn Brothers for the purpose of seeing whether in that box there was anything that had to do with these transactions?

A. In room 320 yes, every box of 1895; that is, of incoming and outgoing letters.

Q. 158. You looked in the outgoing letters also, did you?

A. Yes, sir.

Q. 159. And looked through every outgoing letter?

A. Yes, sir.

Q. 160. And you had no assistance of any kind whatever?

A. No.

Q. 161. What part did Mr. Walter Lewisohn take in these investigations?

A. He came around the room and directed me to look through and went around the other side of the house in Lewisohn
613 Brothers' room and gave instructions there, in room 303, the general office.

Q. 162. Directing them and giving them instructions?

A. I don't know who he gave instructions to. He said he was going around the other side of the house.

Q. 163. He didn't make any examination of the matters, did he?

A. I don't know.

Q. 164. What did you do with the papers you called out?

A. Put them on Mr. Fred and Mr. Walter Lewisohn's desk.

Q. 165. You made no list of them?

A. No, sir, I did not.

Q. 166. Simply put them there?

A. Yes, sir.

Q. 167. On how many different dates did you make that search?

A. Practically every afternoon after 3 o'clock.

Q. 168. For how long a period of time?

A. I was looking all last week, and the week before that I was looking.

Q. 169. And do you mean at the end of the day you put the papers down on their desk?

A. After 3 o'clock, yes, sir.

Q. 170. How many did you find in all?

A. I never counted the letters.

Q. 171. About?

A. I won't give an idea of how many we found, because I didn't count them.

Q. 172. When did you find the last of them?

A. I think it was Saturday afternoon, if I am not mistaken.

Q. 173. Did Saturday afternoon complete your search?

A. Yes, sir.

Q. 174. What else did you find in this file of letters except letters themselves; anything?

A. What do you mean by "what else?"

Q. 175. Any other papers,—contracts or any papers other than letters?

A. I found contracts in the contract file.

Q. 176. What is the contract file that you are talking about?

A. Contracts on copper with different people; with regard to lead, tin, spelter—any contracts made in the New York Metal Exchange.

Q. 177. You searched through those files, did you?

A. Yes, sir, searched through the contract file and attorney file; Lewisohn Brothers' files.

Q. 178. Are these entirely separate files from the letter files you spoke of?

A. Yes, sir.

Q. 179. And one of them you call a contract file?

A. Yes, sir.

Q. 180. And is that a single file or is that a series of boxes such as you spoke of before?

A. Two boxes.

644 Q. 181. Covering the whole year 1895?

A. Yes sir.

Q. 182. Did you find anything in that file?

A. No, sir.

Q. 13. Did you find anything there?

A. No, sir.

Q. 184. You spoke of attorney's files; did you find anything there?

A. I think I did; one or two letters.

Q. 185. What was that attorney's file?

A. Letters from attorneys.

Q. 186. Letters from counsel?

A. Yes, sir.

Q. 187. They are kept separate from all other letters, are they?

A. Yes, sir.

Q. 188. What did you refer to as Lewisohn Brothers' file? Is that a separate file?

A. I meant Lewisohn Brothers' file; it was Lewisohn Brothers

then, and this was kept in the United Smelting Company's file, room 320.

Q. 189. Are these boxes you speak of Lewisohn Brothers' files?

A. Yes, sir, these small boxes.

Q. 190. Just like the other boxes?

A. Yes, sir.

Q. 191. What is the difference between Lewisohn Brothers' file of boxes and the boxes which you described before?

A. Which boxes?

Q. 193. You described at great length having looked into some boxes.

A. They were Lewisohn Brothers', but they belonged to the Smelting Company, as I understand.

Q. 193. Do you mean anything else now than that you looked in room 320 and that that room is a room of the office of the United Metal & Smelting Company?

A. That is it.

Q. 194. Those two boxes containing the contracts for the year 1895 in which you found nothing in room 320, were they?

A. All the boxes were in that room.

Q. 195. I thought you said that certain boxes were in Lewisohn Brothers' office?

A. Old cases that related to different things; not only 1895, but 1896, '97, and 98; sometimes the papers accumulate and the boys would not give them to you, but would throw them aside and they would lay there for some time and then they would be put in the boxes and reduced that way.

Q. 196. And those are the papers you say you looked at in the office, are they?

A. In the main office, yes.

Q. 197. How do you know that you looked at all the boxes relating to 1895?

A. All that was in room 320.

Q. 198. But there are in that room a large number of boxes besides the boxes of 1895, are they not?

A. Yes, sir.

645 Q. 199. What other boxes are there in there?

A. 1889, I suppose, and 1896—No, 1895, I believe, is the last; up to 1895 and before that.

Q. 200. How far do you think they go back?

A. 1866.

Q. 201. How do you know that you found all the boxes that related to 1895?

A. They were all together.

Q. 202. How do you know they were?

A. They were all together.

Q. 203. How do you know they were all together?

A. When I went in there I found them.

Q. 204. You formed certain ones, but how do you know you had all the letters for that year and all the boxes?

A. I didn't say I had all the letters for that year.

Q. 205. How do you know whether you have covered all the various boxes for the year 1895?

A. I covered all that were in that room.

Q. 206. These boxes covered definite periods, I understand?

A. From January 1 to December 31.

Q. 207. But each box covers the period of a certain number of days?

A. Yes, sir.

Q. 208. It is not a regular period, is it; there are not the same number of days covered in any one box?

A. No, sir.

Q. 209. It depends upon whether the box gets full or not?

A. Yes.

Q. 210. Now you have the box covering a period of days?

A. Yes.

Q. 211. Now have you checked up those boxes which you examined so that you have a list, or made a list, of the boxes covering the twelve months from January 1, 1895, to January 1, 1896?

A. I didn't check them up, but I took a box that run, for instance, from January 1 to 7, then the next box from January 7 to 13, and so on until the end of the year.

Q. 212. But you did not check them, so that you don't know whether you got all the boxes?

A. There wasn't any need of checking them, was there?

Q. 213. There was a need unless you followed them up?

A. That is what I did.

Q. 214. For each year?

A. Each day.

Q. 215. Then you are certain and can swear you examined every box covering each business day of that year?

A. Yes, incoming and outgoing letters.

Q. 216. Both?

A. Both.

Q. 217. Then you do know, do you, that you have covered boxes taking in that whole period?

A. Yes, sir.

Q. 218. What did you mean by saying you did not check
646 them up?

A. By checking them up I thought you meant taking a piece of paper and pencil and checking each one off. That is what I understand you meant by "checking."

Q. 219. How were the boxes arranged in that place?

A. A and Ba running from January to a certain date, and then took the next A and Ba to the end of the year and the same way with the outgoing letters.

Q. 220. There is not, among the letters which have been produced by Mr. Lauterbach, any letter from J. Morris Meredith. Do you recall whether you found in the files any letters from J. Morris Meredith?

A. I don't know whether I did or not. I can't recall finding any.

Q. 221. It appears by the letter from Mr. Charles C. Beaman to Leonard Lewisohn of May 9, 1895, which Mr. Lauterbach has produced, that letter was received from J. Morris Meredith on May 8, 1895, relating to Old Dominion matters. Will you now search and see whether you can find that letter?

A. Do you want me to make a search?

Q. 222. Yes.

A. I will do so.

Q. 223. It appears by the copy of a letter of Lewisohn Brothers to G. M. Hyams of May 14, 1895, that Lewisohn Brothers received a telegram from Mr. Hyams of that date. Will you search for that telegram?

A. I will.

Q. 224. It appears by the letter of Lewisohn Brothers to William Keyser dated May 13, and Lewisohn Brothers to G. M. Hyams dated May 15, that Lewisohn Brothers received a letter from William Keyser dated on or about May 12, in relation to the Old Dominion property, which letter is not among those produced by Mr. Lauterbach. Will you make search for that letter?

A. Yes, sir.

Q. 225. It appears by a letter, presumably of Mr. Jesse Lewisohn or Leonard Lewisohn, or Lewisohn Brothers, of May 17, 1895, that there was a letter of J. Morris Meredith of May 16, 1895, which has not been produced or is not among those produced by Mr. Lauterbach. Will you look for that letter?

A. Yes, sir.

Q. 226. It appears by the letter of Mr. Leonard Lewisohn to Mr. A. S. Bigelow, dated May 15, 1895, marked "Personal," that a statement was enclosed by Mr. Leonard Lewisohn to Mr. Bigelow relating to this matter. Will you look for the copy of that statement?

A. Yes, sir.

Q. 227. It appears, by a copy of the letter of Lewisohn Brothers to Aleck J. Meyer, dated May 29, 1895, that Lewisohn Brothers had communications with Mr. Meyer in regard to his share in the Old Dominion scheme. Will you search for letters from Mr. Meyer relating to the same subject?

A. Yes, sir.

Q. 228. It appears from a copy of the letter of Lewisohn
647 Brothers to William Keyser produced by Mr. Lauterbach, dated June 3, 1895, that there was a letter of Mr. Keyser to Mr. Meredith of May 24, 1895. Will you search for that letter?

A. I will.

Q. 229. It appears, by a copy of the letter of Leonard Lewisohn to William Keyser dated June 5, 1895, produced by Mr. Lauterbach, that there was a letter to Mr. Leonard Lewisohn of June 4, 1895, which has not been produced. Will you search for that letter?

A. I will.

Q. 230. It appears by the letter of Leonard Lewisohn to J. W. Belches of Boston, dated June 5, 1895, of which a copy has been produced by Mr. Lauterbach, that there was correspondence with Mr. Belches in regard to his share in the syndicate but there are no

letters from him among the papers produced by Mr. Lauterbach. Will you look for letters at that time, and subsequently, of Mr. Belches?

A. I will.

Q. 231. It appears, by the letter of Lewisohn Brothers to Mr. Bigelow, of June 6, 1895, that a letter was received on or about that date from Mr. James Calhoun, in relation to the Old Dominion. Will you search for that letter and other letters from Mr. Calhoun relating to this letter, as none have been produced?

A. I will.

Q. 232. It appears from the copy of a letter of Leonard Lewisohn dated June 6, 1895, to Thomas Nelson, that there was correspondence relating to this matter with Mr. Nelson. No letter from Mr. Nelson of that date, or any other date, has been produced. Will you search for letters from Mr. Nelson?

A. I will.

Q. 233. It appears from a letter of June 4, 1895, that Lewisohn Brothers received on that date, from Mr. A. S. Bigelow, the blanks relating to the Old Dominion Syndicate. Will you search for the letter of Mr. Bigelow accompanying those blanks?

A. Yes, sir.

Q. 234. And for any of the blanks therein referred to?

A. Yes, sir.

Q. 235. It appears by the letter of Mr. C. C. Beaman of June 7, 1895, that Lewisohn Brothers wrote Mr. Beaman about the date of June 5 in regard to his share in the Old Dominion Syndicate. Will you search for a copy of that letter?

A. I will.

Q. 236. It appears by the letter of Leonard Lewisohn to Mr. Brent Keyser, of June 7, 1895, that there was a letter of Mr. Keyser, of June 6, which has not been produced. Will you look for that letter?

A. Yes, sir.

Q. 237. It appears by a letter of Mr. Leonard Lewisohn, of June 10, 1895, to William Keyser, which has been produced that there was a letter from Mr. William Keyser, dated June 7, to Mr. Leonard Lewisohn, which has not been produced. Will you search for that letter?

A. Yes, sir.

Q. 238. It appears by the letter of Lewisohn Brothers to
648 Mr. A. S. Bigelow, of June 11, 1895, a telegram was received from Mr. William Keyser to Leonard Lewisohn, on that date. That telegram has not been produced. Will you search for that?

A. Yes, sir.

Q. 239. It appears by the letter of Lewisohn Brothers to A. S. Bigelow, of June 12, 1895, that there was a letter of Mr. Bigelow's dated June 11, which has not been produced. Will you search for that?

A. I will.

Q. 240. By the letter of Lewisohn Brothers to A. S. Bigelow, ap-

parently signed by Mr. Jesse Lewisohn, dated June 17, 1895, it appears that there were two letters from Mr. A. S. Bigelow, both dated June 15, which have not been produced. Will you search for those letters?

A. I will.

Q. 241. It appears by the letter of Leonard Lewisohn to A. S. Bigelow, of June 17, 1895, of which a copy has been produced by Mr. Lauterbach, that there must have been a letter from Mr. Bigelow to Mr. Lewisohn, of that date, which has not been produced. Will you look for that letter from Mr. Bigelow?

A. Yes, sir.

Q. 242. It appears from the letter of June 18, 1895, of Lewisohn Brothers to A. S. Bigelow, apparently signed by Mr. Jesse Lewisohn, of which a copy has been produced by Mr. Lauterbach, that a telegram was received from Mr. Hyams on that date, which telegram has not been produced. Will you search for that telegram?

A. Yes, sir.

Q. 243. It appears by the letter of June 21, 1895, of Lewisohn Brothers to A. S. Bigelow of which a copy has been produced by Mr. Lauterbach, that a letter was received from Mr. Bigelow dated June 19 which has not been produced. Will you search for that letter?

A. I will.

Q. 243½. It appears by the letter of June 21 of Lewisohn Brothers, or Leonard Lewisohn, to A. S. Bigelow, of which a copy has been produced, that there was a letter of June 20 from Mr. Bigelow which has not been produced. Will you search for that letter?

A. Yes, sir.

Q. 244. It appears by the letter of Lewisohn Brothers to William Keyser, dated June 25, 1895, of which a copy has been produced that there was a letter of June 24 from Mr. Keyser which has not been produced. Will you search for that?

A. I will.

Q. 245. It appears by the letter of June 27 of Leonard Lewisohn to William Keyser, of which a copy has been produced by Mr. Lauterbach, that there was a letter of Mr. Keyser of June 26 which has not been produced. Will you search for that?

A. Yes, sir.

Q. 246. It appears by the letter of July 1, 1895, from Leonard Lewisohn to R. Brent Keyser, of which a copy has been pro-
649 duced, that there was a letter of Mr. Keyser to Leonard Lewisohn received at that time, which letter has not been produced. Will you search for that?

A. Yes, sir.

Q. 247. It appears by the letter of Leonard Lewisohn of July 1, 1895, to Mr. A. W. Spencer, that a letter was received from Mr. Spencer to which the letter of July 1 is a reply. That letter from Mr. Spencer has not been produced. Will you search for that.

A. Yes, sir.

Q. 248. By the copy of the letter of July 5, 1895, from Lewisohn Brothers, or Mr. Leonard Lewisohn to A. W. Spencer it appears

that a letter of Mr. Spencer of July 3, 1895, has not been produced. Will you search for that?

A. Yes, sir.

Q. 249. By the letter of Leonard Lewisohn to A. W. Spencer of July 11, 1895, it appears that there was a letter of July 10 of Mr. Spencer to Mr. Lewisohn which has not been produced. Will you search for that?

A. Yes, sir.

Q. 250. It appears by a letter of Leonard Lewisohn, or Lewisohn Brothers, to the Old Colony Trust Company of July 3, 1895, that there was a letter received from them under date of July 2, which has not been produced. Will you search for that letter?

A. Yes, sir.

Q. 251. It appears by the letter of Lewisohn Brothers to G. M. Hyams of July 3, 1895, that on that date there was received by Lewisohn Brothers or Leonard Lewisohn, a letter from R. Brent Keyser, dated July 2, and also a letter from Mr. William Keyser dated July 2 which have not been produced. Will you search for those letters?

A. Yes, sir.

Q. 252. It appears by the letter of Leonard Lewisohn or William Keyser, dated July 5, that Leonard Lewisohn received a letter from William Keyser, dated July 3 which has not been produced. Will you look for that?

A. Yes, sir.

Q. 253. It appears by a letter of July 5, 1895, of Leonard Lewisohn to Allan W. Evarts, that there was a communication received from Mr. A. S. Bigelow on that date. Will you search for any letters or telegrams from Mr. Bigelow?

A. Yes, sir.

Q. 254. It appears by a letter of July 8, 1895, from Leonard Lewisohn, or Lewisohn Brothers, to Albert S. Bigelow, of which a copy has been produced, that there was a letter received from Mr. Allan W. Evarts on or about that date, which has not been produced. Will you search for that?

A. Yes, sir.

Q. 255. It appears by a letter of July 9, 1895, from Leonard Lewisohn to William Keyser that there was a letter of July 8 to William Keyser which has not been produced. Will you search for that?

A. Yes, sir.

Q. 256. It appears by the letter of July 12, 1895, of Lewisohn Brothers to the Old Colony Trust Company that there was a
650 letter from the Old Colony Trust Company dated July 11, which has not been produced. Will you search for that?

A. Yes, sir.

Q. 257. It appears by the letter of Leonard Lewisohn, or Lewisohn Brothers, of July 15, 1895, that there was a letter of Mr. Bigelow's of July 12 which has not been produced. Will you search for that?

A. Yes, sir.

Q. 258. It appears by the letter of Lewisohn Brothers of July 15 to J. W. Belches that there was a telegram from Mr. Belches which has not been produced. Will you search for that?

A. Yes, sir.

Q. 259. It appears from the letter of Lewisohn Brothers to the Old Colony Trust Company of July 15 that there was a letter of the Old Colony Trust Company of July 12 which has not been produced. Will you search for that?

A. Yes, sir.

Q. 260. It appears by the letter of July 16 of Lewisohn Brothers to A. S. Bigelow that there was a letter from Mr. Bigelow of July 15 which has not been produced. Will you search for that?

A. Yes.

Q. 261. It appears by the letter of Leonard Lewisohn to A. S. Bigelow of July 17 that there was a letter from him of the 16th which has not been produced. Will you search for that?

A. Yes, sir.

Q. 262. It also appears by the letter of Leonard Lewisohn, or Lewisohn Brothers, to William Keyser, which has been produced, dated July 17, 1895, that there was a letter of July 16 that has not been produced, from Mr. Keyser. Will you search for that?

A. Yes.

Q. 263. It appears by the letter of Lewisohn Brothers of July 18 to Mr. Bigelow that there was one of July 17 from Mr. Bigelow which has not been produced. Will you search for that?

A. Yes.

Q. 264. It appears by Lewisohn Brothers' letter of July 19 to A. S. Bigelow, which has not been produced, that there was a letter the preceding day from Mr. Bigelow which has not been produced. Will you search for that?

A. Yes, sir.

Q. 265. It appears by the leter of July 19, 1895, entitled "Old Dominion Syndicate," that a copy of a notice was sent by Lewisohn Brothers, or Leonard Lewisohn, to fifteen different subscribers of the Old Dominion Syndicate. Will you search for the letters to those fifteen different subscribers?

A. Yes, sir.

Q. 266. It appears by the letter of July 22 from Lewisohn Brothers to A. S. Bigelow, of which a copy has been produced, that there was a letter of Mr. Bigelow of the preceding day which has not been produced. Will you search for that?

A. Yes, sir.

Q. 267. It appears by the letter of Lewisohn Brothers of
651 July 22 to Mr. Bigelow that there was a letter from Mr. Bigelow to Lewisohn Brothers of the preceding day, or a day prior to that, which has not been produced. Will you search for that?

A. Yes, sir.

Q. 268. It appears by the letter of July 23, 1895, of Lewisohn Brothers to A. S. Bigelow that there presumably must have been

a letter dated immediately after that from Mr. Bigelow which has not been produced. Will you search for that?

A. Yes, sir.

Q. 269. And also by a letter from Lewisohn Brothers to A. S. Bigelow, of which a copy has been produced, dated July 23, 1895, it appears that there was a letter from Mr. Bigelow to Lewisohn Brothers of the preceding day which has not been produced. Will you search for that?

A. Yes, sir.

Q. 270. It appears also from a letter of Lewisohn Brothers to A. S. Bigelow, dated July 25, 1895, that there was a letter from Mr. Bigelow of the preceding day which has not been produced. Will you search for that?

A. Yes, sir.

Q. 271. It appears by the letter of Lewisohn Brothers to Mr. Bigelow of July 26 that there was a letter from Mr. Bigelow of July 25 which has not been produced. Will you search for that?

A. Yes, sir.

Q. 272. It appears by a letter of Lewisohn Brothers to Mr. Bigelow of July 30, of which a copy has been produced, that there was a letter of Mr. Bigelow of July 29 which has not been produced. Will you search for that?

A. Yes, sir.

Q. 273. It appears by a letter of July 30 of Lewisohn Brothers, or Leonard Lewisohn, to William Keyser that there was a letter from Mr. Keyser of the 24th which has not been produced. Will you search for that?

A. Yes, sir.

Q. 274. It appears by the letter of Lewisohn Brothers to William Keyser of July 30 that there was a letter from Mr. Bigelow to Leonard Lewisohn, presumably of July 29, which has not been produced. Will you search for that?

A. Yes, sir.

Q. 275. It appears by the letter of August 5, 1895, of Lewisohn Brothers to A. S. Bigelow, that there was a letter of August 3 from Mr. Bigelow which has not been produced. Will you search for that?

A. Yes, sir.

Q. 276. It appears by the letter of Lewisohn Brothers to R. Brent Keyser of August 12, 1895, that there was a letter from Mr. Keyser of August 10 which has not been produced. Will you search for that?

A. Yes, sir.

Q. 277. It appears by the letter of Lewisohn Brothers to Mr. Bigelow of August 22, 1895, that there was a letter of Mr. Bigelow's of the 21st which has not been produced. Will you search for that?

A. Yes, sir.

652 Q. 278. It appears by Lewisohn Brothers' letter to A. S. Bigelow of August 20, 1895, that there was a letter from Mr. Bigelow of August 19 which has not been produced. Will you search for that?

A. Yes, sir.

Q. 279. It appears by the letter of Lewisohn Brothers to Mr. Bigelow of August 23, that there was a letter of August 22 of Mr. Bigelow's which has not been produced. Will you search for that?

A. Yes, sir.

Q. 280. It appears by the letter of Lewisohn Brothers to Mr. Bigelow of August 24, that there was a letter of August 23 from Mr. Bigelow which has not been produced. Will you search for that?

A. Yes, sir.

Q. 281. It appears by the letter of Lewisohn Brothers of August 27 to Mr. Bigelow that there was a letter from Mr. Bigelow to Lewisohn Brothers of August 26 which has not been produced. Will you search for that?

A. Yes, sir.

Q. 282. It appears by the letter of Lewisohn Brothers to Mr. Bigelow of August 30 that there was a letter from Mr. Bigelow to Lewisohn Brothers of August 29 which has not been produced. Will you search for that?

A. Yes, sir.

Q. 283. It appears by the letter of Lewisohn Brothers to Mr. Bigelow of August 31 that there was a letter from Mr. Bigelow of August 30 which has not been produced. Will you search for that?

A. Yes, sir.

Q. 284. It appears by the letter of the executors of A. W. Spencer to Leonard Lewisohn, dated October 5, 1895, that there was presumably a letter of Lewisohn Brothers to the executors, or to William A. Gaston, their attorney, dated August 6, or one of the few days following, of which no copy has been produced. Will you search for that letter?

A. Yes, sir.

Q. 285. It appears by the letter of William Keyser to Leonard Lewisohn, dated November 13, 1895, which has been produced, that there was a letter of Leonard Lewisohn to William Keyser of November 11 which has not been produced. Will you search for that?

A. Yes, sir.

Q. 286. It also appears that from that same letter of November 13 that there was a letter of William Keyser to Leonard Lewisohn, dated June 25, 1895, which has not been produced. Will you search for that?

A. Yes, sir.

Q. 287. It appears by the letter of Simon H. Stern to Lewisohn Brothers, dated September 20, 1895, that there was a letter from Lewisohn Brothers to Simon H. Stern of June 3 of which no copy has been produced. Will you search for that copy?

A. Yes, sir.

Q. 288. It appears by the letter of Simon H. Stern to Lewisohn Brothers, of October 4, 1895, that there were two letters of
653 Lewisohn Brothers to Mr. Stern of that date, only one of which has been produced. Will you search for the other?

A. Yes, sir.

Q. 289. It appears by the letter of Mr. Gaston to Adolph Lewisohn, dated October 8, 1895, that there was a letter from Adolph Lewisohn to Mr. Gaston of October 7, 1895, of which a copy has not been produced. Will you search for that?

A. Yes, sir.

Q. 290. It appears by the letter of November 6, 1895, from Leonard Lewisohn, or Lewisohn Brothers, to A. S. Bigelow that there was a letter from Mr. Bigelow to Leonard Lewisohn or Lewisohn Brothers of November 5 which has not been produced. Will you search for that?

A. Yes, sir.

Q. 291. It appears by the letter of Lewisohn Brothers to John Stanton, dated October 4, 1895, that there was some correspondence between John Stanton and Leonard Lewisohn, or Lewisohn Brothers, or Adolph Lewisohn, in relation to this matter. There is no letter from Mr. Stanton here and no other letter from Leonard Lewisohn or Lewisohn Brothers. Will you search for the letters from Mr. Stanton, and copies of other letters to Mr. Stanton, both before and after that date?

A. Yes, sir.

Q. 292. Were the letters of Mr. Jesse Lewisohn and Mr. Adolph Lewisohn in relation to those matters filed together with Lewisohn Brothers' and Leonard Lewisohn's letters?

A. All Lewisohn Brothers' were filed together.

Q. 293. No matter by whom they were written?

A. No, unless they kept a separate file for themselves, which I don't know anything about.

Q. 294. Do you know of any of their private files?

A. No, sir.

Q. 295. Or any private files of anybody else?

A. I have all of Lewisohn Brothers' files.

Q. 296. Do you know of anybody's private files?

A. Not of 1895.

Q. 297. Nor the early private files of 1896?

A. No, sir.

Q. 298. When was that begun?

A. I don't know. I know there were private files there, but what the date is I don't know.

Q. 299. I wish you would look that up.

A. I will.

Q. 300. It appears by the letter of Leonard Lewisohn to Simon H. Stern of December 23, 1895, that Leonard Lewisohn wrote Mr. Stern under date of the 19th of December, which letter has not been produced. Will you search for that letter?

A. Yes, sir.

Q. 301. Is there any explanation other than the lack of thoroughness in your search, which you can suggest explaining why
654 these letters to which I have referred in my questions and asked you to make search for, were not found in the search which you made?

Mr. HEMENWAY: Objected to as immaterial at present.

WITNESS: Shall I answer that question?

Mr. LAUTERBACH: Yes, go on.

WITNESS: I can't give you any explanation for it.

Q. 302. Has anybody made any examination of these files for the year 1895, recently, to your knowledge, before you began, and during the time in which you made that examination?

A. I don't know that anybody has made any examination of them. I could not say that because they are in different parts of the house altogether.

Q. 303. I ask you whether, so far as you know, anybody has?

A. No one has been through those files, so far as I know, outside of myself.

Q. 304. Do you know whether or not Mr. Hyams has made any examination of these files within the last few months?

A. No, sir.

Q. 305. You have seen Mr. Hyams and know him, don't you?

A. Yes.

Q. 306. He has been at the office, I presume?

A. Yes, sir.

Q. 307. And you don't know whether or not he has made any examination?

A. No, sir, I do not.

Q. 308. Were you not given directions by Mr. Walter Lewisohn or either of the other executors, or Mr. Lauterbach, or any one, as to how you should proceed to make your examination?

A. I was told to find all papers pertaining to the Old Dominion matters.

Q. 309. And what did you look for?

A. Well, Old Dominion.

Q. 310. Has it been part of your duty to make search for papers from time to time, or is this the first instance?

A. The first instance of anything like this where I have been called to search for papers.

Q. 311. Whose duty is it in that office; who generally makes the search through the old files for anything that happens to come up?

A. I don't know.

Q. 312. That is not one of the things you have done in that office?

A. I have looked for other papers in the past, but not at present.

Q. 313. To what extent have you been occupied in searching for papers?

A. When old letters were called for we would be requested to go and find them.

Q. 314. Have you done that often?

A. Not very often.

Q. 315. Anybody else there who does it in the office?

A. Not that I know of.

Q. 316. Who else is there in that office now besides you, except the heads of the office?

A. Who do you mean?

655 Q. 317. In the way of clerks.

A. Several clerks; Mr. Westervelt and Mr. Van Zandt.

Q. 318. What clerks are there now who were there when you commenced to work there in July, 1895?
A. In Lewisohn Brothers'?
Q. 319. Yes.
A. None.
Q. 320. That is, you are the sole survivor of those at that time?
A. Since 1895, yes.
Q. 321. Are you the only person there now who was there January 1, 1896?
A. With Lewisohn Brothers at the present time?
Q. 322. Yes.
A. I cannot answer that question exactly; there may be one or two.
Q. 323. Who are the ones?
A. Mr. Gibson of the coffee department, I think.
Q. 324. Who else?
A. I think that is the only one.
Q. 325. Is there anybody now living who was there July 1, 1895, with Lewisohn Brothers, so far you know?
A. Yes.
Q. 326. Who?
A. Quite a few of them.
Q. 327. Who are they?
A. Mr. W. Welch.
Q. 328. Where is he now?
A. At 11 Broadway.
Q. 329. He is not with Lewisohn Brothers now?
A. No, sir.
Q. 330. What is his business now?
A. With the United Metal Selling Company, I believe.
Q. 331. Who else?
A. Mr. Wilson.
Q. 332. What is his first name?
A. I think Mr. T. Wilson.
Q. 333. Where is he now?
A. 11 Broadway.
Q. 334. With the Metal Selling Company?
A. Yes, sir.
Q. 335. Who else?
A. Mr. Kane.
Q. 336. What is his first name?
A. T. J., I believe.
Q. 337. Who is he with?
A. The United Metal Selling Company.
Q. 338. Who else?
A. T. Gaden.
Q. 339. Who is he with?
A. The United Metal Selling Company.
Q. 340. Who else?
A. W. A. Weaver.
Q. 341. Who is he with?

A. The United Metal Selling Company.

Q. 342. Who else?

A. Mr. E. Laverty, and he is connected with the Metal Selling Company.

Q. 343. Go on.

A. Max Rosenthal.

Q. 344. Who is he with?

A. The United Metal Selling Company. Those are the only people I know of that are living that were employed with Lewisohn Brothers.

656 Q. 345. Go ahead and finish the list.

A. I think E. Meschaner; that is all I can think of at the moment. A. There are some additional ones, but I can't think of them all.

Q. 346. Is there anybody who was with Lewisohn Brothers in 1895, whom you can think of, and who is living, and who is not with the United Metal Selling Company now?

A. With Lewisohn Brothers in 1895, that is living, and not with the United Metal Selling Company.

Q. 347. Yes.

A. No, I don't know of anybody that was with us then that is living now.

Q. 348. Is there anybody who is dead that you remember?

A. No, I have not heard of any deaths.

Q. 349. Then, to your recollection, everybody who was with Lewisohn Brothers in the office in 1895, except yourself, is now with the United Metal Selling Company?

A. No; there have been some people discharged or left of their own accord.

Q. 350. Who are they?

A. Mr. A. L. Casey, I think, was one, and Mr. William Faint—they had about forty or fifty clerks, but I don't remember them all.

Q. 351. You don't remember any of them?

A. No, at the moment, no, sir. There was Arthur Morris there before me. I was in the telephone booth at the time, and have always been since. Mr. Rechert was there. He was the cashier, but he is dead. And Mr. P. W. Landsburg.

Q. 352. Is he dead?

A. No, he is with Landsburg Brothers.

Q. 353. Mr. Faint was the stenographer to whom you referred?

A. Yes, sir.

Q. 354. Was he the only stenographer?

A. No, there was a Mr. Fox, I believe; where he disappeared to, or went, I don't know.

Q. 355. Mr. Faint was the one that had to do with the filing away of these papers?

A. I believe so, yes.

Q. 356. I wish you would, in addition to the matters specifically called to your attention, make a full search for all papers of any kind relating to the Old Dominion matters.

A. I will.

Q. 357. Or of all letters of any kind relating to Old Dominion matters to or from Albert S. Bigelow.

A. Yes, sir.

Q. 358. Or to or from G. M. Hyams.

A. Yes, sir.

Q. 359. Or to or from William Keyser.

A. Yes, sir.

Q. 360. Or to or from J. Morris Meredith.

A. Yes, sir.

Q. 361. Or to or from R. Brent Keyser.

A. Yes, sir.

Q. 362. Or to or from each one of those fifteen subscribers.

A. Yes, sir.

657 Q. 363. And when you are making that search check up so as to see that you have the full number of fifteen.

A. I will, but I don't know what their names are.

Q. 364. I haven't the full list. It appears by this list that among the subscribers are included John Stanton, Simon H. Stern, A. W. Spencer, J. W. Belches, and Alexander J. Meyer.

Q. 365. Were letter-press copy books kept by Lewisohn Brothers?

A. Of the copper business, do you mean?

Q. 366. I mean were the letters that were sent out kept in copying books?

A. I believe those that were written were.

Q. 367. What do you mean by that?

A. Plain writing.

Q. 368. You mean those that were in manuscript?

A. Yes.

Q. 369. And those that were not in manuscript,—those which were in typewriting,—were those kept in letter-press copy books?

A. I can't answer that. I paid no attention to that part.

Q. 370. I am referring to 1895 and 1896.

A. Yes, I don't know anything about that, then.

Mr. LAUTERBACH: There were copper copying books, were there not, indicating the purchase and sales of copper?

WITNESS: Yes.

Q. 371. What do you know, if anything, about where the books of account of 1895 or 1896 are kept—of Lewisohn Brothers or Leonard Lewisohn?

A. Where are they now?

Q. 372. Yes.

A. I don't know.

Q. 373. You had nothing to do with them at that time?

A. No.

Q. 374. And not since?

A. No, sir.

Q. 375. None of them are in this room 320?

A. Not that I have seen. I think that is the number of the room. I am pretty sure it is.

[Examination of this witness suspended for the present and recess is taken until 3 p. m.]

ADOLPH LEWISOHN, sworn.

Direct examination by Mr. BRANDEIS:

Q. 376. Give your full name.
A. Adolph Lewisohn.
Q. 377. During what period were you a member of the firm of Lewisohn Brothers?
A. It was no firm of Lewisohn Brothers. From about
658 1890 or 1891. I don't know when there was a corporation formed—from between 1891 to about 1901—and then there was the corporation of Lewisohn Brothers.
Q. 378. Prior to 1890 it was a firm?
A. Yes, sir.
Q. 379. And you and Mr. Leonard Lewisohn were members of that firm?
A. Yes.
Q. 380. Were you the sole members?
A. For many years.
Q. 381. For many years prior to 1890?
A. Away back to about 1885 Leonard Lewisohn and myself were the sole partners. I don't know the exact date.
Q. 382. And under what law was the corporation, Lewisohn Brothers, to which you referred, organized?
A. This state.
Q. 383. Who were the officers of that corporation?
A. Leonard Lewisohn, myself, Jesse Lewisohn. I don't think of any others. I think that was about all.
Q. 384. What were the interests of the several members in the corporation?
A. Leonard Lewisohn and myself had the larger share of it.
Q. 385. And Jesse a small interest?
A. Yes.
Q. 386. You and Leonard Lewisohn were equally interested, or which was the largest?
A. I think equally.
Q. 387. How long did you continue to own your share in the corporation of Lewisohn Brothers?
A. Until about a year and a half ago.
Q. 388. And then sold out to Leonard?
A. Yes.
Q. 389. And was Jesse a part owner up to the time you sold out?
A. Yes.
Q. 390. How were the offices distributed in the company; you three were directors?
A. Yes, sir.
Q. 391. Leonard, president?
A. I think Leonard was president, and I was treasurer.
Q. 392. There appear to be letters signed by you as general manager.
A. In order to make business easy there were two general managers; if one of us was away the other acted in that capacity.

Q. 393. That is, each of you had the power to act as general manager?

A. Yes, sir.

Q. 394. Now what was the business of the corporation?

A. Dealing in metal.

Q. 395. And was that the sole business of the corporation?

A. Yes, practically. I think they had other rights but practically that was the business.

Q. 396. It appears that under the name of Lewisohn Brothers a large number of transactions relating to the Old Dominion were carried on; that was not dealing in metal was it?

A. It was really for account of Leonard Lewisohn, and Lewisohn Brothers took charge of the matter for him.

659 Q. 397. That is, Lewisohn Brothers were practically the agents of Leonard Lewisohn in carrying on the firm's transactions?

A. Well, attended to it, practically, sometimes by Leonard Lewisohn and sometimes Lewisohn Brothers.

Q. 398. Was this transaction which was undertaken by Leonard Lewisohn in connection with A. S. Bigelow a transaction of Leonard Lewisohn individually?

Mr. HEMENWAY: Objected to as assuming that there were transactions which had taken place which does not appear in the evidence as yet.

Mr. BRANDEIS: I will say transactions in connection with the purchase of the Old Dominion Copper Mining Company property, and other mining claims, a transaction by Leonard Lewisohn individually, or by the corporation.

Mr. HEMENWAY: Objected to as leading, and also as indefinite, inasmuch as the transaction is not described, and as yet there is no evidence of any transaction.

A. It was for Leonard Lewisohn.

Q. 399. Was it a transaction in which you had any interest?

A. Leonard Lewisohn gave me a share in the profits.

Q. 400. What was that share?

Mr. HEMENWAY: Objected to as immaterial and incompetent.

A. I don't remember the exact share.

Q. 401. State as fully as you can what you recall in regard to the matter.

[Same objection.]

A. I think about a quarter or a third. I don't know exactly.

Q. 402. Of his interest?

A. Of his interest.

Q. 403. Did Jesse Lewisohn also have an interest?

A. I think he did.

Q. 404. Do you know what that interest was?

A. No, I don't remember.

Q. 405. When did you acquire that interest?

A. I was in Europe, as far as I remember at the time——

Mr. Hemenway (Interrupting): The question is, when did you acquire it?

A. I don't know any more the time.

Q. 406. You spoke of being in Europe. Do you refer to the period of 1895?

A. Yes.

Q. 407. Do you recall during what months you were in Europe?

A. I don't know what time I came back. I think I went in the spring.

Q. 408. You went in the spring, did you?

A. I think so. I think I came back in the summer. I don't know exactly.

660 Q. 409. Do you know whether or not this property had been purchased during your absence in Europe?

A. I remember it had.

Q. It had been?

A. Yes, sir.

Q. 411. Do you remember whether or not you heard of the purchase after you returned from Europe or while you were in Europe?

A. I don't remember that any more.

Q. 412. Do you remember whether or not the interest which you acquired in this syndicate was acquired by you after you returned to America?

Mr. Hemenway: Objected to, as it does not appear that he acquired any interest in the syndicate, and also as immaterial.

A. As far as I remember after my return,—well, Leonard Lewisohn gave me that share in the profits.

Q. 413. Was that evidenced by any writing?

A. No; I don't think so.

Q. 414. Was your interest that you speak of evidenced by any shares of stock, or by money, or both?

A. As I said before, a share in the profits, whatever that is.

Q. 415. Did you receive, as the result of that share, stock or certificates of stock in the Old Dominion Company, or money, or both?

A. I received, no doubt, shares and money.

Q. 416. Both?

A. I believe so. Paid for it, you see,—that means a share in the profits. I would have to pay and receive the money.

Q. 417. You say you received a share in the profits. Do you mean by that, you made a payment towards the amount as well as receiving something from it?

A. No doubt has been charged that payment,—charged that payment in order to get the balance of profits.

Q. 418. That is, you were charged with a certain amount as your contribution to the fund required to purchase?

A. Yes.

Q. 419. Do you recall what your proportion was?

A. No, I do not know.

Q. 420. Do you recall what proportion you had, or the total in-

terest which Leonard Lewisohn had, or that Leonard Lewisohn and Bigelow had together?

A. No; whatever interest or profits there was, was in the share of Leonard Lewisohn's profits.

Q. 421. Do you recall what fraction or proportion of Leonard Lewisohn's part you acquired?

A. As I said before, between either one quarter or one third.

Q. 422. Now were there any books kept by Leonard Lewisohn, or by you, or by Lewisohn Brothers, from which you could refresh your recollection as to the fact in this respect?

A. I have no books.

661 Q. 423. In what books were the facts relating to this transaction which you have just testified to recorded?

A. I don't know.

Q. 424. What other persons, if any, besides yourself, contributed to this fund which was required to make the purchase?

A. I don't remember that.

Q. 425. Don't you recall that other persons were spoken of as the syndicate subscribers coming in to contribute a share in the result in some form?

A. It is a good many years ago, and I don't remember any more details except what I have told here to-day.

Q. 426. It appears that there was a certain amount of correspondence conducted apparently in your name, by you as manager, relating to the matter; does not that refresh your recollection that there were other persons who did contribute?

A. I heard it testified to-day, as I say.

Q. 427. You refer by that to the examination of Mr. Rahaeuser, which you listened to, do you?

A. Yes, sir.

Q. 428. It appears from that deposition that there were other persons who contributed money, and who received certain proceeds of the syndicate transactions. I ask you in what books those transactions were recorded?

A. I don't know.

Q. 429. What did you have to do with the books of Lewisohn Brothers; anything?

A. I didn't tend to the books; they had a business manager, Mr. Rechert.

Q. 430. He was the bookkeeper, was he not?

A. Yes, sir.

Q. 431. I am not asking you as to the contents of the books, but I am asking what books there were, to your knowledge?

A. I don't know.

Q. 432. There being these books in which Lewisohn Brothers acted for some person or persons in connection with the receipt of money, and the disbursement of certificates—distribution of certificates of stock in this matter; are you not able to state whether or not these matters were recorded in Lewisohn Brothers' books?

A. I could not say.

Q. 433. Did you keep a private set of books for your own transactions?

A. I did not.

Q. 434. I don't mean whether you personally wrote in the books, but whether there was kept a private set of books for your individual transactions?

A. I think there were some books kept by me.

Q. 435. What has become of those books?

A. I don't think there were any kept for myself separately.

Q. 436. Do you mean by that that the transactions relating to yourself individually were kept in Lewisohn Brothers Books?

662 A. There was no doubt a record kept; I don't know whether it was in the books of Lewisohn Brothers or separate.

Q. 437. Do you mean by that to say that you don't know whether you had any individual books of Adolph Lewisohn during this period?

A. I don't remember that.

Q. 438. What is your best recollection?

A. I don't know whether it was kept separate or not.

Q. 439. You don't know whether it was kept separate?

A. No.

Q. 440. I ask you for your best recollection in regard to it. Have you any recollection?

A. I don't recollect.

Q. 441. Have you made search yourself for any of the papers or books relating in any way to this Old Dominion matter?

A. No.

Q. 442. Why not?

A. I was not asked to; I was away.

Q. 443. Where are the books and papers of Leonard Lewisohn, or of your own, or of the Lewisohn Brothers' corporation, each and all of them that had anything to do with the transaction in relation to the Old Dominion?

A. I don't know.

Q. 444. When you sold out your interest in the Lewisohn Brothers' corporation, was that a complete severance of your relations with the business?

A. It was.

Q. 445. And all business connection with Leonard Lewisohn?

A. Yes.

Q. 446. What was done with the books and papers covering the previous transactions of yourself in connection with your brother Leonard?

A. I didn't keep any books of any kind from that time on. That is the only record I have.

Q. 447. And you have had a separate place of business, have you?

A. Since that time I have a separate office.

Q. 448. And you have had nothing whatever to do with the books or papers of the previous period?

A. Nothing whatever.

Q. 449. Did Edgar Buffum have any connection with Lewisohn Brothers or Leonard Lewisohn in 1895?

A. He was a clerk or bookkeeper.

Q. 450. Of Lewisohn Brothers?

A. Of Lewisohn Brothers, yes.

Q. 451. How long did he continue in that capacity?

A. He was there until a few years ago. He is now with the United Metal Selling Company.

Q. 452. Did the corporation of Lewisohn Brothers continue until the United Metal Selling Company was organized?

A. The corporation continued; they only sold the metal business to the metal company.

Q. 453. And did the corporation continue business until the time of Mr. Leonard Lewisohn's death?

A. Yes, but did not operate.

Q. 454. Who are the officers of it now?

A. I don't know, but simply the Lewisohn Brothers, as a
663 firm, owns all the shares in the Lewisohn Brothers' corporation, but it is simply inoperative.

Q. 455. And Walter and Frederick are the only partners?

A. I believe so.

Q. 456. Was Charles W. Welch connected with the firm of Lewisohn Brothers?

A. Yes.

Q. 457. In what capacity?

A. Some kind of a bookkeeper.

Q. 458. In 1895?

A. Yes.

Q. 459. How long did he continue with the firm?

A. The same way. He is now with the Metal Selling Company.

Q. 460. Was Sidney Riddlesdorffer connected with the firm of Lewisohn Brothers?

A. I think he was at that time.

Q. 461. In what capacity?

A. Bookkeeper, I think.

Q. 462. And he was with Lewisohn Brothers until the Metal Selling Company was organized?

A. No, he went over to the factory in Perth Amboy.

Q. 463. Lewisohn Brothers' factory?

A. It now belongs to the Metal Selling Company.

Q. 464. Then controlled by Lewisohn Brothers?

A. Yes.

Q. 465. And he is over there yet?

A. Yes, he is over there yet.

Q. 466. Do you know William V. Rowe?

A. I don't know him. I don't know his last name; probably one of the employees, I suppose; one of the younger boys.

Q. 467. Do you know William R. Montgomery?

A. I don't know the names; no doubt they are some of the clerks that have been there, the same as I would not have known we had this Mr. Rahaeuser.

Mr. LAUTERBACH: I think it right to say that there was in existence, coincident with Lewisohn Brothers' corporation, a Lewisohn Brothers' firm, although when he started his connection with Leonard Lewisohn, he started it with the firm of Leonard Lewisohn, then existing as well as the corporation, although it don't appear, and this present Leonard Lewisohn then became the sole partner of Lewisohn Brothers about a year and a half ago. Then he took into his firm Fred and Walter before his death, so that upon his death they became the surviving partners of what was really a continuing firm of Lewisohn Brothers, of which at one time he was a member.

WITNESS: When the Metal Selling Company was formed,— as I said before, the metal business that was the principal part of the business was sold to the Metal Company,—Leonard and I formed the partnership of Lewisohn Brothers, which partnership only existed then since 1900.

Q. 468. Mr. Lauterbach also spoke of there having been
664 a firm of Lewisohn Brothers previously, during the 90's?

A. I said before, formerly it was a corporation, away back to 1867 there was a firm, Lewisohn Brothers, and it was only a corporation was formed in 1891, I believe.

Q. 469. When the corporation was formed in 1891 did you cease to be in that firm of Lewisohn Brothers?

A. I didn't cease to be in the firm. We only made a new firm in about 1900. Leonard and myself were in the firm, and they took in the two boys after we went out.

Q. 470. Are you able to recall whether or not there was any one connected with Lewisohn Brothers by the name of E. Hawley, in 1895?

A. I don't think he was connected with it.

Q. 471. Do you remember any person by the name of E. Hawley?

A. Yes.

Q. 472. What, if anything, did he have to do with the Old Dominion matters?

A. I don't know as he had any.

Q. 473. Was he not a subscriber to the syndicate?

A. I suppose so. I don't remember.

Q. 474. Do you remember any gentleman in connection with it in 1895 by the name of H. Vollestein?

A. I know a gentleman by that name.

Q. 475. Who was he?

A. He was a merchant in the city.

Q. 476. Do you remember whether or not he had any relation with the subscribers to the Old Dominion Syndicate?

A. I don't remember.

Q. 477. Do you remember any person by the name of Theodore Gaden, Jr.?

A. He was a clerk.

Q. 478. In Lewisohn Brothers' employ?

A. Yes, sir.

Q. 479. How long did he remain in their employ?

A. He has gone with the Metal Selling Company.

Q. 480. Jacob Kohn: do you remember any such person?

A. I remember him.

Q. 481. What was he, a clerk?

A. No, a brother-in-law of mine.

Q. 482. Was he connected with Lewisohn Brothers?

A. No.

Q. 483. Do you remember whether he had any interest in the Old Dominion Syndicate?

A. I don't remember now, but maybe he was.

Q. 484. Do you remember G. A. Bicknell?

A. Yes, I know who he is.

Q. 485. Did he have any connection with Lewisohn Brothers?

A. No.

Q. 486. What was he?

A. He was a wool broker. I knew him very well.

Q. 487. Did he have any interest in the Old Dominion Syndicate?

A. I don't recollect it.

665 Q. 488. Charles F. Brooker?

A. No connection with Lewisohn Brothers; it is all the same.

Q. 489. What was Charles F. Brooker?

A. Manufacturer of brass. He was then with the Coe Brass Manufacturing Company. He was a merchant of some kind.

Q. 490. Did he have an interest in the Old Dominion Syndicate?

A. I don't know, but I suppose so.

Q. 491. Do you remember a man by the name of Louis G. Schiffer?

A. Yes.

Q. 492. He wasn't connected with Lewisohn Brothers, was he?

A. No.

Q. 493. What was he?

A. He is a cotton broker.

Q. 494. Was he interested in the Old Dominion Syndicate?

A. I don't remember that he was.

Q. 495. Do you know the concern of J. W. Belches & Company, referred to in the correspondence?

A. He was a stockbroker, I think.

Q. 496. Do you remember anything with regard to his interest in the Old Dominion?

A. No, I don't remember the interest.

Q. 497. Do you know what books there are, or papers there are, or where any can be found, in which you can refresh your recollection as to the relations of any of these persons with the Old Dominion?

A. I have no books or records of any kind.

Q. 498. Do you know where any are or are kept?

A. I do not.

Q. 499. Do you know in what manner the papers in Lewisohn Brothers were filed away and kept?

A. I do not.

Q. 500. Have you ever yourself seen the papers when they were filed away?

A. No.

Q. 501. Did you ever have occasion to refer to any papers which had been filed away?

A. Mr. Rahaeuser, as I said before, had charge of the business, and if I wanted any I would refer to him. I didn't know how they were filed in any way.

Q. 502. You heard the testimony that was given this morning by Mr. Rahaeuser in regard to the way in which the papers were filed away. Is there anything in that testimony which is contrary to your recollection?

A. No, I have no recollection about it.

Q. 503. No recollection whatever?

A. No.

Q. 504. Do you know whether or not Lewisohn Brothers had letter-press copy books in which their letters were copied?

A. I don't know.

Q. 505. Have you any recollection whether the letters which you wrote were ever copied in the letter-press copy books?

A. I don't know whether they were or not. I don't know whether they only filed them or copied them.

666 Q. 506. Do you remember whether or not at the time you returned from Europe, a corporation known as the Old Dominion Copper Mining & Smelting Company had been formed?

A. I don't remember that any more.

Q. 507. Have you no recollection as to the length of your stay abroad?

A. I generally stayed three to four months, about.

Q. 508. Have you any way of fixing the time when you went abroad?

A. I could not tell; I don't know that year. I often used to go in March and come back in June or July, but I could not place the time I went at that time.

Q. 509. Is there any way in which you can fix that date from papers which you can refer to?

A. Probably; I can't find out now.

Q. 510. What do you mean by "now"?

A. It is so many years ago I don't know.

Q. 511. Do you suppose by looking at the books of entry of Lewisohn Brothers, and papers, you could not easily enough determine and tell me when you ceased to sign letters and when you began again; couldn't you do that?

A. I don't know of any papers.

Q. 512. Do you mean to say that if you found it important to find out what date it was when you left and the date when you came back from Europe, you could not do it approximately?

A. Perhaps I could.

Q. 513. How would you go about it to do it?

A. I don't know at present how to do it.

Q. 514. Could you not do it by looking at the papers of Lewisohn

Brothers, and the business which you were carrying on, and find out when you ceased to take part in that business and when you began again?

A. I don't know anything about any books, and I don't know where they are, and I could not say.

Q. 515. Where were they when you last knew about them?

A. As I said before, since I was out I haven't any of those papers.

Q. 516. I ask you where they were when you last knew about them?

A. I suppose they were at Lewisohn Brothers.

Q. 517. Do you mean to say you have any doubt that, by looking at the papers of Lewisohn Brothers, you could state approximately when you went to Europe and when you came back?

A. I suppose I could find out.

Q. 518. Will you?

A. All right, I will try. I can't say what I have not got. No doubt I can; they might not let me in. I don't know. I am not connected with them.

Q. 519. If you will try, that is all we can ask of you.

A. I think I can find out some way or other.

667 Q. 520. Have you any doubt now that you could find out; also as to who the syndicate subscribers were with whom you communicated as manager of Lewisohn & Company in relation to the Old Dominion matters?

Mr. HEMENWAY: Objected to, as assuming that he did communicate, and that is not yet proven.

A. I don't know whether I could, but I presume I could.

Q. 521. Will you try?

A. All right; I want to do what I ought to do.

Q. 522. Will you also try and get such information as will enable you to determine exactly what your share was in this syndicate and what you paid for your share in that syndicate and what you got in the way of stock or moneys as the result of your interest in that syndicate?

A. I will.

Q. 523. How soon can you enter upon the making of those efforts?

A. I suppose in a few days.

Mr. BRANDEIS: If you could do it to-day or between to-day and sometime to-morrow I would like to suspend your examination until you could make an effort to get back. We will suspend your examination then for the present temporarily and go on with Mr. Walter Lewisohn.

WALTER LEWISOHN.

Q. 524. Is it a fact that you did not have anything to do with relation of any matters in connection with the Old Dominion syndicate?

A. Unless it was anything that I carried out for Mr. Leonard Lewisohn.

Q. 525. Do you mean merely the formal correspondence?

A. Yes, sir; that is all the business that I had to attend to.

Q. 526. Do you mean to be understood as testifying that you had no knowledge as to what the relations were between, say, Leonard Lewisohn and Albert S. Bigelow in connection with the purchase of this property?

A. I don't want to go as far as that; I might have been informed at the time, but I was not the direct—it was all for account of Leonard Lewisohn, and except, as I said before, I would carry out Mr. Leonard Lewisohn's business, but I don't want to say that I at that time didn't know about it.

Q. 527. Do you wish to be understood as testifying that you did not know anything about it?

A. I have already answered I don't know any of the details of these things.

Q. 528. Do you want us to understand that you have now no recollection of the circumstances attending the purchase of this Old Dominion property by Leonard Lewisohn and Mr. Bigelow?

A. Yes.

668 Q. 529. You don't know anything about it at present?

A. No.

Q. 530. Then you may have known at one time, but you don't know anything about it now; is that it?

A. That is it.

Q. 531. And you don't know anything now about the relations of any persons as members of the syndicate; is that so?

A. That is it.

Q. 532. And you don't know anything in regard to the plan to form a corporation?

A. I don't remember those details now.

Q. 533. Is there any way that you know of by which you can refresh your recollection on any of these matters I have asked you about?

A. No, I have no record in my hands.

Q. 534. No letters you received from Leonard Lewisohn?

A. I have nothing at all.

Q. 535. While you were abroad you certainly—I don't say certainly, but you probably received letters from Leonard Lewisohn?

A. If there were any I haven't got them now any more. It is years ago.

Q. 536. Do you mean you destroyed them?

A. I haven't got any of the old papers.

Q. 537. It was customary for your brother to correspond with you when you were abroad, was it not?

A. I got some letters, yes.

Q. 538. And to report to you the business that was going on?

A. Sometimes he would and sometimes not. This was not of this order, this kind of business. He went right along by himself with that kind of business, and what I would know about it would be the small business which would go to the London office.

Q. 539. Do you mean to say that in all transactions such as this

was, the purchase of practically the whole interest in a mining property in which an obligation of Lewisohn Brothers was given, amounting to nearly $1,000,000, that your brother would not report this matter to you?

A. He would act in just this way.

Q. 540. And it is your recollection, is it, that he did not report anything about that?

A. I don't say that. I don't recollect that he did.

Q. 541. At all events, if he did the letters in which he reported to you are not in existence?

A. No, sir, I am pretty sure.

Q. 542. Do you mean by that that it is not your custom to preserve letters?

A. Not any letters that I would receive from my brother. I mean regular business-house copy letters, but if I would get letters seven or eight years ago it is not likely I would have them now.

Q. 543. Do you mean it was your practice to destroy those letters?

A. Yes, sir.

Q. 544. While abroad were you on business or traveling for pleasure?

A. Business combined with pleasure; something to do there.

669 Q. 545. You had no office there?

A. I did not, no.

Q. 546. I mean no regular place of business.

A. The house had a London office.

Q. 547. Lewisohn Brothers?

A. Yes, sir.

Q. 548. Were you in London during this period?

A. I was traveling mostly on the Continent.

Q. 549. Then you feel certain that any letters which were received by you from your brother during that period in 1895 when you were abroad are not in existence?

A. If there were any, no, I am sure.

Q. 550. And you therefore say there is nothing whatever that would in any way refresh your recollection as to what he may have told you or may have written you in relation to the Old Dominion Syndicate and the formation of the corporation?

A. Yes, that is it.

Mr. BRANDEIS: If you could as soon as convenient ascertain this fact or the dates of your trip, or anything that would aid you to testify further than this, we will take you up again. What will be most convenient for you when we can continue?

Mr. LAUTERBACH: I will produce Mr. Lewisohn for further examination at any future time you may want him.

Q. 551. I show you a paper; is that Mr. Leonard Lewisohn's signature to the paper which I show you, being one of the papers produced by Mr. Lauterbach in response to our request?

A. Apparently it is.

Q. 552. Do you mean the signature is Mr. Leonard Lewisohn's handwriting?

A. Yes, sir.

Q. 553. In whose handwriting is the black writing?

A. I don't know.

Q. 554. I hand you another paper, being one of the papers produced by Mr. Lauterbach, in response to our request endorsed "Dated July 11th, 1895, Leonard Lewisohn to Old Dominion Copper Mining and Smelting Company. Offer to convey Mines, etc. Submitted to meeting of Directors of Old Dominion Copper M. & S. Co. held July 11, 1895, and accepted," entitled "To the Old Dominion Copper Mining & Smelting Company," and ask you whether or not the signature purporting to be that of Leonard Lewisohn, signed at the foot of that offer, is the handwriting of your brother Leonard?

A. It seems to be, I am pretty positive.

Q. 555. I ask you whether the signature purporting to be that of Leonard Lewisohn, which follows the words after the offer, "Please issue said 30,000 shares of stock to Mr. A. S. Bigelow and myself," is the handwriting of your brother?

A. That certainly appears to be Leonard Lewisohn's signature.

670 Q. 556. Are you able to state whose handwriting the words "Please issue said 30,000 shares of stock to Mr. A. S. Bigelow and myself" is?

A. I am not.

Q. 557. Are you able to state in whose handwriting the words "thirty thousand" which are inserted in black ink in the offer are?

A. No, I am not.

[The paper shown witness is here marked for identification "Plaintiff's Exhibit No. 1, February 10, 1903."]

Q. 558. I hand you herewith a paper endorsed "Old Dominion Copper Company of Baltimore City to Old Dominion Copper Mining and Smelting Company. Offer to sell property. Submitted to meeting of Board of Directors of Old Dominion Copper M. & S. Company held July 11, 1895, and accepted," being one of the papers produced by Mr. Lauterbach in response to our call for papers, and I ask you whether or not this paper purporting to be signed by "A. S. Bigelow, President," if that is the signature of A. S. Bigelow?

A. I think it is.

Q. 559. I call your attention to the words in the twenty-first line: "one thousand," before the word "shares," and ask you if you are able to state in whose handwriting those words are?

A. No.

Q. 560. I call your attention also to the word "first," in the last line on page 1, and ask you whether you are able to state in whose handwriting that is?

A. No.

[The paper shown witness is here marked for identification "Plaintiff's Exhibit 2, February 10, 1903."]

Q. 561. I call your attention to the letter dated Boston, May 28, 1895, Leonard Lewisohn to A. S. Bigelow, being one of the papers produced by Mr. Lauterbach in response to our call, and ask you whether or not the signature of Leonard Lewisohn, at the foot of that letter, is in your brother's handwriting?

A. That appears to be all right; yes, that seems to be his signature.

[The paper shown witness is here marked "Plaintiff's Exhibit 3," for identification of this date, and the rest of the papers produced by Mr. Lauterbach in response to the plaintiff's call, are here marked for identification, "Plaintiff's Exhibits 4 to 161, both inclusive, February 10, 1903."]

[Adjourned to to-morrow at 10.30 a. m.]

671 NEW YORK, *February* 11, 1903.

[Met pursuant to adjournment.]
[Present: Same as before.]

WALTER LEWISOHN, recalled.

By Mr. BRANDEIS:

Q. 562. Will you state whether you personally made any search whatever for all the papers referred to in the subpœna.

A. I personally searched a little bit, but not very much, such as going through the closets in those rooms; they are like closets where these papers were separated in this room 320. There was quite a little dirt around there, and I had my man Ferdinand Rahaeuser to go through.

Q. 563. The Ferdinand Rahaeuser who testified here yesterday?

A. Yes, sir.

Q. 564. Did you personally look through any files of papers?

A. I looked at the files, but not very carefully.

Q. 565. You mean you looked at the outside of the boxes?

A. Yes, but I was too busy to attend to looking through the files. He attended to that, for I had not done very much about files and don't know anything about them. I merely saw they were attended to properly.

Q. 566. Did you personally look at the contents of any files of papers?

A. Yes, I did.

Q. 567. What file of papers did you personally look through?

A. I don't remember.

Q. 568. What did the file look like that you looked through; was there more than one that you looked at personally?

A. Probably two or three I looked at.

Q. 569. What was the general appearance of those two or three boxes or files which you looked at?

A. Oh, a sort of oblong pasteboard box, I think, with wood at the bottom.

Q. 570. How large were those boxes?

A. About one foot long and 10 x 12 inches square, like that.

Q. 571. Were those boxes marked on the outside?

A. I forget exactly; I don't know; I think they were, but I don't remember.

Q. 572. Were those two or three boxes you looked at in the general room 320 which Ferdinand Rahaeuser has testified to?

A. Yes.

Q. 573. At the time you looked at them?

A. Yes, sir.

Q. 574. How much of an examination did you make of those two or three boxes?

A. I merely glanced through them to get a general idea of the files, that is all.

672 Q. 575. You did not, then, read the letters in them with a view of determining whether or not any of them were Old Dominion letters or related to the Old Dominion transaction?

A. I would look through to see if I saw Old Dominion letters, but I did not stand there very long to attend to it. I just wanted to see the search started, that is all, and to see that it was properly done.

Q. 576. Did you yourself take any of these letters from the files?

A. Yes, I just took them out and scrutinized quickly, just glanced through a few of those files, and then I told him to look and be sure he got all the Old Dominion papers, and then I had to run around the office, and he made the search and even came down at night.

Q. 577. I want you to describe a little more fully what you did when you looked through these two or three files that you refer to.

A. I just picked up the papers and quickly glanced through.

Q. 578. What do you mean by picking them up; did you take them out of the file?

A. Yes, sir.

Q. 579. How are they filed; are they affixed to anything, or simply lying there?

A. I didn't notice the details of it; I could not say; I just went in and picked the papers out of the files; didn't notice particularly how they were.

Q. 580. Did you go through any one of those files sufficiently careful to pick from any one of them the letters which related to Old Dominion matters, or did you merely glance at the files and see what they looked like?

A. I glanced at the files, and the papers in the files, but I just wanted to see just to get an idea of the files, just that the papers were all right there. I didn't make a regular search, as I said before, as there wouldn't have been any use, as I say I only saw two or three. There was no particular need to look at all the papers in those two or three unless I did them all.

Q. 581. What I want to know is whether, as matter of fact, you did go through any one of these files with sufficient care to know whether there were Old Dominion papers in it or not?

A. Yes, I saw there were Old Dominion papers there, but I didn't read them all over.

Q. 582. Was there anything in those files besides those Old Dominion papers?

A. That I don't remember, exactly. I think there were a few other papers.

Q. 583. That is, according to your recollection, most of the papers in those two or three files you looked at related to Old Dominion matters?

A. Yes.

Q. 584. Do you remember specifically any other matter that any of them related to?

A. No, I don't remember.

Q. 585. Are you certain there were no letters in there that
673 related to any other matter?

A. No, I don't know exactly: as I said, I only went through quickly, just looked at them.

Q. 586. Were those boxes and files, the two or three that you have referred to as having looked at, files of letters which were received or were they files of letters which had been sent?

A. I don't remember.

Q. 587. Do you remember whether or not the boxes or files you looked at contained original letters which had been received?

A. I don't know that either.

Q. 588. Do you remember whether or not the two files which you looked at had in them signed letters?

A. Yes, I think some of them were signed. I saw some signatures.

Q. 589. As matter of fact, the copies of letters which you have produced through Mr. Lauterbach are all unsigned, are they not?

A. I don't remember.

Q. 590. What do you know about the papers which Frederick Rahaeuser selected out of those boxes, as to whether or not we have those papers here?

A. I don't quite understand.

Q. 591. I want to know what you know about the result of his search?

A. Those that he went through he said he took out all the papers he could get of the Old Dominion.

Q. 592. Was that statement made by him to you?

A. Yes, sir.

Q. 593. What do you know about it besides the statement? Have you ever had those papers in your possession,—the papers that have been produced here by Mr. Lauterbach?

A. Yes, I had some of them: one day there were two, three, and four on my desk, and I was handed by my brother at another time some more.

Q. 594. What brother?

A. Fred, and that is all, and then I just had them put together and gave them back to him. I just looked at them hastily. I didn't look at them long enough to remember anything in particular about them. I didn't take any notice: probably just for about a minute, just glanced at them.

Q. 595. What is the total number of letters and papers which you received as having been found by Ferdinand Rahaeuser?

A. I don't know.

Q. 596. Are they more than five?

A. The papers that have been found?

Q. 597. Or letters.

A. All together?

Q. 598. Yes.

A. I think there were; I don't remember, exactly.

Q. 599. Where did you get them from; you got certain ones from Rahaeuser?

A. They were placed on my desk; that was all he went through at night and I noticed on my brother's and my own desk—we have a desk together there; of course there are other desks around the office at that place there, and I handed them to my brother and I
671 think he gave them in to one of the clerks or something to be taken care of, and they probably were afterwards handed to Mr. Lauterbach.

Q. 600. Were those letters placed on your desk at one time or at several times?

A. I don't know how many letters there were; there may have been only two at one time and a few at another time; that was all I remember. One day, I think, they just found one extra letter and I think it was handed to Mr. Lauterbach; I don't know.

Q. 601. So far as you know, then, all the letters which you know about as having seen were just these two or three or five or six letters; that small number, was it?

A. Yes, that is all I recollect.

Q. 602. That is all you saw?

A. I may have seen more; there may have been a dozen there, so far as I know, but I didn't look through all of them.

Q. 603. What was done with those that you did see, whether there were two or a dozen?

A. In what way?

Q. 604. What was done with them after you saw them?

A. I handed them over to one of the clerks to be given to my brother, so that they would be sent over to Mr. Lauterbach.

Q. 605. Which of the clerks did you hand them to?

A. I don't remember now exactly which one it was.

Q. 606. Who are the clerks—what are the names of the clerks to whom you delivered those letters?

A. Frederick Rahaeuser, I think, and another man by the name of Herman something—I don't know his last name—and E. C. Westervelt. I don't know whether he was given any of them, but he was a clerk in the office.

Q. 607. Then you handed them to one of those three, did you?

A. To either one of those three or, as I stated before, to my brother Fred.

Q. 608. You did not yourself send any of those letters to Mr. Lauterbach?

A. I looked at those letters, and transmitted them to Mr. Lauterbach.

Q. 609. I mean, you did not personally send them, accompanied by a letter. Did you write any letter to Mr. Lauterbach accompanying those?

A. I did not personally write a letter. I gave word to have those letters sent over to Mr. Lauterbach.

Q. 610. Were they accompanied by a letter?

A. That I don't know.

Q. 611. Those that we received yesterday—they were accompanied by a letter, were they not?

A. I could not tell you.

Q. 612. You did not sign the letter, if there was a letter written?

A. No, I did not.

Q. 613. And, so far as you know, who has had access, since
675 the time of your father's death, to the files of letters, and other papers, covering the year 1895?

A. I think all the executors have had access.

Q. 614. Who else besides the executors?

A. I don't believe anybody else, except like one of our clerks who would have access; there is nobody who has the right without our permission.

Q. 615. Who actually had permission to examine the letter files?

A. Ferdinand Rahaeuser.

Q. 616. Whom else?

A. Or any other clerks. I don't know that anybody, unless my brother may have given permission. I don't know. He could arbitrarily give permission, if he wanted to, or any of the executors could.

Q. 617. Whom else besides your clerks, if anybody, has had access to those papers?

A. I don't know who else.

Q. 618. Have any of the papers relating to the year 1895 been removed from the files, so far as you know, other than those which were brought out and collected by Ferdinand Rahaeuser, and delivered to you, or your brother, as you testified to?

A. I don't know anything about that.

Q. 619. I ask you whether, to your knowledge, any papers have been taken from those files except those taken by Ferdinand Rahaeuser, and delivered to Mr. Lauterbach?

A. Not that I know of. I don't know of anybody else taking any.

Q. 620. Hasn't Mr. G. M. Hyams of Boston—you know him, don't you?

A. Yes, sir.

Q. 621. He has been here at your office a number of times, has he not, within the last few months?

A. Yes, sir.

Q. 622. Since this litigation began?

A. Yes, sir.

Q. 623. Has he not had access to the files of papers for the year 1895?

A. I don't know whether he has had access to the files. He may have been given permission to go through the files; I don't know.

Mr. HEMENWAY: You are testifying against yourself. Testify to your own knowledge, what he has done so far as you know.

WITNESS: So far as I know, I don't know anything about his going through the files. What I do know is that the letters were brought into our office, some of them, when Mr. Hyams was there, it may have been, but I don't know whether any were given to Mr. Hyams. I know he has been in our office, but I don't know whether he has had access to the files or not.

Q. 624. He has been to your office during the time the search has been made?

676 A. It may have accidentally happened he was there during that time because he is in our office a good deal of the time.

Q. 625. He is here a large part of the time in your office, is he not?

A. Yes, sir, he is in our office whenever he is in New York and down at business. He stops in at our office.

Q. 626. Has Mr. Bigelow been in your office since this litigation began?

A. No, not that I know of.

Q. 627. Do you know whether or not these various boxes or files of letters which are described as being in room 320 have ever been removed from that room, in whole or in part, since you were appointed executors?

A. I don't know anything about that.

Q. 628. So far as you know they never have been removed, in whole or in part, is that true?

A. Well, of course the papers that were taken out of the files here lately must have been removed; those that you have here now.

Q. 629. But other than those particular papers which were taken from the files by Ferdinand Rahaeuser under your direction, have any papers been taken, even temporarily, from these files in that room?

A. I don't know; I could not tell you.

Q. 630. So far as you know, none have; is that the fact?

A. I don't know anything about it.

Q. 631. You don't know of any having been taken; is that what you wish to say?

A. Other than those that were brought here, I don't know anything about whether he had removed any papers. I don't imagine he did, but I don't know anything about it.

Q. 632. Whom do you mean by "he"?

A. You said Ferdinand Rahaeuser.

Q. 633. I say other than those papers which Ferdinand Rahaeuser gave to you, or laid on your desk, have any papers, or boxes or files containing papers, been removed from that room, temporarily or permanently, so far as you know?

A. No others, so far as I know.

Q. 634. Where are the books kept of Leonard Lewisohn and of Lewisohn Brothers, the books for the years 1895 and subsequently?

A. I don't know that.

Q. 635. Do you mean that you don't know where the books are relating to this period of 1895 to the time of your father's death?

A. No; I personally don't know where they are.

Q. 636. Are there any books?

A. I don't know whether there are or not.

Q. 637. Have you made any search for them?

A. I personally have not; no.

Q. 638. Did you request anybody to make any search for them?

A. No.

677 Q. 639. You were requested by the subpœna to do so?

A. My brother may have. I was not personally.

Q. 640. The same request was made to each executor.

A. Well, we will then obey it. If I had not been there at the time, he would have attended to it.

Q. 641. As a matter of fact, you have not made any search whatever to ascertain whether there are any books of account of Leonard Lewisohn or of Lewisohn Brothers in existence relating to the time prior to the death of your father?

A. I personally did not have anything to do with the search for any of these books.

Q. 642. And you mean by that that you did not direct any search to be made?

A. No; I did not because I didn't know I had anything to do with it.

Q. 643. You did not know that you were required to do it?

A. No, I don't think I ever read anything in the subpœna; whatever was to have been done may have been stated in the office to my brother, or he may have read it; and he would have attended to it in my absence, because if my duty called me out and he happened to be in he would attend to it, and when he is out I attend to the business when I am in the office.

Q. 644. As matter of fact, at the present moment you are unable to give us any information whatever with regard to the books of Leonard Lewisohn, or of the corporation or firm of Lewisohn Brothers, prior to the death of your father?

A. I am unable.

Q. 645. You mean by that you have never, since you were appointed executor, have had occasion to refer to a single entry in any books of account kept either by your father or for your father, or the firm or corporation prior to your appointment?

A. Relating to what matters?

Q. 646. Relating to any matters.

A. I have looked in some books.

Q. 647. What do you mean by that?

A. Of the firm of Lewisohn Brothers.

Q. 648. How far back?

A. 1901, I guess it was, or 1902.

Q. 649. That is, nothing earlier than that time?

A. No.

Q. 649½. So that you don't know now whether any such books exist or where they are?

A. No.

[The examination of this witness is further suspended for the present.]

678 FREDERICK LEWISOHN, sworn for plaintiff.

Direct examination by Mr. BRANDEIS:

Q. 650. State your name, age, and occupation.

A. Frederick Lewisohn; age, twenty-one; banker and mining business.

Q. 651. You are a member of the firm of Lewisohn Brothers, are you not?

A. Yes.

Q. 652. And the only other member of the firm is your brother Walter?

A. Yes, sir.

Q. 653. You and your brother were copartners with your father under the firm name of Lewisohn Brothers, at the time of his death?

A. Yes, sir.

Q. 654. And had been for how long before that?

A. I believe just a few months. He died on March 5, and our agreement dates back to January; that would be three months.

Q. 655. What connection, if any, has Albert Lewisohn, your coexecutor, with the firm of Lewisohn Brothers?

A. He has no connection whatsoever.

Q. 656. Are you engaged in business in any way with him except as executor of your father's estate?

A. No.

Q. 657. What is Albert Lewisohn's business?

A. He is an importer and dealer in feathers, bristles, etc., I believe.

Q. 658. Is P. S. Henry, the other executor, connected with Lewisohn Brothers?

A. I believe he has an interest in our coffee department. He is not a partner; that is separate.

Q. 659. What is his business?

A. His business is to look after the coffee department.

Q. 660. Was he connected with your father's business before his death?

A. No, he was in no way connected; he was formerly employed by the United Metal Selling Company through C. S. Henry & Company of London, who were the foreign agents.

Q. 661. And was Albert Lewisohn connected with your father's business in any way?

A. In no way, I believe.

Q. 662. How long were you connected in any way in business with your father prior to the formation of this firm of Lewisohn Brothers in January, 1902?

A. I think I started with him the last week in December, 1897.

We started from January, 1898, which was my first start; that was in Fulton street.

Q. 663. And you have been continuously connected with the business, I believe?

A. In certain branches.

679 Q. 664. What branches?

A. I was in the metal department for quite a while, copper department, and then I was superintendent of the refining works in 1899. I think that was at Ansonia, Conn. Then I came back and went with the United Metal Selling Company, for a while, and then my father took me in his firm.

Q. 665. The United Metal Selling Company was a concern in which your father was largely interested?

A. He was president of the company.

Q. 666. What search, if any, have you made for papers relating to the transactions which your father had in connection with the Old Dominion Company or syndicate?

A. I directed one of our clerks, whom I believe you had over here, to go through all the files we had in our office and pick out from them everything relating to the Old Dominion matter, get a list of all letters of which we had copies, all the letters we had, and hand them over to me.

Q. 667. The clerk you refer to is Ferdinand Rahaeuser?

A. Yes, sir. He was about the only one I could think of who has been with us quite a while and had that sort of work to handle. He was used to it.

Q. 668. Aside from the directions which you gave him what, if anything, did you do in regard to finding the papers asked for?

A. I didn't do anything else, because I didn't know how to get at anything no more than what we had in the office. I directed him to get out all he could and that is all we could do. We found all that was there; that is all we could find.

Q. 669. Have you yourself ever examined any of the files of letters and other papers for the year 1895?

A. No.

Q. 670. Have you ever even looked at the exterior of the boxes in which those files are contained?

A. No, because these boxes and papers were all put in a special room away from our office.

Q. 671. What room is that?

A. A stationery room we have. We never have any reason to enter there so that there was nothing done until I received word to look there, and we sent the clerk who was best suited for that purpose to look for the papers.

Q. 672. You have not seen a single box or single file of these papers since you were requested to make the investigation? I mean you have never gone so far as to go to the room in which these papers were stored, to look at the boxes or files in which these papers were stored?

A. No, I did not go into the room.

Q. 673. Have you ever had occasion to examine the files of papers

relating to any of the matters in which your father or Lewisohn Brothers were interested prior to 1900?

A. No.

Q. 674. You know what the practice was in regard to the filing of papers?

680 A. No, I do not, only what I heard lately. They only had these carbon copies of letters that were sent out at that time.

Q. 675. That is, there were no letter-press copy books kept in the office business or his personal affairs?

A. I don't believe in 1895 there were.

Q. 676. Was there at any time?

A. Later on there may have been.

Q. 677. Is there any now?

A. Do you mean in our office?

Q. 678. Yes.

A. Yes, I believe there is.

Q. 679. Was there in the office of which you were a partner from January 1, 1902?

A. Yes, I believe there were letter-press copy books.

Q. 680. Was there, in the business with which you were connected from January, 1898, down to 1902?

A. I don't really know. I had nothing to do with that portion. I was only in the different accounting departments, just as a clerk.

Q. 681. Was it in pursuance of any suggestion which you made that the practice of taking letter-press copy books was continued in this firm?

A. I believe they had them when I came in. I say, when I entered the firm with my father they had already had them; that was only a year or so ago; what they did before that I don't know, because I had nothing to do with that portion of the business.

Q. 682. Do you know whether or not any books of account were kept by your father in regard to his business prior to his death, covering the year 1895 and subsequently?

A. No, I do not.

Q. 683. Do you know whether any books of account were kept at all?

A. I don't think he kept any personal books so far as we could find out. We looked for other matters and I believe most of it was done with his corporation business.

Q. 684. That is, the accounts were kept on the books of Lewisohn Brothers?

A. I believe that is the way they were kept. I don't know.

Q. 685. Now are those books of Lewisohn Brothers in your possession?

A. No, we have nothing to do with the Lewisohn Brothers corporation.

Q. 686. Who has to do with the corporation?

A. I believe that was sold out to the United Metal Selling Company; some arrangement was made, I believe, that Lewisohn Brothers corporation was sold out to the United Metal Selling Company, so that they do practically the same thing.

Q. 687. Do you wish to be understood as testifying that all the books relating to all the business that was done by Lewisohn Brothers was sold out to the United Metal Selling Company?

A. No, I am not in a position to know just how that was arranged. I had nothing to do with it.

Q. 688. Do you mean to say that the corporation of Lewi-
681 sohn Brothers delivered its books, and turned over its books of account in which the private accounts of your father were kept, to the United Metal Selling Company?

A. I really could not say. I don't know. I had nothing to do with that company.

Q. 689. Then you do not wish to be understood as testifying that that was the fact?

A. No. Of my own knowledge and belief the amount of his private—we can't find that any private books of his were kept; all the records we have are here, these copies of certain letters and different things.

Q. 690. Then you did direct the search to be made for private books of account containing his transactions, did you?

A. I told this clerk to look for books and papers in regard to the Old Dominion or any books that might by any chance have any statements in them regarding the Old Dominion transactions, and I gave him the dates and full particulars, and showed him what we were asked to produce, and he made this search, and whatever he got out was turned over to Mr. Lauterbach.

Q. 691. When you turned them over to Mr. Lauterbach did you accompany the papers which you sent him by a letter?

A. Yes, we told him we enclosed the letters that we found in the Old Dominion matters.

Q. 692. And in the letter you recited the letters which you enclosed, did you not?

A. I believe my brother signed the letter that was sent to Mr. Lauterbach.

Mr. LAUTERBACH: I never got such a letter. With the second batch I did get such a letter, but I don't recall whether he sent me a letter with the first batch or not.

Q. 693. Do you wish to be understood as testifying that the books of the corporation of Lewisohn Brothers are not in the possession of yourselves as executors of the firm of Lewisohn Brothers?

A. Yes, we have nothing whatsoever to do with those books.

Q. 694. How do you know you haven't those books in your possession?

A. We know what books we have got in our office.

Q. 695. How do you know that these books are not among the books in your office?

A. Because we have not been able to find them.

Q. 696. Have you made any search whatever for the books of the corporation of Lewisohn Brothers?

A. Yes, we have made a search.

Q. 697. I am asking you whether you did, not what "we" did?

A. Our firm did.

Q. 698. Have you made personally any search whatsoever for any of the books of account?

A. No, I have not made any search for any books of account.

Q. 699. Why not?

A. Because I was not in a position to find them. I had one of my clerks try to find them who knew how to do it. I would not really know where to look to find them.

682 Q. 700. What clerk did you request to look for them?

A. I requested our clerk Ferdinand Rahaeuser to get all the letters and papers under the direction of our cashier, Mr. E. C. Westervelt. I told him the whole situation of affairs, and asked him to look into it himself, and see if he could not ferret out these books.

Q. 701. Whom did you tell that to?

A. I told that to these two clerks.

Q. 702. That is, you told that both to Rahaeuser and Mr. Westervelt?

A. Yes, sir.

Q. 703. Were they together when you told them that, or were they separate or apart?

A. I don't remember. I may have spoken to them singly.

Q. 704. Which one of these did you request to make the search for the books, or did you request both of them to make search for the books?

A. I believe I told Westervelt about the books, and I am pretty sure I also told Ferdinand to get the books as well as the papers. I know I told him about the letters and all that, and I am pretty sure I also told him to get out the books.

Q. 705. You mean Ferdinand?

A. Yes, sir.

Q. 706. Are you certain you requested Mr. Westervelt to search for the books which contained the transactions?

A. I told him to send as many people as were needed to go through the room and get all the papers, and that he should stay down there of an evening, and superintend the matter.

Q. 707. I am not referring now to the papers. I am talking about books of account in which the transactions of your father relating to Old Dominion matters were kept; whether they were personal books or Lewisohn Brothers' books, firm or corporation. Now did you request Ferdinand Rahaeuser to search for those books?

A. I believe I did.

Q. 708. What do you mean by "I believe"; that it is your recollection?

A. That is my recollection.

Q. 709. When, according to your recollection, did you make any such request of him?

A. It was a few days after the subpœna that we started to look.

Q. 710. What report, according to your recollection, did Ferdinand Rahaeuser make to you with regard to the books of account?

A. He said they brought the papers out and he could not find

anything else at that time, but he was going to keep on looking; that was the first thing; he looked quite a while and then said he could not find any books. You see you can't find books that are not in our office.

Q. 711. I am asking you now just what Ferdinand Rahaeuser reported to you. Have you stated fully what he reported to you after the first day?

A. He reported to me after the first day he had gotten
683 this batch of letters out and that there was no more there, but he would keep on continuing his search, and that, as far as any books were concerned, he could not find any that had any bearing on that matter.

Q. 712. You are sure he made that report to you, are you?

A. I could not swear whether he or Westervelt told me that,—but one or the other.

Q. 713. What did you do with these letters that he delivered to you on the first day?

A. I think I sent them over on the following day to Mr. Lauterbach.

Q. 714. When next did Ferdinand make any report to you as to the result of his search?

A. A couple of days later he went through the files again and brought out some more papers and said he would still continue and he kept that up for a few days and then we finally sent them over, and you finally asked us to look up some more papers and he got out as many as he could.

Q. 715. On how many different days, according to the best of your recollection, did Rahaeuser deliver any papers to you?

A. Well, I remember about,—I think, four different times he gave me papers.

Q. 716. And what, on each of these occasions, did you do with the letters?

A. Why, I would let them accumulate until he had gotten a lot and put them on my desk and then I turned them over to Mr. Lauterbach—sent them over.

Q. 717. What else did you do?

A. I didn't do anything else.

Q. 718. You have stated two occasions when you sent letters to Mr. Lauterbach. Are those the only occasions?

A. I don't recollect how many times we sent over these letters; that is a small matter.

Mr. LAUTERBACH: I got two batches.

Q. 719. Did you examine the letters which were handed you, and papers, by Ferdinand Rahaeuser?

A. No, I didn't make any examination. I looked through one or two. I didn't know anything about the matters. I had not been in the office in 1895 and I didn't think it would do any good for me to look at them, and I thought I had better send them to Mr. Lauterbach.

Q. 720. Did you ever have any conversation with Ferdinand Ra-

haeuser about the books other than after the first day when he reported to you?

A. Yes, sir, I told him to continue his search.

Q. 721. For books?

A. For books.

Q. 722. When did you tell him to continue his search for books?

A. After he had obtained this first batch of letters, I believe.

Q. 723. And did he ever after that report to you the result of his search for books?

A. Yes, he reported.

Q. 724. When?

A. A few days later.

684 Q. 725. What report did he make?

A. He reported that the papers he handed me were all he was able to find; that there were no books.

Q. 726. That there were no books of account?

A. No books of account.

Q. 727. Did you ever have any other conversation with him in regard to the search for books in which these transactions were contained?

A. No.

Q. 728. You stated you asked your cashier or bookkeeper, E. C. Westervelt, to make a search for books, either of Leonard Lewisohn, or Lewisohn Brothers, and of the firm of Lewisohn Brothers, that would contain transactions of your father relating to the Old Dominion Syndicate. Now can you tell us whether or not Mr. Westervelt made any search so far as you know?

A. He made a search.

Q. 729. When?

A. At that time when we got out these letters, he made a search for the books and reported there was nothing to be found.

Q. 730. Was that report made before or after Rahaeuser made a report that there were no books?

A. I guess it was some time before. I think I told him about it the same day. Whether I told them together or not I don't know.

Q 731. Did you have any subsequent conversation with him in regard to the books?

A. No.

Q. 732. You stated a while ago that they could not find any books because there were not any books containing the entries relating to Old Dominion matters in your possession. Do I understand, also, that you mean under your control?

A. I mean in my possession.

Q. 733. Either in your possession or under your control?

A. Yes, of Lewisohn Brothers.

Q. 734. Or individually?

A. Or individually.

Q. 735. Or as an executor of your father's estate?

A. Yes, sir.

Q. 736. Or in any other capacity?

A. Have no control over any of those books.

Q. 737. Do you mean also to say that you have no knowledge where any such books are?

A. I have no knowledge.

Q. 738. Haven't you heard where any such books are?

A. Never heard where any such books are.

Q. 739. Haven't you heard what has become of the books of Lewisohn Brothers for the period prior to your partnership of 1902?

A. No.

Q. 740. Do you wish to be understood as testifying you have no knowledge as to where any of those books are?

A. Yes.

Q. 741. And by "knowledge" you mean any information of any kind relating to it?

A. Yes, sir.

685 Q. 742. You have heard nothing whatever as to where any of those books are?

A. I have heard nothing.

Q. 743. From any person?

A. From any person.

Q. 744. In what books were transactions of your father for the time immediately preceding his death recorded?

A. I don't know.

Q. 745. Have you had no occasion whatever to inquire, in your capacity as executor, in regard to any transactions in which your father was interested?

A. No.

Q. 746. Your father was engaged in very extensive business transactions at the time of his death, was he not?

A. Well, I don't know that there was anything very extensive,—one or two little things.

Q. 747. Is it not a fact that your father was interested in very large business transactions?

A. Yes; he had been.

Q. 748. For some time prior to his death?

A. He had been some time before,—a good while, but not right before. There wasn't anything very large except his coffee business.

Q. 749. What do you mean by "very large"?

A. I mean that he had to do himself. He had large interests, like holding various stocks of corporations that were being run. He was president of the United Metal Selling Company; that was practically his business; that was practically taking over his old business of Lewisohn Brothers, selling copper on commission and handling the products of these different companies.

Q. 750. He was interested in other transactions also, was he not?

A. In various corporations he had large interests.

Q. 751. What corporations?

A. I don't know what this has to do with it.

Q. 752. What corporations was he interested in?

A. Different corporations.

Q. 753. Go ahead; answer what they were.

A. United Metal Selling Company and a lot of small corporations.

Q. 754. Give us the names of them.

A. I will give you a few. He was interested in these different mining companies: do you want to know them?

Q. 755. Yes.

A. Tamarack, Osceola, Feather River Exploration Company, Raritan Traction Company, Middlesex Real Estate Company, Tennessee Copper Company, Utah Consolidated Gold & Copper Mining Company. The coffee business was about the only business that he really had to attend to himself at the time of his death. The other things were corporations he was heavily interested in.

Q. 756. His interests in all these corporations amounted to many millions of dollars, did they not?

A. I believe they did.

686 Q. 757. Do you wish to be understood as testifying there were no books in which his interests in these various concerns were recorded?

A. No, I believe he had some books that he put these things in; we had nothing to do with them, my brother or myself.

Q. 758. I asked you whether there were not books in which the interests of your father, the individual interests of your father, were recorded, and I understood you to testify there were no such books?

A. There were such books at the time—I mean there were no such books, to my knowledge, previous to the time I went in the firm.

Q. 759. Were there any such books at that time?

A. There were books where he kept an account of what stocks he held, of course.

Q. 760. Those books were not confined to what stocks he held, were they? They were confined principally to all his individual interests?

A. They were confined to the different corporations, so far as I can remember, and what his holdings were in each of them.

Q. 761. Where were those books?

A. Those books were turned over to the executors of the estate,—to my brother and myself.

Q. 762. And they are now in the possession of the executors?

A. They are in our possession still; they are in liquidation, but most of these books have been turned over.

Q. 763. Have you ever examined those books?

A. I have been over them, yes.

Q. 764. You have seen those books?

A. Yes, sir.

Q. 765. How many of them are there?

A. There is one book, I believe, a stock book.

Q. 766. A single book, is it?

A. A stock book,—his whole set of books; he certainly had a set of books when I was there, stock book and ledger.

Q. 767. Is that all?

A. Probably a cash book and journal, that is all; four books, they had from the time we went in.

Mr. HEMENWAY: Are these books of the firm of Lewisohn Brothers; they are books of the firm of Lewisohn Brothers of which your father was a partner, and you and your brother members of the firm?

WITNESS: Yes.

Q. 768. Do you mean to say the only books that came into your possession are the books of Lewisohn Brothers?

A. Yes, only the books of Lewisohn Brothers.

Q. 769. And that all these entries you are now referring
687 to are entries in the books of the partnership which began when you became a member on January 1, 1902?

A. I don't know; they may have been started before; whether when we just began or not I don't know. My brother attended to the books.

Q. 770. These books which you are testifying about are in your possession?

A. Yes, sir.

Q. 771. What is the earliest date that appears in those books?

A. 1901, I believe.

Q. 772. When did you last examine those books?

A. I have not made any examination.

Q. 773. Will you examine that set of books to which you now refer and prepare yourself to testify as to what the date is, and whether or not in those books there are any entries relating to the Old Dominion Syndicate; and will you also, when you examine those books, see whether the ledger, journal, and cash book appear to be entirely a new set of books, or whether they refer, either by transfers or balances, or by the numbers, to a series of which there were books preceding them?

A. I will.

Q. 774. These books you have referred to as to which you have now testified, you have referred to frequently, I suppose, in your capacity as executor, haven't you?

A. No, I have not.

Q. 775. What do you mean by "frequently"; what number of times?

A. I have turned them over; we have had the accountants to make out the accounts.

Q. 776. Who are the accountants who have made out the accounts in connection with these books?

A. We have several accountants working in the office; they do work in our different companies like the United Metal Selling Company; they have a regular audit department, and in our coffee department we use Deloitte, Dever & Griffith; but for small matters we use one of the auditors of the United Metal Company.

Q. 777. Who is the expert accountant you use on your books?

A. On all our books we usually use Deloitte, Dever & Griffith, a firm of chartered accountants.

Q. 778. I am asking you now who this particular bookkeeper of

the United Metal Selling Company was who has acted as bookkeeper for you in connection with the estate?

A. In connection with the estate I believe we had Arthur Stoneham; he was formerly connected with the firm of Deloitte, Dever & Griffith; he is our accountant for the estate.

Q. 779. According to the best of your knowledge, has any inspection been made by any one in regard to entries in any books of any business with which your father was connected concerning
688 his transactions in connection with the Old Dominion Company, Old Dominion Syndicate, and the acquisition of this property in connection with Mr. Bigelow?

A. Yes, what I said before. I told Mr. Westervelt to see what he could find in that direction.

Q. 780. You asked Mr. Westervelt to look for books according to your testimony?

A. Yes, and I told him at the time to look in the books and see if there was any account regarding the Old Dominion. We asked him to look separately for Old Dominion books because I didn't believe there were any; I thought they were in the ledger that was used at that time, and we could not find any 1895 or 1896 ledger, for I am pretty sure my father did not keep any separate books on those things; no particular books on those different companies; he put it all in the different companies, and if it is to be found, it is to be found in the old ledger; I don't know in whose hands it is now; but whether we can find these different accounts with this syndicate and this corporation I don't know.

Q. 781. What did Mr. Westervelt report to you in regard to the books containing those entries?

A. He reported he could not find any.

Q. 782. How long has Mr. Westervelt been in your employ?

A. He has been in my employ since last May; since our new firm started.

Q. 783. Was he previously to last May connected in any way in business with Lewisohn Brothers or your father?

A. Yes, I believe he was with my father before that for I don't know just how long; I could not say; three or four years probably. I know he was up at Fulton street when I was there, and that is about three, four, or five years ago.

Q. 784. And in what capacity was he employed by your father?

A. At that time, I believe, he was just stock clerk.

Q. 785. And what subsequently?

A. Subsequently, he was made a sort of manager of the office, to look after the clerks and books and cashier.

Q. 786. And continued in that capacity?

A. Still in that capacity.

Q. 787. Who else, so far as you know, has access to papers or books in your possession as executors, or individually, or members of the firm of Lewisohn Brothers during the last year?

A. No one would have access except the executors of the firm of Lewisohn Brothers, my brother and myself.

Q. 788. Do you mean that nobody has had physically any oppor-

tunity of seeing any of these papers or books, or that nobody had any right?

A. Nobody had any right. They may have broken in; I don't know.

Q. 789. Without breaking in; I suppose, then, there is no opportunity of getting in without breaking in?

A. I don't believe so; I believe the door is locked.

689 Q. 790. What was done with the keys?

A. I believe this is the stationery room; the keys are in charge of Ferdinand, I guess; I mean either one of the boys have the keys.

Q. 791. So far as you know, has anybody made an examination of the files, and books and papers, during the last year other than the examination made by Ferdinand Rahaeuser, under your directions within the last few weeks?

A. No, I believe there has been nobody in that room except Ferdinand, and I don't know how many boys they used for the purpose, but I told them to take as many as they wanted. Previous to that I don't believe we had to send anybody in there.

Q. 792. Do you know whether anybody aided Rahaeuser in his search?

A. I don't know.

Q. 793. Do you know whether or not Mr. G. M. Hyams of Boston has been here during the period of the search?

A. I believe I have seen him around at different times. He is usually in New York, and when he comes to New York, he usually comes in our office; he is here once in two weeks or so.

Q. 794. Is that all?

A. I don't know. We have a direct business with him. I only see him up on the same floor. I see him flitting in and out of the office once in a while, and he stops to see us for a few minutes, but that is all.

Q. 795. Has he, so far as you know, seen any of the letters or papers which related to the Old Dominion matters?

A. I don't know as he has seen any of the papers, that is, that came out of our office; I don't see how he could very well see them.

Q. 796. Is it your best recollection that he has not seen any of these papers?

A. So far as I know, I don't think anybody has except Westervelt, Ferdinand, or the boys they employed in getting them out.

Q. 797. Is it your best recollection that Mr. Hyams has not seen any of the papers or books, or made any investigation or search for any of the papers or books relating to the Old Dominion transactions?

A. He has done nothing in our office regarding the papers.

Q. 798. So far as you know?

A. So far as I know.

Q. 799. And you have had no consultation with him in any way regarding the matter?

A. Nothing of Old Dominion. I have talked to him a few minutes about a suit which had been started here.

Q. 800. Aside from that reference to the suit, you have had no talk with him whatsoever on this matter?

A. No, none whatever.

Q. 801. You are absolutely certain of that, are you?

A. I am certain I have had nothing to say to him regarding anything about the suit.

690 Q. 802. Or he to you?

A. He didn't say anything to me.

Q. 803. And he has not made any search for papers or examined any papers?

A. Not in my office he has not.

Q. 804. I mean the office of Lewisohn Brothers.

A. That is what I mean; that is the same thing as my office.

Q. 805. It appears from the examination of the papers which have been produced by you through Mr. Lauterbach, you and your co-executor through Mr. Lauterbach, that there are not among the papers which he has produced here on February 4, or February 10, a single letter from Albert S. Bigelow, or from J. Morris Meredith, or from G. M. Hyams. Are you able to give any explanation for the failure to produce any letters from any of those parties?

A. I don't know of any reason why.

Q. 806. It also appears from examination of such letters that were produced that there were received, apparently by your father or Leonard Lewisohn, a large number of letters relating to these matters which have not been produced. Are you able to give any explanation for the failure to produce the other letters which appear to have been received, as being referred to in the correspondence which has been produced?

A. No.

[Further examination of this witness suspended for the present.]

ALBERT LEWISOHN, sworn for plaintiffs.

Direct examination by Mr. BRANDEIS:

Q. 807. Give your full name, age, and occupation.

A. My name is Albert Lewisohn; age, thirty-seven; occupation, merchant.

Q. 808. You are one of the executors of Leonard Lewisohn?

A. Yes, sir.

Q. 809. Have you, as executor of Leonard Lewisohn, or otherwise, made any search for any of the papers and books called for in the subpœna which was served upon you?

A. Not I personally; I don't attend to that part.

Q. 810. What did you do, if anything, in reference to having a search made?

A. Mr. Fred Lewisohn attended to that. We left that part of Lewisohn Brothers' business to him. I attend myself to the coffee business; each one of us cannot attend to all details.

Q. 811. What, if anything, do you know in regard to the

691 books and papers of Leonard Lewisohn's estate?

A. I don't know anything much about the details. We

have our expert, who attends to that part, together with Mr. Frederick Lewisohn.

Q. 812. Who is the auditor or expert?

A. Mr. Stoneham, from the Metal Selling Company.

Q. 813. Have you yourself any knowledge whatever in regard to any papers or books belonging to the estate?

A. I have none whatsoever.

Q. 814. Have you been consulted in any way in regard to any one having access to the books or papers?

A. I have not.

Q. 815. Do you know Mr. G. M. Hyams of Boston?

A. Yes, sir.

Q. 816. Has he been here within the last three or four weeks?

A. I believe so. I have not seen him; but I am, as I say, in an entirely different part of the world; I am in the coffee business.

Q. 817. Has there been submitted to you any papers as being the result of a search for books or papers relating to the Old Dominion matter?

A. No; I have not seen any papers.

Q. 818. Has any information been given to you with regard to any papers referred to in this subpœna which was served upon you?

A. No.

Q. 819. Has any information been given to you, by any one, in regard to them?

A. No.

Q. 820. Has Mr. Frederick Lewisohn or Walter Lewisohn reported to you with regard to the search which you were requested to make in this subpœna?

A. No; those are detail matters which I could not take up. We could not take up every detail in the estate matters.

Q. 821. As a matter of fact, you have heard nothing whatsoever from any one in regard to this matter of the books and papers that are called for in the subpœna?

A. I knew a search was made.

Q. 822. Who told you it was made?

A. I heard that from Mr. Fred Lewisohn.

Q. 823. When did you hear that?

A. A few days, or a week, ago.

Q. 824. Is that all you have heard with regard to it?

A. Nothing else.

Q. 825. What he told you?

A. Yes.

Q. 826. And he told you on that single occasion, did he?

A. I think so. I don't remember. I didn't pay any attention.

Q. 827. What did he tell you?

A. Only that you wanted papers, and they had to get some papers, and he would try to get all the papers they could.

Q. 828. That is all the information you have obtained?

A. Yes.

692 Q. 829. And you have made no effort on your own behalf to get any?

A. No; I have not been able to. I have not had the time to attend to any of those matters.

Q. 830. Do you know how the accounts—in what manner, or in what books, the accounts of Leonard Lewisohn, relating to transactions which he had during his lifetime, were kept?

A. I have no idea.

Q. 831. Have you, as executor, had occasion to refer to any books whatsoever relating to Leonard Lewisohn's transactions?

A. No, I have not. The experts and Lewisohn Brothers have attended to that part.

Q. 832. Have you never, in connection with this large estate and the very extensive interest of Leonard Lewisohn, had occasion to have any matters looked up in the books relating to his past transactions?

A. These are not matters for us at all.

Q. 833. What do you refer to?

A. I mean these details. We don't attend to those. As executor, I looked after the estate—after the main interests—to see that everything is in good order; and for that reason we took the expert in there. The business I am attending to is the coffee business, which takes a very large part of my time, as it is a very large business.

Q. 834. I ask you whether, as matter of fact, you have had occasion, as executors, to have any matters relating to Leonard Lewisohn's individual estate looked up? I mean those matters in which he was personally interested?

A. I don't look them up.

Q. 835. Did you have them looked up?

A. Not I personally.

Q. 836. You have had nothing looked up?

A. No; that is not in my line.

Q. 837. In whose line is it?

A. That was Lewisohn Brothers and Fred and the expert.

Q. 838. Frederick and the expert are the ones, are they?

A. Yes, the main ones.

Q. 839. Who else?

A. Nobody else.

Q. 840. You said the main ones?

A. I can't tell whether they had anybody else; they are the ones who have attended to it.

Q. 841. In the distribution of labor between the executors relative to Leonard Lewisohn's estate, who is it that has had the charge of matters relating to his personal investments and stocks in various companies?

A. I just mentioned the names, Mr. Fred Lewisohn and Mr. Stoneman.

Q. 842. In that distribution among the several executors of Leonard Lewisohn, which one, if any, has had charge of matters relating to the litigation brought against them concerning Leonard Lewisohn's connection with the Old Dominion syndicate?

A. Fred Lewisohn has taken charge of that.

693 Q. 843. Have you had anything whatever to do with the matter?

A. Nothing, except I am subpœnaed here.

Q. 844. You have also been sued as one of the executors?

A. Yes, sir.

Q. 845. Do you mean to say that in the conferences with counsel you have taken no part?

A. I have taken no part in this, because I don't know anything about these matters. I don't know anything about mining and would not know if I heard all about it.

Q. 846. In the litigation of a claim which has been brought against the estate, involving a million or two of dollars or more, do you mean to state that you have not discussed the matter at all?

A. No.

Q. 847. You have left that to one of the other executors?

A. Yes, sir.

Q. 848. And you have made no search of any kind, or been consulted with regard to the matter in any way?

A. No.

Q. 849. And you have not been consulted in any way?

A. No, sir; I could not be, because I would not know anything about it. I cannot be consulted for I don't know anything about these mining matters, and I have not had anything to do with any mining matters, and I would not know what was going on at all, so I don't think I could be of any good.

Q. 850. You might not know of transactions in the past, but you would know of things with regard to the present?

A. I do know.

Q. 851. It is things with regard to the present about which I am asking you, such as the request which is contained in the subpœna which was served upon you, to produce here certain books and papers relating to Old Dominion matters.

A. I am satisfied that search was attended to.

Q. 852. But you have not given any direction with regard to attending to it?

A. Each one cannot give directions; besides I have not got time for it; if one party attends to it, that is sufficient.

Mr. BRANDEIS: I will suspend the examination of this witness for the present.

(By Mr. LAUTERBACH:)

Q. 853. When the subpœna was served on you you spoke to Mr. Fred Lewisohn about it, did you not?

A. Yes, sir.

Q. 854. And he agreed to do what he could to comply with the subpœna?

A. Yes.

Q. 855. And you rely on that?

A. Yes, sir.

(By Mr. BRANDEIS:)

Q. 856. You mean you have relied upon it?

A. Yes.

[Adjourned to February 24, at 10 A. M.]

[Next Plaintiff's Exhibit for Identification, 162.]

694 NEW YORK, *February* 24, 1903—10 a. m.

[Parties met pursuant to adjournment.]

Present: Mr. Webb, Mr. Brandeis, Mr. Hemenway, and Mr. Lauterbach.

[Mr. Lauterbach produced another batch of letters, etc., which are marked for identification 162 to 230, both inclusive.]

FERDINAND RAHAEUSER, recalled:

(By Mr. BRANDEIS:)

Q. 857. In addition to the letters, copies of letters, and papers produced at the sessions of February 4 and February 10, of which a list is to be annexed to your deposition and marked A, you have now produced, through Mr. Lauterbach, certain letters and documents, and copies of letters, of which a list is to be annexed to your deposition marked B. I ask you whether these letters, telegrams, and copies of letters enumerated in the list marked B, and now shown you, were found by you upon the search made since the adjournment of your examination on February 10?

Mr. HEMENWAY: So far as letters have been produced for the inspection of counsel, I do not understand that a single one of those letters has been offered in evidence, therefore I do not see the propriety of adding a list of letters at the present time. Whenever these letters shall be offered in evidence, I, as counsel for Mr. Bigelow, shall be entitled to examine them, and if I have any objection to their admission, to have that objection noted. At the present time, those letters have not been submitted to my examination.

Mr. BRANDEIS: They have been produced by your associate.

Mr. HEMENWAY: They have been produced by Mr. Lauterbach as counsel for the witnesses who have been requested to find and furnish certain papers; they have not been produced to be put in evidence as yet, and are subject to all legal objections.

Mr. BRANDEIS: I now offer you all these papers for your inspection. Do you wish me to suspend while you are examining them? I supposed you had looked them over or I would have handed them to you as I went along.

Mr. HEMENWAY: If you are going to ask him about them, of course.

Mr. BRANDEIS: I am merely going to ask him with regard to the search.

Mr. HEMENWAY: All right, then, go ahead.

Q. 858. Will you state fully what way you proceeded and to what extent you made a search for additional papers in pursuance
695 of the request made before the last adjournment?

A. I looked for the letters you requested me to look for, any other papers relating to Old Dominion; looked through the files for them.

Q. 859. When did you begin that search?

A. Oh, a day or two afterwards.

Q. 860. And on how many different days did you continue that search?

A. Practically every day except Sundays.

Q. 861. From the time you commenced until when?

A. Until last night.

Q. 862. And how much time did you spend each day in making that search?

A. I can't exactly answer that question, what time. I did it with my other work up to 5.30.

Q. 863. And how much time after 5.30?

A. At 5.30 we closed shop. I went home.

Q. 864. How much time did you spend each day on this search, approximately?

A. That I can't answer, for I didn't take notice of the time.

Q. 865. How much time did you spend yesterday in making this search?

A. From quarter after one until practically 4.30.

Q. 866. Did you spend as much or more than that on the other days?

A. I could not very well; yesterday was a holiday, and I devoted my time to it, other days I did other work.

Q. 867. Now on the other days did you spend as much as an hour a day?

A. Yes.

Q. 868. Did you spend as much as two hours a day?

A. Might some days, other days maybe not.

Q. 869. In the time which you did spend in making that search, how did you proceed; did you take up each single box of these seventy-odd boxes, if there were as many as that, as you have described before?

A. Each box, yes, sir.

Q. 870. And how many of the whole lot of boxes did you examine in this time?

A. Examined all of them.

Q. 871. How many of them did you examine yesterday?

A. Examined the telegram file yesterday.

Q. 872. Is there a separate file kept of telegrams?

A. Yes.

Q. 873. How many different boxes of telegrams?

A. Four.

Q. 874. And do all these telegrams relate to Old Dominion?

A. In the boxes?

Q. 875. Yes.

A. No, sir, all business.

Q. 876. Did these four boxes of telegrams comprise all the telegrams received during the year 1895?

A. Yes, sir.

696 Q. 877. You examined the full file for that year?

A. What do you mean by "examined the full file"?

Q. 878. The telegrams.

A. For telegrams from Hyams, Keyser, and all these different people you requested me to look for.

Q. 879. What other papers did you look for?

A. No other ones.

Q. 880. You did not?

A. No.

Q. 881. I mean give me a list of those you did look for.

A. Keyser, Stern, Hyams, Calhoun, Bigelow, and all those others I was told to look for.

Q. 882. Give me a list of them.

A. Just repeat the list.

Q. 883. No, I won't.

A. For instance, Bigelow, Calhoun, Hyams, Keyser, Meredith Spencer, Stern, Simpson, Gaston. I think that is about all.

Q. 884. What search did you make on Saturday, the 21st?

A. Incoming letters.

Q. 885. How many files of letters did you examine at that time?

A. I didn't take a record of them Saturday.

Q. 886. Don't you remember how many?

A. No, I do not.

Q. 887. Were all the incoming letters that you examined at all examined on Saturday, the 21st?

A. No, sir.

Q. 888. On what days other than February 21 did you examine files of incoming letters since you recommenced your search, after February 10?

A. Saturday, I believe, was the first day. I started in at that time.

Q. 889. Saturday, the 21st?

A. Yes, sir.

Q. 890. How many boxes of incoming letter files did you examine on Saturday, the 21st?

A. I can't answer that question.

Q. 891. Approximately, how many?

A. I haven't any idea.

Q. 892. What time did you leave the office on Saturday, the 21st?

A. About 7.15.

Q. 893. When did you begin your search on Saturday, the 21st?

A. That I can't exactly answer; it must have been about twenty minutes after one when I got in the office on Saturday. I think it was about that time.

Q. 894. You got there?

A. Yes; went out again, came back, and then we started to search for the letters; what time it was I don't know.

Q. 895. That is, you started to search after you came back to the office?

A. Soon after I came back.

Q. 896. You said you came to the office about twenty minutes past one and then went out. Did you make any search between the time you came there and the time you went out?

A. No, sir.

697 Q. 897. When did you go out, approximately?

A. That I can't say.

Q. 898. As nearly as you can remember.

A. I didn't take notice of the time.

Q. 899. Was it an hour or two hours after you got to the office?

A. That I could not say.

Q. 900. What did you do between the time you got there, twenty minutes past one, and the time you went out?

A. Talked.

Q. 901. Haven't you any idea whether it was half an hour or an hour or two hours before you went out?

A. No, I have not.

Q. 902. How do you account for your extraordinary lapse of memory from the 21st to the 24th?

A. What do you mean by "extraordinary lapse of memory"?

Q. 903. If you can't remember from Saturday, the 21st, until Tuesday, the 24th, whether or not you were in the office, between your coming and going out, half an hour or an hour or two hours, I should call that an extraordinary lapse of memory, wouldn't you?

A. I don't know; there were some of the boys there, and I didn't take notice of the time.

Q. 904. You have no recollection whatsoever as to the time that you spent in discussion with them?

A. No, I have not.

Q. 905. How long did you stay out?

A. I can't say.

Q. 906. Was that half an hour or an hour or two hours; which?

A. I don't know how long I stayed out.

Q. 907. Have you no recollection whatsoever in regard to it?

A. No, sir, we were talking.

Q. 908. When you went out were you talking?

A. Yes, sir.

Q. 909. Where did you go when you went out?

A. I must not answer that question, must I?

Q. 910. Did you go to do something when you went out, to perform some duty?

A. I don't know whether you would call it duty or not.

Q. 911. How long were you gone; haven't you any idea as to how long you were gone?

A. No, sir.

Q. 912. No idea as to when you came back?

A. I don't know exactly what time I came back.

Q. 913. I haven't asked you exactly; have you any idea as to when you came back?

A. Oh, maybe about half past three or quarter to four; that is as near as I can get at it. I won't say that positively.

Q. 914. After you came back did you immediately begin to make your search?

A. Yes, sir.

698 Q. 915. And did you continue without interruption from that time until you left?

A. There might have been one or two minutes' interruption, but it wasn't much; the office force had all gone home then.

Q. 916. Did anybody aid you in the search?

A. No, sir.

Q. 917. You were there absolutely alone, were you?

A. Yes.

Q. 918. According to this testimony you are now giving, you searched on Saturday about three hours. Why didn't you mention that before when I asked you how much time you had searched on any day?

A. I didn't take note of the time. I did it every time I had an opportunity. Saturday is a sort of holiday with us.

[No Q. 919.]

Q. 920. When you searched Saturday during this time, about how many boxes of incoming letters did you look through?

A. That is a hard thing to say. I never kept record of how many boxes I looked through.

Q. 921. What period of time did you cover in the search which you made?

A. What period of time?

Q. 922. Yes.

A. Incoming boxes they run, you may say, from January to June, and July to January, alphabetically arranged, like A to Bl; they cover a period, that is, of the letters coming in, from A to Bl; any of those names would be filed in that file, and they would usually cover one year, A to Bl, and Bo to By; that is the way the files run alphabetically, letters coming in like Blackford or some other name like that, would be under Bl. If it was before June it would be put in that file; and if it was after, it would be put in the other file. Then there might be A to Bl; there might be six or eight files of those, according to what letters came in, and then we would have Bo to By.

Q. 923. Do you wish to be understood as testifying that there was a single file covering A to Bl letters received between January 1 and July 1, 1895?

A. No; I say the boxes came in that way. If there is an amount of letters that require more than one month's file, we transfer them for one month; but for a general period, they are not filed more than, say, twice a year, I believe.

Q. 924. What do you mean by being "filed twice a year;" you say you examined a box of incoming letters, that these letters were arranged alphabetically A to Bl: is that correct?

A. Yes, sir.

Q. 925. Now are these letters arranged also chronologically according to date?

A. No, not in the files; I can't say that.

Q. 926. In any one file of letters covering what dates do
699 letters A to Bl appear; from what date to what date do you keep in a single box letters A to Bl?

A. May or June.

Q. 927. From what date to what date?

A. From January 1 to May or June.
Q. 928. In one box?
A. Yes, sir.
Q. 929. A to Bl?
A. Yes.
Q. 930. And Bl to Bo also in one box from January to June?
A. Not Bl, Bo to By, I think they run.
Q. 931. One box from January to June?
A. I think so.
Q. 932. When is the next box?
A. Take June on.
Q. 933. Until December 31?
A. Might be until December 31.
Q. 934. You are sure of this statement you are making now, are you, that outgoing letters A to Bl, or Bo to By, cover a definite period of four or five months, do they, at least?
A. Sometimes only a month and sometimes two months; sometimes six months and other times four months.
Q. 935. Take A to Bl; that covers a period of four or five months?
A. I think so, yes.
Q. 936. How large a part of the alphabet did you cover in your search on Saturday, the 21st?
A. I haven't any idea of that.
Q. 937. Did you search through all of the boxes for all of the letters of the alphabet?
A. Those letters I was requested to search for, Old Dominion letters.
Q. 938. I assume you have searched for Old Dominion letters, but I ask you whether, in that search which you made for Old Dominion letters, you have covered all the letters of the alphabet?
A. I searched for the letters I was requested to search for, incoming letters from any of those people, as I said before, Stern and those people.
Q. 939. Bigelow?
A. Yes, Bigelow and Hyams.
Q. 940. And Meredith?
A. If there was any incoming letter that related to any party I would look for that also.
Q. 941. Did you cover in your search all of the boxes relating to these letters received for the whole year 1895?
A. Yes, sir.
Q. 942. Are you not able to state approximately how many boxes you examined?
A. No, I could not give account of that. I have no idea about that.
Q. 943. What did you do in your search on Friday, the 20th?
A. Outgoing letters.
Q. 944. Was that the first day on which you examined the outgoing letters,—by which I assume you mean the copies of letters?
A. No, that was not the first day I looked for them.

700 Q. 945. What did you do on Friday, the 20th?

A. I think I was finishing up the outgoing letters.

Q. 946. When you say "finishing up the outgoing letters," what did you look for?

A. The letters relating to Old Dominion that I could find: the names I was requested to look for.

Q. 947. Did you examine every file?

A. Yes, sir.

Q. 948. Now were those letters filed in the same way as the incoming letters?

A. What do you mean by "the same way;" alphabetically arranged?

Q. 949. Yes, alphabetically and chronologically.

A. Yes, sir.

Q. 950. In precisely the same method?

A. Yes—no, pardon me, those outgoing letters were filed A to Z, and they cover a period of maybe a week or two weeks, say from January 1 to January 10, January 11, the 14th or 15th, and so on.

Q. 951. That is, they are filed differently from the incoming letters, are they?

A. Yes, sir.

Q. 952. Then you examined every single file, did you, of the outgoing letters?

A. Every file of outgoing letters.

Q. 953. Covering the year 1895?

A. Yes, sir.

Q. 954. What part of that year did you examine on Friday, the 20th?

A. I don't know. I think I went through them all to a certain extent. I haven't any idea I examined any special one, so far as I can remember.

Q. 955. Do you mean to say that on Friday, the 20th, you looked into every one of the boxes of each one of these files covering perhaps a week?

A. I think I did, yes, sir.

Q. 956. Why did you?

A. To see if I left any in there or made a mistake—missed a box or two.

Q. 957. That is, you think you looked into every box containing every file of outgoing letters for the year 1895, do you mean, you did on Friday the 20th?

A. Yes, I think I did.

Q. 958. Do you mean to say that that was the only search you made?

A. On Friday, the 20th?

Q. 959. Yes.

A. No, sir.

Q. 960. What was it you did on Friday, the 20th; you certainly did not read all the outgoing letters on Friday, the 20th?

A. No, looked to see if there were any letters in there.

Q. 961. When you looked to see them you had to read them, didn't you?

A. Some of them.

701 Q. 962. Had you read any of them before?

A. I don't think I had. I started to read them, and if they related to Old Dominion or Stern or any of those people, took it out and laid it aside.

Q. 963. And you did that on Friday, the 20th?

A. No, I only reviewed to see if I left any in there.

Q. 964. How much time did you spend in that review on Friday, the 20th?

A. I can't say. I think I started in after lunch.

Q. 965. Was that a day when you spent as much as an hour on it?

A. I could not tell you. Friday is a pretty busy day running at the telephones and looking through the letters every time I had an opportunity.

Q. 966. What did you do on Thursday, the 19th, so far as searching for letters went?

A. The same thing.

Q. 967. You did not review it on Thursday, the 19th?

A. No, I looked through the files.

Q. 968. Through what?

A. Files.

Q. 969. What files?

A. Those I opened; it depended upon how far I was.

Q. 970. Did you proceed chronologically in making the search?

A. No, I can't say I did at the start-off.

Q. 971. How did you proceed?

A. All the files I had them carted or carried over to my room.

Q. 972. What room is that?

A. Telephone room, and put them down, and I would take them up every time I had occasion.

Q. 973. How do you know you examined them all?

A. I knew on Friday, the 20th.

Q. 974. How?

A. I had them alphabetically arranged from January 1 to the end of the year, one after another.

Q. 975. Sure?

A. Sure.

Q. 976. What did you do with the letters and copies of letters which you took out of these files?

A. Put them on the side and then put them on Mr. Lewisohn's desk.

Q. 977. Which Mr. Lewisohn?

A. Mr. Fred Lewisohn.

Q. 978. On what day did you put them there?

A. Friday I put some there. I think I put them there as I found them; then after a while I would go and get the letters and put them on my desk.

Q. 978½. Get them from where?

A. Mr. Lewisohn's desk.

Q. 979. That is, you put them first on his desk?

A. After I found them, laid them aside and then put them on his desk.

702 Q. 980. Do you mean to testify that on each day you put them on Frederick Lewisohn's desk?

A. Not exactly each day.

Q. 981. What did you do on the days which you did not; what did you do with the letters you got out of the files?

A. Put them in my desk.

Q. 982. In your own desk?

A. Yes, sir.

Q. 983. Was there any on which you did not get some letters?

A. I can't recall that.

Q. 984. Do you recall any day on which you did not get some letters?

A. I can't say yes or no to that very well.

Q. 985. You certainly can say whether you recall any day on which you did not find some one or more letters?

A. No, I can't say that I can to that extent say yes or no. We had a very active market down below and that kept me busy, and I was thinking of that also.

Q. 986. Did you keep any list of the letters which you found?

A. No, I did not.

Q. 987. Did you keep any account of the letters you found or delivered to Mr. Lewisohn?

A. No, sir.

Q. 988. Were the letters you laid on his desk fastened together in any way, or were they left loose?

A. No, they were not fastened.

Q. 989. Were they enclosed in an envelope, or left open?

A. Just laid flat on his desk.

Q. 990. Was that the last you ever saw of them after they were laid on his desk?

A. No, sir.

Q. 991. What else did you see of them?

A. I had them put together to send over to Mr. Lauterbach.

Q. 992. How many different batches of those letters did you send to Mr. Lauterbach?

A. One.

Q. 993. When was that?

A. Friday.

Q. 994. The 20th?

A. Yes, sir.

Q. 995. What was done with the letters you found on the 21st?

A. I have them here.

Q. 996. Did you produce them here this morning?

A. Yes, I brought them over this morning.

Q. 997. What had been done with those letters from the time you found them on the 21st until you brought them here?

A. In my desk.

Q. 998. Had Frederick Lewisohn seen those letters?

A. I put them on his desk this morning, when he requested me to take them over here.

703 Q. 999. In a copy of the letter of Lewisohn Brothers to Alex. J. Mayer, dated May 29, 1895, which is among the papers which have been shown you, and which were produced by Mr. Lauterbach this morning, there appears a memorandum in pencil, "We wrote to this effect but Faint has an exact copy in his private file under 'Old Dominion:'" was that memorandum on that copy letter when you found it?

A. Yes, that is Faint's writing. I will testify to that.

Q. 1000. It is Faint's writing?

A. Yes, sir.

Q. 1001. Now when did you find that copy of the letter?

A. That letter?

Q. 1002. Yes.

A. Yes, Friday or Saturday.

Q. 1003. Do you mean Friday, the 20th, or Saturday, the 21st?

A. Yes.

Q. 1004. Which, according to your best recollection, was it: Friday or Saturday?

A. Friday.

Q. 1005. What time on Friday?

A. I have no idea what time.

Q. 1006. Was it in the forenoon or afternoon?

A. Afternoon.

Q. 1007. When you took those letters to Mr. Lauterbach, what time was it?

A. When we sent them over to Mr. Lauterbach?

Q. 1008. Yes.

A. Maybe half past four or quarter to five.

Q. 1009. Did you deliver them to him in person?

A. No, sir, I did not.

Q. 1010. When you said you got them together to send to Mr. Lauterbach, do you mean you wrote him a letter enclosing them?

A. No, I just directed the boy to take the letters over to Mr. Lauterbach.

Q. 1011. Did you put them in an envelope?

A. No, I didn't put them in an envelope.

Q. 1012. Did anybody?

A. Eddy Middy might have, I don't know whether it was he or one of the other boys.

Q. 1013. And that copy of letter of May 29, containing the memorandum in Faint's handwriting, was among those that you sent to Mr. Lauterbach on the afternoon of Friday, the 20th, was it?

A. Yes, sir.

Q. 1014. Why didn't you send it to him then?

A. I don't know why.

Q. 1015. Didn't you say you sent to him on Friday all the letters and documents which you had found?

A. I believe I did.

Q. 1016. Why didn't you send this?

A. Why didn't I send that?

Q. 1017. Yes.

A. I don't know exactly why I didn't.

Q. 1018. There must have been some reason, must there not?

A. One of the reasons was Old Dominion wasn't on it; that is all.

Q. 1019. The fact that there was no Old Dominion on it
704 was a reason for sending it to him, not for withholding it?

A. I don't know where that file is; it is a lot of dirty work and tedious work.

Q. 1020. The fact that this was dirty work or tedious work, do you consider that a reason why you should not have sent to Mr. Lauterbach this letter of May 29, 1895, which you found on Friday afternoon?

Mr. HEMENWAY: He said he found it Friday or Saturday, and he thought Friday.

A. I may have wanted to show the letter to Mr. Lewisohn.

Q. 1022. Did you want to show the letter to Mr. Lewisohn?

A. Yes, I did.

Q. 1023. Why didn't you answer that before?

A. I don't know why I didn't answer it before.

Q. 1024. Which Mr. Lewisohn?

A. Mr. Fred Lewisohn.

Q. 1025. Do you realize that you are testifying here under oath?

A. Yes, sir.

Q. 1026. Now why didn't you state before the reason for your not sending this letter of May 29 to Mr. Lauterbach?

A. Repeat that question, will you?

Q. 1027. Question repeated.

A. I don't know why.

Q. 1028. Wasn't it because you wished to withhold that answer?

A. Withhold which answer?

Q. 1029. That you held it back in order to show it to Frederick Lewisohn.

A. Well, yes, I wanted to show it to him.

Q. 1030. Why didn't you answer that before when you were asked for the reason?

A. I can't answer that question very well.

Q. 1031. Do you understand that you were sworn to tell the truth, the whole truth, and nothing but the truth?

A. Yes.

Q. 1032. And do you realize also that if you fail in your oath it is perjury?

A. Yes, sir.

Q. 1033. Now I ask you again whether you can give any reason why, when I asked you the cause of your withholding this letter from Mr. Lauterbach, you said you did not know why, when you have since testified the reason why?

A. I can't answer that very well.

Q. 1034. What did Mr. Fred Lewisohn say when you handed him that letter of May 29?

A. I don't know as he passed any comments on it one way or the other.

Q. 1035. When did you see that next after the time you handed it to Mr. Frederick Lewisohn?

A. Maybe a minute or two.

[No Q. 1036.]

Q. 1037. When did you hand it to Mr. Frederick Lewisohn?

A. In the afternoon, before he was leaving.

705 Q. 1038. About 5 o'clock?

A. I don't know exactly what time he left.

Q. 1039. Did he give you any direction on leaving?

A. Direction with regard to what?

Q. 1040. Of any kind?

A. No, sir.

Q. 1041. When did you see Frederick Lewisohn next? After you handed him the letter of May 29, when did you next see him?

A. This morning, I believe.

Q. 1042. What time?

A. When he came in the office.

Q. 1043. Now what did you do with reference to searching for papers between the time when you handed that letter to Frederick Lewisohn and to-day when you came to this room to testify?

A. Didn't I tell you I looked for the files also, the incoming mail?

Q. 1044. Is that all you did?

A. Telegrams.

Q. 1045. Does that describe fully all that you did, or is there anything else that you did that you have not testified to?

A. No, not in regard to the search for the papers. I have testified all I know with regard to the search for the papers.

Q. 1046. Then you now testify that between Friday afternoon, the 20th, when you handed this letter of May 29, 1895, to Fred Lewisohn, and this morning, when you came here to testify, you have done nothing with reference to searching for any papers except what you have testified in answer to your previous questions this morning?

A. Yes, sir.

Q. 1047. Is that true?

A. I can't seem to catch that.

Q. 1048. What is that you can't seem to catch?

A. I believe I told you that I looked through all the papers I was requested to look for.

Q. 1049. Now the papers you have testified you had looked for, that you had searched for on Saturday; you said you searched for the incoming letters?

A. Yes, sir.

Q. 1050. And that was the only day when you looked for the incoming letters?

A. No, I don't think so. I believe I looked Sunday also.

Q. 1051. Sunday, the 22d?

A. Yes, sir.

Q. 1052. How much time did you spend Sunday, the 22d?

A. I don't know exactly the time I spent on Sunday, the 22d.

Q. 1053. Are you sure you were at the office on Sunday, the 22d?

A. Yes, sir.

Q. 1054. Didn't you state earlier in this testimony that you searched every day except Sunday?

A. No, I don't believe I did.

Q. 1055. Now I call your attention to Int. 850, "And on how many different days did you continue that search," and your
706 answer thereto, "Practically every day except Sundays," and ask you whether it is the fact that you did make a search on Sunday, the 22d?

A. Yes, sir.

Q. 1056. Now tell us what you did on Sunday, the 22d.

A. I think I finished up incoming letters.

Q. 1057. When were you at the office on Sunday, the 22d?

A. I think from about a quarter after one to 4.30.

Q. 1059. Did you do anything else besides finishing the incoming letters?

A. No, I don't think I did.

Q. 1060. Did you begin on the telegrams?

A. No, sir.

Q. 1061. What part of the incoming letters did you examine on Sunday, the 22d?

A. The part that I hadn't looked through before.

Q. 1062. What part was that?

A. That was the latter part of the year, the late numbers; or, at least, the alphabetical numbers. I don't know whether it was the S's or O's or what.

Q. 1063. You are sure you spent about three hours there Sunday afternoon?

A. Yes, sir.

Q. 1064. Looking through the incoming letters and nothing else?

A. I may have spent a minute or two with some of the boys.

Q. 1065. Who were there Sunday afternoon?

A. The cashier of the coffee department.

Q. 1066. What is his name?

A. Mr. Gibson, and I think Mr. Vilaret.

Q. 1067. Who is he?

A. Mr. Gibson's assistant.

Q. 1068. Did they aid you in the search?

A. No, sir.

Q. 1069. Have you now stated all that you did in the way of searching from the time you handed that letter to Mr. Fred Lewisohn on May 29 up to the time you came here to testify to-day?

A. Yes.

Q. 1070. Then you have never made any search particularly for this private file of Old Dominion papers referred to in that memorandum in Mr. Faint's handwriting on the letter of May 29?

A. I never knew where Mr. Faint kept his private files.

Q. 1071. Did you understand the question? I ask you whether you have made any specific search for that file?

A. No, I can't say that I did.

Q. 1072. You did not know that any such file existed until you found that memorandum on that letter, did you?

A. No, sir, I did not.

Q. 1073. What other letter did you hold back from Mr. Lauterbach, or other paper, on Friday, the 20th?

A. I don't know as there was any held back.

Q. 1074. Are you sure you sent him every letter that you
707 had found and copy of letter and paper, with the exception of this letter of May 29, 1895?

A. Yes, up to that time.

Q. 1075. Now what letters or papers that you found after Friday, after that talk with Mr. Lewisohn on Friday, the 20th, have you held back?

A. None.

Mr. BRANDEIS: It appears clearly from this witness' testimony that he has made no search for the private Old Dominion file.

[Mr. Lauterbach then instructs the witness to make further search for the private file referred to by Mr. Faint.]

Mr. BRANDEIS: I request the witness, in making this search, to make a memorandum of the exact time that he begins and the days and hours in which he is occupied in making the search for the file referred to; also to make a memorandum of each box or file of papers which he handles or examines in connection with making that search.

WITNESS: What do you mean by that? Make a record of each box I handle? You understand that I take a box in my hand the same as I take up anything else; you don't want me to make a record of that, do you?

Mr. BRANDEIS: Yes, every box you handle or examine in connection with making this search.

WITNESS: And do you want me to tell you what is in the box?

Mr. BRANDEIS: I want you to make a memorandum of it so that you can testify fully.

Mr. LAUTERBACH: And I also request you at the same time to bring any other papers which you may find relating to Old Dominion matters and covered by the previous request to search for papers already made.

[The witness, in the course of this investigation, is requested to examine all the files of letters and papers in the room referred to in this deposition as room 320, but which he now says is room 321, and also the other files of papers in the general office which the witness has referred to, and any other files of papers which may come to the witness' knowledge in connection with Lewisohn Brothers' business and the Leonard Lewisohn estate.]

WITNESS: What do you mean by "examine"?

Mr. BRANDEIS: Look through them and see whether they have

been examined and searched through heretofore by you, and
708 whether they contain the private files referred to as being Mr. Faint's private Old Dominion files, and whether they contain any other papers relating to these Old Dominion matters.

Mr. LAUTERBACH: Mr. Brandeis means to re-examine the whole thing in order to be absolutely sure you have gone over everything.

Mr. BRANDEIS: And make a memorandum of the search he has made and the time consumed in the search; and he is instructed to take any one to assist him; and if he takes any one with him we want the same record kept by that other person that he keeps.

[The examination of this witness is then suspended for the present, and it is consented that the deposition of Edward C. Westervelt may be taken with the same force and effect as if his name was mentioned in the order for examination herein.]

EDWARD C. WESTERVELT, sworn for plaintiff.

Direct examination by Mr. BRANDEIS:

Q. 1076. What is your occupation?

A. Clerk with Lewisohn Brothers.

Q. 1077. How long have you been connected with Lewisohn Brothers?

A. About four years.

Q. 1078. Were you connected with the corporation of Lewisohn Brothers?

A. No, only the firm.

Q. 1079. What was your occupation before you became connected with Lewisohn Brothers?

A. Clerk in Wall street with Walter C. Stokes & Company.

Q. 1080. How long had you been engaged in that business?

A. Do you mean the Wall-street business? Ten or twelve years.

Q. 1081. Are you a bookkeeper?

A. I am not.

Q. 1082. What is the nature of your duties as clerk?

A. Stock clerk. I am now cashier with Lewisohn Brothers, but I went there as stock clerk for Mr. Leonard Lewisohn. I merely ran the stock ledger.

Q. 1083. In the various corporations he was in?

A. No, memorandum of stocks bought and sold; New York stocks, sundry stocks.

Q. 1084. Sundry stocks bought and sold by him?

A. That was all, stock ledger; took charge of the securities, to see that they came in proper and see that they went to the vault.

Q. 1085. That is, the investments of one kind and another of Lewisohn Brothers that they made in stocks of different companies buying and selling?

A. Yes.

709 Q. 1086. Mr. Lauterbach has produced to-day what purport to be transcripts of accounts entitled "Old Dominion Syndicate," "Old Dominion Syndicate Subscription No. 2," and

"Old Dominion New Stock Subscription New Acc," containing in all seven double pages which have been marked 231, 232, and 233. Are these transcripts in your handwriting?

A. No; they are our bookkeeper's handwriting, Mr. C. Ebner. I don't know whether it is Charles or not.

Q. 1087. From what book or books are these a transcript?

A. Lewisohn Brothers' ledger.

Q. 1088. The corporation?

A. The old firm.

Q. 1089. The old corporation?

A. The old corporation.

Q. 1090. How is the ledger numbered?

A. I could not tell you that, I believe in years, it must have been the '95 and '96 ledger, 1895 ledger.

Q. 1091. And have they a separate ledger for each year?

A. That I could not tell you. I know nothing at all about their books.

Q. 1092. What investigation have you made in regard to this matter that enables you to testify at all?

A. None at all.

Q. 1093. I mean why you were singled out to testify in connection with these transcripts?

A. Of course you have had everybody in the office practically working on this matter, and of course I knew it was going on, and as I have been cashier since the first of the year, I naturally cleared out everything and started all around—I went over the old books in the office, and cleared out a lot of old matter to make myself perfectly familiar with everything, so that in case anything should turn up I would know everything about the place, and I found this ledger and I immediately took it in—I believe Mr. Lauterbach was there at the time, and I asked him if that had anything to do with that account, and he said yes, that he wanted this account, so I run through the ledger to see what was there, and told the bookkeeper to take everything out; and that is everything.

Q. 1094. And is that a transcript of these accounts which you found in the ledger?

A. Yes, of the ledger, and that is practically all I know about it.

Q. 1095. Are these the only accounts in that ledger?

A. The only accounts of the Old Dominion; that is all you want, isn't it, bearing upon the Old Dominion matters?

Q. 1096. Can you furnish me definitely a description of the ledger; I mean whether it was numbered or lettered, and the pages on which these accounts appear?

A. I could not do that without looking at the ledger.

Q. 1097. And that ledger you can get, can you not, and give it to us later?

A. Oh, yes.

710 Q. 1098. On my examination of the papers submitted as transcripts of the ledger, I find no reference in the transcripts to pages of any journal or cash book, or any other book from which these ledger entries are taken.

A. "To Cash," that is cash book.

Q. 1099. But I understand, according to the habits of bookkeepers——

A. [Interrupting.] I am not a bookkeeper.

Q. 1100. I understand, according to the habit of bookkeepers, it is customary to have some reference to another book, be it a day book, or cash book, or sales book, or stock book, whatever it may be, from which the items are entered in the ledger, and I call your attention to the absence of any such reference here, and ask you whether, in view of that fact, you are able to say these are exact transcripts of the ledger?

A. Well, not being a bookkeeper, I didn't do it. Of course, I gave it in charge of our head bookkeeper, and he has taken it off from the ledger, I suppose, I know where he states "To Cash," that of course that is the cash book.

Q. 1001. But you have no reference to any page as against that?

A. When you take off a transcript of an account you never do it.

Q. 1102. And you haven't done it in this instance?

A. No; and I never saw anybody who did it. Of course, it can be done.

Mr. BRANDEIS: I should like to have that done.

Mr. LACTERBACH: If the ledger contains any such column, which, I suppose, it does, I will furnish it.

Q. 1103. Did you also find any other books relating to this period, 1895, besides the ledger?

A. I did not.

Q. 1104. What other books were there at the place where you found this ledger?

A. No others. I have explained the place where I found the book: found it in the stock.

Q. 1105. Was there nothing else in that stock?

A. Nothing at all.

Q. 1106. And you have never seen anywhere the other books making up the set of which that ledger is one?

A. I have not.

Q. 1107. How far back have you found the regular set of books in the place?

A. Our books go back to January 1, 1900.

Q. 1108. No books prior to that date there except this ledger?

A. None that I know of of any kind.

Q. 1109. Are there any private books of Mr. Leonard Lewisohn prior to January?

A. Not in our office.

Q. 1110. Or anywhere, so far as you know?

A. No, of course I could not tell.

711 Q. 1111. So far as you know you can't tell?

A. No, there are none.

Q. 1112. And you are certain there are none in the office under your personal charge?

A. I am very much so. Not in my office.

Q. 1113. What do you mean by "your office"?
A. Lewisohn Brothers' office, the general office.
Q. 1114. Have you made any search in any storeroom?
A. I have not.
Q. 1115. And you don't know where the old books are stored?
A. I do not.
Q. 1116. And haven't heard anything in regard to it?
A. Nothing except the controversy here among yourselves.
Q. 1117. I mean as to where they are stored.
A. No.

Mr. BRANDEIS: Can't this witness take back these papers, and have them completed?

Mr. LAUTERBACH: You mean the folios, etc., put in?

Mr. BRANDEIS: Yes.

WITNESS: When I spoke to the bookkeeper I didn't specify that, but I thought he would do it.

Mr. BRANDEIS: I wish you would, at the same time, also give us a description of the ledger on the back; state what it is,—for instance, No. 3, or whatever is on the back of it.

Mr. LAUTERBACH: It is 1895, I am sure.

Mr. BRANDEIS: And I wish in the mean time you would see if you can find any other book.

WITNESS: I never bother very much about them, and I can't tell.

Mr. LAUTERBACH: And also see if you can find any ledger, day book, cash book, or any other book to which these entries refer.

JESSE LEWISOHN, sworn for plaintiff.

Direct examination by Mr. BRANDEIS:

Q. 1118. State your full name, age, and present occupation.
A. Jesse Lewisohn; age, thirty-one; manager of the United Metal Selling Company.
Q. 1119. What was your occupation in 1895?
A. I was employed by Lewisohn Brothers.
Q. 1120. Was that a partnership or corporation?
A. In 1895? I really don't remember—it was a partnership, and was transferred to a corporation, now the date I don't re-
712 member, as I had been employed by the Lewisohn Brothers partnership before, and continued right through.
Q. 1121. And you continued to be employed by Lewisohn Brothers, first as a firm and then as a corporation, until the United Metal Selling Company was organized?
A. Yes.
Q. 1122. And you became manager of the United Metal Selling Company?
A. Sometime after, yes.
Q. 1123. The United Metal Selling Company took over the business of selling copper which Lewisohn Brothers were engaged in?
A. That is correct.
Q. 1124. And the concern was then, and subsequently, largely owned by the members of the Lewisohn family?

A. That is right.

Q. 1125. What was your interest in the firm or corporation of Lewisohn Brothers in 1895 at the time when the Old Dominion——

A. [Interrupting.] I had a percentage, my interest was on a percentage basis.

Q. 1126. Did you have an interest in the profits?

A. In the profits.

Q. 1127. And in the company, you had an interest in the stock?

A. Yes.

Q. 1128. What office did you hold in the corporation?

A. No particular office.

Q. 1129. You were one of the directors, I presume?

A. Yes, I was.

Q. 1130. And you were one of those who signed as general manager?

A. Yes, sir, assistant general manager.

Q. 1131. Your father, Leonard, and Adolph, signed as general manager, both of them?

A. Yes, sir.

Q. 1132. When the Old Dominion matter was taken up for the purchase of the Simpson interest, the Old Dominion Copper Company of Baltimore City, you acquired an interest in that purchase, did you not?

A. Yes, the interest that Lewisohn Brothers took.

Q. 1133. What was your first connection with that purchase; the first thing that you had to do with it?

A. I don't remember.

Q. 1134. Did you have any part in any negotiation for the purchase?

A. No.

Q. 1135. I call your attention to a telegram appearing among those produced by Mr. Lauterbach of May 3, 1895, from G. M. Hyams to Lewisohn Brothers, reading as follows: "Had not you or Jesse better meet me at station on arrival so that I may know what to say to Meredith. Train will probably arrive an hour or two late." I ask you whether that telegram in any way refreshes your recollection as to any interview you had with Mr. Hyams in regard to the purchase?

Mr. HEMENWAY: Defendant objects to the putting on record of a telegram which is alleged to be described in the interrogatory 713: tory, such telegram not being admissible in evidence and not yet having been offered in evidence, it being between parties other than the parties in this suit.

A. It does not.

Q. 1136. State what the first thing is that you do recall, if anything, in regard to interest acquired by Lewisohn Brothers, or Leonard Lewisohn, or yourself, in the Old Dominion Copper Company of Baltimore City, or the Old Dominion Mine, as it is sometimes called.

Mr. HEMENWAY: The defendant objects to the interrogatory, as it inquires for irrelevant and incompetent matter.

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A. That would virtually necessitate the story of what is formed in my opinion.

Q. 1137. Question repeated.

A. I remember the purchasing of the Simpson-estate interest.

Q. 1138. Now state what you recall in regard to that purchase.

A. I remember that the syndicate acquired a five sevenths interest in the Old Dominion Company of Maryland, for an amount which I don't remember now.

Q. 1139. Will you state fully all that you recall in regard to the acquisition of that interest, and the formation of the syndicate by which you say that it was acquired?

Mr. HEMENWAY: These are facts that are called for.

A. My recollection is that Mr. Lewisohn and Mr. A. S. Bigelow bought this interest.

Q. 1140. Question repeated.

A. I don't recollect how the syndicate was formed other than it would be by a conversation.

Q. 1141. Well, tell us all that you remember for the formation of the syndicate, be it by conversation or otherwise; I am endeavoring to get your full recollection.

Mr. HEMENWAY: The defendant objects to any conversation at which Mr. Bigelow was not present.

A. Mr. Beaman, of the firm of Evarts, Choate & Beaman, was the attorney for our interest, Lewisohn Brothers, in this acquisition.

Q. 1142. Question repeated.

A. I then remember that the balance of the company was bought from the Keysers of Baltimore and that a new company was formed under the laws of New Jersey, wherein I was the treasurer and was subsequently deposed in favor of Mr. Nelson, to whom I turned over the books—whatever books and moneys that I had.

Q. 1143. You stated a few moments ago that all you re-
714 member in regard to the formation of the syndicate was by a conversation: what conversation do you refer to?

A. I refer to the possibility of the conversation being held over the 'phone as we had the use of a 'phone continually with the Boston office at that time, and unless it is on record in the letters that you have it might have taken place over the 'phone.

Q. 1144. You refer now to a conversation between Lewisohn Brothers and Mr. Albert S. Bigelow?

A. Yes.

Q. 1145. Is there any conversation which you had with Albert S. Bigelow on this subject?

A. None.

Q. 1146. Is there any conversation which your father had with Albert S. Bigelow in your presence?

A. None.

Q. 1147. Is there any conversation which your father had with any one in your presence in relation to this syndicate?

A. None that I can remember.

Q. 1148. Do you recall that you were ever present when your father had any conversation with Albert S. Bigelow in relation to this syndicate?

A. I cannot recall.

Q. 1150. Or in relation to the purchase of the property?

A. I do not remember.

Q. 1151. I call your attention to a copy of a letter of Lewisohn Brothers to Mr. James Calhoun of May 14, 1895, being one of the papers produced by Mr. Lauterbach, and particularly to the initials in the left-hand corner of that copy, "J. L." above the word "Enclo," and ask you whether such letters indicate that it is a letter dictated by you?

A. Either dictated by me or for me to sign.

Q. 1152. I call your attention to the following copies of letters produced by Mr. Lauterbach and bearing the initials "J. L." in the left-hand corner, as inquired about in the previous interrogatory, namely: Letter of May 6, 1895, No. 5; May 14, 1895, No. 164; May 14, 1895, No. 11; May 15, 1895, No. 13; May 15, 1895, No. 166; May 17, 1895, No. 16; May 29, 1895, No. 17; May 29, 1895, No. 167; June 14, 1895, No. 41; June 15, 1895, No. 44; June 17, 1895, No. 45; June 18, 1895, No. 52; June 18, 1895, No. 54; June 18, 1895, No. 58; June 18, 1895, No. 59; July 10, 1895, No. 91; November 26, 1895, No. 226; December 9, 1895, No. 229, and request you, after reading the same, to state whether or not these, or any of these letters, refresh your recollection in any respect as to the facts relating to the purchase of the interest in the Old Dominion Company or mine, or the formation of the syndicate in connection with the purchase, or of your own relations thereto.

A. [After examining the letters.] They refresh my memory.

Q. 1153. Now will you state, after so refreshing your recol-
715 lection, more fully what the facts were in relation to the purchase of the mine and the formation of the syndicate?

Mr. HEMENWAY: The defendant objects to this testimony as being incompetent and irrelevant at the present stage of the testimony.

A. As I remember the matter, my father, Mr. Leonard Lewisohn, desired to buy or get a controlling interest in the Old Dominion, and arranged with Mr. Meredith to get an option from the Simpson estate, who owned five sevenths. This was accomplished, and Mr. Calhoun and Mr. Hyams were sent to examine the properties, as the option was only for a short period. After they had started to make their examination Mr. Leonard Lewisohn took the matter up with Mr. Bigelow, and they agreed to take the option jointly in case the report was satisfactory.

Mr. HEMENWAY: The defendant objects to this statement of the agreement; if the agreement was in writing—it must be produced, if it was in writing. Defendant desires the witness to state whether or not it was in writing.

Q. 1154. You can state whether it was in writing, if you know.

A. I don't know whether it was in writing; this is my recollection

now after reading the different papers that you called my attention to.

Mr. HEMENWAY: Is this your recollection of an agreement between your father and Mr. Bigelow, or is it a recollection of something in reference to the transaction?

WITNESS: Only in reference to the transaction.

Mr. HEMENWAY: The defendant objects to the statement of the witness except as to matters which took place between Mr. Leonard Lewisohn and Mr. Bigelow in his presence.

Q. 1155. You may go on.

A. During the examination it was deemed advisable to endeavor to obtain the Keyser interest, and that was acquired.

Mr. HEMENWAY: Did you take part in these negotiations?

WITNESS: I was in the office continually, but I don't remember just whether I was absolutely active in the direct negotiation.

Q. 1156. Or whether it was done in your presence?

A. I don't know whether it was done in my presence; that is my recollection of the business.

Mr. HEMENWAY: It is your own memory that is being asked for in this case, and not any inference.

Q. 1157. Your recollection; and I ask also for a recollection of everything that was said to you by your father, or by Mr. Bigelow, or said in your presence; it does not mean necessarily said to you.

A. Well, I could not make any declaration as to any particular inference that I drew from anything directly said to me.

716 Q. 1158. I am asking you, not merely what was said to you, but for anything that happened, to your knowledge, or anything that you heard.

Mr. HEMENWAY: He is asking for your memory of what took place in 1895; not your inference now of what might have taken place, but your memory of what actually took place, if you have any.

A. Then there was a new company formed, which acquired the property from Leonard Lewisohn.

Q. 1159. What, if anything, do you recall, after refreshing your recollection, as to the organization of the syndicate who joined with your father and Mr. Bigelow to purchase the property?

A. There was no such syndicate ever formed.

Q. 1160. What was the syndicate to which you referred?

A. The syndicate to which I referred in answer to a previous interrogatory?

Q. 1161. Yes.

A. It was the syndicate of Leonard Lewisohn and A. S. Bigelow solely.

Q. 1162. Is it not a fact that a number of other persons joined with them in the purchase, or in contributing money with which the property was paid for?

A. No.

Q. 1163. What is your best recollection in that connection?

A. That Leonard Lewisohn and A. S. Bigelow paid jointly for the property.

Q. 1164. Do you mean by that to say that the money—that no part of the money which was used in paying for that property was contributed by any other person?

A. I believe no one else.

Q. 1165. I call your attention to the names of the following persons, and ask you whether that does not refresh your recollection as to others contributing to the purchase: John Stanton, J. D. Probst & Company, Charles F. Brooker, Joseph Cahn, Theodore Gaden, D. Wallerstein, E. Hawley, E. L. Bingham & Company, G. A. Bickner, W. A. Ammermann?

A. They did not contribute to the purchase of the shares from the Simpson estate and the Keyser shares.

Q. 1166. Do you mean, by your answer to the last interrogatory, to testify that all the purchase money was paid by your father and Mr. Bigelow in cash before these persons made any payment, or acquired any interest in the syndicate, so called, or in the Old Dominion Company?

A. I mean that they either paid for it or gave notes before the money was paid by the parties mentioned from your list.

Q. 1167. Before any money was paid by any of those parties?

A. I cannot say "any money," but my recollection serves me that either cash or notes had been given for the full payment of the purchase of the stock before any money was paid by any subsequent sale of new shares of stock.

Q. 1168. Will you make more clear what you mean by
717 your answer to the last question? What do you mean by "any subsequent sale of new shares of stock"?

A. That Leonard Lewisohn and A. S. Bigelow bought the Old Dominion shares from Simpson and Keyser, and that thereafter there was a sale of these shares to the syndicate, who invited participation; and the money—well, I think that answers your question.

Q. 1169. You mean that Leonard Lewisohn and Albert S. Bigelow paid for the property before anybody else was permitted to take any interest in the property?

A. That they either paid the money or gave notes, which, I understood, was the equivalent.

Q. 1170. For both the Simpson and the Keyser interests?

A. That is my recollection.

[Adjourned to February 25, 1903, at 10 a. m.]

[Next Exhibit for Identification, 234.]

NEW YORK, *February* 25, 1903.

[Met pursuant to adjournment.]
[Present: Same as before.]

JESSE LEWISOHN, resumed.

By Mr. BRANDEIS:

Q. 1171. At the adjournment of the session yesterday you were stating in what respect a perusal of the letters and papers submitted to you refreshed your recollection. We will go on from that. Now will you proceed and state anything further in respect to which your memory is refreshed by the perusal of those letters?

A. I can't think of anything else.

[Mr. Lauterbach here returns the transcripts of the accounts heretofore marked for identification 231, 232, and 233, with the statement that the references to cash books and journals, and the page numbers, as appeared by the witness' testimony, have now been supplied.]

Mr. BRANDEIS: I offer those transcript in evidence as part of Mr. Westervelt's testimony.

Mr. HEMENWAY: The defendant objects to the introduction of the transcripts on the ground that they are irrelevant, incompetent, and immaterial; that they are matters taking place between other parties than the parties to the suit, and that the subject matter
718 thereof is not strictly within the purview of books of account as admitted in action at law or in equity.

Q. 1172. I hand you transcripts from the ledger of Lewisohn Brothers entitled "Old Dominion Copper Company Syndicate," being Exhibit No. 231, "Old Dominion Syndicate, Sub. No. 2," and "Old Dominion New Stock Subscription A/C," these being papers marked Nos. 231, 232, and 233, introduced as a part of the deposition of E. C. Westervelt in this case, and ask you to examine the same, and state whether such examination enables you to refresh, in any respect, your recollection in regard to the purchase of the interest in the Old Dominion Company and property and of the formation of the syndicate?

A. [After examination:] I see nothing in these documents to refresh my memory as to the syndicates.

Q. 1173. Does it refresh your memory any further in regard to the circumstances attending the purchase of the interests in the property?

A. It does not.

Q. 1174. Does it refresh your recollection in any respect as to any interviews that you had with Mr. Bigelow?

A. No, sir.

Q. 1175. Or Mr. Hyams, as representing Mr. Bigelow?

A. It does not.

Q. 1176. Or with Mr. Meredith?

A. It does not.

Q. 1177. Or with Mr. Keyser?

A. It does not.

Q. 1178. Or with your father, or anything said by any of these persons in your presence?

A. I can't recall anything.

Q. 1179. Is your memory refreshed in any respect beyond what you have fully testified in respect to any such interviews or any matters by the letters which you read yesterday or otherwise, or have you now stated fully all that you remember in regard to the acquisition of the property, or relations to the syndicate or organization of the syndicate?

A. I remember nothing further than what I have already stated.

Mr. Brandeis: I should like to suspend this examination until you have completed your search, and then go on with Mr. Lewisohn, as I suppose when we adjourn that search will be made so full that we will have everything completed and will have everything before us.

Mr. Lauterbach: I have given instructions to have a thorough search made, and I think under those instructions it must be very thorough.

[Adjourned until Tuesday, March 3, at 10 a. m., with the understanding that if Mr. Hemenway is engaged, the adjournment is until the following day, March 4, at 10 a. m.]

[Next Exhibit for Identification, 234.]

719 New York, *March* 3, 1903.

[At the request of Mr. Lauterbach and Mr. Hemenway, adjourned to March 5, at 10 a. m.]

New York, *March* 5, 10 a. m.

[Met pursuant to adjournment.]

[Present: Mr. Webb, Mr. Brandeis, Mr. Lauterbach, and Mr. Hemenway.]

Edward C. Westervelt, recalled.

By Mr. Brandeis:

Q. 1180. Referring to the request made by counsel for plaintiff of Mr. Lauterbach, under date of February 27, 1903, namely, "You will recall that the total amount of Old Dominion stock delivered to Mr. Leonard Lewisohn or his order was 58,840 shares, that is 36,190 shares out of the 80,000 shares and 22,650 shares out of the 50,000 shares. The transcripts of the account which you submitted from Lewisohn Brothers' ledger which went in as exhibits Nos. 231, 232, and 233 do not show what the disposition was of this stock; that is, they do not show how much of this stock was delivered to Mr. Leonard Lewisohn's associates in the syndicates, how much was retained by him, and what disposition he made of the stock; that is, to the extent his estate still holds the stock or even when he sold it and

the proceeds of such sale." Will you have the kindness to have ready at our next meeting transcripts of such of the accounts as will show these facts? I understand this request was transmitted to you as the person in charge of Lewisohn Brothers' books most competent to make the search and present the testimony. Will you state whether or not you have complied with that request?

A. I have endeavored to comply with it.

Q. 1181. And what has been the result of those endeavors?

A. I could not do it.

Q. 1182. What accounts have you found in Lewisohn Brothers' books containing the entries relating to the transactions inquired about in that request?

A. Stock book C, folios 59, 85, 86, 87, 88, 125, and 126, covering the period from September 24, 1895, to March 11, 1897 as of which date the account is transferred to stock book D folio 20. That contains all the entries which I have found bearing upon that matter.

Mr. HEMENWAY: On examination of these pages referred to in the answer of the witness the defendant objects to any admission of them for any purpose of the contents of these pages, either the original or a transcript, for the reason that they are apparently the entries of transactions not ordinarily or properly the subject of
720 book accounts, and it does not appear by whom said entries were authorized or that said entries in any way ever came to the attention of the defendant in this action, the whole matter being transactions between other parties with whom the plaintiff has no interest or connection.

Q. 1183. Where was this stock book C of Lewisohn Brothers found by you?

A. It was not found by me.

Q. 1184. When did it first come into your possession or subject to your inspection?

A. The 3d of March.

Q. 1185. By whom was the book submitted to you?

A. An office boy.

Q. 1186. Give his name.

A. Edward Middy.

Q. 1187. At Lewisohn Brothers?

A. Yes, sir.

Q. 1188. Had you ever seen this book before?

A. No.

Q. 1189. Do you mean you had not even seen the exterior of the book?

A. How could I answer a question like that?

Mr. HEMENWAY: Answer it of your own knowledge.

A. Not to my own knowledge.

Q. 1190. That is you have never seen this book before March 3?

A. Not to my knowledge.

Q. 1911. And do you know where this book was kept prior to March 3?

A. In the storeroom.

Q. 1192. Which storeroom?
A. Lewisohn Brothers' storeroom.
Q. 1193. No. 321?
A. The number of the room I don't know.
Q. 1194. Was it kept where the other old books of Lewisohn Brothers are kept?
A. No.
Q. 1195. Where were the other old books of Lewisohn Brothers kept?
A. That I could not tell you.
Q. 1196. Then you don't know that they are not kept at the same place this book was kept?
A. May I speak to Mr. Lauterbach?
Mr. LAUTERBACH: No. State all that you know about the books and about any book.
A. All the old books in this storeroom are the stock ledgers; just the stock ledgers.
Q. 1197. What stock ledgers are in that storeroom; covering what period?
A. A, B, C, D, and so on.
Q. 1198. What is the stock book now in use; what number or letter?
A. H.
Q. 1199. Then all the stock books except H, the one in current use, are in the storeroom?
A. Or they ought to be.
721 Q. 1200. You have seen the whole of the books after C yourself, haven't you, in the course of this search?
A. From D on.
Q. 1201. D, E, F, and G you have seen?
A. Yes, sir.
Q. 1202. And they are in the storeroom?
A. Yes, sir.
Q. 1203. In whose handwriting are the entries in this book?
A. I don't know.
Q. 1204. Is it the handwriting of any person who is now in the employ of Lewisohn Brothers?
A. No.
Q. 1205. Or who has been in the employ while you were there?
A. No.
Q. 1206. Why do you say that you are unable, from this book, to determine what disposition was made of the stock received by Lewisohn Brothers?
A. I went over it to prove it and I could not prove it; that was all.
Q. 1207. Doesn't this book give all the data necessary to determine?
A. Not being a clerk at that time I know nothing at all about the matter.
Q. 1208. That is, all the knowledge you have is the knowledge which the book itself affords?
A. Contains.

Q. 1209. And the only data which you could arrive at from that book are those which any accountant that took the entries in the book and put them together could arrive at: is that what you mean to say?

A. That is what I mean.

Q. 1210. And have you made a similar examination of books D, E, F, and G?

A. I have not.

Q. 1211. Have you examined any one of those with reference to the entries of Old Dominion?

A. I have not.

Q. 1212. Have you examined stock book B?

A. No.

Q. 1213. Did you request the office boy or any one to bring you the stock book B?

A. The way I put my request was to ask them for the stock book for the period of 1895.

Q. 1214. This stock book C begins September 24, 1895?

A. Yes.

Q. 1215. So that you don't know, of your own knowledge, at all events, whether there is any entry in stock book B relating to Old Dominion or not?

A. I do not.

[The witness, upon request, produces stock book B.]

Q. 1216. You have now before you stock book B. Will you state whether or not there is in stock book B any entries relating to transactions in stock of the Old Dominion Company or Old Dominion Copper Mining & Smelting Company?

A. Nothing to my knowledge.

Q. 1217. You have also produced now, upon request, stock
722 book D. Will you state whether or not there are any entries in that book relating to the transactions of Lewisohn Brothers in the Old Dominion Copper Mining & Smelting Company stock: if so, on what pages?

Mr. HEMENWAY: The defendant objects to any reference to the entries in stock book D for the same reasons expressed in regard to the admission of stock book C.

A. There are: folios 20, 21, 22, 23, 24, 25, 26, 27 (marked void), 28, and 29.

Q. 1218. At folio 29 the account appears to be transferred to stock book E, folio 20, does it not?

A. Yes.

Q. 1219. Please give the first and last dates of the entries in this account in stock ledger D which you have mentioned.

A. The first entry is under date of March 11, 1897, and the last entry is June 30, 1898.

Q. 1220. Are you able to state in whose handwriting this account, or any portion of it, is in this stock ledger D?

A. A part of it is in mine, part of it is in the handwriting of Theodore F. Van Ness, and the balance I don't know whose writing it is.

Q. 1221. What is the first entry in your own handwriting?

A. The entry of June 30, on folio 29.

Q. 1222. The first two entries on that date are in your handwriting?

A. Yes, sir.

Q. 1223. During what period is the handwriting of Theodore F. Van Ness?

A. All of the entries commencing with November 18, 1897, on folio 24, up to my entries on June 30, I believe, are in the handwriting of Mr. Van Ness. The entries on folios 20 and 24 prior to November 17, 1897, appear to be in the same handwriting as the entries in stock book C, and I don't know who made them, with the exception of the entries from October 18 to October 20, 1897, which appear to be in a different handwriting.

Q. 1224. Is Theodore F. Van Ness still in the employ of Lewisohn Brothers?

A. He is not.

Q. 1225. Is he living, so far as you know?

A. So far as I know he is.

Q. 1226. Where is he?

A. That I could not tell you.

Q. 1227. When did you last see him or hear of him?

A. I saw him about six months ago on Broadway.

Q. 1228. You don't konw his present address or occupation?

A. No.

[Recess.]

WITNESS: I told you this morning that the last stock book in use was H. It is not. I have not got any number on it at all. The last one was G.

Q. 1229. The one in use now being not numbered?

A. Not numbered.

723 Q. 1230. You have produced now, in pursuance of request, stock book E of Lewisohn Brothers, containing the account of transactions in Old Dominion Copper Mining & Smelting Company stock, from folios 20 and 21, covering a period, the first entry appearing being October 4, 1895, and the last entry April 25, 1899. Please state in whose handwriting those entries are.

Mr. HEMENWAY: The defendant objects to any examination or to the admission of any account in stock book E, the same being immaterial, irrelevant, and incompetent, and for the reasons already stated in reference to the other stock books.

A. Mine.

Q. 1231. I will ask you whether at any time in this account covered on folio 20 in the stock ledger E, the account appears to be balanced; and if so, at what date?

A. It is not directly balanced, but under date of November 9, 1898, all stock that Lewisohn Brothers previously held had been disposed of according to the books.

Q. 1232. Will you prepare, or allow the commissioner or stenog-

rapher to prepare, and annex to your deposition a transcript of the entries in stock ledgers C, D, and E, up to and including the date of November 9, 1898?

A. We will make it ourselves.

Q. 1233. And hand it to the commissioner?

A. Yes.

Mr. LAUTERBACH: Have you any objection to its being continued down to and including all the entries in stock ledger E, to show the whole transactions?

Mr. BRANDEIS: Not at all.

Q. 1234. Have you looked at the ledger from which the accounts produced here at the last hearing, marked, I think, 231, 232, and 233, were taken, to ascertain how the book is described?

A. I have looked at it in a general way.

Q. 1235. Can you tell what it is called and how it is numbered?

A. 1895 ledger, I believe.

Q. 1236. Of Lewisohn Brothers?

A. Lewisohn Brothers.

Mr. LAUTERBACH: Is that the corporation or the firm?

WITNESS: That is the corporation.

Q. 1237. Have you made any search for any other books than those which have been produced here, and of which a transcript was produced at the last hearing?

A. I have not.

Q. 1238. Have you aided any one in making a search for any letters or papers in relation to the Old Dominion matters?

A. I have not.

Q. 1239. And you have no knowledge of what search was made?

A. Except that a search was being made.

[The examination of this witness is suspended for the present.]

724 FERDINAND RAHAEUSER, recalled.

[Mr. Lauterbach produces another batch of papers, telegrams, etc.]

By Mr. BRANDEIS:

Q. 1240. You have produced here a memorandum of seven pages. Does that memorandum embody a correct statement of the days and hours during which you made search for the papers which you were requested at our last hearing and also a correct description of the various files of papers which you examined?

A. Yes, sir.

[The memorandum produced by the witness is here marked "Plaintiff's Exhibit C."]

Q. 1241. Did you complete the examination of all files available?

A. To 1895, yes, sir.

Q. 1242. And where did you make a search for those files?

A. In room 321.

Q. 1243. And also the general office?

A. We had all the files from 1895 sent down to the general office, as we had better light to work under there.

Q. 1244. And does the search which you made include all files for 1895 anywhere in the office?

A. Yes, sir.

Q. 1245. And you have produced here letters and copies of letters as appears by the list marked D which you presented at the hearing this morning? Are these all the letters and copies of letters and papers relating to Old Dominion matters that you found in connection with your search?

A. Yes, sir.

Q. 1246. In what files did you find these letters and copies of letters and papers; that is, were they all found in one file or separate files?

A. In separate files.

Q. 1247. I call your attention to the fact that there is not, among all of the papers which you now present, a single letter from or to Albert S. Bigelow or from or to J. Morris Meredith or from or to G. M. Hyams. Were there no letters from or to either Mr. Bigelow or Mr. Meredith or Mr. Hyams in the files which you examined?

A. Nothing relating to Old Dominion.

Q. 1248. Was there anything in those files relating to any other subject from or to Mr. Bigelow, Mr. Hyams, or Mr. Meredith?

A. From Mr. Hyams and Mr. Bigelow I believe there was.

Q. 1249. But not from Mr. Meredith?

A. Not that I know of.

Q. 1250. Now you were requested to make a search for the private file of Old Dominion papers referred to in the memorandum you stated was in William Faint's handwriting and which was
725 made on the copy of the letter of May 29, Exhibit 167. Have you made such search?

A. I had John Stocket, the colored man, bring around all the files of 1895; they are in one place; they are all kept together, 1895 files; and I went around myself afterwards to see they were all taken out and there was no private file of Old Dominion there.

Q. 1251. Then the only search that you made is that which you have described, namely, examining the files which John Stocket brought you?

A. And went around to see myself.

Q. 1252. You afterwards went into the room from which you are informed these files were taken; is that the fact?

A. Yes and saw there was no 1895 file left there.

Q. 1253. Do you mean to say you made an examination to see if there was no 1895 files there?

A. Yes, sir.

Q. 1254. Now what was there in that room 321 when you made that examination, and what was there there when the 1895 file left there?

A. I think there were files there away back for fifteen or twenty years; I believe, up to 1895.

Q. 1255. And were there any there for 1895?

A. No, sir.

Q. 1256. That is the last year of anything in that room?

A. Yes, sir.

Q. 1257. Did you take a memorandum of all files which you examined which you looked at the outside of?

A. In that room?

Q. 1258. Yes.

A. No, sir.

Q. 1259. You were requested to do that, were you not?

A. Only those that I handled; that is what I understood.

Q. 1260. You were requested to make an examination of all files which you examined, with a view to being able to testify what you had looked over, in order to testify as to the extent of your search for that private Old Dominion file; isn't that what you were requested to do?

A. I understood I was to look for the Old Dominion file and all files of 1895 in relation to Old Dominion. Now if I looked over one file in that room there I could easily say there were five or six hundred files in the room, dating back from 1866 up.

Q. 1261. Did you look at each one of those five or six hundred files, or how many there were in there?

A. No, sir, I did not.

Q. 1262. I don't mean whether you examined the contents of each one of these, but whether you looked at each file?

A. I looked at the outside of the files.

Q. 1263. How careful an examination did you make of the outside of those files?

A. Glanced over to see whether there were 1895 Old Dominion files among them.

Q. 1264. The precise thing I desired you to do was to take
726 a note of each file that you examined in order to ascertain whether you could find that Old Dominion file, and I submit you have not done it.

Mr. HEMENWAY: And I submit he has. What he says, as I understand his answer, is that in this room there were files from 1866 up, and that there were from five to six hundred of them; that the files of 1895 he examined carefully and went through them, and then examined the others sufficiently to see that there were no 1895 files in them other than those he examined.

Mr. LAUTERBACH: And no Old Dominion files.

Mr. HEMENWAY: That is what you say, isn't it?

WITNESS: Yes.

Q. 1265. I ask you whether you made so careful an examination of every file that there is or was in room 321 that you can, on your oath, state as a fact that there is no file there relating to Old Dominion matters?

A. Yes, sir.

Q. 1266. You do state that as a fact?

A. There is no file there relating to Old Dominion.

Q. 1267. And do you also state as a fact, upon your oath, that

there is and was no file there covering the year 1895, which you have not carefully examined, and from which you have not taken every letter or other paper relating to Old Dominion that was in there?

A. Every file of 1895 was examined in the way you have described.

Q. 1268. Did you find, in the course of your examination, anything to indicate in any way where that private Old Dominion file is?

A. No, I did not.

Q. 1269. Did you, in the course of that examination, find anything which would indicate to you where any letters or copies of letters to or from Albert S. Bigelow, G. M. Hyams, or J. Morris-Meredith are?

A. No, sir.

Q. 1270. Where any of them could be found?

A. No, sir. In examining the papers for Old Dominion, you understand that when I came to a file where there was a lot of Old Dominion in it I took it out and pushed it aside without reading the letters through and through.

Q. 1271. Now have you produced here every single letter and paper relating to Old Dominion which you found?

A. Yes, sir.

Q. 1272. What happened to these letters and papers between the time that you took them out of the files and the time you produced them here to-day?

A. In my desk.

Q. 1273. Under your personal custody?

A. In my desk, yes, sir.

Q. 1274. Were they continuously in your custody?

A. Yes, sir.

Q. 1275. Nobody else saw them?

A. No, sir, except the stenographer this morning.

727 Q. 1276. Which stenographer?

A. Our stenographer—no, he didn't see them this morning; he saw them yesterday.

Q. 1277. In what connection did your stenographer see them yesterday?

A. Taking a memorandum of the letters, just who they were sent to and who they were from.

Q. 1278. Making a list?

A. Yes, sir.

Q. 1279. Of all the dates?

A. Yes, sir, all the letters and dates.

Q. 1280. Who is that stenographer?

A. Mr. Willicomb.

Q. 1281. How long were those letters in Mr. Willicomb's possession?

A. Long enough for him to finish making a memorandum of the letters.

Q. 1282. I mean, how many hours?

A. They were not in his hands any time.

Q. 1283. Some hours?

A. I don't think so. I didn't pay any attention to the time he had them.

Q. 1284. Was your desk locked while these papers were there?

A. Every night.

Q. 1285. And open during the day?

A. Open during the day.

Q. 1286. Anybody else besides the stenographer have occasion to go to your desk?

A. Nobody has occasion to go to my desk. In fact, no one is allowed in the room.

Q. 1287. That is, nobody is supposed to be in the room; you haven't a room absolutely alone, have you?

A. I have.

Q. 1288. How do you account for the fact that you have now produced this large number of letters and papers relating to Old Dominion, and that you failed to produce them heretofore when you had been requested to make a search and produce the letters relating to this subject?

A. The only way I can answer that is, as I said before, that I worked under insufficient light. I worked around that room under candle light at first. Now I sent them around to my room and made a more thorough search of them. I may have skipped a couple of them that came from a place.

Q. 1289. You spoke about skipping a couple. Now I find four or five times as many papers than you produced as the result of the other two searches?

A. I was requested before as to Stern and Meredith, and the other subscribers of Old Dominion or any one I could find. I think that accounts for it.

Q. 1290. Is that the only explanation you can give?

A. That is the only one I can give.

Q. 1291. Are you certain you now have made the most thorough search for these letters?

A. Yes, sir; I have had some help during that work.

Q. 1292. Who helped you?

A. Mr. Henry Asendorf, and John Stocket, I believe his name is.

Mr. LAUTERBACH: That is the negro?

728 The WITNESS: Yes, sir.

Q. 1293. Any other assistant?

A. No; they were the only ones.

Q. 1294. Did you have the assistance of Mr. John Stocket and Mr. Asendorf continuously?

A. No; Mr. Asendorf for one night, I believe, and Mr. Stocket worked on them one or two nights and during the daytime.

Q. 1295. Alone or in connection with you?

A. In the daytime worked alone and in the night time we both worked at different desks.

Q. 1296. Then in the daytime, when he worked, some of these papers were found, and some when you worked; isn't that the fact?

A. Yes, sir.

Q. 1297. And you have no knowledge yourself as to whether Mr. Stocket has handed you all the papers which he found or not?

A. I certainly have; he kept them in his desk until this morning, when I asked him for them and put them with my other letters and brought them over.

Q. 1298. You have no knowledge except that you made a request of him and he handed you the letters to-day?

A. That is all.

Q. 1229. And is the same true with regard to Mr. Asendorf's examination?

A. Yes, sir; in fact, Mr. Asendorf didn't hand me any letters.

Q. 1300. What did Mr. Asendorf do in the way of assisting you?

A. Looked through the files.

Q. 1301. When he found letters what happened?

A. I don't know as he found any letters.

Q. 1302. Then there was part of these files which you have never examined yourself?

A. Yes, sir.

Q. 1303. What part have you not examined personally?

A. The list is there. I don't know exactly what they are.

Q. 1304. You mean by reference to the list marked C?

A. Yes.

Q. 1305. Can you by reference to that list marked C state what you have not examined personally?

A. Those appearing on the list under Mr. Stocket which he examined and Mr. Asendorf examined. Those I have not examined personally.

Mr. LAUTERBACH: All the rest you have?

WITNESS: Yes, sir. I was mistaken in saying that Mr. Asendorf handed me nothing. He did hand me some cables.

[It is agreed that Mr. Stocket and Mr. Asendorf shall be examined next, and the hearing for the taking of the testimony of the witnesses is adjourned until some day mutually agreed upon by counsel.]

[Next Exhibit for Identification, 495.]

729 HENRY A. ROOT, sworn for plaintiff.

Direct examination by Mr. MCCLENNEN:

Q. 1306. What is your residence?

A. Butte, Mont.

Q. 1307. Were you interested in some way in the original organization of the Old Dominion Copper Mining & Smelting Company?

[Objected to as leading.]

A. I was interested financially in that enterprise.

Q. 1308. What was the first thing that called your attention to the matter of the Old Dominion Copper Mining & Smelting Company?

A. My best recollection is a conversation I had with Mr. Hyams in Boston.

Q. 1309. With Mr. G. M. Hyams?

A. Yes, the gentleman sitting here.

Q. 1310. Can you fix the date of that conversation?

A. I can only fix it by reference to some papers I have looked at in Mr. Stern's office.

Q. 1311. To what papers do you refer?

A. I have seen an agreement there which was made by Mr. Stern with Mr. Lewisohn.

Q. 1312. And by reference to that paper what was the time you fixed as the date of the conversation with Mr. Hyams?

A. I should say it was a short time, whether a few days or a week or two I could not say, before the end of May, 1895.

Q. 1313. Where did the conversation occur?

A. In Mr. Bigelow's office in Boston.

Q. 1314. Will you relate the conversation, as nearly as you can?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I had been interested, as Mr. Hyams knew, or rather, to put it in more legal shape, Mr. Hyams and I had been talking over a little experience I had with the Merced mine, and fortunately I had made a little money, and I told Mr. Hyams that I would like to know if there was anything going on where there would be an opportunity to make some money, and he said he would be very much pleased to let me know any time that there was something doing, and he told me at that time that Mr. Bigelow and Mr. Lewisohn were going to bring out a new company, the Old Dominion, and that he would let me know when there would be some underwriting if I wanted him to so as to give me a chance to get some of the underwriting. That is all there was to it.

Q. 1315. That is the whole conversation?

A. That is all I recollect about it. That was impressed
730 on my mind because I thought it was very friendly on the part of Mr. Hyams.

Mr. Hemenway: I object to the latter part of the answer as not responsive to the question.

Q. 1316. You think that entirely exhausts your present recollection of the conversation, do you?

A. I think it does, yes.

Q. 1317. Let me call your attention to some specific things. Was anything said in that conversation with reference to under the laws of what state the new company was to be organized?

[Objected to as incompetent.]

A. Nothing.

Q. 1318. Was anything said in the conversation as to the amount of capital which the new company was to have?

[Objected to as incompetent.]

A. Not a word.

Q. 1319. Did you have any subsequent conversation with Mr. Hyams in relation to your going into the enterprise?

[Objected to as immaterial.]

A. None that I recall.

Q. 1320. What next did you do with reference to the matter?

[Objected to as immaterial and incompetent.]

A. I called to see Mr. Stern.

Q. 1321. And I assume you had some conversation with Mr. Stern?

[Objected to as immaterial and incompetent.]

A. I did have.

Q. 1321½. That is, Mr. Simon H. Stern?

[Objected to as immaterial and incompetent.]

A. Yes, sir.

Q. 1322. Of Stern & Rushmore of New York city?

A. Yes, sir.

731 Q. 1323. After this conversation with Mr. Stern what next did you do?

[Objected to as incompetent, immaterial, and irrelevant.]

A. The next thing that occurred, so far as I was concerned,—perhaps there may have been more than one conversation with Mr. Stern,—but the next step of any importance that I can think of was meeting Mr. Jesse Lewisohn.

Q. 1324. And where did you meet Mr. Jesse Lewisohn?

A. At the Lawyers' Club.

Q. 1325. In New York?

A. In New York.

Q. 1326. Who were present at that interview?

A. Mr. Stern, Mr. Lewisohn, and myself.

Q. 1327. Will you relate, as nearly as you can, the conversation at that interview?

[Objected to as incompetent, immaterial, and irrelevant.]

A. Mr. Stern talked with Mr. Lewisohn about going into the Old Dominion speculation. Mr. Lewisohn told him that if he would deliver over to him, Lewisohn, some of the underwriting which Mr. Stern had in the Merced Gold Mining Company, Mr. Lewisohn, or the Lewisohns, would give Mr. Stern a chance to go into the Old Dominion enterprise.

Q. 1328. Was there any more to that conversation?

[Objected to as immaterial and incompetent.]

A. Oh, it was a conversation that lasted probably an hour—a great deal more. Mr. Lewisohn, it is my best recollection, offered, or told Mr. Stern, that if he would turn over to the Lewisohns 600 shares of the underwriting in Merced they would let Mr. Stern into 5 per cent of their investment in Old Dominion. I say 600 shares

without being absolutely positive about it, but just an impression I have that there were 600 shares spoken of, but my further best recollection would be that Mr. Stern told them that was too much, didn't want to give them so much as that, and finally they agreed between themselves that he was to turn over to Lewisohns 300 shares of the Merced underwriting, and Lewisohns were to allow Stern to have 5 per cent of the investment which Lewisohn Brothers were putting into the Old Dominion. I may, of course, be mistaken as to this conversation. I could not be mistaken as to the 5 per cent, because I was equally interested with Mr. Stern in that myself, and
732 the amount was stated as to what we would have to put in; that is, what the 5 per cent was to be.

[The defendant objects to the answer as not responsive.]

Q. 1329. Do you recall anything further now of that conversation?

A. Nothing further except as to the amount that we were to put in; what the 5 per cent was to be.

Q. 1330. What was the date of that conversation?

A. I don't know. I only know it was before the agreement was made. It may have been two or three days, and might have been a week or two; I don't know.

Q. 1331. And the agreement was actually made on what date?

[Objected to as incompetent and immaterial.]

A. On the last day of May.

Q. 1332. In view of the objection just made, I will ask you again, what was the date of the signing of the paper which you have characterized as an agreement?

[Objected to as immaterial and incompetent.]

A. The paper is dated the 31st day of May. I don't know whether it was signed that day.

Q. 1333. And the year?

A. 1895.

Mr. Heminway: I object to this evidence of the contents of a paper not produced nor its absence accounted for.

Q. 1334. Having regard to such papers as you have investigated lately, will you state the extreme dates within which that conversation occurred with Jesse Lewisohn?

[Objected to as immaterial.]

A. I would say it was in the month of May, 1895.

Q. 1335. Have you stated all that you now recall of that conversation?

A. Unless you should call my attention to something that would refresh my memory, I have.

Q. 1336. Was any reference made in that conversation to the fact that you had previously talked with Mr. Hyams as to the bringing out of this new corporation?

[Objected to as incompetent, immaterial, and irrelevant.]

733 A. I don't recollect any.

Q. 1337. Was there anything said in the conversation relative to the subject matter of your 5 per cent interest; what you were to have a 5 per cent interest for?

[Objected to as incompetent and immaterial.]

A. Yes, sir.

Q. 1338. What?

[Objected to as before.]

A. In the Old Dominion Mining Company.

Q. 1339. Was anything said in the conversation indicating whether your interest was to be an interest in an old or a new corporation?

[Objected to as incompetent, immaterial, and irrelevant.]

A. It was to be in some stock that was to be issued.

Q. 1340. And stock of what?

[Objected to as incompetent and immaterial.]

A. Old Dominion Mining Company, or the Old Dominion, that is all. I don't think there was anything said about Mining Company—Old Dominion.

Q. 1341. Were you informed in that conversation as to the price which was to be paid, or had been paid for the Old Dominion mine or mines?

[Objected to as incompetent, irrelevant, and immaterial, and leading.]

A. We were informed that the Lewisohns were to put into it $300,000. That was to be their share of the contribution to the enterprise.

Q. 1342. Were you informed as to the total amount that was to be devoted to acquiring the properties?

[Objected to as before.]

A. As to that I could not be absolutely positive; but it is my best impression, and I would be nearly positive, that Mr. Lewisohn said they were to pay $300,000 for a further interest in the property that was being purchased—that their investment was to the extent of one half; that is my impression, which is rather a positive impression, but I could not testify to it with absolute certainty.

734 Q. 1343. Were you informed where the properties were situated?

[Objected to as immaterial.]

A. I don't think I was then, but I knew where they were. I think I got that information from Mr. Hyams, or learned it somewhere.

Q. 1344. Was anything said in that interview as to the laws of the state that the company was to be organized under?

[Objected to as incompetent and immaterial.]

A. There was not.
Q. 1345. Was anything said in that conversation as to whether the property had or had not already been acquired?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I could not say.
Q. 1346. Was anything said in that interview as to the amount of capital for which it was proposed to organize?

[Objected to as incompetent and immaterial, and having already been asked, and irrelevant.]

A. I don't think there was.
Q. 1347. Did you personally have any talk with Leonard Lewisohn relative to the matter?
A. I don't think I did.
Q. 1348. Do you know what amount of money was in fact contributed by yourself and Mr. Stern?

[Objected to as immaterial.]

A. Yes, sir.
Q. 1349. What was the amount?

[Objected to as immaterial.]

A. $15,000.
Q. 1350. Did you receive some stock in the Old Dominion Copper Mining & Smelting Company?

[Objected to as immaterial.]

735 A. Yes, sir.
Q. 1351. What amount of stock did you receive? I mean by that, you and Mr. Stern.

[Objected to as immaterial.]

A. I believe we received 1800 shares.
Q. 1352. I call your attention to a letter of December 4, 1895, from Simon H. Stern to Jesse Lewisohn, and marked for identification, "Exhibit 152."

Mr. HEMENWAY: The defendant objects to the introduction of said letter, or its examination by the witness.

Mr. MCCLENNEN: Do you recall having the conversation therein referred to?

[Objected to as incompetent and leading.]

WITNESS: I have a faint recollection of the subject, which is brought to me now by this letter, or this copy of a letter.
Q. 1353. Do you remember where that conversation took place?

[Objected to as incompetent and irrelevant.]

A. Yes, at his office.
Q. 1354. Whose office?
A. Mr. Stern's office; because we always talked business there. I

will say that, because we always talked business there, and nowhere else, that I remember.

[Answer objected to as irresponsive.]

Q. 1355. Do you remember any one else being present?

A. I presume there was no one. I don't remember any one being there.

Q. 1356. Who were the participants in that conversation?

A. Mr. Stern and myself.

Q. 1357. Did you, before that time, have any conversation with Jesse Lewisohn?

[Objected to as incompetent and immaterial.]

A. I don't think I did.

Cross-examined by Mr. HEMENWAY:

X 1358. With whom have you talked about the substance of your direct examination?

A. I talked with Mr. Stern about it yesterday and with Mr. McClennen this morning.

736 X 1359. These matters having occurred more than ten years ago your memory is somewhat hazy about it, is it not?

A. I can't say that it is hazy except that it is refreshed by papers I have examined.

X 1360. Otherwise you would have no particular memory about it, would you?

A. Oh, yes, I would. I made some money out of it and I never forget anything I make money out of.

Mr. MCCLENNEN: The latter part of the answer is objected to as not responsive.

Mr. MCCLENNEN: From the papers marked for identification Exhibits 1 to 494 of the depositions taken in New York on February 4, 10, 11, and 24, and March 5, 1903, the complainant offers in evidence, subject to the right of the defendant to object to any of them on the ground of immateriality, the following:

Exhibit 18, letter of June 3, 1895, Lewisohn Brothers to William Keyser, as follows:—

"JUNE 3RD, 1895.

William Keyser, Esq., President Old Dominion Copper Co., Baltimore, Md.

DEAR SIR: The Expert has returned from the Old Dominion Copper Company and—as you were doubtless advised by Mr. Butler—the first payment was duly made and good and sufficient Notes given for the balance.

The new owner would be obliged to you if, under the circumstances, you would send directions to the mine to stop all work of every kind, except pumping and such other work as is necessary for the protection of the property.

Very truly yours,

LEWISOHN BROTHERS,
General Manager."

Exhibit 20, letter of June 4, 1895, Lewisohn Brothers to A. S. Bigelow, as follows:—

"JUNE 4TH, 1895.

A. S. Bigelow, Esq., Boston, Mass.

DEAR SIR: We to-day received the Old Dominion Syndicate blanks for which we are obliged.

Kindly send us bill and we will remit.

Very truly yours,

LEWISOHN BROTHERS,
General Manager.

J. R."

737 Exhibit 36, letter of June 13, 1895, Leonard Lewisohn to William Keyser, as follows:—

"JUNE 13TH, 1895.

Mr. Wm. Keyser, care Balto. Smelting & Rolling Co., Baltimore, Md.

DEAR SIR: Mr. Brent Keyser no doubt has told you that I have offered you through him an interest of up to $25,000 in the Old Dominion enterprise with us on the same terms exactly as I myself come in. I should like to know from you, either tomorrow (Friday) or on Saturday at the latest, whether you are going to avail yourself of this or not. I thought you might wish to be a little interested and I should be only too glad to have you with us somewhat in the matter.

Yours very truly,

LEONARD LEWISOHN.

L. L."

Exhibit 38, letter of June 13, 1895, William Keyser to Leonard Lewisohn, as follows:—

"William Keyser, President.
Joseph Glendenn, Secretary.
R. Brent Keyser, Treasurer.
A. L. Walker, Consulting Engineer.

The Old Dominion Copper Company of Baltimore City.

Office: Keyser Building, German and Caldert Streets, Baltimore.

JUNE 13TH, 1895.

Mr. Leonard Lewisohn, New York City.

DEAR SIR: In accordance with a telephone message from Mr. Beaman I enclose herewith, duly signed, two papers drawn yesterday the first being a plan of procedure for Thursday June 20th, 1895, and the second covering the details of the sale of the two-sevenths of the stock of this company. In the latter paper I have added to the third clause from the last the words 'as of May 28, 1895' and have erased entirely the clause next to the last. Trusting you will find them in order, I remain

Yours truly,

WILLIAM KEYSER,
B."

738 Exhibit 39, letter of June 13, 1895, Leonard Lewisohn to A. S. Bigelow, as follows:—

NEW YORK, *June 13th*, 1895.

A. S. Bigelow, Esq., Boston, Mass.

DEAR SIR: After a long telephonic communication between Messrs. Beaman, Keyser and myself this afternoon, we have arranged as per enclosed copy of agreement, which Mr. Keyser has signed in Baltimore to-day and is sending me, and which I have signed at Mr. Beaman's office and am sending him.

Besides, please find enclosed plan of procedure for Meeting of the Directors of the Old Dominion Copper Company next Thursday, June 20th, when transfer is to be made.

Mr. Allen W. Evarts and I will be in Baltimore on that day, and I should be very pleased if you could make arrangements to be there also.

Very truly yours,

LEONARD LEWISOHN.
Per JESSE LEWISOHN.

Enclo."

Exhibit 43, form of agreement to form the Old Dominion Syndicate, dated June 15, 1895, as follows:—

"We the undersigned propose to form a Syndicate to be called the 'Old Dominion Syndicate.'

And we hereby agree to pay to A. S. Bigelow the sums set against our respective names.

Subscriptions to this Syndicate shall be payable as follows:

May 27, 1895 Fourteen per cent. (14%).

July 26, 1895 Twenty-eight and two-thirds per cent (28⅔%) and interest at five per cent from date of first payment.

August 25, 1895 Twenty-eight and two-thirds per cent (28⅔%) and interest at five per cent from date of first payment.

September 26, 1895 Twenty-eight and two-thirds per cent (28⅔%) and interest at five per cent from date of first payment.

It is expressly agreed and understood that each subscriber hereto acts for himself alone and that the relation of partners shall not exist or be deemed to exist between the subscribers hereto by virtue hereof.

The conditions, covenants and agreements herein contained
739 shall be binding on the substitutes, successors, heirs, representatives and assigns of the respective subscribers hereto.

In Witness Whereof, we have hereunto set our hands and opposite thereto the amounts of our subscriptions respectively, this fifteenth day of June, A. D. One thousand eight hundred and ninety-five."

[No signatures.]

Exhibit 45, letter of June 17, 1895, Lewisohn Brothers to A. S. Bigelow, as follows:—

"JUNE 17TH, 1895.

A. S. Bigelow, Esq., Boston, Mass.

DEAR SIR: In answer to your second letter of June 15th; we wish to say that we have had a conversation over the telephone this morning with Mr. Keyser regarding the way in which payments are to be made; and Mr. Keyser understands fully, and wishes us to make the payment in Boston—so that all the payments will be made in Boston at the office of the Old Colony Trust Company.

We also hear from Mr. Keyser that Mr. Bigelow has arranged with the Old Colony Trust Company that the money will be paid on Thursday. Mr. Abbott has written to this effect to Mr. Keyser.

Mr. Keyser is writing a letter to Mr. Abbott to-day telling him on payment of this money, to hold the shares to the order of Mr. Lewisohn—although we understand that the shares will have to be retained by the Old Colony Trust Company until the last note is paid.

Mr. Keyser is sending copies of the letters he is writing, of which we will send you copies.

In regard to the 25 shares of stock which Mr. Keyser is holding over; he is doing this as each Director needs 5 shares to qualify, and he thought it best to have these on hand in case they are needed at the Meeting, so that the Directors are qualified. Mr. Beaman also says this is necessary. We saw Mr. Beaman this afternoon and this gentleman says he believes that as regards the three Directors who, they promise, will resign; this will go quite in order; but he says he understood Mr. Bigelow had some relative or friend residing in Maryland who could be a Director—that if Mr. Bigelow desired this and that gentleman could be present, he could act as a Director.

740 If there is anything further you wish us to do, please let us know over the telephone and we will be glad to attend to it.

Very truly yours,

LEWISOHN BROTHERS.
General Manager.

J. L."

Exhibit 67, letter of June 28, 1895, Leonard Lewisohn to C. C. Beaman, as follows:—

"JUNE 28TH, 1895.

Mr. C. C. Beaman, Messrs. Evarts, Choate & Beaman, 52 Wall Street, New York City.

DEAR SIR: We merely desire to confirm our message to your clerk on the telephone this afternoon—that Mr. Leonard Lewisohn would like to hear from you at your convenience whether you consider it would be best to re-organize the Old Dominion Copper Company under the laws of Arizona, or whether it would be more advantageous to do so under the laws of some other State.

Very truly yours,

LEWISOHN BROTHERS.
General Manager.

W. F."

Exhibit 81, letter of Leonard Lewisohn to Allan W. Evarts, July 5, 1895, as follows:—

"JULY 5, 1895.

Allan W. Evarts, Esq., New York City.

DEAR SIR: Since this morning I have communicated with Mr. A. S. Bigelow, who desires me to have for the first year the following seven directors of the Old Dominion Copper Mining & Smelting Co. nominated, namely: Mr. A. S. Bigelow, Mr. Thomas Nelson, Mr. Leonard Lewisohn, Mr. Edgar Suffum, Mr. Moses P. Stephens, Mr. Joseph G. Ray, Mr. J. A. Coram.

Yours very truly, LEONARD LEWISOHN.

L. L."

Exhibit 134, letter of September 20, 1895, Simon H. Stern to Lewisohn Brothers, as follows:—

741 "Stern & Rushmore, Attorneys & Counsellors,
40 Wall Street, New York.

Simon H. Stern.
Charles E. Rushmore.

SEPTEMBER, 20TH, 1895

DEAR SIR: Referring to your favor of the 3rd of June last I beg to enclose herewith my check for $8600 to cover third and fourth payments for my interests in the Old Dominion Syndicate as they then existed. Kindly acknowledge receipt of same. If you consider any adjustment of interest necessary please let your bookkeeper make a calculation and send it to me, but inasmuch as I anticipated some of the payments it seemed to me it could not make much difference one way or the other. Please also send me such certificates of stock as I am entitled to.

Yours truly, SIMON H. STERN.

Messrs. Lewisohn Brothers, City."

Exhibit 135, letter of Simon H. Stern to Lewisohn Brothers, dated October 1, 1895, as follows:—

"DEAR SIRS. I beg to acknowledge your two favors of even date and certificate No. 349 for 1200 shares of Old Dominion Copper Mining & Smelting Company stock. I propose now only to acknowledge receipt of the same and to return to you as requested the receipts Nos. 1A, 17A, 80A and 84A, but will write you further in relation to this matter in a day or two.

Yours truly, SIMON H. STERN.

Messrs. Lewisohn Brothers, City."

Exhibit 136, letter dated October 4, 1895, Lewisohn Brothers to John Stanton, as follows:—

"OCT. 4TH, 1895.

John Stanton, Esq., City.

DEAR SIR: Enclosed we hand you Certificate N. 361 for 400 shares capital stock of Old Dominion Copper Mining & Smelting
742 Company, against your subscription to the Syndicate of $5,000—in exchange for which please hand bearer the official receipts which you now hold.

Very truly yours,

LEWISOHN BROTHERS.
General Manager.

Rid/F."

Exhibit 137, letter dated October 4, 1895, Lewisohn Brothers to Simon H. Stern, as follows:—

"OCT. 4TH, 1895.

Mr. Simon H. Stern, 40 Wall Street, New York City.

DEAR SIR: Herewith we beg to hand you Certificate No. 349 for 1200 shares Old Dominion Copper Mining & Smelting Company's capital stock, against your subscription of $15,000 to the Syndicate.

Please hand bearer receipts Nos. 1A, 17A, 80A and 84A in exchange for above and oblige.

Very truly yours,

LEWISOHN BROTHERS.
General Manager.

Rid/F.

P. S.—Since writing the previous letter annexed hereto, the 1200 shares have come in, and we are sending them to you herewith as above mentioned."

Exhibit 138, letter of October 5, 1895, Executors of the Will of A. W. Spencer, by William A. Gaston, Attorney, to Lewisohn Brothers, as follows:—

"Gaston & Snow, Attorneys & Counsellors-at-Law,
8 Congress Street, Room 4.

BOSTON, *October* 5, 1895.

Messrs. Lewisohn Brothers, Mr. Adolph Lewisohn, Manager, 81-83 Fulton Street, New York.

DEAR SIRS: The executors of the Will of Mr. Spencer have this day received your letter of October 4th, 1895, and have received Certificate No. 368 for 800 shares of the capital stock of the
743 Old Dominion Copper Mining & Smelting Company. We understood we were to receive from you on account of Mr. Spencer's subscription to the Old Dominion Syndicate more than the 800 shares which we have just now received. In your note you mention the terms of subscription. We have not seen the terms of subscription and would be very much obliged to you if you will kindly send us a copy of the same. Mr. A. S. Bigelow is at present

out of the city and when he returns we have no doubt he will be able to explain our position to us and give us accurate information as to what amount of shares the estate of Mr. Spencer is entitled to.

Deferring therefore to see Mr. Thomas Nelson and to deliver to him the stock in accordance with your request, we remain

Very truly yours,

EXECUTORS OF THE WILL OF
A. W. SPENCER,
By WILLIAM A. GASTON, *Attorney.*"

Exhibit 152, letter of December 4, 1895, Simon H. Stern to Jesse Lewisohn, as follows:

"DECEMBER 4TH, 1895.

DEAR JESSE: Mr. Root and I had a serious talk to-day in relation to your suggestion made last evening that we accept 600 shares of the Old Dominion Mining Company's stock, and call the matter ended.

While we do not agree with some of your views, nevertheless, we are deeply impressed with what you said concerning your father's wishes in the matter, and there is just this about it; that inasmuch as your father does wish that we should take the 600 shares and consider the thing closed, we will accept it so far as the shares are concerned. There is this one thing, however, which you must do, because it is perfectly right and proper to do, and because I know very well that your father does not wish to get from us anything which we are entitled to have. We paid you $15,000, that being five per cent of the amount which it was then thought L. Bros. would invest. It turns out now, after the matter is all over, that all you did invest was $285,000. Therefore, instead of paying you $15,000 for a five per cent interest, all that we should have paid you was $14,250, and of course it is clear that we are entitled in addition to the 600 shares, to receive a check from you for $750. Kindly send me the 600 shares and the check for $750 to-morrow, during the morning if possible, because Root is going away to-morrow night, and I want to fix up some things with him.

Yours truly, SIMON H. STERN.

Jesse Lewisohn, Esq., City."

744 Exhibit 162 letter of April 29, 1895, from Leonard Lewisohn to J. Morris Meredith, as follows:

"APRIL 29, 1895.

Mr. J. Morris Meredith, care Messrs. Meredith & Grew, 15 Congress St., Boston, Mass.

DEAR SIR: Your favor of the 27th instant at hand.

I am very glad that you have given me the particulars. I will state how the matter occurred with Mr. Stanton. He called at my office here on last Thursday, and in conversation with him I might have answered some of his questions too frankly, as Mr. Stanton

always acts so very nicely; but I shall take your advice and be more guarded in future. Hoping to hear from you soon again, I remain,

Yours very truly, LEONARD LEWISOHN.

P. S.—I am trying to get the copper market up to ten cents, and after that hope to get it even higher.

L. L."

Exhibit 174, letter of June 21, 1895, Leonard Lewisohn to A. W. Spencer, as follows:

"JUNE 21, 1895.

Mr. A. W. Spencer, 53 State Street, Boston, Mass.

DEAR SIR: First and second payments on the $10,000 subscription to Old Dominion Syndicate will amount to the following:

14% on $10,000	$1,400 00
28⅝% on $10,000	2,866 67
Interest from May 28 to June 22, 25 days at 5%	14 81
Total	$4,281 48

Yours truly, LEONARD LEWISOHN,

Per —— ——."

Per —— ——."

Exhibit 187, letter of July 24, 1895, to Simon H. Stern, as follows:

745 "Mr. Simon H. Stern, City.

DEAR SIR: A number of the largest subscribers to the Old Dominion Syndicate have requested that they be allowed to take shares in the new Company at their par value of $25. per share, instead of having the amount of their subscription returned to them from the proceeds of sale of stock in the new Company as proposed.

As a subscriber to the Syndicate you are hereby informed that it has been decided to grant this request; and, the amount of your subscription being $15,000, you can, if you like, have six hundred shares of stock in the new Company (instead of the return of your $15,000.)—in addition to which a further six hundred shares in the new Company (equalling the amount of your subscription at $25 a share) will be allotted to you.

If you wish to avail yourself of the option of taking the six hundred shares first mentioned instead of receiving back the $15,000 which you subscribed to the Syndicate, you must notify me in writing on or before Saturday next the 27th instant, after which date this option will positively expire.

Very truly yours,

—— ——."

Exhibit 231, being three double pages Ledger No. 476 and 304, entitled "Old Dominion Copper Company Syndicate," marked "Exhibit 231, May 12, 1906."

Exhibit 232, two double pages, respectively Ledger 536 and Ledger 420, entitled "Old Dominion New Subscription Account," marked "Exhibit 233, May 12, 1906."

Exhibit 233, two double pages, respectively Ledger 479 and Ledger 484, entitled "Old Dominion Syndicate Sub-No. 2," marked "Exhibit 233, May 12, 1906."

Exhibit 258, letter of June 25, 1895, Lewisohn Brothers to Charles F. Brooker, as follows:

"JUNE 25TH, 1895.

Mr. Charles F. Brooker, c/o Coe Brass Manufacturing Company, Torrington, Ct.

DEAR SIR: The first and second payments on your Five thousand dollars subscription to the Old Dominion Syndicate are now due, as follows:

14% of $5,000	$700 00
28⅔% of $5,000	1,433 33
Interest from May 28th to June 26th—29 days at 5% p. a.	
Total amount of first and second payments	$2,141 92

746 The third payment of 28⅔rds per cent will be due August 25th; and the fourth and last payment of 28⅔rds per cent will be due September 24th, with interest at the rate of 5% per annum from May 28th.

Very truly yours, LEWISOHN BROTHERS,
General Manager.

J. R."

Exhibit 267, letter July 12, 1895, Jacob H. Schiff to Leonard Lewisohn, as follows:

"Kuhn, Loeb & Co.
27 & 29 Pine Street.

NEW YORK, *July 12th*, 1895.

DEAR MR. LEWISOHN: If Mr. Beaman has informed you that the Northern Pacific Underwriting Syndicate is now being formed, he certainly knows more about it than I do. The fact is that so far the proposed combination between the Northern Pacific and Great Northern is very far from having become perfected. I am not aware that we shall have anything to do with the formation of the Syndicate when it is to be formed; in fact, I have not even yet asked for an interest for ourselves, since I am convinced there is no such thing as a Syndicate as yet, nor will be for some time.

I thank you very much for your offer of a participation in the Syndicate which purchases the Old Dominion Copper Mining Shares, but as I have as yet too much money locked up in outside things, I prefer not to avail of your kind offer.

Thanking you, I am,

Yours very truly, JACOB H. SCHIFF.

Leonard Lewisohn, Esq., 81 Fulton St., City."

Exhibit 273, letter of July 24, 1895, to Charles J. Brooker, as follows:

JULY 24th, 1895.

Charles J. Brooker, Esq., Torrington, Ct.

DEAR SIR: A number of the largest subscribers to the Old Dominion Syndicate have requested that they be allowed to take
747 shares in the new Company at their par value of $25 per share, instead of having the amount of their subscription returned to them from the proceeds of sale of stock in the new Company, as proposed.

As a subscriber to the Syndicate you are hereby informed that it has been decided to grant this request; and, the amount of your subscription being $5,000., you can, if you like, have two hundred shares of stock in the new Company (instead of the return of your $5,000.)—in addition to which a further two hundred shares in the new Company (equalling the amount of your subscription at $25. a share) will be allotted to you.

If you wish to avail yourself of the option of taking the two hundred shares first mentioned, instead of receiving back the $5,000. which you subscribed to the Syndicate, you must notify me in writing on or before Saturday next the 27th instant, after which date this option will positively expire.

Very truly yours,

——— ———."

Exhibit 276, letter of July 25, 1895, to E. Hawley, as follows:—

"JULY 25, 1895.

Mr. E. Hawley,

DEAR SIR: A number of the largest subscribers to the Old Dominion Syndicate having requested that they be allowed to take shares in the new Company at their par value of $25 per share, instead of having the amount of their subscription returned to them from the proceeds of sale of stock in the New Company as proposed, as a subscriber to the Syndicate you are hereby informed that it has been decided to grant this request; and the amount of your subscription being $10,000. you can, if you like, have four hundred shares of stock in the new Company (instead of the return of your $10,000)—in addition to which a further four hundred shares in the new Company (equalling the amount of your subscription at $25 a share) will be allotted to you.

If you wish to avail yourself of the option of taking the four hundred shares first mentioned instead of receiving back the $10,000 which you subscribed to the Syndicate, you must notify me in writing on or before Saturday next the 27th instant, after which date this option will positively expire.

Very truly yours,

——— ———."

748 Exhibit 288, letter of August 6, 1895, Lewisohn Brothers to L. Behrens & Sons, as follows:—

"Per St. Louis

Aug. 6, 1895.

Messrs. L. Behrens & Sohne, Hamburg.

Dear Sirs: No doubt you know that copper has advanced considerably lately, and the prospects are rather for a still higher than a lower market. This condition of things has made some of the copper mining enterprises particularly prosperous, and we thought it no harm to direct your attention to the Old Dominion Copper Mining & Smelting Co., which has lately been organized, although the mine had been successfully worked since a number of years; but the Company is now in particularly good condition, owing to large developments which have recently been made and the better transportation facilities, thus enabling the Company to produce their copper lower than ever before and in much larger quantities. The prospect for regular and good-sized dividends is very promising, and some of the leading houses in Europe, like Messrs. N. M. Rothschilds & Sons of London, have lately taken some interest in this Company and bought some of its shares. The shares are quoted, at present, at $34, and are likely to be considerably higher soon. If you should wish to interest yourself in this Company and buy some of its shares, please cable us, and we may be able to offer you some of the shares; or, if you prefer, of course you could inquire or buy through other sources. They are dealt in principally in Boston, like the shares of most other copper mining companies. The shares of the Boston & Montana Co., in which we are largely interested, have advanced from $16, 2 years ago, and from $25, about a year ago, to about $100, per share now. We are the agents for the sale of the products of these various companies, as you probably know.

T. H."

Yours very truly,

LEWISOHN BROTHERS,
General Manager.

A. L."

Exhibit 296, letter of August 20, 1895, Lewisohn Brothers to C. S. Henry & Company, as follows:—

749 "August 20, 1895.

Messrs. C. S. Henry & Co., London.

Gentlemen: Enclosed we send you sale note for the 200 shares of Old Dominion Copper Mining & Smelting Co., stock sold to Messrs. Lazarus Sons at $29. Please hand it to them if you agree with same.

Very truly yours,

LEWISOHN BROTHERS,
General Manager."

Exhibit 305, letter of August 26, 1895, Lewisohn Brothers, to C. S. Henry & Company, as follows:—

"Per Havel. AUG. 26, 1895.

Messrs. C. S. Henry & Co., London.

DEAR SIRS: In conformity with our reading of your cable gram received to-day, we have booked Mr. G. A. Jamieson for 500 shares of stock of Old Dominion Copper Mining & Smelting Co., at $30., less 5%. Please advise us if this is correct, and oblige,

Yours very truly,

LEWISOHN BROTHERS,
General Manager.

T. H."

Exhibit 315, letter of September 12, 1895, Lewisohn Brothers, to Sally Mainz, as follows:—

S. S. Lucania." "SEP. 12TH, 1895.

Mr. Sally Mainz, Hamburg, Germany.

DEAR SIR: We beg to confirm sale to you, by our Mr. Leonard Lewisohn of two hundred (200) shares of stock of the Old Dominion Copper Mining & Smelting Company, at twenty-nine dollars ($29) a share, as per statement herewith.

Very truly yours,

LEWISOHN BROTHERS,
General Manager.

Enclo.

Rid-F."

750 Exhibit 335, letter October 1, 1895, Lewisohn Brothers to Waldemar Caspary, as follows:—

OCT. 1, 1895.

Mr. Waldemar Caspary, 502 Broadway, City.

DEAR SIR: We beg to acknowledge receipt of your check for $31,000. for the purchase of 1,000 shares of stock of Old Dominion Copper Mining & Smelting Co., which we have credited to your account.

Yours very truly,

LEWISOHN BROTHERS,
General Manager.

H. E."

Exhibit 363, letter October 10, 1895, Lewisohn Brothers to A. Iselin & Company, as follows:—

"OCTOBER 10TH, 1895.

Messrs. A. Iselin & Co., 36 Wall Street, City.

GENTLEMEN: We herewith hand you Certificate No. 385 for 500 shares Old Dominion Copper Mining & Smelting Co. capital stock for account of Banque International, Paris, against payment of

$13,500. The certificate is in the name of G. A. Brocknell, whose endorsement we guarantee.

Very truly yours,

LEWISOHN BROTHERS."

CHARLES F. BROOKER, sworn for complainant.

Direct examination by Mr. McCLENNEN:

Q. 1361. You reside where?

A. Ansonia, Conn.

Q. 1362. I show you certificate No. 369, for 200 shares of the Old Dominion Copper Mining & Smelting Company in the name of Charles F. Brooker, dated October 3, 1895; is the signature to the endorsement on the back in your handwriting?

A. That is my handwriting.

[Offered in evidence and marked "Complainant's Exhibit 495, May 12, 1906."]

751 Q. 1363. What was the first of the negotiations which led to your acquiring this stock?

A. I could not tell you distinctly from memory what the first was.

Q. 1364. What is the first you now recall?

A. If you will let me tell the story in my own way I think I can give you the whole thing. This is eleven years ago, and I have no books or papers connected with the matter, and it is simply a matter of recollection, and if you will allow me to tell the matter as I remember it I will be glad to go on.

Q. 1365. I wish you would.

[Objected to as incompetent, immaterial, and irrelevant.]

A. Some time in 1895, I should say it was in the spring, Mr. Leonard Lewisohn or Mr. Adolph Lewisohn, I can't say which, one or the other, and perhaps both, suggested to me taking an interest in what they called Old Dominion matters, and I agreed to take a $5000 interest in the matter, or the syndicate, or whatever it was they called it. I don't remember; but I agreed to take a $5000 interest, which I did, and the understanding in the matter was that the property had cost $1,000,000, and they proposed to capitalize the company at $2,500,000, and the money we put into it was to be paid back and we were to have an equal amount of stock. That was done. I paid my money, whether I did it all at once or in instalments I don't remember, and have no account of it, but I paid the money and got it back; afterwards I got a certificate for 200 shares of stock, and when I got the certificate I noticed that the company was capitalized for $3,750,000, which I noticed to be different, and I made some inquiry about it and was informed by whomever the powers in authority were that they had concluded to make it $3,750,000 instead of $2,500,000. I accepted it without demur on the ground that I was asked to go into the company and the money I made was because I was asked, and I saw no reason

for me to make any row about it; therefore I accepted it. That is all I know about it. Afterwards I sold my stock at whatever the price was; if I remember right, something like $18 or $20 a share, and got out of it. That is the history of my connection with it, and really all I know about it.

[Defendant objects to the answer as incompetent, immaterial, and irrelevant.]

Q. 1366. Do you remember, after discovering that the corporation was capitalized at $3,750,000 instead of $2,500,000, having a conversation with Leonard Lewisohn?

[Objected to as incompetent and immaterial.]

752 A. I don't remember any particular distinct conversation with Leonard Lewisohn about it or Adolph. I might have asked them what the capitalization was and why it was different from what it started originally. I presume I did, and they told me for some reason or other they made it $3,750,000 instead of $2,500,000. I asked Mr. Bigelow at one time the same question, and he told me that there were expenses connected with the thing which they had not thought of in the first place, and they had concluded to make it $3,750,000, and they did.

[Answer objected to as incompetent, immaterial, and irrelevant.]

Q. 1367. Did they say what had been or was to be done with the 50,000 shares?

[Objected to as incompetent, immaterial, and irrelevant.]

A. My recollection about that is more or less indistinct, but I should say that Mr. Bigelow said to me that that was divided up between him and Leonard Lewisohn. I should say that was the statement in connection with it.

Q. 1368. Do you remember whether or not you asked Adolph Lewisohn and he referred you to Leonard?

[Objected to as leading, incompetent, and immaterial.]

A. I could not say whether I asked Adolph first or Leonard first.

Q. 1369. Do you remember whether Leonard referred you to Mr. Bigelow?

A. I don't think he ever did. I don't remember that he ever did.

Q. 1370. Do you remember any conversation on this subject with Albert S. Bigelow, in which he said something to the effect that it was none of his damned business?

[Objected to as incompetent, immaterial, and leading.]

A. No, I remember this conversation with Albert Bigelow in connection with the matter.

Q. 1371. What is that?

[Objected to as immaterial, incompetent, and irrelevant.]

A. It may be what you have in mind, and what you have in mind you have gathered from what I told Mr. Smith one day in a conver-

sation at that gentleman's office, and which I had no reason to suppose he would repeat, but he evidently has. I told Mr. Bigelow, when asking him a question—and I remember it because Mr.
753 Smith said that I said it to him—I asked Bigelow and he said if that question had been asked him by some people sitting in that chair he would say it was none of their damned business, but that with me it would be different; and that is probably what you have in your mind and what Mr. Smith possibly brought to you about a confidential conversation which he failed to observe.

[Answer objected to as incompetent and not responsive, and motion to strike out latter part of same.]

Q. 1372. Have you any way of fixing how long it was, before you put in your first money, you had had your conversation with Mr. Lewisohn relating to this subject of capitalization?

A. I have no way of fixing that at all. I have no record of it. This is eleven years ago, and the papers I had at that time have been destroyed.

Q. 1373. I show you a letter of Lewisohn Brothers to you of June 25, 1895, Exhibit 258, and ask you if that would assist you in stating anything about the date of the conversation?

A. No, only it gives me the date on which this letter is written.

Q. 1374. Would it enable you to state whether or not your conversation was before or after that letter? I mean the conversation in which the amount of capital was stated.

A. No, it would not assist me at all.

Q. 1375. Were you given any information as to the laws of the state that this $2,500,000 corporation was to be organized under?

[Objected to as incompetent, immaterial, and irrelevant.]

A. Nothing more than I have given.

Q. 1376. In view of the objection which Mr. Hemenway has interposed to your answer, I will ask you to state now the conversation which you had with Mr. Bigelow, without reference to what you have said about it to any one else?

A. My recollection of the conversation is, as I said before, that while in Mr. Bigelow's office I made some inquiry as to the amount of its capitalization, and I should say he said to me that "some people sitting where you do I would tell them it was none of their damned business, but that it was different with you," and the capitalization was made $3,750,000, because they found that there were expenses and so on which they did not count on in the beginning, and it was finally made $3,750,000, instead of $2,500,000.

Q. 1377. And in that conversation did he say what was done with the additional 50,000 shares?

A. He said, if I remember correctly, that it was divided between himself and Leonard Lewisohn.

754 NEW YORK, *May* 23, 1906.

[Hearing resumed this day.]

[Present: The Commissioner and Messrs. McClennen, Hemenway, and Lauterbach.]

SIMON H. STERN, sworn for complainant.

Direct examination by Mr. MCCLENNEN:

Q. 1378. Will you kindly state your full name?

A. Simon H. Stern.

Q. 1379. And you reside where?

A. In the city of New York.

Q. 1380. You are a practising attorney in the city of New York?

A. Yes; I am a member of the firm of Stern & Rushmore.

Q. 1381. Do you recall the bringing out of the Old Dominion in 1895?

A. Yes, sir.

Q. 1382. What was it that first came to your attention in connection therewith?

[Objected to by Mr. Hemenway and Mr. Lauterbach as incompetent, irrelevant, and immaterial.]

A. I first heard of it in a conversation with Mr. Leonard Lewisohn.

Q. 1383. What was that conversation?

[Same objection, and also the special objection that Mr. Lewisohn is dead.]

A. Mr. Leonard Lewisohn asked me to deliver him a certain number of shares of the stock of the Merced Mining Company in consideration of transferring to me an interest to the extent of 5 per cent which the firm of Lewisohn Brothers were to have in a syndicate which it was about acquiring of the entire property of the Old Dominion Company, I think, of Arizona.

Q. 1384. Do you recall whether there was any one else who took part in that conversation, or was present at it?

A. No one was.

Q. 1385. Can you fix the date of that conversation approximately?

A. Possibly by reference to some of my papers [referring to papers]; in April or May of 1895.

Q. 1386. Did Mr. Lewisohn say anything to you with reference to the way in which it was proposed to handle this property?

[Same objection.]

A. He did.

755 Mr. LAUTERBACH: And I would like it understood that I object to any conversation with Mr. Lewisohn on the ground that he is dead.

Q. 1387. What did he say?

A. He said that he and Bigelow of Boston had acquired large

interests in the Old Dominion Mining Company and that they were negotiating for the balance of the interest, the Keyser interest, as I recollect it, of Baltimore, and he thought I would be benefited very much indeed by getting an interest in his interest in the enterprise. He may have said "proposition" and not "enterprise."

Q. 1388. Was the arrangement between you and him in writing?

A. Not the arrangement I made with him. We did not go into details. He told me his son Jesse would see me on the subject, he being extremely busy at the time, and it was a hasty talk.

Q. 1389. And all that you have said was done in one conversation, was it?

A. All in one conversation.

Q. 1390. Do you recall anything more of what was said in the conversation?

[Objected to as incompetent, immaterial, and irrelevant.]

A. Yes, he started out by saying that I ought to let his firm have a certain number of shares of the Merced Mining Company stock at the exact cost of it to me on the ground that before I had purchased it I had asked him for advice, as to whether or not it would be a good thing for me to purchase. I told him that was a most absurd proposition, inasmuch as when I went to him for advice he said he could not advise me, but that if I would turn over my whole subscription for the Merced stock he would take it off my hands. He said, "Of course, I am in a different situation than you are. I go into these things and I win or lose. I lose on one thing and gain on another and it is my business, but you are a lawyer, and this is not your line of business and you may consider that it is unwise to take any chances, therefore I can't give you any advice"—oh, that was in the first interview. I did have two interviews with him. He telephoned me one day and wanted me to give up, I think, 600 shares of Merced mining stock on the ground that he had advised me, and in the second interview I have related what took place.

Q. 1391. Do you think of anything further that occurred?

A. That is all that ever occurred that I can recollect at the moment with Leonard Lewisohn, because he said he would send his son Jesse to me and he would arrange the business with me.

756 Q. 1392. Did Leonard Lewisohn say anything in either of those interviews as to how it was proposed to work out the profit, if any?

[Objected to as incompetent, immaterial, and irrelevant.]

A. He said that when they acquired the Keyser interest they were going to form a new company and give it a very successful management.

Q. 1393. Did he inform you what amount of capital the company was proposed?

A. He did not.

Q. 1394. Did you subsequently have a conversation with Jesse Lewisohn?

A. I did.

Q. 1395. Where did that occur?

[Same objection.]

A. I had several conversations with Jesse Lewisohn. I think the first was at the Lawyers' Club where Mr. Root, he, and I took luncheon together.

Q. 1396. What, as far as you recall, was said in that interview?

[Objected to as incompetent, immaterial, and irrelevant.]

A. He started out by telling me that I had not pleased his father. That he was afraid that his father felt aggrieved at my refusal to give him my shares of Merced Mining Company stock at cost to me of the same, saying, that his father was an extremely important man and had many opportunities to favor his friends and that I should have done precisely what the old gentleman had asked me to do without any discussion or argument. I told him that his father, whom he alluded to usually as the "old gentleman" had asked me to do an absurd thing; that there was not the slightest merit in the suggestion that I make him a handsome present of money; that he came very near discouraging me from going into the thing at all by the manner he had treated the subject when I first spoke to him, and I asked him to drop the subject, because it annoyed me. He then began to dicker with me about getting some of my shares of Merced at cost for a 5 per cent interest in the Old Dominion Mining Company scheme with which his firm was connected with Mr. Bigelow. We finally agreed on a lesser number than he had asked for and the document, the original of which I have present, was signed by his firm, and is dated New York, May 31, 1895.

757 Q. 1397. Do you remember whether or not it was signed on that day?

A. That I do not. My best recollection is it was taken away by Jesse Lewisohn and then returned to me by mail; but that I don't really recollect. It may have been returned by messenger boy. I know I got it back.

Q. 1398. Do you know within how near a time to that date it was?

A. I don't remember the date, but I do remember that it was a very short time indeed when I received the document back after I handed it to Jesse Lewisohn.

Q. 1399. May I see the document?

A. You may [producing same].

Mr. McClennen: I offer the document referred to by the witness in evidence as an exhibit.

Mr. Hemenway: I object to the admission of this paper on the ground that so far as Mr. Bigelow is concerned and so far as the issues in this action are concerned, it is incompetent, immaterial, and irrelevant.

The paper is marked "Exhibit 496," and is as follows:

"NEW YORK, *May* 31, 1895.

For and in consideration of the sum of One Dollar and of other good and valuable considerations we have agreed and do hereby agree with Simon H. Stern that he shall be entitled to an interest equal to five per cent of such interest as we have at present or shall acquire hereafter in the enterprise known at present as The Old Dominion Mining Company of Arizona. Our present investment therein partially paid for and to be paid for hereafter amounts to about $300,000.

LEWISOHN BROTHERS."

Q. 1400. What is the next thing that occurred so far as you now recall after the making of this agreement?

[Objected to as incompetent, immaterial, and irrelevant.]

A. The next thing that happened was the receipt by me of a letter from Messrs. Lewisohn Brothers and signed by Adolph Lewisohn and Jesse Lewisohn of date June 3, 1895.

[Letter offered in evidence.]

[Objected to on the same grounds.]

The letter is marked "Exhibit 197" and is as follows:

758 "Lewisohn Brothers, 81-83 Fulton Street, New York.

Cable Address: Lohengrin.

P. O. Box 1247.

NEW YORK, *June* 3, 1895

Mr. Simon H. Stern, 10 Wall Street, New York.

DEAR SIR: In answer to your favor of the first instant we would inform you that the first payment on account of the $15,000 interest you have in the Old Dominion Syndicate was due on the 28th ultimo amounting to $2,100. This first payment is for 14% of the $15,000. The second payment is for 28⅔% due July 26th or $4,300; therefore the total amount of the first and second payment is $6,400, for which you may send us your check, and the amount of the third and fourth payments you can send on your return from Europe.

Very truly yours,

LEWISOHN BROTHERS.
A. LEWISOHN, *General Manager.*
JESSE LEWISOHN.

Third payment 28⅔% and 5% interest is due August 25, 1895. Fourth payment 28⅔% and 5% interest is due September 24, 1895."

The entire letter is typewritten except the words "A. Lewisohn" and "Jesse Lewisohn," and it is written on the printed letterhead of Lewisohn Brothers.

Q. 1401. Have you with you any copy of the letter of June 1 to which this appears to be a reply?

A. I have not a copy of that letter with me, but I can produce it, I have no doubt.

Q. 1402. Have you any recollection of how long a time elapsed between the time of your conference with Leonard Lewisohn and the time of your coming to an actual agreement on paper, as appears by this exhibit of May 31, 1895?

A. It was a short time. The Lewisohns were very eager to get my Merced stock, and, as I recollect it, it was appreciating in the market.

[The letter is objected to as improper and not responsive.]

759 Q. 1403. By "a short time" do you mean a matter of days or weeks?

A. Oh, a few days.

Q. 1404. Now going on. After the letter of June 3, what is the next you had to do with the matter?

[Objected to as immaterial, irrelevant, and incompetent.]

Q. 1404½. The next was the receipt of a letter, addressed to me at my office dated July 24, 1895 [producing same].

[Offered in evidence. Same objection.]

Letter marked "Exhibit 498," and is as follows, being written on the printed letterhead of Lewisohn Brothers:—

"81—83 Fulton Street,

Cable Address: Lohengrin, P. O. Box 1247, New York.

JULY 24TH, 1895.

Mr. Simon H. Stern, City.

DEAR SIR: A number of the largest subscribers to the Old Dominion Syndicate have requested that they be allowed to take shares in the new Company at their par value of $25 per share, instead of having the amount of their subscription returned to them from the proceeds of sale of stock in the new Company as proposed.

As a subscriber to the Syndicate you are hereby informed that it has been decided to grant this request; and, the amount of your subscription being $15,000., you can, if you like, have six hundred shares of stock in the new Company (instead of the return of your $15,000)—in addition to which a further six hundred shares in the new Company (equalling the amount of your subscription at $25. a share) will be allotted to you.

If you wish to avail yourself of the option of taking the six hundred shares first mentioned instead of receiving back the $15,000. which you subscribed to the Syndicate, you must notify me in writing on or before Saturday next the 27th instant, after which date this option will positively expire.

Very truly yours,

LEONARD LEWISOHN.
ADOLPH LEWISOHN, *Atty.*"

760 WITNESS: When this letter came to my office I was in Europe.

Q. 1405. What is the next?

[Objected to as incompetent, immaterial, and irrelevant.]

A. The next thing was the receipt at my office, either by me personally or by my representative, I can't now recall whether I had returned from Europe at that time or not, of a letter dated September 20, 1895 [producing same].

[Offered in evidence. Same objection.]

Letter marked "Exhibit 499," and is as follows, same printed letterhead, and dated:—

SEPTEMBER 20TH, 1895.

Mr. Simon H. Stern, 40 Wall Street, City.

DEAR SIR: Enclosed we hand you official receipts Nos. 80 and 81 covering third and fourth payments against your subscription of $15,000 to the Old Dominion Syndicate. The amount of interest due from May 28th to date at 5% per annum is One hundred and twenty-four Dolalrs and eighty-two cents ($124.82) which please remit at your convenience and it will close your subscription.

Very truly yours,

LEWISOHN BROTHERS.

J. L. A. LEWISOHN, *General Manager.*

N. B.—On reference to your letter of June 3rd you will note interest therein charged on first and second payments and above interest only applies to third and fourth payments aggregating $8,600."

[All typewritten except the words, "A. Lewisohn" and "J. L.," which are in handwriting.]

Q. 1406. Have you the answer to the letter of July 24, Exhibit 498?

A. Yes, sir [producing same].

[Letter offered in evidence. Same objection.]

Marked "Exhibit 500," and is as follows:—

"DEAR SIR: Your letter of the 24th inst. to Simon H. Stern, Esq. relative to the matter of the Old Dominion Syndicate
761 and the allotment of shares in the new company has been received. I have Mr. Stern's instructions to notify you, and I hereby do so, that he desires that his subscription should remain and that he should receive the stock to which he will be entitled as per your favor referred to and pursuant to the agreement heretofore made between Lewisohn Brothers and himself relative to the Old Dominion enterprise, it being understood that the acceptance

of the option contained in your letter of the 24th is to be of course without prejudice to the original agreement with Mr. Stern referred to.

Very truly yours,
CHARLES E. RUSHMORE.
For Simon H. Stern.

Leonard Lewisohn, Esq.,
Adolph Lewisohn, Esq., New York City."

Q. 1407. Who is Mr. Rushmore?
A. He was my partner, and attorney, in fact.
Q. 1408. Now after the letter of September 20, Exhibit 499, what was the next thing that occurred?

[Same objection.]

A. A letter of October 4, 1895 [producing same].

[Offered in evidence. Same objection.]

Marked "Exhibit 501," being on the same printed letterhead, and is as follows:—

"OCT. 4TH, 1895.

Mr. Simon H. Stern, 40 Wall Street, New York City.

DEAR SIR: Herewith we beg to hand you Certificate No. 349 for 1200 shares Old Dominion Copper Mining & Smelting Company's capital stock, against your subscription of $15,000. to the Syndicate.

Please hand bearer receipts Nos. 1A, 17A, 80A and 84A in exchange for above and oblige,

Very truly yours,
LEWISOHN BROTHERS.
ADOLPH LEWISOHN,
General Manager.

Rid/f

P. S.—Since writing the previous letter annexed hereto, the 1200 shares have come in, and we are sending them to you herewith as above mentioned."

762 Q. 1409. What amount of money did you, in fact, pay to Lewisohn Brothers in this matter?

[Objected to as incompetent, immaterial, and irrelevant.]

A. June 4, $6400; September 20, $8724.82; a total of $15,124.82.
Q. 1410. After the letter of October 4, what is the next?

[Same objection.]

A. In the way of letters or conversations?
Q. 1411. Either; letters or conversations.
A. Here is another letter I received dated October 4 [producing same].

[Offered in evidence. Same objection.]

Marked "Exhibit 52," and is as follows. It is written on the same printed letterhead and dated,—

"NEW YORK, *October 4th*, 1895.

Mr. Simon H. Stern, 40 Wall Street, New York.

DEAR SIR: We beg to acknowledge receipt of yours of October 3rd. We directed our Boston friends a few days ago to issue the 1200 shares stock which you are entitled to under the subscription. We expect to receive the stock to-day or to-morrow, when we will send the stock to you promptly. In regard to balance, as our Mr. Jesse Lewisohn has already informed you, we are entitled to about 12,000 shares, so you will get 5%, 600 extra, which will be sent to you as soon as received. The reason that we could not tell you the exact amount of these shares is that it has not been determined yet exactly how much of the shares has to be given to the party who brought about the deal, and our Boston friends besides may not know, and we are abiding by their action. Trusting this information will be satisfactory, we remain

Very truly yours,

LEWISOHN BROTHERS.
ADOLPH LEWISOHN,
General Manager."

Q. 1412. In this letter reference is made to information already given you by Mr. Jesse Lewisohn; have you any recollection relative to that matter?

A. Yes.

763 Q. 1413. Did you have some conversation with Jesse Lewisohn?

A. I did.

Q. 1414. What was the conversation?

[Objected to as incompetent, immaterial, and irrelevant.]

A. I asked him the meaning of it and said that I could not understand how his firm could claim that I was only entitled to 1200 shares of stock being 5 per cent of the syndicate, and I related to him things I had heard concerning the original capitalization that was contemplated, and the reason of it, and I said, "This don't look right, and it doesn't satisfy me, and I want to get a detailed account of the interest of Lewisohn Brothers in the Old Dominion Mining Company." He promised me that at one time, but he never gave it to me, nor anybody else connected with Lewisohn Brothers, and I am ignorant to this day as to the final result of Lewisohn Brothers' participation in that syndicate, nor how they worked out the details.

[The answer of the witness is objected to on the ground that it is a commentary by him and not responsive.]

Q. 1415. Did Jesse Lewisohn or Lewisohn Brothers ever furnish you the account?

[Same objection.]

A. They did not. It was promised me several times by Jesse

Lewisohn, although they assured me at the time it was absolutely accurate.

Q. 1416. Did you ever have any conversation with either Leonard or Adolph Lewisohn on this subject?

A. I did not.

Q. 1417. Were you ever informed, from any source, as to the amount of stock received by Lewisohn Brothers or Leonard Lewisohn in this transaction before the beginning of the present suits?

[Objected to as immaterial, incompetent, and irrelevant.]

A. I was.

Q. 1418. When did you get that information?

[Same objection.]

A. In December, 1895, the early part thereof, Jesse Lewisohn informed me that an accurate calculation of my 5 per cent interest in that syndicate amounted to a certain number of shares, I think 600, and then in a letter of December 5, signed on behalf of Lewisohn Brothers by Mr. Adolph Lewisohn, general manager.

764 Q. 1419. Have you that letter?

A. Yes, and I was again informed [producing letter].

[Letter offered in evidence. Same objection.]

Marked "Exhibit 503," and is as follows, being written on the same letterhead and dated December 5, 1895:—

"Mr. Simon H. Stern, City.

DEAR SIR: We beg to acknowledge receipt of your favor of December 4th and send you herewith accordingly 600 shares of Old Dominion Copper Mining & Smelting Company stock in full settlement of your entire interest in the Old Dominion Mining Company matter. Please acknowledge receipt of enclosure on the accompanying form, and oblige

Very truly yours,

LEWISOHN BROTHERS,
ADOLPH LEWISOHN,
General Manager.

Q. 1420. Your letter of December 4, referred to in Exhibit 503, has already been put in evidence as Exhibit 152, on page 187 of the testimony, and in that you refer to Jesse Lewisohn's suggestion that you accept 600 shares. Will you relate the conversation referred to?

[Same objection.]

A. Substantially it was that he asserted that that was all I was entitled to as my syndicate interest, and I told him I did not believe him. That I wanted an account, and he told me that his father was ill—I don't know whether I told him I would see his father or not on the subject, but I did not believe him at all, and I expected to get from his father the truth. He begged me very hard not to disturb his father. He said his father was a sick man, and that he would

look into it again, and protested very warmly that there wasn't anything in the world he would not do for me, if he could; that they would rather decide a doubt against themselves than against me.

Q. 1421. Now subsequent to that time, and up to the time of the beginning of these suits in October, 1902, had you received any further information on the subject?

[Objected to as incompetent, immaterial, and irrelevant.]

765 A. None whatever.

Q. 1422. From any source?

A. From no source.

Q. 1422. Does what you have testified to cover substantially all of your connection with this matter in 1895?

A. Substantially, yes. I met Jesse Lewisohn frequently. We were in the neighborhood, and met him at Delmonico's and luncheon places, and he used to have talks with me, and the burden of his song was usually that I was going to do very well. He was a very cheerful young man.

In the course of taking depositions before Howland Twombly, Esq., notary public, at 161 Devonshire street, Boston, Mass., October 31, 1907.

Appearances:

Louis D. Brandeis, Esq., for the plaintiff.
Alfred Hemenway, Esq., and Eugene Treadwell, Esq., and J. Wells Farley, Esq., for the defendants.
George C. Burpee, stenographer.

Correspondence Introduced by Defendants.

Mr. HEMENWAY: There was produced at the taking of depositions in New York pertaining to these cases, a list of papers which were examined by counsel for plaintiffs (they being produced by the defendants' counsel) and a list marked "Exhibit A, B, D.," was produced, numbered from 1 to 494. I will now, on behalf of the defendants, offer in evidence certain letters that were then identified. And the first letter that I will offer of that evidence is numbered 22, Lewisohn to Belches. (To Mr. Farley.) Will you read that letter?

[It was agreed between counsel that in place of the witness reading this and other letters to be offered, the stenographer should copy into the record the letters introduced as evidence.]

[The letter numbered 22 is as follows:]

"JUNE 5TH, 1895.

Mr. J. W. Belches, Boston, Mass.

DEAR SIR: The first instalment of 14 per cent., of your subscription of Five thousand dollars to the Old Dominion Syndi-
766 cate, is now due. Kindly therefore remit us the amount of $700, to cover the first instalment, at your convenience, and oblige.

The subsequent payments will be as follows:

2nd instalment,	July 26th:	.....	28 2/3%	$1,433 33
3rd do.	Aug. 25th:	.....	do.	$1,433 33
4th do.	Sep. 24th:	.....	do.	$1,433 34

To the second, third and fourth instalments interest at the rate of 5 per cent. per annum will have to be added.

Very truly yours,

LEWISOHN BROTHERS,
General Manager."

Mr. HEMENWAY: The next letter is No. 181, Lewisohn to Belches.

Mr. TREADWELL: You have stated that wrongly, Mr. Hemenway, it is Belches to Lewisohn.

[The letter numbered 181 is as follows:]

"BOSTON, *July* 15, 1895.

Messrs. Lewisohn Bros., New York.

GENTLEMEN: We enclose herewith check for $4,328.67 amt. due on $5,000 block Old Dominion to pay in full. We understood you allowed us but $5,000, but your telegram gives figures on $10,000 block undoubtedly. Which is correct? We think the new stock will be quickly taken—have ourselves already booked several subscriptions.

Resp'y,

J. W. BELCHES & CO."

Mr. HEMENWAY: Then Nos. 158 and 159.

Mr. TREADWELL: Mr. Hemenway, I will call your attention that one of those is a copy of the other.

Mr. HEMENWAY: Is not one a carbon?

Mr. TREADWELL: No, it is not a carbon, it is a copy, marked "copy."

Mr. HEMENWAY: If they are identically the same, we will put in only 158.

[The letter numbered 158 is as follows:]

767 "The Old Dominion Copper Company in Account with Baltimore Copper Smelting & Rolling Co.

Dr.

To Balance June 1st		$3,542.62
" draft from Globe		$2,500.00
" June Expenses Baltimore		$1,316.68
" draft from Globe	$1,700.00	
	621.30	
		$1,078.70
" June Salaries, Globe Supt.	300.00	
Asst. Supt.	200.00	
		$500.00
		$8,938.00

Cr.

By overcharge a/cs collected—		
Southern Pacific Company	$571.30	
H. C. Frick Company	134.50	
	$705.80	
" cash from L. Lewisohn	$8,232.20	
		$8,938.00"

Mr. HEMENWAY: 142 and 143, Keyser to Lewisohn.

Mr. TREADWELL: No. 142 is with enclosures. The second page of No. 143 is out of order. The second page will be found after No. 148.

[The letters numbered 142 and 143 are as follows:]

"BALTIMORE, *Nov. 2nd,* 1895.

Mr. Leonard Lewisohn, New York City.

DEAR SIR: We have your favor of the 1st, enclosing Ladenburg-Thalman & Co.'s receipt for $8,000 in full settlement of their claim against me. I am also advised by my Counsel that the details connected with the dismission of the suit have been settled and I now have the pleasure of sending you herewith Draft on New York for $1,263.52 in settlement of all matters open between us as shown in the accompanying statement, which I trust will explain themselves.

The first statement shows the winding up of your affairs in connection with the Old Stock-holders of the Old Dominion
768 Copper Company, in which statement you will note that they paid to the Baltimore Copper S. & R. Co. $8,232.20 in settlement of the balance due that Company as of June 1st, and the amounts advanced by that Company to the Old Dominion Copper Company for expenses, etc., after June 1st, in accordance with our understanding at the time.

The second statement is of the Old Dominion Copper Company in account with the Baltimore Copper S. & R. Co., which will tie in with the books of the former Company sent at your request to Boston. I also enclose papers from Globe, Vouchers, etc., covering the various items paid for the account of the Old Dominion Copper Co. as shown in the statement.

Trusting this will be found in order, I remain,

Yours very truly,

WM. KEYSER,
Per R. BRENT KEYSER.

Leonard Lewisohn in Account with Old Stockholders, Old Dominion Copper Company.

Cr.

By Ladenburg, Thalman settlement	$8,000.00
" Balance due as per William Keyser's letter of June 20th, 1895	$1,495.72
	$9,495.72

Dr.

To Cash paid Baltimore Copper S. & R. Company, a/c Old Dominion Copper Company $8,232.20
To Check herewith $1,263.52
$9,495.72."

"BALTIMORE, *Nov. 6th*, 1895.

Mr. Leonard Lewisohn, New York City.

DEAR SIR: Replying to your letter of the 4th instant, you will find that I sent you a statement of the Old Dominion Copper Company's affairs, separate from any relations we had together, having had the B. C. S. & R. Company pay all money for their account. If you will, therefore, turn over to the Old Dominion Copper Company the statement of the account between it and the Baltimore Copper S. & R. Co., which I sent you, and have this statement posted into its books, it will, I think, enable you to understand the matter fully.

769 Referring to the explanation requested in regard to the gross amount being charged on the pay-rolls for June, you will find that these statements, also, tie in with the Old Dominion Copper Company's books. You will remember that the transfer of the property was made by a change of stockholders, and that as far as the books of the Company are concerned, no change took place. You state that you have no voucher for the balance due to the Baltimore Copper S. & R. Co. June 1st—$3542.62. This balance appears upon the Old Dominion Copper Company's ledger as a credit to the B. C. S. & R. Co. as of that date.

In regard to the June vouchers for salaries of Superintendent and Asst. Superintendent at Globe, I would state that you would probably find them at Globe, as they have not been sent to us here. You must remember that you took charge there on June 20th, and all payments, etc., after that date were attended to by your own people, we merely paying their drafts as an accommodation to you. We held the papers which they sent us from time to time, until the 2nd instant, when we forwarded on everything that had been received.

Yours very truly,

WM. KEYSER."

Mr. HEMENWAY: No. 60.

Mr. TREADWELL: No. 60 is from William Keyser to Leonard Lewisohn.

[The letter numbered 60 is as follows:]

"The Old Dominion Copper Mining Company of Baltimore City.
Office, Keyser Building, German and Calvert Sts.

BALTIMORE, *June 20th*, 1895.

Mr. Leonard Lewisohn, New York City.

DEAR SIR: I hand you herewith the balance sheet of the Old Dominion Copper Company as of June 19th, 1895. This, of course,

does not include any of the expenditures at Globe since June 1st. You will note that the only claim against the Company, shown by the balance sheet, is a loan by the

Baltimore Copper Smelting & Rolling Company.....		$3,542 62
This offsets the Cash at Globe, June 1st.....	$131 10	
and the Overcharge Account of.....	705 80	
		2,046 90
Leaving a balance of.....		$1,495 72

770 which balance, we are to make good to you, personally, either in cash or by credits allowed us under our agreement. We are, also, to make good to you the $705.80 overcharge account, if the money should not be collected from the Railroad Companies.

Yours truly,

WM. KEYSER.
p. p. R. BRENT KEYSER."

Mr. HEMENWAY: And No. 124.

Mr. TREADWELL: This is from Lewisohn Brothers to R. Brent Keyser, dated August 12, 1895.

[The letter numbered 124 is as follows:]

"AUG. 12TH, 1895.

Mr. R. Brent Keyser, Baltimore, Md.

DEAR SIR: In answer to your favor of the 10th, we herewith return your letter from Mr. Louis Walker and the requisition for July.

We will be obliged to you if you will pay the expenses and, as you say, take all these unsettled financial matters up at one time.

We note in the requisition 'expenses Joseph Campbell, $600, account of the old management.'

Very truly yours,

LEWISOHN BROTHERS.
General Manager."

Mr. HEMENWAY: Now No. 172.

Mr. TREADWELL: That is dated June 5, 1895, Lewisohn Brothers to John Stanton, Esq.

[The letter numbered 172 is as follows:]

"JUNE 5TH, 1895.

John Stanton, Esq., City.

DEAR SIR: The first installment of 14 per cent., of your subscription of Five thousand dollars to the Old Dominion Syndicate, is now due. Kindly remit us therefore the amount of $700 to cover the first installment, at your convenience, and oblige.

The subsequent payments will be as follows:

771 2nd installment, July 26th; 28 2/3% $1,433 33
3rd do. Aug. 25th; do. $1,433 33
4th do. Sep. 24th; do. $1,433 34

Very truly yours,

LEWISOHN BROTHERS,
General Manager.

J. R.

To the second, third and fourth installments interest at the rate of 5 per cent. per ann. will have to be added."

Mr. HEMENWAY: No. 136.

Mr. TREADWELL: That is dated October 4, 1895, Lewisohn Brothers to John Stanton.

[The letter numbered 136 is as follows:]

OCT. 4TH, 1895.

John Stanton, Esq., City.

DEAR SIR: Enclosed we hand you Certificate #361, for 400 shares capital stock of Old Dominion Copper Mining & Smelting Company, against your subscription to the Syndicate of $5,000.—in exchange for which please hand bearer the official receipts which you now hold.

Very truly yours,

LEWISOHN BROTHERS,
General Manager."

Mr. HEMENWAY: No. 183.

Mr. TREADWELL: Dated July 19, 1895, Leonard Lewisohn to John Stanton.

[The letter numbered 183 is as follows:]

"NEW YORK, *July 19th*, 1895.

Old Dominion Syndicate.

DEAR SIR: The second installment of 28⅔rds per cent. of your subscription of $5000.00 to the Old Dominion Syndicate, is called for payment July 26th instant.

Your pro-rata amount is 1433.34 ..... $1433 34
and, adding interest at 5% p. a. from May 28th last 11 94

The total sum called for on second instalment is.. $1445 28

Very truly yours,

LEONARD LEWISOHN,
Per JESSE LEWISOHN.

John Stanton, Esqr."

772 Mr. HEMENWAY: No. 364.

Mr. TREADWELL: Charles F. Brooker to Lewisohn Brothers, dated October 10, 1895.

[The letter numbered 364 is as follows:]

"TORRINGTON, CONN., U. S. A., *Oct.* 10, 1895.

Messrs. Lewisohn Bros., New York City.

GENTLEMEN: On my return this morning, I have yours of the 5th inst. enclosing check for $2,123.05, as stated by you, in settlement of the Old Dominion Syndicate account, which I find to be correct, and very satisfactory, and herewith enclose official receipt as requested.

I also have with the same enclosure, Certificate #369 for 200 shares Old Dominion stock—for all of which I am very much obliged.

Very truly yours,

CHAS. F. BROOKER."

Mr. HEMENWAY: No. 356.

Mr. TREADWELL: Lewisohn Brothers to Charles F. Brooker, dated October 5, 1895.

[The letter numbered 356 is as follows:]

"OCT. 5, 1895.

Mr. Chas. F. Brooker, Torrington, Conn.

DEAR SIR: Enclosed please find certificate No. 369 for 200 shares of Old Dominion Copper Mining & Smelting Company's stock made out in your name; also statement showing a credit balance of $2,123.05, being your first and second payments on subscription — the syndicate, less interest on third and fourth payments, for which amount we enclose our check, receipt of which please acknowledge, and oblige.

Yours very truly,

LEWISOHN BROTHERS,
General Manager."

Mr. HEMENWAY: No. 258.

Mr. TREADWELL: Lewisohn Brothers to Charles F. Brooker, dated June 25, 1895.

[The letter numbered 258 is as follows:]

773 "JUNE 25TH, 1895.

Mr. Charles F. Brooker, c/o Coe Brass Manufacturing Company, Torrington, Ct.

DEAR SIR: The first and second payments on your Five thousand dollars subscription to the Old Dominion Syndicate are now due, as follows:—

14% of $5,000	$700 00
28¾% of $5,000	1,433 33
Interest from May 28th to June 26th—29 days at 5% p. a.	8 59
Total amounts of first and second payments	$2,141 92

The third payment of 28⅔rds per cent. will be due August 25th; and the fourth and last payment of 28⅔rds per cent. will be due September 24th, with interest at the rate of 5% per annum from May 28th.

Very truly yours,

LEWISOHN BROTHERS,
General Manager."

Mr. HEMENWAY: No. 273.

Mr. TREADWELL: Letter dated June 24, 1895, Thalmann to Charles J. Brooker.

[The letter numbered 273 is as follows:]

"JULY 24TH, 1895.

Chas. J. Brooker, Esq., Torrington, Ct.

DEAR SIR: A number of the largest subscribers to the Old Dominion Syndicate have requested that they be allowed to take shares in the new Company at their par value of $25: per share, instead of having the amount of their subscription returned to them from the proceeds of sale of stock in the new Company, as proposed.

As a subscriber to the Syndicate you are hereby informed that it has been decided to grant this request; and, the amount of your subscription being $5,000, you can, if you like, have two hundred shares of stock in the new Company (instead of the return of your $5,000) —in addition to which a further two hundred shares in the new Company (equalling the amount of your subscription at $25. a share) will be allotted to you.

If you wish to avail yourself of the option of taking the two hundred shares first mentioned, instead of receiving back the
774 $5,000, which you subscribed to the Syndicate, you must notify me in writing on or before Saturday next the 27th instant, after which date this option will positively expire.

Very truly yours,

—— ——."

Mr. HEMENWAY: No. 275.

Mr. TREADWELL: A letter dated July 25, 1895, Lewisohn Brothers to H. Wallerstein.

[The letter numbered 275 is as follows:]

JULY 25TH, 1895.

H. Wallerstein, Esq., City.

DEAR SIR: We beg to confirm that we have subscribed for your account for five hundred (500) shares of Old Dominion Copper Mining & Smelting Company's stock at $25. a share, which we expect will be delivered about October 1st, when one payment will be required.

Please confirm.

Very truly yours,

LEWISOHN BROTHERS,
General Manager."

Mr. HEMENWAY: No. 291.

Mr. TREADWELL: Letter dated August 6, 1895, Lewisohn Brothers to H. Wallerstein.

[The letter numbered 291 is as follows:]

AUGUST 6TH, 1895.

Mr. H. Wallerstein, c/o Mr. D. Wallerstein, City.

DEAR SIR: The following will give you a little idea of the prospects of the Old Dominion Copper Mining & Smelting Company.

This mine, under the name of the Old Dominion Copper Company, has been in operation for the last 14 years, making copper right along called the Old Dominion copper containing about 97½ per cent. pure copper. This copper has been sold mostly to France and Germany, and some to England of late years; therefore the brand is known all over. It is a very pure copper.

The ores from which this copper is made are mostly carbonates, which ores are materially better than the sulphates, which is the product of the Montana mines. The sulphate ores have first
775 to be concentrated, which costs quite something, and the plant itself is very costly indeed; then it has to be roasted in order to get the impurities out, like arsenic, sulphur, etc.; then, after it is roasted, it has to be made into a matte of about 45 to 50 per cent. copper.

Now, these carbonate ores, of which the Old Dominion mines has enormous quantities opened up now, are ready to be taken out at a moment; and there is quite a lot on the dump. They have simply to be thrown into a blast furnace and 97½ per cent copper is made without any concentrating or roasting. Naturally it is much cheaper to produce and needs nothing like such an expensive plant.

The new company, The Old Dominion Copper Mining & Smelting Company, has all the furnaces and everything ready for making a larger production, and we have $500,000 in cash in the treasury of the company, to be used to add new furnaces and make the production even larger. There is no question about it that the company will be able to declare dividends within six months.

We are not at present making much copper as the railroad will be in Globe, at the mines, sometime late this autumn. The railroad is now 60 miles away—to which distance it was only finished a little while ago from a former distance of 120 miles.

The old company has always made money and made copper very cheap, even hauling in coke 120 miles and bringing out the copper the same distance by mule teams, which was naturally very expensive and on which we will effect an enormous saving.

We believe that the Old Dominion Copper Mining & Smelting Company will produce cheaper copper than any other copper mine in this country—including the Calumet & Hecla, Anaconda and Boston & Montana.

We expect to have a report from the different Engineers who have examined the mine carefully a month or two ago, shortly, and we can then give you further particulars.

Very truly yours, LEWISOHN BROTHERS,
General Manager."

Mr. HEMENWAY: No. 134.

Mr. TREADWELL: Letter dated September 20, 1895, Simon H. Stern to Lewisohn Brothers.

776 [The letter numbered 134 is as follows:]

"SEPTEMBER 20TH, 1895.

DEAR SIRS: Referring to your favor of the 3rd of June last I beg to enclose herein my check for $8600 to cover the third and fourth payments for my interests in the Old Dominion Syndicate as they then existed. Kindly acknowledge receipt of same. If you consider any adjustment of interest necessary please let your bookkeeper make a calculation and send it to me; but inasmuch as I anticipated some of the payments it seemed to me it could not make much difference one way or the other.

Please also send me such certificate of stock as I am entitled to.

Yours truly, SIMON H. STERN.

Mess. Lewisohn Brothers, City."

Mr. HEMENWAY: No. 94.

Mr. TREADWELL: Letter dated July 12, 1895, A. W. Evarts to Leonard Lewisohn.

[The letter numbered 94 is as follows:]

"NEW YORK, *July* 12, 1895.

DEAR MR. LEWISOHN: I enclose deed from you to the Old Dominion C. M. & S. Co. The certificates of organization and the appointment of an agent required by Arizona law to be filed before any business can be done in that territory went by last night's registered mail to be filed & I requested telegraph notice to be sent of their filing which should reach here by Thursday of next week. It would be better not to execute this deed from you to the company until these papers are filed—but if you are to be away for any length of time it can be executed and left by you with me to be delivered later when the deed from the Baltimore Co. is delivered.

If you conclude to execute today, please have two witnesses and acknowledge before a Notary Public who should affix his seal.

Yours very truly, A. W. EVARTS.

Leonard Lewisohn, Esqr., 81 Fulton St."

Mr. HEMENWAY: No. 95.

Mr. TREADWELL: Letter dated July 12, 1895, to Allan W. Evarts.

777 [The letter numbered 95 is as follows:]

"JULY 12, 1895.

Allen W. Evarts, Esq., 52 Wall Street, City.

DEAR SIR: Please find enclosed herewith deed from me to the Old Dominion Copper Smelting & Mining Co., which has been executed

in accordance with the directions contained in your favor of even date.

Yours very truly, —— ——."

Mr. HEMENWAY: No. 276.

Mr. TREADWELL: Letter dated July 25, 1895, to E. Hawley.

[The letter numbered 276 is as follows:]

"JULY 25, 1895.

Mr. E. Hawley.

DEAR SIR: A number of the largest subscribers to the Old Dominion Syndicate having requested that they be allowed to take shares in the new Company at their par value of $25 per share, instead of having the amount of their subscription returned to them from the proceeds of sale of stock in the new Company as proposed, as a subscriber to the Syndicate you are hereby informed that it has been decided to grant this request; and the amount of your subscription being $10,000, you can, if you like, have four hundred shares of stock in the new Company (instead of the return of your $10,000)—in addition to which a further four hundred shares in the new Company (equalling the amount of your subscription at $25 a share) will be allotted to you.

If you wish to avail yourself of the option of taking the four hundred shares first mentioned instead of receiving back the $10,000 which you subscribed to the Syndicate, you must notify me in writing on or before Saturday next the 27th instant, after which date this option will positively expire.

Very truly yours, —— ——."

Mr. HEMENWAY: No. 244.

Mr. TREADWELL: Letter dated May 24, 1895, Lewisohn Brothers to Adolph Lewisohn.

[The letter numbered 244 is as follows:]

"NEW YORK, *May 24th*, 1895.

Adolph Lewisohn, Esq., London.

DEAR SIR: Mr. Meredith got back from Baltimore yesterday and had a conference of a couple of hours' duration with Mr.
778 Keyser, but is none the wiser as to whether this gentleman intends to let us have his two-sevenths of the Old Dominion or not. He intimates that if we make it a different Company with a higher capitalization he would probably not remain in; but he has not decided and is not compelled to decide for sixty days. Having three Directors out of five, they control; and we would have to get one of these Directors on our side—otherwise they would have the running of the Company until next February, when a Meeting will be held and new Directors appointed.

We will have to take our chances on this matter, and we hope he will act fairly.

Mr. Lieberman of Arizona is one of the Directors, we understand, and Mr. Leonard Lewisohn believes we will be able to win him over.

Mr. Simpson also promised to help us in gaining our point there, and it is probable that this matter will right itself in course of time, as it is not likely that Keyser will be very mean when there is not much for him to gain thereby.

Very truly yours, LEWISOHN BROTHERS,
General Manager."

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

Deposition of Joseph F. Costello.

JOSEPH F. COSTELLO, being first duly sworn, in answer to interrogatories propounded by J. WELLS FARLEY, Esq., counsel for the defendants, the witness deposes and says,—

Q. 1. What is your full name?
A. Joseph F. Costello.
Q. 2. Where do you live?
A. Dorchester; 31 East street.
Q. 3. What is your present occupation?
A. I am a reporter for the "Boston News Bureau."
Q. 4. What are these two books that I now show you, marked on the outside, "Boston News Bureau, Vol. 17, July 1st, 1895, to Sept 31, 1895," and "Boston News Bureau, Vol. 16, Jan. 1, 1895, to June 30, 1895," respectively?
A. Those are two bound volumes of the "Boston News Bureau" summaries.
779 Q. 5. Where did you find them?
A. Those came from our vault.
Q. 6. By whom were you directed to bring them here?
A. Mr. Herbert M. Cole.
Q. 7. Who is Mr. Herbert M. Cole?
A. He is the manager in the absence of Mr. C. W. Barron.
Q. 8. Where is Mr. Barron?
A. Where is he now?
Q. 9. Yes.
A. I do not know where Mr. Barron is.
Q. 10. Is he present at or absent from the office?
A. He is absent from the office.
Q. 11. Will you turn to the issue of Saturday, May 25, 1895, and, looking on the last page of that issue (the pages not being numbered), read, or see that I read correctly, the item in regard to Old Dominion?

[Objected to as incompetent, irrelevant, and immaterial.]

Mr. HEMENWAY: This evidence is offered simply for the sake of showing the publicity of these transactions.

Mr. BRANDEIS: The admissibility of the evidence for any purpose is objected to as incompetent, irrelevant, and immaterial.

A. The item is as follows:

"Old Dominion.

Boston—The syndicate that holds an option on five-sevenths of the Dominion copper mine of Arizona will also take the other two-sevenths as soon as arrangements can be made. The syndicate that has taken hold of this property comprises only five or six parties, and there is no intention of placing any stock on the market."

Q. 12. Will you now turn to the issue of Wednesday, May 29, 1895, and, looking on the first page thereof, read the item in regard to Old Dominion?

[Objected to for the reasons above stated.]

A. The item is as follows:

"Old Dominion.

Boston—The Syndicate that holds an option on five-sevenths of the Old Dominion Copper Mining Co. of Arizona closed the same yesterday and will probably later take the other two-sevenths controlled by Mr. Kaiser of the Baltimore Smelting Co. and his friends.

780 Mr. Dodge of Phelps, Dodge & Co. while a large holder or Arizona copper mines securities, is not interested in the Old Dominion.

No plans in regard to the mine have been formulated as yet. The mine is already equipped with machinery.

This mine in no way controls the Arizona copper outputs as reported. Arizona last year produced 11,000,000 lbs. of copper, of which Old Dominion produced about 4,000,000 lbs. Its largest production in one year was 7,500,000 lbs."

Q. 13. Will you now turn to the issue of Friday, May 31, 1895, and, looking on the last page thereof, read the item in regard to Old Dominion?

[Objected to for the reasons above stated.]

A. The item is as follows:

"Old Dominion.

Boston—The purchase of the Old Dominion copper mine has been concluded, and property has passed into the hands of the Bigelow-Lewisohn syndicate."

Q. 14. Will you now turn to the issue of June 13, 1895, and, looking on the first page thereof, read the item in regard to the Old Dominion Copper Company?

[Objected to for the reasons above stated.]

A. The item is as follows:

"Old Dominion Copper Co.

Boston—The Sears building people have received final word that the minority interests of the Old Dominion Copper Co. will sell the last two-sevenths of the property at the price paid for the major interest."

Q. 15. Will you now turn to the issue of June 20, 1895, and looking on the first page thereof, read the item which there appears in regard to the Old Dominion Copper Company?

[Objected to for the reasons above stated.]

A. The item is as follows:

781 "Old Dominion.

Boston—Payment was made today to the Old Colony Trust Co. for the two-sevenths interest in the Old Dominion Co. held by Baltimore people.

Boston—$2000, or 2%, has been bid for a $10,000 subscription to Old Dominion Copper Co."

Q. 16. Will you now turn to the issue of June 24, 1895, and, looking at that issue of June 24, 1895, read the item which there appears in regard to Old Dominion?

[Objected to for the reasons above stated.]

A. The item is as follows:

"Old Dominion.

Boston—We understand that the Old Dominion Copper Co. will be reorganized with capital stock of 100,000 shares, par value $25."

Q. 17. Will you now turn to the issue of June 25, 1895, and, looking at that issue of June 25, 1895, on the first page, read the item that there appears in regard to Old Dominion?

[Objected to for the reasons above stated.]

A. The item is as follows:

"Old Dominion.

Boston—Nothing has been actually done by the trustees of the Old Dominion Copper Co. as yet regarding the organization or capitalization of the company."

Q. 18. Will you now turn to the issue of July 9, 1895, and, looking at that issue of Tuesday, July 9, 1895, read the item that there appears in regard to Old Dominion?

[Objected to for the reasons above stated.]

A. The item is as follows:

"Old Dominion.

Boston—It is not true that Mr. Lewisohn took one-half of the Old Dominion Copper Co. subscription. He took one-half of the five-sevenths, but Boston not only took one-half of the five-sevenths but two-thirds of the two-sevenths.

It is understood that there will be 150,000 shares of the
782 par value of $25 in the new Co. although this is not yet settled, in fact the concern is not yet a public affair and subscriptions are non negotiable.

It is a fact, however, that Boston will have the larger interest in the property and it is understood that Hon. Moses T. Stevens of North Andover and Hon. Joseph G. Ray of Franklin will be directors in the new company, and also Henry M. Whitney of Boston."

Q. 19. Will you now turn to the issue of July 10, 1895, and, looking at that issue of Wednesday, July 10, 1895, on the first page thereof, read the item that there appears in regard to Old Dominion?

[Objected to for the reasons above stated.]

A. The item is as follows:

"Old Dominion.

Boston—New York interests are bidding a premium of 75% for Old Dominion subscriptions and it is figured that subscribers will get their money all back which would make their stock left all gain.

Good judges say that the Old Dominion can produce copper cheaper than any mine in this country. It is believed that if the mine has railroad facilities it can lay down copper in New York at 4c. per pound.

The Old Dominion has always been a paying property. It has paid as high as 20% on its capital stock when its ore had to be carted 120 miles."

Q. 20. Will you now turn to the issue of July 11, 1895, and, looking at that issue, on the first page thereof, read the item that there appears in regard to Old Dominion?

[Objected to for the reasons above stated.]

A. The item is as follows:

"Old Dominion.

Boston—The subscribers of the Old Dominion Copper Co. will probably receive back their money and 40,000 shares in the new organization. There will be offered for subscription 60,000 shares at $25 per share; 40,000 shares to furnish the $1,000,000 paid to original subscribers and 20,000 shares to furnish $500,000 working capital."

Q. 21. Will you now turn to the issue of July 12, 1895,
783 and, looking at that issue of Friday, July 12, 1895, on the first page thereof, read the item which there appears in regard to Old Dominion?

[Objected to for the reasons as above stated.]

A. The item is as follows:

"Old Dominion.

Boston—The following were elected yesterday directors of the 'new' Old Dominion Copper Co.: A. S. Bigelow, Thos. Nelson and Henry M. Whitney of Boston, A. W. Evarts of New York, Jos. G. Ray of Franklin, Leonard Lewisohn of New York, Edgar Buffum of New Jersey A. S. Bigelow, president, and Thos. Nelson, treasurer. It was necessary in order to obtain a quorum to make Mr. Evarts a director, but he will be succeeded by Moses T. Stevens."

Q. 22. Will you now turn to the issue of July 19, 1895, and, looking at that issue of Friday, July 19, 1895, and looking on the first page thereof, read the item which there appears in regard to Old Dominion?

[Objected to for the reasons as above stated.]

A. The item is as follows:

"Old Dominion.

Boston—A small lot of Old Dominion sold at 30 this morning Of the 150,000 shares of this company, 20,000 shares have been sold at 25 to give the corporation a working capital of $500,00."

Q. 23. Will you now turn to the issue of July 20, 1895, and, looking at that issue of Saturday, July 20, 1895, on the first page thereof, read the item which there appears in regard to Old Dominion?

[Objected to for the reasons as above stated.]

A. The item is as follows:

"Old Dominion.

Boston—The Old Dominion subscriptions will be allotted about Aug. 1."

Q. 24. Will you now turn to the issue of July 22, 1895, and, looking at that issue for Monday, July 22, 1895, read the item which there appears in regard to Old Dominion?

[Objected to for the reasons as above stated.]

784 A. The item is as follows:

"Old Dominion.

Boston—The following letter has been issued to the Old Dominion syndicate:

'A number of the largest subscribers to the Old Dominion Syndicate have requested that they be allowed to take shares in the new company at their par value of $25, in lieu of the money which they originally advanced, and which was to be repaid to them from the proceeds of the sales of the new stock. As a subscriber to the

syndicate you are hereby informed that it has been decided to grant this request. If you wish to avail yourself of this opportunity, you must notify me in writing on or before Aug. 1, 1895, after which date this option will positively expire.

A. S. BIGELOW."

Q. 25. Will you now turn to the issue of July 25, 1895, and, looking at that issue of Thursday, July 25, 1895, on the first page thereof, read the item which there appears in regard to the Old Dominion?

[Objected to for the reasons as above stated.]

A. The item is as follows:

"Old Dominion.

Boston—Members of the original syndicate in the Old Dominion subscription are very generally taking advantage of the option accorded them to take the new stock."

Q. 26. Will you now turn to the issue of August 3, 1895, and, looking at that issue of Saturday, August 3, 1895, on the last page thereof, read the item which there appears in regard to the Old Dominion?

[Objected to for the reasons as above stated.]

A. The item is as follows:

"Old Dominion.

Boston—Subscriptions to the Old Dominion copper shares at $25 per share are understood to have exceeded 100,000 shares. As all the members of the syndicate elected to keep their stock in preference to parting with it at $25 per share, the subscribing brokerage houses will get nothing outside of their syndicate subscription.

785 Of the 20,000 shares taken at $25 per share for working capital by the original purchasing syndicate a small amount may be surrendered to friends of the Co., but there is no placing of the stock abroad and practically no allotment on the public subscription."

Q. 27. Will you now turn to the issue of the 6th of August, and, looking at that issue of Tuesday, August 6, 1895, on the first page thereof, read the item which there appears in regard to the Old Dominion?

[Objected to for the reasons as above stated.]

A. The item is as follows:

"Old Dominion.

Boston—Mr. Lewisohn estimates that the Old Dominion will in time be as large a producer of copper and as valuable a property as the Boston & Montana. He says it can produce copper at as low a cost as the Montana.

When Mr. Lewisohn secured through Mr. Meredith of Meredith & Grew the option upon five-sevenths of the Old Dominion property from the Simpson estate upon the basis of $1,000,000, the Baltimore Smelting people owning two-sevenths of the property claimed to have an option upon the five-sevenths upon the basis of $800,000, and were very much disappointed when they found they had lost the property."

Q. 28. Will you now turn to the issue of the 7th of August, 1895, and, looking at that issue of Wednesday, August 7th, 1895, on the first page thereof, read the item which there appears in regard to Old Dominion?

[Objected to for the reasons as above stated.]

A. The item is as follows:

"Old Dominion.

Boston—The parties in interest who first proposed to take all the 20,000 shares Old Dominion stock, issued for working capital, have finally agreed to give up the same and consequently there will be little scaling down of the public subscription."

Q. 29. Will you now turn to the issue of September 19, 1895, and, looking at that issue of Thursday, September 19, 1895, on the first page thereof, read the item which there appears in regard to Old Dominion?

[Objected to for the reasons as above stated.]

786 A. The item is as follows:

"Old Dominion.

Boston—The corporate organization of the Old Dominion Copper Co. was completed yesterday at a meeting of the directors, and $500,000 in cash put into the treasury of the new company, although Mr. Hyams just back from the mines reports that he cannot see where more than $50,000 can be expended for the improvement of the property at the present time.

The report from Globe, Arizona, that the company had purchased $350,000 worth of machinery is not true. Only a $750 boiler has thus far been ordered.

Taking the books of the old company as a basis, and adding only the reduction in expenses already made, although many more are contemplated, the cost of the Old Dominion Co.'s copper laid down in New York and sold cannot be above 7½c., and the present price for pig copper is 10⅝c."

Q. 30. How long have you been with the "Boston News Bureau?"

A. Since the 19th of September, 1904. I had been there three years on the 19th of last September.

JOSEPH F. COSTELLO.

[No cross-examination.]

[Recess until 2 P. M.]

Subscribed and sworn to this 5th day of November, 1907, before me,

[SEAL.] HOWLAND TWOMBLY,
Notary Public.

Stipulation.

It is agreed that the deposition of this witness shall be taken stenographically; also that either party may use this deposition when filed.

Deposition of Thomas H. O'Neil.

THOMAS H. O'NEIL, being first duly sworn, in answer to interrogatories propounded by Alfred Hemenway, Esq., counsel for the defendants, the witness deposes and says:

Q. 1. What is your full name?
A. Thomas H. O'Neil.
Q. 2. What is your business?
A. I am a reporter for the "Boston Herald."
787 Q. 3. This bound volume of the files of the "Boston Herald," "July and August, 1895," is produced by you, is it not?
A. Yes, sir.
Q. 4. Where did you get this volume?
A. From the "Boston Herald" news room.
Q. 5. Now will you turn to the issue of Friday, July 19, 1895, and read to us what is said about the Old Dominion Company on page 5 of that issue?

[Objected to as incompetent, irrelevant, and immaterial.]

Mr. HEMENWAY: This evidence is offered simply for the sake of showing the publicity of these transactions.

Mr. BRANDEIS: The admissibility of the evidence for any purpose is objected to as incompetent, irrelevant, and immaterial.

A. "Old Dominion (new) stock was quoted 26 and 30 bid privately. It now transpires that the recapitulation as previously understood $2,500,000 is $1,250,000 below the actual. The Herald is always pleased to understate the truth when the exact truth is not stated through ignorance of the full truth. The amendment of supposed fact merely punctuates the comment made upon this subject. The $1,000,000 of 'water' in the capital stock is swollen to a 'flood' of $2,250,000, and it is understood that the original promoters take this added $1,250,000 to themselves. The case stands this way:

Original capital, 25,000 shares at 20	$500,000
Purchasers paid for same 40 a share	$1,000,000
Capitalized same for 150,000 shares at 25	$3,750,000
Put into pockets of purchasers, 50,000 shares at 25	$1,250,000
Gone to subscribers of $1,000,000 purchase money 40,000 shares at 25	$1,000,000
Sold to public 60,000 shares at 25	$1,500,000

And a premium is now bid of 1 to 5 per share for the stock of a company formerly capitalized for $500,000 and considered well sold for $1,000,000 a few days ago, but now recapitalized for 750 per cent. of its former par value and 375 per cent. of the purchase price. What will be the fruit of such financial sowing? What but the inevitable fruit of speculative financiering? It is said that New York took a large amount of the 60,000 shares sold to the public, and that Mr. Leonard Lewisohn stood ready to give his check for the whole block."

788 Q. 6. In what column does that what you have just read appear?

A. In the column headed "Financial."

Q. 7. Is that the morning edition?

A. It is the morning edition.

Q. 8. By whom were you directed to bring this file of new-papers here?

A. By W. H. Ford, the day editor of the "Herald."

Q. 9. Will you now turn to the issue of the "Boston Herald" of Friday morning, July 26, 1895, and read from the third page, in the financial column, what is said about Old Dominion?

[Objected to for the reasons above stated.]

A. "Old Dominion stock was 28¾, and sales, while 1 per cent. was reported bid to call it at 31 within 60 days. It is said that members of the original syndicate in the Old Dominion subscription are very generally taking advantage of the option accorded to them to take the new stock. By original syndicate is meant the subscribers to the $1,000,000 paid for the stock of the original company, not the ground floor syndicate which arranged for the deal and voted itself a fee of $1,250,000 par value. Now, the $1,000,000 syndicate had the option of receiving back the $1,000,000 with a bonus of another $1,000,000 par value, to wit, 40,000 shares of stock, or subscribing for 40,000 more shares at par, 25, and receiving 40,000 shares as a bonus. It is said that the members are generally elected to turn the original subscription into stock, which is scarcely amazing. The 80,000 shares will cost the syndicate $1,000,000, or 12½ per share, and this stock is now quoted at 28¾—a premium, of 3¾—before it is issued. Now, this $1,000,000 syndicate is believed to include the ground floor or sub-cellar syndicate which took to itself the fee, or bonus, or whatever the fitting name, of 50,000 shares, par value $1,250,000. The members of the $1,000,000 syndicate, who subscribed, say, $10,000 and took stock instead of the money in repayment, receives 400 shares for his money and 400 shares as a practical bonus, 800 shares in all, at a cost of 12½ per share. But if he was also in the lower stratum syndicate he gets 500 shares additional, or 1300 shares in all, at a cost of $10,000 for the lot, say about 7 11/16 per share. Here, then, are two classes of shareholders paying 12½ and 7 11/16, respectively, for the new Old Dominion stock. Then there is that other class buying the balance of the 60,000 shares, of which the $1,000,000

syndicate takes 40,000 at 25 per share. Three classes of shareholders, therefore, will exist, the sub-cellar, the ground floor
789 and the attic classes, holding certificates costing in the ratio of 7 11/16, 12½ and 25; or, to express it in dollars, $7.69, $12.50 and $25."

Q. 10. Will you turn to the issue of the "Boston Herald" of September 20, 1895, and, from the financial column on page 5, read any comment upon Old Dominion?

[Objected to for the reasons above stated.]

A. "The Old Dominion Copper Company has completed its reorganization. Agent Hyams sees no need of expending more than $50,000 on improvements, for the present. The story that $350,000 worth of machinery had been purchased is wrong. A boiler to cost $750 is the limit of orders placed to date.

If only $50,000 of money is required for Old Dominion improvements, why was a capital stock of $500,000 multiplied to $3,750,000 and cash equal to the old capital stock put into the treasury? New stock was offered at 25 today. It is not unlikely that a pool will take this stock in hand and put it up to enhance the profits of subscribers who may wish to unload. The first sign of such purpose is seen in the following paragraph:

One-fourth of one per cent. was bid in the local board today to call 1000 shares of Old Dominion at 30 within 30 days."

[No cross-examination.]

THOMAS H. O'NEIL.

Subscribed and sworn to this 6th day of November, 1907.
Before me:
[SEAL.] HOWLAND TWOMBLY,
Notary Public.

CHARLES H. ALTMILLER, recalled.

CHARLES H. ALTMILLER, having previously been sworn, and having previously testified, being recalled by counsel for the defendants for further cross-examination, in answer to interrogatories propounded by J. Wells Farley, Esq., of counsel for defendants, further deposes and says:

X 216. What is your full name?

A. Charles H. Altmiller.

X 216½. You have been previously sworn in this case?

A. Yes, sir.

X 217. Will you first produce the deed from Leonard
790 Lewisohn to the Old Dominion Copper Mining & Smelting Company of certain mining claims?

A. [Deed produced.]

Mr. FARLEY: I will ask to have this deed marked.

Mr. BRANDEIS: A copy of it had better go in. Have it marked, and a copy made to go in.

Mr. FARLEY: It is agreed that the original deed may be marked, and that a copy shall be submitted to be copied into the record, the copy to be an absolute copy.

Mr. BRANDEIS: Mr. Burpee had better take the deed and make a copy of it.

Mr. HEMENWAY: Not only a copy of the deed, but of the endorsements, when it was recorded, and so forth.

[The original deed, dated July 12, 1895, was marked "Defendants' Exhibit A, G. C. B., October 31, 1907;" and a copy of the deed is as follows:]

"This Indenture made the twelfth day of July in the year One thousand eight hundred and ninety five Between Leonard Lewisohn of the City, County and State of New York party of the first part and Old Dominion Copper Mining and Smelting Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey party of the second part.

Witnesseth: that the said party of the first part for and in consideration of the sum of One hundred dollars and of other good and valuable considerations the receipt whereof is hereby acknowledged hath granted, conveyed, bargained, sold, released and forever quitclaimed and doth by these presents grant, convey, bargain, sell, release and forever quit-claim unto the said party of the second part its successors and assigns all the right, title, interest and estate of the said party of the first part in and to all the following described premises, situate, lying and being in the County of Gila, Arizona Territory, viz:

1st. The Old Dominion Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1883, in the United States Land office at Tucson, Arizona, Entry No. 267, Lot No. 45, situated in Globe Mining District in Gila County, Arizona.

2nd. The New York Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1883, in the United States Land office at Tucson, Arizona, Entry No. 268, Lot No. 46, in Globe Mining District in Gila County, Arizona.

3rd. The Chicago Mine entered by the Old Dominion
791 Copper Mining Company on the 17th day of December 1883, in the United States Land office at Tucson, Arizona, Entry No. 269, Lot No. 51, in Globe Mining District Gila County, Arizona.

4th. The Keystone Mine entered by the Old Dominion Copper Mining Company on the 17th day of December 1885, in the United States Land office at Tucson, Arizona, Entry No. 384 Lot No. 54 in Globe Mining District, Gila County, Arizona.

5th. A lot or parcel of land situated near the Bloody Tanks and deeded by E. A. Saxe to the Old Dominion Copper Mining Company, Deed recorded in Book 1, of Deeds of the Recorder of Gila County, Arizona, and reference is hereby made to said record for a fuller description of said parcel of land.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining:

To Have and To Hold all and singular the said premises together with the appurtenances and privileges thereto incident unto the said party of the second part its successors and assigns forever.

In Witness Whereof the said party of the first part hath hereunto set his hand and seal the day and year first above written.

LEONARD LEWISOHN. [SEAL.]

In the presence of,

JOSEPH RECHERT.
SIDNEY RIDDLESDORFFER.

STATE OF NEW YORK,
City and County of New York, ss:

Before me —— ——, a Notary Public of the State of New York residing in the City and County of New York duly commissioned and sworn on the twelfth day of July eighteen hundred and ninety five personally appeared Leonard Lewisohn known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office the day and year last above written.

JOHN F. FOX.
[SEAL.] *Notary Public, New York County.*

792 [Endorsements.]

Dated July 12th, 1895.

Leonard Lewisohn
to
Old Dominion Copper Mining and Smelting Company.

TERRITORY OF ARIZONA,
County of Gila, ss:

I, G. M. Allison, County Recorder in and for said Gila County, Do Hereby Certify, that the within instrument of writing, was filed at the request of J. A. Parnall, Supt. on the 18 day of Jany. A. D., 1896, at 10 minutes past 4 o'clock P. M., and duly recorded at Page 116, Book 3, Records of Deeds to Mines, Gila County, Arizona Territory.

[Seal Gila County, Arizona, Recorder.]

G. M. ALLISON,
County Recorder.

X 218. Will you also produce the deed from the Old Dominion Copper Company to the Old Dominion Copper Mining & Smelting Company of certain mining claims?

A. [Deed produced.]

Mr. FARLEY: The next paper produced by Mr. Altmiller is a deed to be marked "Defendants' Exhibit B," this being a deed from the Old Dominion Copper Company to the Old Dominion Copper Mining & Smelting Company, dated December 28, 1895.

[This deed is marked "Defendants' Exhibit B, G. C. B., October 31, 1907," and a copy of the deed follows:]

"This Indenture made the 28th day of December in the year One thousand eight hundred and ninety five Between The Old Dominion Copper Company, of Baltimore City, a corporation organized and existing under and by virtue of the laws of the State of Maryland, party of the first part and Old Dominion Copper Mining and Smelting Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, party of the second part Witnesseth:

That the said party of the first part for and in consideration of the sum of one hundred dollars and of other goods and valu-
793 able considerations, the receipt is hereby acknowledged hath granted, conveyed, bargained, sold, released and forever quit-claimed and doth by these presents grant, convey, bargain, sell, release and forever quit-claim unto the said party of the second part its successors and assigns all the right, title, interest, and estate of the said party of the first part in and to all the following described premises situate, lying and being in the County of Gila, Arizona Territory, viz:

First. The Globe Mine, patented by the United States Government to B. W. Reagan on the 18th day of October 1881, by patent recorded in the office of the Recorder of Pinal County, Territory of Arizona, on the 19th day of November 1881, to which record reference is made for a fuller description of said Mine.

Second. The Globe Ledge Mine, patented by the United States Government to Benjamin W. Reagan on the eighteenth day of October 1881, by patent recorded in the office of the Recorder of Pinal County, Territory of Arizona, on the nineteenth day of November 1881, to which record reference is made for a fuller description of said Mine.

Third. The Copper Jack Mill Site, of which the location is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 311, and to which record reference is hereby made for a fuller description of said Mill Site, and upon which the Smelting Works, formerly owned by the Old Dominion Copper Mining Co. are situated.

Fourth. The Globe Mill Site, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 311, to which record reference is hereby made for a fuller description of said Mill Site.

Fifth. The Globe Ledge Mill Site, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 310, to which record reference is hereby made for a fuller description of said Mill Site.

Sixth. The Southeast Globe Mine, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 312 and reference is hereby made to said records for a fuller description of said Mine.

Seventh. All of that certain Mining Claim known as the Interloper, in Globe District, County of Gila, Territory of Arizona, and recorded in Globe District Records, on pages 116 and 117 in Book 3, reference to which will more fully show, being the same property conveyed to the said party of the first part by William Key-
794 ser by deed bearing date of June 27th 1888, and recorded as pages 14-16, Book 3 Records of Deeds to Mines, Gila County, Arizona Territory.

Eighth. The Fraction Mine, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 569, to which record reference is hereby made for a fuller description of said Mine.

Ninth. The Alice Mine or Lode, located October 10th, 1875, by A. R. Hammond and J. W. Reed, and notice of location recorded in Book 1, page 131, Globe District Mining Records (now a part of the Records of Gila County) and relocated February 28th 1879, and notice of location recorded in Book 5, Globe District Mining Records (now a part of the Records of Gila County) on pages 184 and 185, said Mine or Lode being more particularly described in the last mentioned notice of location, as follows, to wit: Commencing at this monument of stones in a gulch, being the center of South-west end of claim, and upon which this notice is posted; thence South-east 300 feet to a monument of stones, thence North-east 1400 feet to a monument of stones; thence North-west 300 feet to a monument of stones; being the center of the Northeast end of claim; thence Northwest 300 feet to a monument of stones, thence Southwest 1400 feet to a monument of stones under a tree; thence Southeast 300 feet to the place of beginning, being the same mining claim conveyed to Michael H. Simpson now deceased, by deed of the Globe City Mining Company, dated July 1st 1884, and recorded with Gila County Deeds to Mines Book 2, page 227 et seq.

Tenth. The Mining Claim called and known as the Hypatia Mine, situate, lying and being in Globe Mining District, Gila County, Territory of Arizona, and more particularly described in the notice of location recorded at page sixty six (66) Book 2, Records of Mines, Gila County Records, to which record reference is made for a more definite description of said Mine; said Mine was formerly known as the South-west Alice Mine, being the same mining claim conveyed to said Michael H. Simpson, now deceased, by deed of William H. Cook, dated November 18th, 1884, and recorded with Gila County Deeds Book 2, page 305.

Eleventh. Any and all other pieces or parcels of real estate mines, mining rights and claims situate, lying and being in Arizona Territory or elsewhere, which are or may be owned by or on behalf of the party of the first part or in which it is or may be interested; it being the purpose and intent of this indenture to grant and convey to the party of the second part, all the mines, lands, real estate and interest therein of every kind and nature whatsoever and

795 wheresoever situated, which the party of the first part now owns or is entitled to and to which it may at any time hereafter become entitled to.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining.

To have and to Hold all and singular the said premises, together with the appurtenances and privileges thereto incident unto the said party of the second part its successors and assigns forever.

In Witness Whereof the said party of the first part hath caused these presents to be signed by its President and its corporate seal to be hereunto affixed and attested by its Secretary, the day and year first above written.

THE OLD DOMINION COPPER CO.

[SEAL.] By A. S. BIGELOW, *President.*

Attest:
THOMAS NELSON, *Sec'y.*

STATE OF MASSACHUSETTS,
County of Suffolk, City of Boston, ss:

Before me Clarence H. Bissell, a Notary Public duly commissioned and sworn on this twenty eighth day of December eighteen hundred and ninety five, personally appeared A. S. Bigelow and Thomas Nelson to me known and known to me to be the President and Secretary respectively of the Old Dominion Copper Company of Baltimore City, who being by me first duly sworn did depose and say: that they were respectively the President and Secretary of said Company: that they knew the corporate seal affixed to the foregoing instrument was such corporate seal and had been so affixed by authority of a resolution of the Board of Directors of said Company and that they had subscribed said instrument by like authority.

In Witness Whereof I have hereunto set my hand and affixed my official seal the day and year last above written.

CLARENCE H. BISSELL,
Notary Public.

[SEAL.]

[Endorsements.]

Dated Dec. 28th, 1895.

The Old Dominion Copper Company
to
Old Dominion Copper Mining and Smelting Company.

Deed.

796 TERRITORY OF ARIZONA,
County of Gila, ss:

I, G. M. Allison, County Recorder in and for said Gila County, Do Hereby Certify, that the within instrument of writing, was filed

at the request of J. A. Parnall, Supt. on the 18 day of Jan'y A. D., 1896, at 15 minutes past 4 o'clock P. M., and duly recorded at Page 448-52, Book 3, Records Deeds to Mines Gila County, Arizona Territory.

[Seal Gila County, Arizona, Recorder.]

G. M. ALLISON,
County Recorder."

X 219. From where did you produce these deeds?

A. From our box.

X 220. Will you now produce the check book of the Old Dominion Copper Mining & Smelting Company,—the first check book which that company has?

A. [Check book produced.]

X 221. Let me ask you in regard to the method of keeping the books of the Old Dominion Copper Mining & Smelting Company at the time this check book was kept, that is, from July 12, 1895, and thereafter. What method did you have of keeping a record of the persons from whom cash was received?

A. Well, it was entered on the debtor side of the check book.

X 222. Was that the only method?

A. That was the only method.

X 223. As I understand you, then, the entries on the stub of this check book represent the original entries of persons from whom cash was received, and the amount in cash received from those persons?

A. Yes.

X 224. Did you formerly, in answer to Mr. Hemenway, submit a list, testify to a list, of the names of persons appearing on the first page, the debit side of that check book?

A. Yes, I think I did.

X 225. Will you examine the list which appears on page 12 of your testimony, and say if that is the list then submitted by you?

A. It is.

X 226. Noticing that list as it appears in testimony, did you then omit to state the number of shares of which you had a memorandum in your check book?

[Plaintiff's counsel objects to the use of the words "omit to state," because the list furnished on page 12 of the testimony referred to by defendants' counsel, was a list, in which the witness was requested to give all the dates of payments by parties, by whom payments were made, and the amounts of the payments, the figures presenting the items from which this aggregate of $185,450 is made up.]

797 A. Well, I suppose so. I cannot remember, it is so long ago.

X 227. Will you again look at that list, and see whether or not you did not omit to enter the $1000 received from Lewisohn Brothers?

[Objected to and withdrawn.]

X 228. I will ask you whether, in your previous testimony, you did state the number of shares in response to the interrogatory just referred to by counsel for the plaintiff?

A. No.

X 229. I will ask you whether in your testimony as it appears on page 42 you stated or mentioned the sum of $1000 cash received from Lewisohn Brothers?

A. I do not know whether it is here or not.

X 230. No, I mean on that page,—page 42.

A. No.

X 231. Is it correct, then, to state that, to give a complete transcript of the first page of the stub of your check book, there should be added to the entries as appearing on page 42 of your testimony, the fact that Lewisohn Brothers paid $1000 cash for 40 shares at $25 per share to qualify directors?

A. No. It was put in suspense account, it was not payment for stock, it was money loaned, money advanced.

X 232. Please answer the question; will you read the first entry on the stub of your check book?

A. "July 12, 1895. Suspense account. Received from Lewisohn Brothers for 40 shares, $25 a share, to qualify directors."

X 233. Will you please explain where you find "Suspense Account"?

A. In lead pencil.

X 234. Written slanting across the entry?

A. That is right.

X 235. Then that is an entry which should be added to give a complete list as appearing on the stub of the persons from whom cash was received as shown by the check book?

A. No, I do not think so. I do not think it appears in this list at all.

X 236. It should be added?

A. No, it should not. It was advanced at that time, and the money was returned to him later.

X 237. I understand that, but I am referring to the list.

A. Well, it should not go into it.

X 238. Well, there was $1000 received from Lewisohn Brothers for 40 shares, was there not?

A. Yes, there was at that time.

X 239. Now have you totaled the number of shares which were given, or issued, according to the memoranda on the check book to the parties appearing at those places?

A. No.

X 240. Will you prepare that list, including the 40
798 shares issued in return for the payment from Lewisohn Brothers, and total the same and submit it as soon as you can complete it [handing witness a paper]?

Mr. BRANDEIS: Well, if you will do that: what Mr. Farley wants is a list of them.

A. Yes, certainly.

X 241. You are willing to take this as correct?

A. Yes.

X 242. Now, Mr. Altmiller, will you turn to the stub of your check book, to the entry which shows the amount of money received for shares of stock sold through Stackpole & Gay, and will you read the entry which appears on the stub of the check book under date of September 21, 1897?

A.—

125 shares of treasury stock at 28¼	3,515 63
450 at 28	12,600 00
Total	16,115 63
Less commission	71 88
Leaving a balance of	16,043 75

X 243. Then will you read the entry which immediately follows that, under date of September 23?

A.—

Sept. 23, Sold through Stackpole & Gay 10 shares treasury stock	$275 00
Less commission	1 25
Total	$273 75

X 244. Now there is one other entry. Will you read the entry which appears on the stub of your check book under date of October 8, 1907?

A. —.

Sold through Stackpole & Gay 1 share of treasury stock	$25 00
Less commission	25
Total	$24 75

Marked in lead pencil "Interest account."

X 245. Now will you total the number of shares as per those entries which appear to have been sold through Stackpole & Gay?

A. 586 shares.

799 X 246. Will you now turn to the entry under date of January 1, 1896? Will you now read the entry which appears on the credit side of the check book under date of January 16, 1896; so far as I am concerned, referring only to the entry "Amount due from Buffum," etc.?

A. "Less amount due from Edgar Buffum for 4 shares of stock, $100."

X 247. Let me ask you what that entry which you have just read refers to?

A. That, as near as I can remember, is 4 shares of those 40 shares

that appeared under July 12, 1895, in suspense account, Lewisohn Brothers.

X 248. Is that entry of $100 which you have just read a credit given to Lewisohn on his bill, as appears from the check book?

A. No, it is a charge to Lewisohn.

X 249. Now will you read the rest of the entry?

A.—

"Jan. 16, 1896, Lewisohn Brothers due per account rendered		10,393 83
Add amount received T. Hopkins		6 00
Making		10,399 83
Less amt. due from Edgar Buffum		100 00
Making a balance of		10,299 83"

X 250. And that $10,299.83 represents a check paid or sent to Lewisohn Brothers?

A. It does.

X 251. And the amount of that check was reduced by $100 by reason of this charge on account of money due from Edgar Buffum?

A. Yes.

X 252. Now, taking the shares for which you, according to the stub of your check book on the first two pages, received cash, including the 40 shares sold to Lewisohn Brothers, and adding the shares sold through Stackpole & Gay, and also adding those four shares which were charged to Lewisohn in accordance with the entry you have just read, is it not so, that the total number thus purchased would be 20,780?

A. Well, I have not done it myself; I checked you up the other day, followed you, and believe it is correct.

X 253. Have you any doubt of it?

A. No, I have no doubt of it.

X 254. Now will you, from the stub of the check book, state the several amounts paid out to J. S. Kendall, D. M. Anthony, and M. Luce, stating the dates, and reading the entries in each case?

A. "Sept. 28, 1895. Suspense account, J. S. Kendall. He took 600 shares and $5000 for 200 shares which he did not take—$5000."

X 255. Let me ask you whether that $5000 represents a check paid to Kendall?

A. I suppose so.

800 X 256. According to your entry does that represent cash for 200 shares of stock which he did not take?

A. Yes.

X 257. Now will you turn to D. M. Anthony? Here is one—Arthur D.——

A. "Oct. 1, 1895, Albert E. Hardy, Suspense, money instead of stock, $2000."

X 258. And the amount of $2000 represents a check paid to Hardy?

A. Yes.

X 259. And, according to your entries, for stock which he did not take?

A. I suppose so. I did not make these entries.

X 260. I ask you, according to the entries?

A. Yes, according to the entries it probably was.

X 261. Take the next entry.

A. "Oct. 1, 1895, H. H. Anthony, Suspense, money instead of stock, $5000."

X 262. And that represents a check paid to Anthony?

A. Yes.

X 263. And for 200 shares of stock which he did not take?

A. That is not stated.

X 264. Now M. Luce.

A. "Oct. 31, 1895. Check to B. C. W. Co. on account of subscription of M. Luce to Water Company bonds, $7500."

X 265. And that $7500 represents a check paid to the water company according to the direction of Luce?

A. It is not stated so on the check book here; it says, "check to B. C. W. Co."

X 266. On account of subscription of M. Luce. Have you any doubt that represents——

[Objected to.]

X 267. Do you know what that entry purports to mean?

A. Yes.

X 268. What does it mean?

A. Well, it was—Mr. Luce made a subscription to the water-company bonds, and instead of paying it direct to Mr. Luce, instead of paying this check directly to Mr. Luce and he paying to the water company, it was money turned over directly to the water company by the Old Dominion.

X 269. Are there any other entries which show money paid in lieu of stock which was not taken; if so, what are they?

A. I do not think so. I think those are all.

X 270. Now I will ask you to turn to the list showing persons from whom cash was received, on stubs 1 to 27 of the check book, and ask you whether Foote & French appear in that list?

A. They do.

X 271. For how many shares?

A. 100 shares.

X 272. And if H. T. Coe appears on that list?

A. Yes.

X 273. And for how many shares?

A. 280.

801 X 274. And if J. T. Herrick appears on that list?

A. Yes.

X 275. For how many shares?

A. 100.

X 276. And if Hy. F. Woods appears on that list?

A. Yes.

X 277. For how many shares?

A. 100.

X 278. Does Cannon, Oswald S. ——?
A. Camman, I guess it is.
X 279. For how many shares?
A. 15.
X 280. Does D. W. Cheever appear on that list?
A. Yes.
X 281. For how many shares?
A. 25.

Mr. FARLEY: I think it would be just as well, now, Mr. Brandeis, with your approval, to correct that which I called your attention to this morning. I went over it the other day, with Mr. Altmiller the other day.

X 282. On page 63 of your deposition, in answer to Int. 82, you stated that certificate No. 82 was transferred, or a portion thereof was transferred, to various parties, and among those parties, in your answer as taken down, appears J. T. Howe for 100 shares. Ought not that to be J. T. Herrick?
A. Yes, it ought.
X 28. In your answer as taken down appears Oswald N. Cousman for 15 shares. Ought not that to be Oswald N. Camman?
A. Yes.

Mr. FARLEY: Now we reach a point at which the tracing of these shares can be done from the testimony, so I am going ahead in that way and see if there is any trouble about it.

X 284. Now I will ask you from what original certificate the shares to Foote & French, H. T. Coe, J. T. Herrick, Henri F. Woods, Oswald N. Camman, and D. W. Cheever came?
A. I do not know.

Mr. FARLEY: I want to put in now, in view of that answer, the three certificates, one for 100,000 shares, one for 30,000 shares, and one for 20,000 shares.

Mr. BRANDEIS: They are already in, are they not?
Mr. FARLEY: Yes.
Mr. BRANDEIS: Why don't you turn to them in the record?
Mr. FARLEY: The defendant at this point calls the witness' attention to certificate No. 71 and the stub thereof, for 100,000 shares, to certificate No. 72 and the stub thereof, to certificate No. 73 and the stub thereof, which were put in evidence during his former examination and referred to at pages 59 and 60 of his testimony.

X 285. And I will ask you whether those three certificates did not include the total 150,000 shares of the stock of the Old Dominion Company?
A. I do not remember.
Mr. BRANDEIS: Look at them. Can you tell by looking at them?
802 The WITNESS: I can tell by looking at them.
Mr. BRANDEIS: Well, then, do so.
The WITNESS: [Examining pages referred to.] Yes, they do.

X 286. Then it is true, is it not, that all shares of stock subsequently issued must, by tracing back, come from those original certificates, either No. 71, No. 72, or No. 73, if they are traced through mesne transfers?

A. Yes, I suppose so.

X 287. Refreshing your recollection from your deposition, it is true, is it not, that No. 71 was issued for property purchased?

A. Yes.

X 288. And that No. 72 was issued for property purchased?

A. Well, I do not remember.

Mr. HEMENWAY: Then you will have to take the certificates.

THE WITNESS: Well, this is a copy, and there is nothing marked on the certificate.

Mr. FARLEY: Plaintiff's counsel admits, if it be an admission, that the stock was issued for property.

X 289. And it is true, is it not, that certificate No. 73 was issued for cash, or was issued?

Mr. MCCLENNEN: Everybody concedes that, I suppose.

A. Yes, sir.

X 290. Bearing in mind, then, that all subsequent certificates must be traceable to one of those three, namely, 71 for 100,000 shares, 72 for 30,000 shares, and 73 for 20,000 shares, and refreshing your recollection by examining page 63 of your deposition, will you state whether or not those shares to which I have referred, namely, the shares of Foote & French, H. T. Coe, J. T. Herrick, Henri F. Woods, Oswald L. Camman, and D. W. Cheever, did not come from certificate 82?

A. It is so stated here, and this is taken from the records. I do not know about the transferring part of it.

X 291. Refreshing now your recollection from any means at hand, can you now state from what original certificate, 71, 72, or 73, the shares of Foote & French, H. T. Coe, J. T. Herrick, Henri F. Woods, Oswald N. Camman, and D. W. Cheever came?

A. No. 82.

X 292. No, no; from what original certificate; from 71, 72 or 73?

A. They did not come from either of those.

X 293. No, no——

A. You want to know where that No. 82 came from?

X 294. Yes.

A Balance of certificate No. 71. It came from No. 71.

803 A 295. Refreshing now your recollection from any means at hand, can you now state from what original certificate, 71, 72, or 73, the shares of Foote & French, H. T. Coe, J. T. Herrick, Henri F. Woods, Oswald N. Camman, and D. W. Cheever came?

A. No. 71.

X 296. Now I will ask you from which of those original certificates the 10 shares issued to directors came?

A. Four shares from No. 75, 4 shares from No. 76, 4 shares from No. 77, 16 shares from No. 78, 4 shares from No. 79, 4 shares from

No. 80, 4 shares from No. 81. They came from certificate No. 71: is that what you mean?

X 297. Yes. I will now ask you from what certificate the 4 shares issued to Buffum came?

A. No. 71.

X 298. I will now ask you whether or not the 200 shares sold by Stackpole & Gay, to which you have referred in your previous testimony, did not come also from certificate No. 71?

A. No.

X 299. Did they not come originally from certificate No. 71, through certain mesne transfers?

A. No. I don't know about that. Yes, I suppose they did.

X 300. You see, Mr. Altmiller, instead of having the certificates, but looking at this testimony, you can figure it up as you please. If you want to use the originals here, why, let them be produced. Of course they are in your possession.

A. Well, I suppose they did.

X 301. Well, did they or did they not?

A. Well, they did.

Mr. BRANDEIS: That appears so, does it?

The WITNESS: No, it don't. Well, they must have.

X 302. Will you now examine the records and determine?

A. [Answer postponed until the next session.]

X 303. Now will you turn to the stub of your check book, and tell us where the so-called syndicate account appears?

A. Yes.

X 304. Will you read that entry?

A.—

Jan. 6, 1896. Check from J. M. Meredith			$202.32
" " " "			1,500.00
Total			1,702.32
Also Ditto			20.98
Also Luce			665.56
Also Coram			665.56
804 Also L. L.			2,528.35
Also T. N.			665.56
A. S. B.	665.55		
Acct. Barron	1,000.00		
	1,665.55		
Less	420.00		
Leaves a balance of			1,245.55

X 305. What do those entries represent?

A. It is not stated.

X 306. What do they purport to represent, according to your best belief?

A. The proportion of payments made to the Old Dominion on account of syndicate account.

X 307. Do those entries represent payments received from various parties, as indicated in your answer?

A. Yes.

X 308. Does the entry "1000 account Barron" represent money paid by Mr. Bigelow?

A. Yes.

X 309. Now will you read the pencil memorandum below on the stub of your check book?

A.—

"Suspense account.	Paid	$18,526.01
	Received	6,493.87
	Balance	12,032.14"

X 310. What is the total of the entries of receipts which you spoke of in your previous answer?

A. $7,493.87.

X 311. What is the total of the entries that you referred to in your previous answer?

A. $7,493.87.

X 312. Now if you exclude the entry of "$1000, account Barron," what does that net?

A. $6,493.87.

X 313. Now, referring again to your pencil memorandum, which you have previously read, is that the same amount that appears by that pencil memorandum to have been received?

A. Yes.

X 314. And what does the entry immediately above that pencil entry of $6,493.87, and marked "Paid" $18,526.01, refer to?

A. Refer to?

X 315. Yes.

A. Various payments.

X 316. What was the entry of those payments; what were they in each case?

805 A.—

Jan. 1,	Evarts, Choate & Beaman's bill	$7,689.66
	Lewisohn Bros., Jan. 16	10,299.83
	G. M. Hyams	436.52
	Edgar Buffum.—Lewisohn Bros., paid acct. Edgar Buffum	100.00

X 317. So that the pencil total, as I understand you, represents the total of the items under date of January 1, 1896, a payment of $7,689.66, Evarts, Choate & Beaman's bill; a payment under date of January 16, 1896, a bill of Lewisohn of $10,399.83, and the payment under date of January 20, 1896, to G. M. Hyams, for expenses, with a deduction of $436.52?

A. Yes.

X 318. Now deducting that entry of the amount received, $6493.87, what balance did that leave?

A. $12,032 14.

X 319. What is the further entry, if any, of that balance, or to what book was it posted?

A. It went into the cash book and from there into the ledger.

X 320. Well, will you get the first cash book?

A. I have got the wrong book here.

X 321. Well, omitting until tomorrow morning the entry in the cash book, will you turn to the ledger and find where the balance is posted?

A. On page 18, on the debit side, under suspense account, "1896, January, cash page 11, $12,032.14."

X 322. Is that on page 18 of the ledger, under the heading "Suspense account"?

A. Yes.

X 323. Now will you state what items on the credit side balance that entry on the debit side of $12,032.14, including in your answer, if it is necessary to explain the account, any other entry on the debit side?

A. Under date of August, 1895, "Cash, $300," on the debit side of the ledger, makes a total of $12,332.14.

X 324. On the debit side?

A. On the debit side. The entries opposite, on the credit side, are:—

Aug. 18, 1895,	By mine agent	$353.51
Sept.,	By mine agent	20
July,	By cash	1,000.00
Sept.,	By cash	6.00
Feb. 1896,	By mine agent	10,972.43

A. 325. Now, taking in turn each one of those items, what was that entry of cash $300, on the debit side?

A. Amount paid N. S. Berry, salary in full to date, August 7, 1895.

806 X 326. And that appears under date of August 7?

A. Yes.

X 327. And Berry was at that time, what? What position did Berry at that time hold?

A. I do not remember.

X 328. Refreshing your recollection, was not he the superintendent at the mines in Arizona?

A. I think so.

X 329. And that, therefore, represents the payment of salary to Berry. For what period was that salary due, do you know?

A. I don't know.

X 330. Do you know what salary he was then receiving?

A. No, I do not; I do not remember.

X 331. Now, taking up the other items that appear on the credit side in their order, what does the entry of "$353.51, by mine agent," represent?

A. I will have to refer to the journal. Under date of August, 1895, "Amount of cash turned over from Old Dominion Copper Company, transferred to Boston books, $353.51."

X 332. That, then, represented cash paid to the new Old Dominion Company from the old Old Dominion Company?

A. I suppose so.

X 333. Have you any doubt of it?

A. I would not swear to it; I think so.

X 334. That is your best information?

A. Yes.

X 335. Now will you take the next item of 20 cents, "by mine agent"?

A. "Sept., 1895, amount of cash turned over from Old Dominion Copper Company, transferred to Boston office, 20 cents."

X 336. That means the same thing?

A. Yes.

X 337. Now the next item?

A. That comes on a cash book which I have not got here.

X 338. And so for the next two items you will have to refer to a cash book which you have not now with you?

A. Yes. Under February, 1896, "Salaries, &c., paid previous to August 1, 1895, transferred to mine books, $10,972.42."

X 339. So that the entry on the credit side, under the date of February, "Mine agent, $10,972.43," is posted to page 3 of the ledger, the heading being "January, 1896," on the ledger page?

A. Yes.

X 340. And this is under the date of February, 1896?

A. Yes.

X 341. And it appears that that entry represents money paid for salaries prior to August 1, 1895?

A. It is so stated.

X 342. And this book which I a moment ago referred to as a ledger, is in fact what?

A. A journal.

[Adjourned to Friday, November 1, 1907, and resumed.]

807 X 343. Now, Mr. Altmiller, reverting to the question in regard to the source of certain stock certificates which I was asking you about yesterday, I will now ask you whether or not 200 of the shares endorsed to and sold through Stackpole & Gay did not come by certain mesne transfers out of certificate No. 71 for 100,000 shares?

A. Yes, sir.

X 344. Yesterday you testified that the 40 so-called directors' shares were taken out of certificate No. 71?

A. Yes, sir.

X 345. I will now ask you whether it is not true that 36 of those 40 shares were not ultimately endorsed to and sold through Stackpole & Gay?

A. It is.

X 346. And that the remaining 4 shares stood in the name of Buffum and were paid for by a charge on the bill of Lewisohn to which we referred yesterday?

A. Correct.

X 347. Now yesterday you testified in regard to the entry on the stub of your check book which showed that $1000 had been received from Mr. Bigelow on the so-called "Account Barron?"

A. Yes.

X 348. I will now ask you what that entry referred to?

A. That is an offset to the $1000 paid by Lewisohn Brothers in the first place.

X 349. It represented, then——

A. 40 shares of stock at $25 a share.

X 350. Did it not also represent $1000 received from Mr. Bigelow?

A. Yes.

X 351. So that, added to the amount of cash received, as shown by the sales of Stackpole & Gay, and the amount received from the various subscribers, as shown on the stub of your check book, should be added $1000 received from Mr. Bigelow on so-called "Account Barron?"

A. That is correct.

X 352. Will you turn to that entry of "$1000 Account Barron?" So far as you can tell, under what date was that $1000 received?

A. January 6, 1896.

X 353. Now, if you will, turn back to the cash book, to the suspense account, which we were examining yesterday. Now yesterday I asked you what the item on page 18 of the ledger, in suspense account, on the credit side, called "July, by cash, $1000," represented, and you then stated that, not having your cash book, you would defer your answer. Have you now the cash book?

A. Yes, I have.

X 354. Will you now state what that item of $1000 represents?

A. Well, it is posted to page 2 of the cash book, to suspense account, Lewisohn Brothers, $1000.

X 355. Does not that represent cash received from Lewisohn Brothers?

A. It does.

X 356. Now will you state what entry on the credit side in suspense account in the ledger, called "September, by cash, $6," represent?

A. "Suspense account, Lewisohn Brothers, $6."

808 X 357. And that also represents cash received from Lewisohn Brothers?

A. It does, indirectly; it belonged to T. Hopkins, but it represented so much increase of the assets paid by Lewisohn Brothers.

X 358. Have you that list of items which made up the balance of $12,032.14 entry on the debit side, plus the $300? You had it on paper yesterday?

A. Yes.

X 359. Now I will ask you whether or not this is not an accurate statement of what is shown by that account: That account shows that $12,032.14 which, according to the check book, appears to have been still owed for certain bills on account of the syndicate, and also $300 paid by the Old Dominion Company to Berry, who

was then agent at the mines, for salary accrued, prior, at least, to August 7, 1895, is balanced by charges or credits which represent either cash received from the old company or from Lewisohn Brothers, or cash paid out for expenses at the mines prior to August 1, 1895?

A. Yes, it does.

Redirect-examination.

[On redirect-examination, in answer to interrogatories propounded by E. F. McClennen, Esq., of counsel for the plaintiff, the witness further deposes and says:]

Q. 360. Mr. Altmiller, you have stated this morning that of the 586 shares sold to or through Stackpole & Gay in September, 1897, 200 came out through several mesne transfers from certificate 71 for 100,000 shares originally issued in the name of Dumaresq. Is it not a fact that the 200 shares in question were those for which certificates had been made for 100 shares each to Sanborn and A. R. Anthony?

A. It is.

Q. 361. Is it a fact that Sanborn was, or purported to be, a signer of the subscription agreement of July 18, 1895, Exhibit 10, and did not purport to be a signer of the syndicate agreements of May and June, Exhibits 3, 4, 5, and 6?

A. Yes.

Q. 362. Is it a fact that Annie R. Anthony, or A. R. Anthony, does not appear as a signer of the syndicate agreements Exhibits 3, 4, 5, and 6?

A. Yes.

Q. 363. Mr. Altmiller, is it true that the 586 shares sold by Stackpole & Gay in September, 1897, was composed of these shares:

36, which had been part of 40, which had stood in the names of the original directors;

50, certificate B3, issued to Goodale;

100, A13, issued to O. N. Pierce;

100, A5, issued to Eldredge;

809 100, A4, issued to Bartholomew;

100, issued in the name of G. E. Sanborn;

100, issued in the name of A. R. Anthony?

A. Do you want me to look through the records?

Q. 364. I think we are both agreed on that, and I think you can safely answer yes.

A. Yes.

Q. 365. Is it true that Pierce, Eldredge, Bartholomew, Goodale, and Sanborn all appear as signers of the subscription agreement of July 18, Exhibit 10, and do not appear as signers of the syndicate agreement, Exhibits 3, 4, 5, and 6?

A. Yes.

Q. 366. Is it true that the shares which had stood in the names, as stated in the question before, of Pierce, Eldredge, Bartholomew, and Goodale came, by various mesne transfers, out of certificate 73 for 20,000 shares issued to Nelson?

A. Yes.

Q. 367. You stated yesterday that certificate 73 was issued for cash. Is the cash to which you referred that set out on pages 11 and 12 of your original testimony plus the cash ultimately received from Stackpole & Gay?

A. Yes.

Q. 368. To put it in more detail, is this correct: That the moneys received from the subscribers, as appears on pages 11 and 12, amount to $503,750, out of which there was paid out, as appears on page 12, $19,500, leaving $484,250; to which was added $1000, the proceeds of 40 shares of stock to Mr. Barron, $100, the proceeds of 1 shares of stock remaining in the name of Edgar Buffum, one of the directors, and 14,650 being a portion of that received from Stackpole & Gay after deducting a portion of those receipts from Stackpole & Gay which were carried to interest account?

A. Yes.

Q. 369. Making the total sum received $500,000 against the 20,000 shares of stock originally represented by certificate 73?

A. Yes.

Q. 370. Issued in the name of Nelson?

A. Yes.

Q. 371. Mr. Altmiller, have you investigated the accounts of the corporation with a view to determining the receipts and expenditures from 1895 to 1902?

A. Yes.

Q. 372. What were the gross production receipts for the balance of the year 1895, after the corporation acquired the property, and for the whole of the year 1896?

Mr. HEMENWAY: That is objected to as immaterial, incompetent, and irrelevant.

A. $590,963.38.

Q. 373. What were the gross operating expenditures for that period, excepting construction and improvement?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

810 A. $644,656.98.

Q. 374. What was the operating deficit for that period?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. $53,693.60.

Q. 375. What were the construction and improvement expenditures?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. $61,358.91.

Q. 376. What was the total deficit for this period?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. $115,052.51.

Q. 377. Now will you give us the same figures for the year 1897?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A.

Gross receipts from copper, silver, and gold	$201,385 38
Operating expenses, exclusive of construction and improvement	292,555 22
Loss	91,169 84
Construction and improvement	39,811 32
Total deficit	130,981 16

Q. 378. The same for 1898?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A.

Receipts from copper, silver, and gold	$195,000 00
Operating expenses	309,202 49
Loss	114,202 49
Construction	68,406 56
Total deficit	182,609 05

Q. 379. The same for 1899?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A.

Receipts	$985,737 61
Operating	857,583 53
Profit	128,154 08
Construction	93,281 20
Net profit	34,872 88

811 Q. 380. The same for 1900?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A.—

Receipts	$1,594,471.46
Operating	1,152,069.77
Profit	$442,401.69
Construction	36,888.33
Net profit	$405,513.36

Q. 381. From the beginning of the company's operations to the 1st of January, 1901, what were the gross receipts?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Receipts for copper, silver, and gold, $3,567,557.83.

Q. 382. What were the operating expenditures?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Operating expenditures, $3,256,067.99.

Q. 383. What was the net operating profit for the whole period?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. $311,489.84.

Q. 384. What were the total construction expenditures?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. $299,746.32.

Q. 385. What was the final balance of profit after the deduction of construction expenditures?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. $11,743.52.

Q. 386. In the figures that you have given for that entire period what was the tatol amount of the additions shown by the construction account?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. $299,746.32.

Q. 387. In the operating expenses as you have given them for the period from the beginning of the company's operations to the 1st of January, 1901, was there any charge for interest on capital?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Of course we received interests on deposits and that was part of the working capital,—if that is what you mean.

812 Q. 388. No, what I mean is, was a charge made as a running expense, for interest upon the capital invested in the business?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Oh, no, no.

Q. 389. Was there included in that expense account any charge for depreciation?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. No.

Q. 390. Was any charge made to operating expenses by reason of the diminishing of the property by reason of the taking out of the ore?

[Here the numbers of interrogatories skip from 390 to 400. The text of the deposition is complete.]

GEORGE C. BURPEE,
Stenographer.

Mr. HEMENWAY: Objected to as immaterial, incompetent, and irrelevant.

A. No.

Q. 400. In giving the gross receipts for the entire period, have you included the value of the ore on hand and unsold on the 1st of January, 1901?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. 401. Mr. Altmiller, was a division between operating expenses and construction expenses, as you have given them, from year to year, made as you have now stated them, upon the books, from year to year?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. They were, with the exception that stocks on hand to the value of $275,000 do not appear on the books.

Q. 402. That is, you have included in that statement that asset which does not appear on the books?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. It does not appear on the books,—stocks on hand January 1, 1901, to the value of $275,000.

Q. 403. In the three and one-half years from the beginning of operations by this company, that is, from the middle of 1895 up to January 1, 1899, was the operating deficit charged off on the books through profit and loss account?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Yes, it was charged off.

813 Q. 404. Was the expense for this same period for construction also charged off on the books through profit and loss account?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. 405. So that, if I understand you correctly, the books for the period ending January 1, 1901, do not show any increase of assets by reason of the moneys that had gone into the account called construction account?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant, and also as leading.

A. No.

Q. 406. In view of the objection to the preceding question as being leading, will you state what, according to the books of the company now before you, was the apparent effect upon the assets of the company as they stood January 1, 1901, by reason of the sums which had gone into the construction account as you have stated it?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

Mr. BRANDEIS: Namely, the $299,746.32——

Mr. McCLENNEN: Referred to in your preceding answer.

[Question as amended read by the stenographer.]

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. They were reduced by the sum of $263,256.48.

(By Mr. BRANDEIS:)

Q. 407. You mean that the profit and loss debit appeared as $263,256.48?

Mr. HEMENWAY: That is objected to as incompetent, immaterial, and irrelevant.

A. Yes.

(By Mr. McCLENNEN:)

Q. 408. Will you explain how you arrive at the difference between this profit and loss debit of $263,256.48, appearing on the books, and the balance of profit for the whole period ending January 1, 1900, which you gave as $11,743.52?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. The stocks on hand January 1, 1901, were not entered on the books—valued at $275,000, were not entered on the books at that time.

(By Mr. BRANDEIS:)

Q. 409. And this $11,743.52 of profits is the balance of profits after deducting from this the sum of $275,000, stocks on hand, the $263,256.48 of deficit as appearing on the books, is it not?

814 Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

(By Mr. BRANDEIS:)

Q. 410. And it is a fact, is it not, that on the books of the company there was charged off to profit and loss, as a part of the expense of conducting the business, not only the items of construction for the period prior to January 1, 1899, but also those items of construction testified to by you made in the years 1899 and 1900?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

(By Mr. MCCLENNEN:)

Q. 411. I notice that while the total receipts, as given by you, for the entire period from the beginning of the company to January 1, 1899, of $3,567,557.83 appear on the report of A. S. Bigelow, president, Exhibit 14 of his deposition of April, 1903, the sum appearing in that report as the gross cost of production at mine and smelter and electrolytic refining, and all expenses of handling copper, such as freight, copper charges, commission, and expense account, is given as $2,714,596.67; whereas your item for that period is $3,256,067.99. Will you explain wherein is the difference of $541,471.32?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. At the time that this report was made up, the report for the year ending January 1, 1900, the report to the stockholders dated April 1, 1901, this amount was charged off for reasons such as extra developments, shut-downs, and so forth.

(By Mr. BRANDEIS:)

Q. 412. Is there any entry anywhere upon the books of account of the Old Dominion Copper Mining & Smelting Company of the item of $541,471.32 deducted in the report to the stockholders from the account of the operating expense for that period, as appearing on the books, and as testified to by him?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. No.

(By Mr. BRANDEIS:)

Q. 413. Are there any items upon the books of account of the Old Dominion Copper Mining & Smelting Company from which an aggregate difference of $541,471.32 can be arrived at?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. No.

(By Mr. MCCLENNEN:)

Q. 414. I notice that you have stated as the construction total from the beginning of the operations of the company to January 1, 1901, $299,746.32, and that the item in the report of Mr. Bigelow as presi-

dent, on April 3, 1901, Exhibit 14 of his deposition in April,
815 1903, gives the item for construction and improvement account and development work at the Globe and Continental mines as $841,217.64. What is the explanation of the difference of $541,471.32?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. It is the amount which was deducted from operating expenses, and charged to construction, improvement, etc., expense.

Q. 415. Was there at any time any entry made upon the books of the corporation showing the transfer of the $541,471.32 of operating expenses, which had already been charged off on the books through profit and loss account in each year, into construction account?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Not during this period.

(By Mr. BRANDEIS:)

Q. 416. How was the amount of $541,471.32, which was taken out of the operating expenses and appears in the annual report to the stockholders, dated April 3, 1901, as part of construction and development expenses arrived at?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I do not remember.

Q. 417. Have you any recollection in regard to the making up of that item of $841,217.64?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. After conversation with either Mr. Ladd or Mr. Hyams, that was arrived at. That is all the reason I can state.

Q. 418. Have you any recollection in regard to what took place at the time that that figure was arrived at and inserted in the annual report to the stockholders?

A. No, I have not.

Q. 419. Are there any data whatever upon the books of account of the Old Dominion Copper Mining & Smelting Company for the period ending January 1, 1901, which show any charges for construction and improvement account and the development work at the Globe and Continental mines other than those items aggregating $299,746.32, which you have already testified to?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant, and as being not a deduction from the books; and that the items themselves ought to be shown by the books.

A. No.

816 Q. 420. In giving for each year for the period ending January 1, 1901, the total operating charges, have you added together several separate accounts as appearing upon the books of the company?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. 421. What are the accounts which enter into that total operating charge for each year, as given by you? State what they are as you go along.

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Mining expense which includes all work at the mine, underground extra development, and so forth; expense account, consisting principally of expenses here in the East; copper charges, covering commission for sales of copper; insurance and various small items in connection with the same; transportation, which includes freight on copper shipments East; refining charges, which includes the expense of refining pig and matte shipments; tax account, which includes New Jersey and Massachusetts taxes; and interest charges, which includes interest on advances on copper accounts, loans, and so forth.

Q. 422. That is, you mean interest on advances made by selling agents or on money borrowed by the company?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. 423. Does the item of mining expense, the account of mining expense which you have given, include all of the expenses of any kind at the mine, include any development work?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. 424. Including that, but not excepting construction. That is true, is it?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Yes, that is true.

Q. 425. Now is there upon the books of the company in the mining expense account anything which could enable you, or any one examining the books, to determine what part, if any, of that expense was devoted to what is called development work?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. You refer to those books here?

Q. 426. These books here.

A. No.

(By Mr. McCLENNEN:)

Q. 427. Is there on the books any charge on account of construction, improvement, or development work, except such as is
817 included in the mining-expense account which you have mentioned, except the construction account to which you have referred?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. No.

(By Mr. BRANDEIS:)

Q. 428. But it is a fact, is it not, that for the years ending *the year* 1895, 1896, and 1897, all expenditures for construction were charged off through the books to mining expense?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. No, no; it was carried as capital account and then charged off.

Mr. BRANDEIS: Strike that out.

Mr. HEMENWAY: No, let it stand.

Q. 429. It is a fact, is it not, that during the years 1895, 1896, 1897, and 1898, the items of construction or improvement as given by you aggregating $169,576.79, which had been carried to capital account, were charged off to profit and loss?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. 430. And at the end of the year 1899, the amount of $95,281.20, representing the construction and improvement in that year, was charged off to profit and loss?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. 431. What was done at the end of the year 1900 with the amount $36,888.33, which you have testified represents the construction and improvement account for the year 1900?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. It was charged off to profit and loss.

(By Mr. McCLENNEN:)

Q. 432. Was there upon the books up to the 1st of January, 1901, any account of construction, improvement, and development work other than the construction account, the sum of which you say was charged off to profit and loss, at the end of the year 1898, for the two and one half years then ending, and charged off at the end of 1899, ar at the end of the year 1900, for the year then ending?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. No.

Q. 433. Mr. Altmiller, what were the gross receipts, operating expense, profit or loss, construction and improvement expense, and final profit or loss, for the year 1901, given in the same way that you gave them for the earlier years?

818 Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. I will have to work that out. The gross receipts from copper, silver, and gold for the year ending December 31, 1901, were $1,276,979.83
Total expense 1,163,140.42

Profit from production 113,839.41
Less special construction and improvement on account of development work at Globe and Continental mines 72,179.98

Surplus for the year..... $41,659.43

Q. 434. I notice that the figures that you have just given for the year 1901 conform to the figures appearing in the report to the stockholders for the year 1901, Exhibit 15, of the deposition of A. S. Bigelow, given on April 10, 1903. Have you any recollection of the facts which led to making this report up in accordance with the books, whereas the other one was not made up in accordance with the books?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. No, I have not.

(By Mr. BRANDEIS:)

Q. 435. Does the item of $72,179.98 appearing in the report for the year 1901, ending December 31, 1901, as special construction and improvement and development work at Globe and Continental mines, include any item except the items which appear upon the books of the company as construction and improvement account?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. One item of $824.95, real estate and property account.

Q. 436. That is, the $72,179.98 is made up of two items appearing upon the books, construction, and improvement, $71,355.03, and real estate and property account, $824.95?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

(By Mr. McCLENNEN:)

Q. 437. In the keeping of the books for the year 1901, was the character of the items of expenditure which were put into the construction and improvement account and the mining-expense account, respectively, any different from what they had been in those two accounts during the preceding period of about five years and a half?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. No.

819 Recross-examination:

[On recross-examination, in answer to interrogatories propounded by J. Wells Farley, Esq., of counsel for the defendants, the witness further deposes and says:]

X 438. Mr. Altmiller, in answer to Mr. McClennen's question, you stated that the total amount received, less the $19,500 paid back in cash checks was $500,000; and you stated that was made up of the item of $503,750, less $19,500, giving a remainder of $484,250, to which was then to be added $1000 received from Bigelow, account Barron, $1000, by charge to Lewisohn's bill, and $14,650, being the amount received from sales of stock by Stackpole & Gay, less premium. Did you not omit, in that answer, the fact that the cash account should first have been increased by $1000, cash received from Lewisohn Brothers, which $1000 was balanced by the $1000, the amount paid to Lewisohn on the bill he rendered? The substance of my question being whether or not your cash account should not show, in addition to the items you mentioned, $1000 received from Lewisohn Brothers, the same being balanced by $1000 they paid?

A. Yes, that would probably be the correct way to make the item up; I simply left it out as an offset. You mean that should be $20,500 deducted and add $1000 to the receipts?

X 439. Speaking in terms of money, $20,500 received and $1000 paid out?

A. Yes.

X 440. Now in your answer to Mr. McClennen, speaking of the constitution, so to speak, of the 586 shares sold through Stackpole & Gay, there is nothing to in any way qualify your original statement, is there, that 36 of those shares, being part of the directors' shares, came from certificate 71, and 200 more thereof, being shares coming via Sanborn and Anthony, also coming from certificate 71?

A. I do not understand what you mean.

X 441. You have no reason to qualify your original statement, which was, in substance, that 236 of the 586 shares sold by Stackpole & Gay can be traced back to certificate 71 as their origin?

A. Yes, I have.

X 442. Well, if so, what is it?

A. Well, certificates No. 1, 2, 3, 4, 5, 6, and 7 were made out in the directors' names; they were surrendered, and certificates 8, 10,

4, 11, 12, 13, and 14 were issued in their places; those certificates were again surrendered, and certificates 75, 76, 77, 78, 79, 80, and 81 were issued in their places; 75, 76, 77, 80, and 81 were again surrendered, and No. 466 for 36 shares was issued in place of them, No. 78 for 4 shares being retained by Edgar Buffman; this
820 certificate 466 was split up into certificates for 25, 10, and 1 shares, and sold through Stackpole & Gay.

X 443. Have you now completed your answer?

A. As far as that is concerned.

X 444. Well, wherein does that answer qualify the original statement you made?

A. These came originally from certificate No. 71.

X 445. Well, did they not?

A. They did.

X 446. Then it does not qualify it, does it?

A. Why, you asked me if they did not come from that.

X 447. Well, in spite of this explanation and history of these shares which you have just given me, it is still true, is it not, that 36 of the 586 shares sold through Stackpole & Gay are traceable to certificate 71?

A. Yes.

X 448. And it is still true that 200 shares of that 586 are also traceable to certificate 71?

A. Yes.

X 449. It is still true that 340 shares, for which you appear to have received cash, according to the list on the stub of your check book, are traceable also to certificate 82, which came from certificate 71?

A. Yes.

X 450. I will now ask you—turn to your check book if necessary—if the Old Dominion Copper Company paid any sums of money on account of mining expense incurred prior to August 1, 1895, except that $300 check to Berry? If so, what were those payments?

A. $10,972.43.

X 451. What have you to show that the Old Dominion Company paid that sum which you have just stated in your answer?

A. Well, it is a balance; it is a balance of the syndicate account, made up of various items of receipts and expenditures.

X 452. Is it not charged off as balancing an amount still due by the syndicate?

A. It is.

X 453. I now repeat my question: what have you to show that the Old Dominion Copper Company of New Jersey paid that amount, except by charging it off against that bill?

A. Well, the books will show that. There are various items.

X 454. I will ask: have you any check, voucher, memorandum, or other paper which shows who in the first instance paid the money constituting the sum of $10,972.43, referred to in your answer?

A. The vouchers are on file somewhere; I don't know where they are, whether they are here.

X 455. Is it not true that every single payment made by the Old

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Dominion Copper Company of New Jersey appears on your check book or cash book?

A. Yes.

821 X 456. Will you now turn to any check or any number of checks which will show that the Old Dominion Copper Company of New Jersey made one or many payments which aggregate that sum of $10,972.43 and show me how you trace them from the checks into the entry in your ledger?

A. Checks were paid as follows:—January 16, Lewisohn Brothers, $10,399.83; January 20, G. M. Hyams, $436.12; January 22, Edward C. Perkins, $1000; January 9, 1896, Evarts, Choate & Beaman, $7689.66. That makes a total of $19,526.01. Then we received syndicate receipts under date of January 6 of $7493.87; which leaves a balance of $12,032.14. Now from that is deducted journal entries of the amount of cash on hand at the mines, August, 1895, $353.51; September, 20 cents; deduction of July, 1895, cash, which is the Lewisohn payment, $1000, and under date of September, 1895, $6; total, $1359.71; leaving a balance of $10,673.43; to that add $300 paid to Berry, August, 1895, makes a total of $10,972.43. Do you want to know what was done with them?

X 457. No, I now want you to answer my question. You have now explained very carefully what we have previously been over, that the balance appearing on the debtor side of your ledger, on page 18, was balanced by certain entries, and you have again recounted those items: you explained that "by mine agent," when it first appears, was money turned over to you——

A. Not here, it was at the mine.

X 458. You have explained that the other items were money that you, in one way or another, or your company, received.

A. Yes.

X 459. You, in your previous examination, told me that this entry of $10,972.43 represented money paid out for salaries prior to August 1. I then asked you, in my previous interrogatory, if you could show me where and how that money had been paid, and you undertook to do so.

A. Yes.

X 460. I will now ask you if that money was paid by the Old Dominion Copper Mining & Smelting Company of New Jersey; and if so, when and how, and in what items?

A. I have explained it to you just now, and I can tell you why that entry was made on the journal calling it salaries and so forth.

X 461. But isn't it true that it would be in exact conformity with all the other entries on that ledger if that had been money paid out for the benefit of the Old Dominion Company, in cash, prior to August 1, 1895?

A. It was not paid out for the benefit of the company.

X 462. How do you know it was not?

A. Because it don't say so on these books here.

X 463. Not paid out by you nor by your company, but
822 paid out by others for your company for the benefit of the property which came into your company?

A. It was paid out for various purposes.

X 464. By whom was it paid out?

A. Well, by Lewisohn Brothers, paid out by the Old Dominion Copper Mining & Smelting Company.

X 465. Show me one entry which shows the original payment of any item entering into that.

A. Here it is right here, Lewisohn and Perkins.

X 466. But you have already accounted for this in making up your total of $18,000, which was owed by the syndicate. You have shown that was charged once, and I will ask you to explain, if that money was paid out by the Old Dominion Copper & Smelting Company, how it appears on the credit side of the ledger, whereas the other payments which were made by them appear on the debit side of the account?

A. Well, that is the amount paid out, $12,332.14 was the amount paid out.

X 467. And that was the amount that was, in some form or other, received by them to be credited as a receipt?

A. No, no, it was not a receipt, that is the excess of expenditures.

X 468. Is it not true that the debit side of your ledger, page 18, shows money paid by the Old Dominion Copper Company?

A. Yes.

X 469. Is it not true that the credit side of your ledger purports to show moneys received?

A. Yes.

X 470. Either received in cash or money paid for your benefit?

A. Yes.

X 471. How, then, do you explain that this item of $10,972.43 was a payment by the Old Dominion Copper Company and not in some form a receipt?

A. Why, it shows on the debit balance of the suspense account that it has been paid out for various purposes, and that item simply I have charged up to the mine on the books to balance the account. It is not a receipt; I should call it an expense account.

X 472. Now will you turn to the entry in your journal or cash book from which that ledger entry is posted?

A. I will. I have simply got the expense off our books here; it is balance of expenses, mining expense account, transferred to mine books, debtor to mine agent, $10,972.43.

X 473. Who paid the mine expenses prior to August 1, 1895?

A. That I do not know.

X 474. Well, did the Old Dominion Company of New Jersey? If so, show one payment, with the exception of the one payment to Berry.

A. I have not got anything to show.

X 475. Have you anything in any book to show; if so, what; anything in your possession, except the item of $300 to Berry,
823 which shows a payment of the mine expenses of the Old Dominion Copper Company prior to August 1, 1895?

A. That is not put down as a mine expense.

X. 476. Or any expense, salaries, or anything of that nature?

A. No.

X 477. Or any vouchers?

A. Well, I do not know if it is included in that Lewisohn bunch or not.

X 478. Is this not true, then, so far as you know, that that entry may represent, and probably does represent from its position and constitution, payments made by others for mine expense prior to August 1, 1895?

A. I do not know.

X 479. Now, turning to your testimony in regard to the mine reports and accounts—and I wish to ask these questions de bene, and by asking them in no way waive our objection to the line of questioning pursued by counsel for the plaintiff,—is it not true that your testimony in regard to the difference between this report of April 3, 1901, which purported to cover the net and gross results of the Old Dominion Copper Mining & Smelting Company from the formation of the company to January 1, 1901, that the net result of your testimony in regard to that difference is simply this: that $541,000, approximately, was taken from operating expenses and added in this report to construction account?

A. Yes.

X 480. So that the total result and the total summing up remains absolutely the same?

A. Correct.

X 481. The only difference being that what, according to your calculation, should be charged as operating expenses appears in this report as charged as part of the item charged to construction account?

[Counsel for plaintiff objects to the use of the word "calculation."]

A. Not what the books show; the books show it is chargeable the other way. The report was made up one way, and the books show the other way.

X 482. To change the account in conformity with your statement, then,—is it not so,—that the difference between this report and the books of the company, as shown by your answers, is simply that $541,000, approximately, has been taken from the item of operating expenses——

A. Mining expenses.

X 483. —the item of mining expenses in the books, and included in the total charged to construction account in the report?

A. Yes.

X 484. And the sum of the two accounts in the books and in the report is identical?

A. Yes.

X 485. You testified, in answer to Mr. McClennen or Mr. Brandeis, that you made up these figures?

A. Yes.

824 X 486. Did you also keep the books?

A. Yes; I had charge of them.

X 487. And you testified that Mr. Ladd or Mr. Hyams spoke to

you, and it was the result of that conversation that you made them up in this way?

A. Yes.

X 488. Did Mr. Bigelow speak to you about it?

A. Well, possibly he, in signing the report, might have mentioned it.

X 489. No, no, not possibly, I ask you whether he did, to your personal, absolute knowledge?

A. I do not remember.

X 490. Or did Mr. Lewisohn?

A. No.

X 491. Leonard Lewisohn?

A. No.

——— ———.

Subscribed and sworn to this — day of ———, before me:

——— ———,

Notary Public.

Order Appointing Commissioner.

In the above-entitled case, at the hearing of the same before Mr. Justice Sheldon, it is ordered, under the provisions of Chancery Rules, No. XXXV., at the request of the defendant, that Bates Torrey be, and he hereby is, appointed commissioner to take the evidence in said case, to be reported to the full court.

By the court:

WALTER F. FREDERICK,
Assistant Clerk.

December 10, 1907.

Report of Commissioner on Proceedings in Court, December 10, 1907.

Mr. HEMENWAY: It is agreed that the two cases were tried together: that was the fact, but it does not appear on the record.

Second. That the originals of the exhibits referred to in the evidence may be shown to the full court on the hearing of any appeal.

Third. That the objections to the admission of evidence made by the parties, respectively, and noted by the magistrate on the taking of the several depositions read at the trial, were not waived by the parties, but that such evidence was admitted de bene, and all the rights of the parties are saved. And that, the full court consenting, the cases may be argued together. That is agreed.

SHELDON, J.: Yes.

825 Mr. HEMINGWAY: Now there is one other suggestion that occurs to me while sitting here, just as this last did on hearing the previous case; and that is, whether any order should or could be made by your Honor in reference to the consolidation of the record of the two cases.

SHELDON, J.: I think, now that I have ordered a separate decree in each case, it would be too late, and therefore I do not think they should be consolidated. The questions are the same, and undoubtedly there would be no difficulty before the full court in having them argued together.

Mr. HEMENWAY: I would ask this with regard to the record that goes to the full court, whether it is possible?

SHELDON, J.: I suppose you could have an agreement of both parties, that as the evidence is the same in both cases the evidence and findings of the court be printed in only one case, as they are the same in both; it would be an useless expense, of course, to print all the evidence in duplicate.

Mr. MCCLENNEN: One thing occurs to us, in view of these special statements in the record, and that is the matter of the objections to the admissibility of the evidence. It is improbable in a record of 1400 pages some one question may not have gotten in that does not quite conform to the requirements of the evidence. It is quite improbable that any such answer as that has affected the finding of your Honor. It is obvious that this case ought not to go to the full bench, except to raise questions which are really——

SHELDON, J.: As an appeal is on the evidence, if any evidence I have considered is incompetent the full court would on the appeal consider the case without regard to that evidence; the appeal is on the evidence, so I do not see how it would make any special difference in the effect of excluding any evidence before me if it should be held to be incompetent. The only thing I can see would happen is that, on considering the evidence left, the full court might come to a different conclusion on the evidence.

Mr. MCCLENNEN: It is suggested that it appear on the record the fact that none of the specific objections to the specific questions were, in fact, called directly to your Honor's attention.

SHELDON, J.: Well, I think some of them were.

Mr. MCCLENNEN: With the exception of those which appear on the record as having been called to your attention.

Mr. HEMENWAY: It was understood that in order to save
826 time it should be admitted de bene, and Mr. McClennen read without referring at all to the deposition, skipping that portion.

SHELDON, J.: I thought the evidence would be printed on the appeal, and the record would show what was called to my attention and what was not; it was understood by both parties that the evidence received de bene was not to be received with any waiver of objection to its admissibility.

Mr. MCCLENNEN: That is undoubtedly true. The decrees have been seen by Mr. Hemenway, and I understand his position to be simply that he does not consent to it.

Mr. HEMENWAY: I object to them most strenuously; if you will permit me to state my position exactly.

SHELDON, J.: As not conforming to my findings and order?

Mr. HEMENWAY: I did not intend to say anything in regard to it, if your Honor please; I suppose the decrees are very short.

SHELDON, J.: You object to my findings?

Mr. HEMENWAY: Absolutely.

SHELDON, J.: You may read them, Mr. McClennen.

[Mr. McClennen reads the decrees.]

Mr. HEMENWAY: Before the entry of the decree Mr. Burpee was the commissioner in the case. He is not present to-day, but the stenographer of the court is, and I ask that he be appointed commissioner.

SHELDON, J.: He may be appointed a commissioner under the rule to write out these proceedings. The decree is not to be entered until the record is transcribed.

BATES TORREY,
Commissioner.

Filed December 10, 1907.

Copy.
Attest:

——— ———, *Clerk.*

827 *Deposition of Cleveland H. Dodge.*

Taken before me, Mark J. Kätz, a notary public in and for the state of New York, at the office of Phelps, Dodge & Company, No. 99 John street, in the city of New York, this 22d day of October, 1907, at 11.30 a. m., pursuant to consent by and between the attorneys for the respective parties hereto.

OCTOBER 22, 1907, 11.30 a. m.

Appearances:

Louis D. Brandeis, counsel for complainant.

Alfred Hemenway, Edward Lauterbach, and Eugene Treadwell, counsel for defendants.

It is hereby consented that the testimony of Cleveland H. Dodge be taken before Mark J. Kätz, a notary public in and for the state of New York, to be filed and used in both of the actions of the Old Dominion Copper Mining & Smelting Company, complainant, against Albert S. Bigelow, in the Supreme Judicial Court of Massachusetts, and in both the actions wherein the same company is complainant against Frederick Lewisohn et al., in the Circuit Court of the United States for the Southern District of New York.

CLEVELAND H. DODGE, a witness produced and sworn on behalf of the defendants, testified as follows:

Direct examination by Mr. LAUTERBACH:

Q. Mr. Dodge, what is your full name, age, and occupation?

A. My name is Cleveland H. Dodge; my age is forty-seven; and my occupation is that of a merchant.

Q. And a member of what firm?

A. The firm of Phelps, Dodge & Company.

Q. The firm of Phelps, Dodge & Company were stockholders, were they not, in the corporation known as the United Globe Mines, a New York corporation, the mines being situated in Arizona?

A. I am not so sure whether the firm was a stockholder; the individual members were.

Q. Including yourself?

A. Yes.

Q. And you remained such owners, did you not, until the time of a turning over of the shares of stock to another corporation?

A. Yes.

Q. The transferee of the stock was the Old Dominion Company of Maine, was it not?

A. Yes, I think so.

828 Q. At about the time of this transfer did you know of the existence of the Old Dominion Copper Mining & Smelting Company of New Jersey?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Oh, yes.

Q. Do you know whether or not, at about the same time that the Old Dominion Company of Maine became the transferee of your stock it also became the transferee of some of the stock of the Old Dominion Copper Mining & Smelting Company?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Yes, it did.

Q. The Old Dominion Company of Maine became the transferee of the whole of the stock of the Globe Company, did it not?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. I am not sure whether it was all of it; it was practically all of it.

Q. And is that true as to the stock of the Old Dominion Copper Mining & Smelting Company,—that it became practically the owner of it?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. A very large percentage;—a large majority of the stock of the New Jersey company; it is a matter of record.

Q. You were interested in the formation of the Maine company, were you not?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. Were there negotiations that preceded the formation of the Maine company and the disposal of your stock to that company?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Certainly.
Q. Can you recall with whom they were carried on?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. I think Mr. Charles S. Smith of Boston was the person with whom these negotiations were had.
Q. What was his relation to any of the companies I have mentioned?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. He was president of the Old Dominion Copper Mining & Smelting Company of New Jersey.
Q. Do you recall that any one else was interested in conducting the negotiations?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Plenty of others were interested.
829 Q. Was there any one else who conducted the negotiations that led up to the acquisition by the Maine company of the properties?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. We came in contact with Mr. Louis D. Brandeis, counsel of the company, at that time; it was those two gentlemen that we saw in connection with the negotiations.
Q. Do you recall that General Maxwell Woodhull was interested?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Oh, yes.
Q. Did you have any knowledge, prior to the conclusion of the transfer to the Maine company of your stock, of a claim pending in the Massachusetts and New York courts by the Old Dominion Copper Mining & Smelting Company as complainant and Mr. Bigelow as defendant in the Massachusetts court, and the estate of Leonard Lewisohn in the New York courts?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Yes, I did.
Q. Did you know the general character of the claim that was involved in those actions?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. Will you state, as nearly as you can, your knowledge of its character?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. As I recollect it, it was a claim against Mr. Bigelow and the estate of Mr. Lewisohn for having turned over to the company certain claims which the company subsequently did not consider as valuable as they were originally put in at; that was the general character.

Q. In whose favor did you understand that claim to exist before the transfer was effected—the legal claim—the transfer of your stock to the Old Dominion Company of Maine?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. The legal claim, if any, existed in the Old Dominion Company of New Jersey.

Q. Did it continue to exist in the Old Dominion Company of New Jersey after the acquisition of such of the stock of the Old Dominion Copper Mining & Smelting Company of New Jersey as the Old Dominion Company of Maine acquired?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

830 A. Of my own knowledge, I do not know.

Q. Did you know at about the time of this transfer o consolidation or acquisition by the holding company, the Maine company, that the Old Dominion Company of New Jersey had divested itself of that claim to a trustee or trustees or to persons other than itself?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant; objected to, further, as leading, and further objected to as assuming conditions and statements which are not in accordance with facts.

A. I heard such was the case.

Mr. BRANDEIS: Answer objected to as irresponsive and as a statement of hearsay.

Q. From whom did you hear it, Mr. Dodge?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. To the best of my recollection I heard it from Mr. Charles S. Smith and from Mr. Brandeis.

Q. Did you have any conversation with Mr. Charles S. Smith concerning this claim?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. I am not sure that I personally had.

Q. Were you present at any time when a conversation concern-

ing it was had in your hearing with Mr. Charles S. Smith or Mr. Brandeis?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. Will you state, as nearly as you can recollect it, the nature of that conversation.

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. As I recollect it, Mr. Lauterbach, these facts which we have been speaking of were mentioned and the members of our firm thought it as well that they, as new stockholders in the consolidated company, should not have any part in these lawsuits.

Q. And how did you understand, from that conversation, that the consolidated company could be relieved of having any part in the result of these litigations?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant, and as assuming facts which do not exist; among other things, that there is or was a consolidated company.

A. It was suggested that the claim be segregated, and, as I recollect it, put in trust in such a way that the old stockholders of the Old Dominion Company of New Jersey should participate
831 in anything that should be derived from these claims, but that the stockholders of the Old Dominion Company of Maine, which I call the consolidated company, should have no participation in them.

Q. You mean what by the term "consolidated company" which you have used?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. The consolidation of the New Jersey company with the United Globe Mines, forming the Old Dominion Company of Maine.

Q. The Old Dominion Company of Maine is the company which you referred to as the consolidated company?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. In fact what was it, rather than a consolidation; the Old Dominion Company of Maine?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. It was a holding company.

Q. Holding a majority of both stocks?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. To whom, then, as you understood it, were the proceeds, if any, of these litigations to go after their segregation of which you have spoken?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant, and as asking for hearsay and asking for conclusions as to matters of law and contents of written instruments, if any.

A. As I understood it at the time, these proceeds were to be enjoyed by the stockholders of the Old Dominion Company of New Jersey.

Q. The then existing stockholders?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Or their successors.

Q. The Maine company were the successors of the assenting stockholders, were they not?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Yes; but what I meant by "successors" was successors to rights that may have existed at the time. I forgot how the transaction took place; there were trust certificates which entitled them to proceeds of these litigations; I meant successors to the trust certificates.

832 Q. Have you any of those certificates?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. No, not to my knowledge. Personally I haven't any.

Q. So that, if I understand you correctly, the proceeds, if any, of these litigations would go, not to the stock of the New Jersey company held by the holding company of Maine, but would go to the holders of these trust certificates?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant, and calling for hearsay contents of wrtiten instruments, inference as to matter of law, and as leading and misleading.

A. That was my understanding.

Q. For what reason was this segregation made?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. It was an old matter in which we had no personal interest, and we did not care to be interested in it. When I say "we" I mean the stockholders of the United Globe Mines.

Q. Do you know who the trustees were in the trust certificates that you have mentioned?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. I don't remember.

Q. Do you know by whom they were designated?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. No, I do not.
Q. By Mr. Smith?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. I don't know.
Q. Or by Mr. Brandeis?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. I don't know that either did.
Q. Do you, perhaps, recall that Mr. Smith was one of the trustees?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. I would not swear to it.
Q. To the best of your recollection?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. I really do not know.
Q. You had no further interest in the matter after the segregation?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

833 A. No; I, of course, knew at the time, but being ancient history I really do not remember who they were.
Q. Do you recall by whom the expenses of the litigation after the consolidation, as you call it, had been effected, were to be borne?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant, and as calling for hearsay.

A. No, I do not know.
Q. Do you recall that they were to be borne by the Old Dominion Company of New Jersey?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant, and as calling for hearsay.

A. No.
Q. Or were they still to be imposed as a burden upon the assenting stockholders of the Old Dominion Company of New Jersey?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant, and as calling for hearsay.

A. What do you mean by "assenting stockholders," Mr. Lauterbach?
Q. Those who transferred their stock to the holding company.

A. No, my general recollection was it was to be borne by the holders of the trust certificates.

Cross-examination by Mr. BRANDEIS:

Q. Mr. Dodge, it is a fact, is it not, that whatever arrangement of any kind may have been made in regard to the prosecution of these suits was embodied in written instruments?

A. As I recollect it, yes.

Q. Have you been an officer, or director, of the Old Dominion Copper Mining & Smelting Company of New Jersey?

A. I don't think so; no, I have not,—the Old Dominion Company of New Jersey, no.

Q. It is a fact, is it not, Mr. Dodge, that all negotiations and arrangements leading up to the acquisition by the Old Dominion Company of Maine of the interest in the United Globe Mines formerly owned by members of the firm of Phelps, Dodge & Company were conducted by your counsel, Mr. William Church Osborne?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Yes, certainly.

834 Q. It is also a fact, is it not, that you personally have never been present at any of the directors' meetings of the Old Dominion Company of New Jersey?

A. No, I never have.

Q. And you have not, at any time, examined the records of the directors' meetings of the Old Dominion Company of New Jersey?

A. No, I have not.

Q. It is a fact, is it not, that at a time some months prior to the formation of the Old Dominion Company of Maine there had been a plan of a real consolidation of the United Globe Mines with the Old Dominion Copper Mining & Smelting Company of New Jersey, and that that plan was later abandoned?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. And is it not a fact that the talk of segregating certain assets of the New Jersey company was a suggestion made at the time of, and with special reference to, the plan of consolidation?

Mr. HEMENWAY: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Redirect examination by Mr. LAUTERBACH:

Q. But this segregation continued to be a feature of the substituted plan, did it not?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Certainly.

Q. Do you know where the instruments, or written documents to which you have referred in answer to Mr. Brandeis' question, are?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. No, I do not.

Q. Have you seen them?

A. Which documents do you mean?

Q. I mean those that Mr. Brandeis asked you about,—whether the arrangement to which you have referred, of the segregation of the claims, was not embodied or formulated in a written instrument or instruments, and you said yes; those are the instruments to which I refer.

A. I do not think I have seen the instruments; as I recollect it, a circular was sent to the stockholders embodying the general plan, but I do not think I saw the actual instruments.

Q. Were you a director, or are you a director, of the Maine company?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

835 Q. And have been since its organization?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. As such director are you advised of the proceedings of the directors of the New Jersey company, the Old Dominion Copper Mining & Smelting Company of New Jersey?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant, and as calling for hearsay.

A. We have a general knowledge of what transpires in their meetings, but not in connection with the trust.

Q. But in respect of other matters?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. Yes.

Q. And all other corporate matters?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. There is no actual record of the meetings read at the meetings of the Maine company, but we have a general knowledge of what transpires.

Q. But not of the prosecution of these actions?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. No.

Q. No interest is taken in those by the Old Dominion Company of Maine?

Mr. BRANDEIS: Objected to as incompetent, immaterial, and irrelevant.

A. No.

CLEVELAND H. DODGE.

Subscribed and sworn to before me this 25th day of October, 1907.

[SEAL.]

MARK J. KATZ,
Notary Public, New York County,
State of New York.

Exhibit 231.

Dr. Old Dominion Copper Co. Syndicate.

1895.			Ledger Folio.			
May 6	To	Cash, J. M. Meredith	476	C 173		2,000 00
28	"	" Globe National Bank	"	" 205		48,000 00
"	"	" A. S. Bigelow	"	" "		1,000 00
June 30	"	Expense	"	" 95	50 00	
18	"	Cash, Travelling exp's L. L. Evarts	"	" 233		50 00
29	"	" Typewriter expenses	"	" 247		67 60
July 1	"	" Note due with Old Colony Trust Co. Aug. 26	"	" 251		10 00
"	"	" interest on above from May 28 to July 26 35 d at 5%	"	" "		204,761 67
8	"	" note due Sept. 25, 95	"	" 263		995 36
"	"	" interest 42 days at 5%	"	" "		204,761 67
"	"	" Incorporation New Jersey, Evarts, Choate & B	"	" "		1,194 44
"	"	" James Colquhoun	"	" "		750 00
9	"	" for deposit	"	" "		52 25
"	"	" services Old Colony Trust Co.	"	" "		1,000 00
"	"	" G. M. Allison, C. M. Bruce & Y. Cohen	"	" 265		700 00
22	"	" Stamp E. A. Tucker & Co	"	" 285		195 60
Aug. 31	"	Transfer Old Dom. Copper Co	304	" "	525 00	40
Dec. 31	"	Transfer Balance Old Dominion Syndicate #2		" 349	209,395 69	
						209,920 69
		Carried forward				$675,459 68

EXHIBIT 231—Continued.

Old Dominion Copper Co. Syndicate.

1895.	Ledger 476.					Folio.		Cr.
May 17	By Cash, A. S. Bigelow					C188		1,000 00
28	" C. S. Henry, 1st installment on subscription			$5,000	14%	H241	700 00	
	Rosalie Lewisohn	1st	"	$1,000 00	14%	"	140 00	
	Leonard Lewisohn chl'dn	1st	"	5,000 00	"	"	700 00	
	Jesse Lewisohn	1st	"	10,000 00	"	"	1,400 00	
	S. Rosenstamm,	1st	"	2,000 00	"	"	280 00	
	Mrs. Eliza Rechat,	1st	"	2,000 00	"	"	280 00	
	G. M. Hyams,	1st	"	2,800 00	"	"	3,920 00	
	Leonard Lewisohn,	1st	"	169,428 33	"	"	23,719 97	
	Adolph Lewisohn,	1st	"	84,714 17	"	"	11,859 98	
	Theo. Armstrong,	1st	"	3,000 00	"	"	420 00	
	Austin M. Purvis,	1st	"	2,000 00	"	"	280 00	
June 6	A. S. Mayer,	1st	"	10,000 00	"	C218	1,400 00	43,699 95
	Jno. Stanton,	1st	"	5,000 00		"	700 00	
	J. W. Belches & Co.	1st	"	5,000 00		"	700 00	
7	C. C. Beaman,	1st	"	10,000 00		"	1,400 00	
14	S. H. Stern,	1st	"	15,000 00		"	2,100 00	
"	" "	2nd	"	15,000 00	28⅔	"	4,300 00	
July 13	Cash, Refund Old Colony Trust Co.			.....		270	175 00	
								10,775 00

EXHIBIT 231—Continued.

Old Dominion Copper Co. Syndicate.

CR. (Continued.)

11	½ note paid Old Colony Trust Company July 1.	$204,761.69	100	102,380	83	
"	" " " " " " July 8.	.....	"	102,380	84	
"	⅔ note paid W. Kayser July 2.....	$81,905	"	54,602	33	
"	⅔ " " " " " 8.....	$81,905	"	54,602	33	
						313,966 33
15	Cash, Refund Old Colony Trust Co.....	.....	C 272	.....		350 00
	Carried forward.....					$369,791 28

838

1895.

DR.

Brought forward.....		675,459 68
Carried forward.....		$675,459 68

EXHIBIT 231—Continued.

839

Old Dominion Copper Co. Syndicate.

CR.

							Cr.
1895.		Brought over					369,791 28
						Folio	
July 16.	Cash	J. W. Belches, Balance subscription on	$5,000		274		4,300 00
23.	"	Jno. Stanton 2d pay't " 28⅝ " on	$5,000		284		1,433 34
25.	"	E. Hawley, " " " " on	$10,000		286		2,866 66
26.	"	Chr. C. Beaman, " " " " on	$10,000		290		2,866 67
"	"	A. J. Meyer, " " " " on	$10,000		"		2,866 67
		Ledger.					
Jul. 30.	By	C. S. Henry, 2d pay't 28¾% on	5,000 00		1,433 33		
"		Theo. Armstrong, " "	3,000 00		860 00		
"		A. M. Purvis, " "	2,000 00		573 34		
"		Rosalie Lewisohn, " "	1,000 00		286 67		
"		Ch'dn of Leonard Lewisohn, "	5,000 00		1,433 33		
"		Jesse Lewisohn, " "	10,000 00		2,866 67		
"		Sam Rosenstamm " "	2,000 00		573 33		
"		Elisa Rechert, " "	2,000 00		573 34		
"		G. M. Hyams, " "	28,000 00		8,026 67		
"		Leonard Lewisohn " "	169,428 33		48,569 45		
"		Adolph Lewisohn " "	84,714 17	H270	24,284 72		
							89,480 85
Aug. 1.		Jno. Stanton, 3 & 4 " "	5,000 00	C302			2,866 67
29.		Chr. E. Beaman, 3d call on		" 334			2,866 67

EXHIBIT 231—Continued.

Old Dominion Copper Co. Syndicate.

CR. (Continued.)

26.	C. S. Henry,	3d pay't	28¾%	on	5,000 00	H282	1,433 33	
"	Ch'dn of Leon. Lewisohn,	"	"	"	5,000 00	"	1,433 33	
	Theo. Armstrong,	"	"		3,000 00	"	860 00	
	A. M. Purvis,	"	"		2,000 00	"	573 34	
	Rosalie Lewisohn,	"	"		1,000 00	"	286 67	
	Jesse Lewisohn,	"	"		10,000 00	"	2,866 67	
	Sam Rosenstamm,	"	"		2,000 00	"	573 33	
	Elisa Rechert,	"	"		2,000 00	"	573 34	
	Carried forward							479,338 81

840

DR.

1895.	Brought over	675,459 68

841

$675,459 68

EXHIBIT 231—Continued.

Old Dominion Copper Co. Syndicate.

CR.

1895.	Brought over					479,338 81
Aug. 26.	G. M. Hyams,	3d pay't 28¾% on	28,000 00	H282	8,026 67	
	Leonard Lewisohn,	" "	169,428 33	"	48,569 45	
	Adolph Lewisohn,	" "	84,714 17	"	24,284 72	
Aug. 31.	Transfer to Old Dominion Co.					89,480 85
Sep. 20.	Simon H. Stern 3d & 4th pay't sub.			J476		2,825 85
24.	A. J. Meyer,	4th pay't, 28⅝% on	15,000 00	C360		8,600 00
26.	C. C. Beaman	" "	10,000 00	" 368		2,866 66
			10,000 00	" 370		2,866 66
	Ledger 304.					
24.	By C. S. Henry, 4th int. 28⅝% on		5,000 00	J301	1,433 34	
	Theo. Armstrong		3,000 00	"	860 00	
	Austin M. Purvis		2,000 00	"	573 32	
	Rosalie Lewisohn		1,000 00	"	286 66	
	Children of Leonard Lewisohn		5,000 00	"	1,433 34	
	Jesse Lewisohn		10,000 00	"	2,866 66	
	Sam Rosenstamm		2,000 00	"	573 34	
	Elisa Rechert		2,000 00	"	573 32	
	G. M. Hyams		28,000 00	"	8,026 66	
	Leonard Lewisohn		169,428 33	"	48,569 46	
	Adolph Lewisohn		84,714 17	"	24,284 75	
						89,480 85
						$675,459 68

EXHIBIT 232.

Old Dominion New Stock Subscription A/C.

DR.

1895.				Folio.		
Sep. 25.	To Cash 50 shares Old Dom.	27	Cash 369	1,356 25
"	" " 50 " " "	26½	" "	1,331 25
"	" " 200 " " "	29	" "	5,825 00
"	" " 100 " " "	28	" "	2,812 50
"	" " 400 " " "	30	" "	12,050 00
"	" " 10 " " "	29	" 373	291 25
"	" " 100 " " "	26½	" 367	2,662 50
"	" " 100 " " "	"	" 369	2,662 50
17.	" C. S. Henry, carrying Aug. 1			
	Bought 200 at 29 $5800..... $5800			
	Sept. 13 sold 200 at 26½..... 5325			
	Differ.....		Jl. 300	475 00
	Ledger 420.			
25.	" A. M. Whitney 400 shares Old Dom....	27½	" 302	11,000 00
30.	" L. Nachman, 1% Comm. on 500 shares.		" 303	500 00
30.	" E. L. Oppenheim 200 shs.....	25	" 305	5,000 00
Oct. 1.	" Chas. F. Brooks 250 " subscription..	26½ + %	" 322	5,050 20
4.	" C. S. Henry & Co. Comm. 250 shs. at 50c		" 324	125 00
21.	" " " " 2000 " " 4 /–		" 327	975 00
3.	" Cash 45 shs. Old Dom.....	29	Cash 381	1,311 26

EXHIBIT 232—Continued.

Old Dominion New Stock Subscription A/C.

DR.

26.	"	C. S. Henry & Co.	200 shs.	Old Dom..	26½ + ⅛ Com.	Jl.	322	5,325	00
16.	"	Cash	25 "	" " ..	22	Cash	403	556	25
25.	"	"	250 "	" " ..	21	"	413	5,281	25
29.	"	"	100 "	" " ..	19 + Com.	"	417	1,912	50
"	"	"	50 "	" " ..	18½	"	417	931	25
"	"	"	100 "	" " ..	18½	"	"	1,862	50
"	"	"	50 "	" " ..	18½	"	"	931	25
31.	"	"	100 "	" " ..	17½ + ⅛	"	419	1,762	50
"	"	"	100 "	" " ..	18½ + ⅛	"	"	1,862	50
"	"	Difference on 1000 shares sold at 25½ Collected at 27.....							
Nov. 7.	"	Commission on 200 shs. Paris.....				Jl.	318	1,500	00
						"	420	105	89
		Carried forward						75,458	60

Old Dominion New Stock Subscription A/C.

CR.

1895.							Folio.		
		Ledger 536.							
Aug.	1.	By Cash	200 shs.	Old	Dom.	25	C—		5,000 00
	26.	" "	400 "	"	"	27 50			11,000 00
Sep.	30.	N. M. Rothschild Son	1000 "	"	"	29	J301	29,000 00	
	"	Waldemar Company	500 "	"	"	30	"	15,000 00	
	"	" "	500 "	"	"	32	"	16,000 00	
	"	Ladenburg, Thalman	400 "	"	"	25	"	10,000 00	
	"	S. Nachman	500 "	"	"	30	"	15,000 00	
	"	E. S. Oppenheim & Co.	2000 "	"	"	25		50,000 00	
									135,000 00
	24.	Sally M. Manz	200 "	"	"	29	J302		5,800 00
	"	E. Lastate	500 "	"	"	30	"		15,000 00
		Ledger 420.							
	25.	A. M. Whitney	600 "	"	"	27 50	"		16,500 00
	"	" "	400 "	"	"	"	"		11,000 00
	30.	S. Lazarus Son	200 "	"	"	29	"		5,800 00
	"	C. S. Henry	400 "	"	"	30	"		12,000 00
	"	" "	100 "	"	"	25	"		2,500 00
Oct.	1.	H. Wallenstein	500 "	"	"	25	J324		12,500 00
	2.	J. D. Probst	400 "	"	"	"	"		10,000 00
	7.	Lawyer Teutsch	250 "	"	"	27	"		6,750 00
	8.	C. S. Henry & Co.	200 "	"	"	30	"		6,000 00
	1.	A. Vogel	25 "	"	"	25	"		625 00
	"	" "	25 "	"	"	"	"		625 00

EXHIBIT 232—Continued.

Old Dominion New Stock Subscription A/C.

CR. (Continued.)

"	Rose Rosenbaum	25	"	"	"	"	"	625 00
"	Bella "	25	"	"	"	"	"	625 00
"	Ike "	25	"	"	"	"	"	625 00
"	Doc. "	25	"	"	"	"	"	625 00
"	Sam. "	40	"	"	"	"	"	1,000 00
"	Baron de Hirsch	2000	"	"	"	30	"	60,000 00
"	Capt. Couch	200	"	"	"	12 50	"	2,500 00
"	T. Wolfson	20	"	"	"	"	"	250 00
"	Edgar Buffon	20	"	"	"	"	"	250 00
"	Theo. Gaden	20	"	"	"	"	"	250 00
	Carried forward							322,000 85

EXHIBIT 232—Continued.

Old Dominion New Stock Subscription A/C.

DR.

844

		Brought over							75,458 60
1895.		Ledger 420.						Folio.	
Nov.	1.	To Cash	400	shares			Cash	423	10,000 00
	2.	" "	100	"		18 Com.	"	425	1,812 50
	6.	" "	50	"		17½ ÷ ⅛	"	427	881 25
	7.	" "	100	"		17¼	"	429	1,737 50
	8.	" "	50	"		15	"	431	756 25
	19.	" 5% Comm. on	200	"	London		Jl.	332	300 00
	12.	" Cash	115	"		15	Cash	437	1,739 37
	16.	" "	50	"		17	"	443	856 25
Dec.	11.	To A. A. Fishl	150	shs.	Old Dom.	16⅜	Jl.	340	2,456 25
Nov.	26.	C. M. Hyams	760	"	" "	26	"	342	19,760 00
Dec.	3.	Cash	100	"	" "	15¾	Cash	463	1,587 50
	19.	Jesse Lewisohn	593	"	" "	25 68	Jl.	345	15,235 82
	"	5% Comm. on	500	"	London		"	"	661 77
Nov.	"	Proceeds of	2000	"	Old Dom.	30	"	"	60,000 00
Dec.	19.	Lewisohn, Adolph Lewisohn	6845	"	" "	Avge. 27.52	Jl.	346	188,401 38
									381,644 44

EXHIBIT 232—Continued.

Old Dominion New Stock Subscription A/C.

845

CR. (Continued.)

1895. Ledger 420.

									Folio.	
		Brought over,								322,850 00
Oct.	1	C. W. Welch	20	shs.	Old	Dom.	12	50	J324	250 00
	"	W. Faint	20	"	"	"	"		"	250 00
	"	S. Radlostorffer	20	"	"	"	"		"	250 00
	"	H. L. Curey	20	"	"	"	"		"	250 00
	"	J. A. Albrecht	20	"	"	"	"		"	250 00
Oct.	1	By T. Wolfson	25	shs.	Old	Dom.	25		Jl.	324 625 00
	"	Edgar Buffon	25	"	"	"	"		"	" 625 00
	"	H. L. Casey	50	"	"	"	"		"	" 1,250 00
	"	McCoy	25	"	"	"	Gratis			
	"	Cyril Henry	100	"	"	"	"			
	"	Sam Lewisohn	20	"	"	"	"			
	10	A. J. Stern	500	"	"	"	27		"	325 13,500 00
	"	Banque International	500	"	"	"	"		"	" 13,500 00
	29	C. S. Henry	100	"	"	"	19¾		"	" 1,987 50
	30	Mrs. Annie Wolfson	15	"	"	"	18		"	" 271 87
	23	G. M. Hyams	100	"	"	"	21		"	" 2,100 00
	24	" " "	100	"	"	"	19		"	" 1,900 00
	26	" " "	100	"	"	"	18½		"	" 1,850 00
	29	" " "	100	"	"	"	"		"	" 1,850 00
	"	Common	400	"	above				"	" 50 00

EXHIBIT 232—Continued.

Old Dominion New Stock Subscription A/C.

CR.

	"	C. S. Henry & Co.	200	"	Old Dom.	26½ ÷ ⅛		Jl.	313	5,325	00
Nov.	7	Comm. on 400 shares						"	329	50	00
	"	Transfer to Wm. Faint	10	"	"	"	17	"	"	171	15
	26	G. M. Hyams	270	"	"	"	24	"	342	6,480	00
		Ledger 421.									
Dec.	5	Cash	15	"	"	"	16	Cash	464	240	00
	11	C. S. Henry overcharge 2/—on	800	shs.				Jl.	342	390	00
	19	Jesse Lewisohn	233	shs.			22 87	"	345	5,328	62
	"	Interest recovered from C. F. Brooks						"	"	50	20
										381,644	44

EXHIBIT 233.

Old Dominion Syndicate Sub. #2.

Dr.

1895.		Ledger 479.			
Jun.	18	To Cash	C233		40,722 22
	"	" "	"235		102,708 07
	20	" Interest paid Louis G. Schiffer	J259	15 17	
	"	" " " H. W. Spencer	"	14 82	29 99
July	1	" note due Aug. 26 discounted Wm. Keyser	C251	81,905 00	
	"	" interest on above from May 28 30d@5%	"	409 52	
	8	" note due Sept. 25th	C263	81,905 00	
	"	" interest 42 days at 5%	"	477 78	164,697 30
	16	" Transfer 1st & 2d payment 42⅞ on 5000 E. L. Oppenheimer & Co.	J269		2,133 33
	"	" " " 1-2-3-4 paym't of 2500 paid by D. L. Wallerstein	"		2,500 00
Aug.	14	" Aloa Arow, 1 & 2d pay't on subsc. 1,000 42⅞%	"284		426 67
	1	" D. W. Wallerstein, entry reversed			2,500 00
	15	" Jacob Cohen, Transfer	J285		

2,133 33

EXHIBIT 233—Continued.

Old Dominion Syndicate Sub. #2.

DR. (Continued.)

Ledger 484.

Sept.	1	" Interest G. E. Oppenheim is credited Aug. 26....	1451 25	J300		
		should have been.....	1433 33			
						17 92
		Carried forward.....				320,368 83

COPPER MINING & SMELTING COMPANY

EXHIBIT 233—Continued.

Old Dominion Syndicate Sub. #2.

CR.

1895	Ledger 479	5,000 00	J259	2,133 33		
		5,000 00	"	2,133 33		
Jun. 20.	By Chas. F. Brooks, 1 & 2 payt 42⅔%.....	1,000 00	"	426 67		
"	Children of Adolph Lewisohn 42⅔%.....	25,000 00	"	10,666 67		
"	Sam'l Lewisohn, 1 & 2 payt.....	44,238 33	"	9,170 00		
"	Lewisohn Bros. " "		"	4,585 55		
"	Leonard Lewisohn, " " ⅔ of.....				29,115 00	
"	Adolph Lewisohn, " " ⅓		J234		5,015 75	
"	L. G. Schiffer full payment.....		"240		4,281 48	
24.	A. W. Spencer.....	5,000 00	"250		2,133 33	
July 1.	C. F. Brooks, 1 & 2 payt 42⅔% sub.....		C254		2,866 67	
5.	A. W. Spencer, 3d payment.....		"266		1,400 00	
10.	1st payment, 14% on subs. $10,000.....		"270		2,866 67	
11.	last " " " " "	2,000 00	"		853 34	
"	A. A. Evarts, 1 & 2 payt subs.....		J271		2,133 33	
16.	E. L. Oppenheim & Co. 1 & 2 installmt.....		"272		2,500 00	
26.	D. Wallerstein, Subscription to Syndicate....	1,000 00				
Aug. 14.	Aloa Arow 1 & 2 pyt on subs. 42⅔%.....		"284		426 67	
15.	Jacob Cohn, " " " " "	2,500 00	"285		1,066 66	
2.	D. Wallerstein, full payt of subscription.....		C302		2,500 00	
24.	A. J. Mayer, 3d payt 28⅔%.....		"326		2,866 67	
26.	E. L. Oppenheim 3d payt	5,000 00	"330		1,451 25	
27.	E. O. Hawley, " " "	10,000 00	"		2,866 66	

EXHIBIT 233—Continued.

Old Dominion Syndicate Sub. #2.

CR. (Continued.)

	Ledger 484						
26.	Allan W. Evarts, " " "	.....	2,000 00	"332			573 33
"	Chas. J. Brooker, " " "	.....	5,000 00	J282	1,433 33		
"	Children Adolph Lewisohn "	.....	5,000 00	"	1,433 33		
"	Sam Lewisohn, " " "	.....	1,000 00	"	286 67		
	Carried forward.....				3,153 33		64,916 81

DR.

	Brought over,				320,368 83
1895	Ledger 486				
Sep. 30.	To amount credited Twice as payt D. Wallerstein		J303,		1,066 66
" "	Readjustment of Jacob Cohn ac.....		" "		1,066 65
					322,502 14

EXHIBIT 233—Continued.

Old Dominion Syndicate Sub. #2.

CR.

1895						
	Brought over				3,153 33	64,916 81
Aug. 26.	Lewisohn Bros 3d payt 28⅔%.....	25,000 00	J282	4,013 32		
"	Leonard Lewisohn " " "	21,492 22	"	6,161 11		
"	Adolph Lewisohn, " " "	10,746 11	"	3,080 55		
"	Aloa Arow, " " "	1,000 00	"	286 67		
						16,694 98
"	Jacob Cohn, " " "	2,500 00	J283			716 66
Sep. 23.	Allan W. Evarts last payt 28⅔% sub. on.....	2,000 00	"366			573 33
"	L. E. Oppenheim " " "	5,000 00	"			1,433 34
"	E. W. Hawley, " " "	10,000 00	"			2,866 67
24.	C. F. Brooker 4 installment sub.....	5,000 00	J300	1,433 34		
"	Children Adolph Lewisohn "	5,000 00	"	1,433 34		
"	Sam Lewisohn, " " "	1,000 00	"	286 66		
	Ledger 484					
24.	By Jacob Cahn, 4th installment sub.....	2,500 00	J300	716 67		
	Aloa Aron, " " "	1,000 00	"	286 67		
	Leonard Lewisohn " "	21,492 22	"	6,161 11		
	Adolph Lewisohn " " "	10,746 11	"	3,080 56		
	Lewisohn Bros. " " "	14,000 00	"	4,013 32		
						17,411 67
Sep. 30.	Cancel entry July 16 D. Wallerstein.....		J303			2,500 00
	" " Aug. 15 L. Bros.....		"			2,500 00
Dec. 31.	Transfer to Old Dominion Syndicate # 1....		J349			209,395 69
"	Interest collected from Sundry Subscribers...		"			3,492 99
						322,502 14

850

EXHIBIT C.

Memorandum.

Commenced searching files 4 P. M., February 25th.

Bigelow, Nelson, Bissell — January 1 to June 30

Bigelow, Nelson, Bissell — July 1 to December 31

Attorneys — January 1 to June 30

" — July 1 to December 31

Quit 5:30 P. M.

Resumed search 7:15 P. M.

Outgoing Letters — January 1 to January 10
January 11 to January 20
January 21 to 31
February 1 to 14
February 14 to 28
March 1 to 15
March 15 to 30
April 1 to 15

Quit 9:30 P. M.

February 26th, 4:20 P. M.

Outgoing Letters— April 15 to 30
May 1 to 15
May 16 to 31
June 1 to 10

Quit 5:50

Resumed 7:05.

Outgoing Letters— June 11 to 20
June 21 to 30
July 1 to 10
July 11 to 20
July 21 to 31
Aug. 1 to 10
Aug. 11 to 20
Aug. 21 to 31

851 February 27th, 7:10 P. M.

Outgoing Letters— Sept. 1 to 10
Sept. 11 to 20
Sept. 21 to 30
Oct. 1 to 10
Oct. 11 to 20
Oct. 21 to 31
Nov. 1 to 10
Nov. 11 to 20
Nov. 21 to 30
Dec. 1 to 15
Dec. 16 to 31
Miscellaneous File 1893 to 1897

Quit 11 P. M.

February 28th, 2:05 P. M.

Letters Received—

A to Ba to Bl
January 1 to March 1
March 1 to May 25
May 25 to June 30
July 1 to Oct. 1

Quit 5 P. M.

March 1st, 1:55 P. M.

" A–Ba to Bl
Oct. 1 to Dec. 31
Bo to By
Jan. 1 to June 30
July 1 to Dec. 31
C
January to March
May to June 30
July 1 to Dec. 31
D
Jan. 1 to June 30
July 1 to Dec. 31
852 E and F
Jan. 1 to June 30
July 1 to Dec. 31
G
Jan. 1 to June 30
July 1 to Dec. 31

Quit 5:20 P. M.

March 1st—continued, 7:30 P. M.

Letters Received—

Ha to He
Jan. 1 to June 30
July 1 to Dec. 31
Hi to J
Jan. 1 to June 30
Hi to J
July 1 to Dec. 31
K
Jan. 1 to June 30
July 1 to Dec. 31
L
Jan. 1 to June 30
July 1 to Dec. 31
Ma to Me
Jan. 1 to June 30
July 1 to Dec. 31 M—
Me to My
Jan. 1 to June 30
N O P
Jan. 1 to May —
June
July 1 to Oct. 15
Oct. 15 to Dec. 31

Quit 11:05

March 2nd, 2:40 P. M.

" Q to R
Jan. 1 to June 30
July 1 to Dec. 31
853 Sa to Sh
January to June
Si to Sy
January to June
Si to Sy
July 1 to Dec. 31

Quit 5:20 P. M.

Resumed 7:15 P. M.

Letters Received—
T U V
Jan. to June
W to Z
January to June
Brokers— June 30th—
July 1 to December 31
Banks— January 1 to June 30
July 1 to December 31

Telegrams Received—
January 1 to May 1
June
July 1 to November 1
Nov. 1 to December 31

Quit 10:30 P. M.

March 3rd—3:10 P. M.

New England Electrolytic Copper Co.
January, February and March
April, May and June
October, November and December
Record of Purchases—
N. E. Elec. Copper Co.
December 1, 1894 to September 30/95
Outgoing Letters—
N. E. Elec. Copper Co.
April to December, 1895
Weight Returns— January to June 30
July 1 to Dec. 31
N. J. Meetal Refining Co.—1895
Penn. Salt Mfg. Co.—
April to December—

Quit 6:30 P. M.

854 March 3—continued—7:15 P. M.

Letters Received—
Sa to Sh—
July 1 to December 31
T U V
July 1 to Dec. 31
W Z
July 1 to Dec. 31.
Ansonia Refining Co.—
January to June—
July 1 to Dec. 31.
Factory Letters— Jan. 1 to June 30
July 1 to Dec. 31.
Bills of Lading— Jan. 1 to June 30
July 1 to Dec. 31

F. L. R.

By JOHN STOCKETT: Commenced search—March 2nd 6 P. M.

N. E. Elec. Copper Co.—
Foreign Statements—
Outgoing Telegrams—

Stopped at 10 P. M.

March 3rd, 9:50 A. M.

Telegrams to 5 P. M.
File contracts—6 P. M.
Foreign letters from C. S. Henry to 9:40 P. M.

March 4th—

Incoming Foreign Letters 9:50 A. M. to 4:30 P. M.
Copper Wire Contracts, Order Bills, etc.—8:15 P. M.

By H. A. Asendorf—Tuesday March 3rd—6:20 P. M.
Receipt Files— January to June
July to December
Salesmen— January to June,
July to December
Assay and Weights—Jan. to June.
July to Dec.
855 L. I. & T. Co. 1895—
Mont. Ore Purchasing Co.—Jan. to June.
European Invoices—January to December 1895—
A. Morris—Penn. Salt Mfg. Co.—Jan. to June—1895
Ansonia Refining Co.—Freight Bills—Jan. to May 1895
Pawtuckett Tolls
Slate—1892 to 1895
Freight Claims—
Penn. Lead Co. December 1895.
Purchases—
January to July
Drafts—January to October—1895.
Stenographers' Letters—January—1895.
New Eng. Elec. Copper Co. 1895.
Lewisohn Imp. and Trading Co. July to December 1895.
T. O. C. Copper Wire July 1 to Dec. 31.
" Foreign Metal Contracts—Dec. 1895 to Dec. 1896—
Assays—1895
T. O. C.—January to June 1895
Bills January to March 1895—March to May, 1895, June, and July to September. — Sept. —. to Nov. — Dec.
Cables—1895. Jan. 1 to Apr. 11—June 30—July to Oct.—Nov. to Dec.—

Quit 9:30 P. M.

Exhibit 504 was a certified copy of the certificate of organization of the complainant corporation. The text of it appears on pages 112–115 of this printed record.

Exhibit 504 is a printed copy of the record in the Court of Appeals of New York in the case of Blum v. Whitney, containing the papers on appeal by leave from a judgment of the appellate division affirming an interlocutory judgment sustaining the demurrers to the bill of complaint which is as follows:—

856 *Complaint. Supreme Court, New York County.*

EDWIN BLUM, on Behalf of Himself and all Other Stockholders of the Distilling Company of America Similarly Situated, Plaintiff,

against

HARRY PAYNE WHITNEY, as Executor of the Last Will and Testament of William C. Whitney, Deceased; Thomas F. Ryan, Robert A. C. Smith, Peter A. B. Widener, William L. Elkins, Thomas Dolan, Frederick P. Olcott, Anthony N. Brady, Hugh J. Grant, Frederick S. Flower, Samuel W. Ehrich, John I. Waterbury, Samuel M. Rice, Edson Bradley, George R. Sheldon, Howard J. M. Cardeza, P. Lewis Anderson, Henry D. Macdona and Distilling Company of America, Defendants.

The plaintiff, for his third amended complaint, complains and alleges, upon information and belief, as follows:

I. That the Distilling Company of America is a foreign stock corporation organized under the laws of the State of New Jersey on or about July 11, 1899, and the plaintiff is a stockholder therein, holding 2,800 shares of the common stock thereof of the par value of $100 per share, and brings this action on behalf of himself and all other stockholders therein. The plaintiff is a resident of the City and State of New York, and the Distilling Company of America has its principal business office and place of business in the City, County and State of New York, and a large portion of its property has been since the time of its organization and still is situated in the State of New York; and the individual defendants, with the exception of defendants Widener, Dolan and Elkins, are residents of the State of New York, and the acts hereinafter set forth were committed and performed in the State of New York.

II. That on the 22d day of June, 1899, and at all the times hereinafter set forth, the following corporations existed and were doing business, each of them having many stockholders, many of said stockholders being stockholders in several of said companies, viz.:

(*a*). The American Spirits Manufacturing Company, hereinafter called the Manufacturing Company, a corporation incorporated August 22, 1895, and existing under the laws of the State of New York, with an issued capital stock of $35,000,000, viz.:
857 350,000 shares of the par value of $100 per share, of which $7,000,000 is 5 per cent. non-cumulative preferred stock and $28,000,000 common stock; and that the objects for which said corporation was formed were to manufacture, sell and distribute spirits and other alcoholic products.

(*b*) The Standard Distilling and Distributing Company, hereinafter called the Standard Company, incorporated June 27, 1898, and existing under the laws of the State of New Jersey, with an issued capital stock of $21,000,000, viz.: 240,000 shares of the par value of $100 each, of which $8,000,000 is preferred stock, entitled to a cumulative quarterly dividend at the rate of 7 per cent. per

annum, and $16,000,000 common stock; and that the objects for which said corporation was formed were to manufacture, sell and distribute spirits and other alcoholic products.

(c) The Kentucky Distilleries and Warehouse Company, hereinafter called the Kentucky Company, incorporated February 3, 1899, and existing under the laws of the State of New Jersey, with an issued capital stock of $29,000,000, viz.: 290,000 shares of the par value of $100 each, of which $10,500,000 is preferred stock entitled to a cumulative quarterly dividend at the rate of 7 per cent. per annum, $18,500,000 common stock, and that the objects for which said corporation was formed were to manufacture, sell and distribute Bourbon and Kentucky and other whiskies and spirits and other alcoholic products.

(d) The Spirits Distributing Company, hereinafter called the Distributing Company, incorporated January 6, 1896, and existing under the laws of the State of New Jersey, with an issued capital stock of $6,500,000, viz.: 65,000 shares of the par value of $100 each, of which $1,250,000 is first preferred stock entitled to cumulative dividends at the rate of 6 per cent. per annum, $1,575,000 second preferred stock entitled to non-cumulative dividends at the rate of 2 per cent. per annum and $3,675,000 common stock; and that the objects for which said corporation was formed were to sell and distribute spirits and other alcoholic products. That said common stock of said Distributing Company was and still is owned by said Standard Company above named.

The plaintiff will refer hereafter to said companies together as the "Constituent Companies."

III. That at the times hereinafter mentioned, the defendant Samuel M. Rice was president of said Manufacturing Company, president of said Kentucky Company, first vice-president of said Standard Company, and a director of each of said "Constituent Companies," the defendant Edson Bradley was vice-president and a director of said Kentucky Company, a director of said Manu-
858 facturing Company, and a director and a member of the Executive Committee of said Standard Company, the defendant George R. Sheldon was president and director of said Standard Company, and a director of said Kentucky Company, the defendant Howard J. M. Cardeza was vice-president and a director of said Manufacturing Company, and one Thomas H. Wentworth, of the City of New York, was the secretary and director of said Manufacturing Company, and secretary of said Kentucky Company, and one N. E. D. Huggins was the secretary of said Standard Company and of said Distributing Company, and the firm of Moran, Kraus & Mayer of the City of Chicago were general counsel for all of said "Constituent Companies," and the New York offices of all of said "Constituent Companies" were at 27 William street, New York City.

IV. That the defendants, Samuel M. Rice, Edson Bradley, George R. Sheldon and Howard J. M. Cardeza, being officers and directors of the said "Constituent Companies," as hereinbefore set forth, and William C. Whitney and the defendants Ryan, Smith, Widener, Elkins, Dolan, Olcott, Brady, Grant, Flower, Ehrich, Waterbury,

Anderson and Macdona, being persons of influence in the financial circles of New York City, and able to procure money for the putting through of large financial schemes, confederated together, in or about the summer of 1899, to make for themselves a secret profit at the expense of the stockholders of the "Constituent Companies," hereinbefore mentioned, and at the expense of the Distilling Company of America and its stockholders and this plaintiff, and to that end formed the scheme of consolidating said "Constituent Companies" and other companies by the formation of the Distilling Company of America as a stockholding corporation for the purpose of acquiring the stock of said "Constituent Companies"; and in order to do so without any risk or expense to themselves, and to insure the success of their scheme, before actually incorporating the defendant the Distilling Company of America they formed the plan of requesting the stockholders of the various "Constituent Companies" to deposit their certificate of stock with a depository named by them, with the intention of incorporating the Distilling Company of America, to acquire and take over such stock, after sufficient stock had been deposited to insure the success of the scheme. It was part of their scheme that after said stock had been deposited they would cause the Distilling Company of America to be incorporated and issue a portion of the stock thereof to the stockholders of the "Constituent Companies" who had deposited their stock under the plan, and a large portion of the stock of the Distilling Company of America remaining they would take and appropriate to their own use, without paying any consideration to the said Distilling Company of America therefor, and said scheme was carried out by the said
859 William C. Whitney and the defendants Ryan, Smith, Widener, Elkins, Dolan, Olcott, Brady, Grant, Flower, Ehrich, Waterbury, Rice, Bradley, Sheldon, Cardeza, Anderson and Macdona as hereinafter set forth.

V. In pursuance of said scheme, the said William C. Whitney and the defendants Ryan, Smith, Widener, Elkins, Dolan, Olcott, Brady, Grant, Flower, Elrich, Waterbury, Rice, Bradley, Sheldon, Cardeza, Anderson and Macdona, obtained an option from the stockholders of the Hannis Distilling Company, a corporation upon about ninety-five per cent. of the stock of said corporation; that the capital stock of said Hannis Distilling Company was $1,000,000, and the said Whitney and others procured an option thereon to purchase the same for the sum of $1,500,000 in cash and $250,000 in preferred stock, and $250,000 in common stock of the Distilling Company of America, a corporation not then formed, but to be organized, as hereinbefore set forth, and the said Hannis Distilling Company, and the stock thereof was not worth more than the said sum of $1,500,000. Thereafter the said persons above mentioned employed and constituted P. Lewis Anderson and Henry D. Macdona, two of the defendants, their agents, associates and representatives, to carry out said scheme, and thereafter and on or about June 22, 1899, the said P. Lewis Anderson and Henry D. Macdona, of the City of New York, designating themselves and hereinafter referred to as the "organizers," proposed to the stockholders of the said "Constituent Compa-

nies" respectively, by printed prospectus and proposed agreement, dated June 21, 1899, and by simultaneous and continued advertisement in the public press, dated June 20, 1899, but beginning June 22, 1899, and by a notice sent to all the stockholders of the said "Constituent Companies" at the instance of the defendants hereinbefore named as officers thereof, the following plan, viz.: That the said "organizers" would organize a corporation to be known as the Distilling Company of America, with an authorized capital of $55,000,000 7 per cent. cumulative preferred stock and $70,000,000 common stock, which the "organizers" would use in acquiring for the Distilling Company of America the capital stock of the said "Constituent Companies" by exchanging the stock of the Distilling Company of America, when issued, for the stock of the said "Constituent Companies" and for the purchase for the Distilling Company of America of certain rye distillery properties, and for an additional working capital of $1,500,000, as therein set forth, leaving in the treasury of the new company for future purposes $23,750,000 of its preferred stock and $23,750,000 of its common stock; and they invited and requested the stockholders of the "Constituent Companies" to co-operate with them therein, and to subscribe for the stock of the Distilling Company of America by depositing the stock of the "Constituent Companies" with the Central Trust Company for the purpose of being exchanged for the stock of the Distilling Company of America
860 when formed. The basis proposed by the "organizers" for the exchange of the stock of the "Constituent Companies" for that of the stock of the Distilling Company of America to be organized was as follows:

(*a*) Holders of stock of the Manufacturing Company to exchange their stock by depositing the same with the Central Trust Company of New York, and receive for each share of the $7,000,000 of the Manufacturing Company's preferred stock 50 per cent. of the par value thereof in preferred stock of the said Distilling Company, and for each share of the $28,000,000 Manufacturing Company's common stock 25 per cent. of the par value thereof in common stock of the said Distilling Company of America.

(*b*) Holders of the stock of the Kentucky Company to similarly deposit their stock and to receive for each share of the $19,500,000 preferred stock of the Kentucky Company 85 per cent. thereof in preferred stock and 15 per cent. thereof in common stock of the said Distilling Company, and for each share of the $18,500,000 common stock of the Kentucky Company 70 per cent. thereof in common stock of the said Distilling Company.

(*c*) Holders of stock of the Standard Company to similarly deposit their stock and receive for each share of the $8,000,000 preferred stock of the Standard Company 85 per cent. thereof in preferred stock and 15 per cent. thereof in common stock of the said Distilling Company 85 per cent. thereof in preferred stock and 15 per cent. thereof in common stock of the said Distilling Company, and for each share of the $16,000,000 common stock of the Standard Company 60 per cent. thereof in common stock of the said Distilling Company.

(*d*) Holders of stock of the Distilling Company to similarly deposit

their stock and receive for each share of the said Distilling Company's $1,250,000 6 per cent. first preferred stock 80 per cent. thereof in preferred and 20 per cent. thereof in common stock of the said Distilling Company, and for each share of the $1,575,000 two per cent. second preferred stock of the Distributing Company, 20 per cent. thereof in preferred and 20 per cent. thereof in common stock of the said Distilling Company.

That $3,675,000 common stock of said Distributing Company being owned by the Standard Company, no proposition in relation thereto was made by said "organizers." The defendant further announced in their said prospectus that they would purchase for the said Distilling Company of America at least 95 per cent. of the common stock of the Hannis Distilling Company of Philadelphia and Baltimore, which was engaged in the business of manufacturing rye whiskies, the St. Paul Distillery, situated in St. Paul, Minnesota, also engaged in manufacturing rye whiskies, and supply to the said Distilling Company at least $1,500,000 in cash. The said pros-
861 pectus did not state that the said William C. Whitney and the individual defendants hereinbefore mentioned had an option on or were interested in the Hannis Distilling Company or its stock, or the amount that it was contemplated they should be paid for their said interest, or that they intended to make a profit out of the sale of the said Distilling Company of America for their option on the stock of the said Hannis Distilling Company; nor did the said William C. Whitney or any of the said defendants at any time or in any way state that they were interested in said Hannis Distilling Company or its stock and intended to cause the said Distilling Company of America to acquire the same from themselves, but they fraudulently concealed the same from the stockholders of the "Constituent Companies," and caused the same to be acquired by the Distilling Company of America at the direction of their own agents and representatives as directors, as hereinafter set forth.

Said prospectus further proposed that the stock of the several "Constituent Companies" hereinabove named should be deposited with the Central Trust Company of New York, on or before June 30th, 1899, which should deliver the same to the State Trust Company of New York, upon receiving from the latter the said shares of the Distilling Company of America, it being provided that said "organizers" should make said exchange through said State Trust Company. A copy of the said prospectus and agreement is hereto annexed, marked "Exhibit A" and made a part hereof.

That the proposition of said "organizers" was not made on their own behalf alone, but was the proposition of and was made with the knowledge and at the instance and request of the said Samuel M. Pice, Edson Bradley, George R. Sheldon and Howard J. M. Carneza, who were directors and officers of said "Constituent Companies," as above set forth; William C. Whitney, Robert A. C. Smith, Peter A. B. Widener, William L. Elkins, Thomas Dolan, Frederick P. Olcott, Anthony N. Brady, Hugh J. Grant, Frederick S. Flower, Samuel W. Ehrich and John I. Waterbury, all of whom collectively will be referred to hereinafter as the "Syndicate."

VI. That accompanying said prospectus issued by the "organizers," the directors of said "Constituent Companies," including the defendants Rice, Bradley, Cardeza and Sheldon, caused to be issued by said "Constituent Companies" and mailed to each stockholder a circular dated June 20th, 1899, signed by the secretaries of said respective "Constituent Companies," and by Moran, Kraus & Mayer, the counsel of all of said "Constituent Companies," wherein it was stated that the proposed plan had received the approval of the officers and directors of each of the "Constituent Companies," a copy of which circular is hereto annexed, marked "Exhibit B" and made a part hereof, and the advertisement mentioned in paragraph V hereof as having been made in the public press was the same as said Exhibit B except that the last paragraph of Exhibit B was omitted from the advertisement, and the advertisement was signed at the end as follows: "Central Trust Company of New York, by F. P. Olcott, President; The State Trust Company, by Walter S. Johnston, President," and thereupon a large number of the stockholders of the said "Constituent Companies," induced thereto by relying upon the statements, propositions and good faith of said "organizers" and of the respective boards of directors of said "Constituent Companies," and believing from the statements made in said prospectus and said circular and said advertisement that all the subscribers to the shares of said Distilling Company of America were being and would be treated alike and equally, and relying upon the good faith of the said "organizers" and of the various directors of said "Constituent Companies" to fully and truly state to them all facts touching their interests which they or any of them might know, and honestly and to fully advise them in the premises; and relying upon the good faith and duty of said George R. Sheldon, Samuel M. Rice, Edson Bradley and Howard J. M. Cardeza, as officers and directors of said "Constituent Companies," as aforesaid, and of the aforesaid general counsel, and believing that the said plan was simply a plan for the consolidation of the various corporations mentioned therein for the mutual benefit of their respective stockholders deposited their respective holdings and subscribed for the stock of the Distilling Company of America; that the holders of the stock of said "Constituent Companies," to the amount of over 90 per cent. of said stocks, so deposited their stock under said plan, and they would not have so deposited their stock under said plan and subscribed for the stock of the Distilling Company of America, had they known the facts herein set forth, and which were then known to the "organizers," and to the members of said "Syndicate," and by them willfully concealed from said stockholders of the "Constituent Companies" and subscribers to the stock of the Distilling Company of America.

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VII. That thereafter, more than a majority of the stock of each of the said "Constituent Companies" having been deposited under the said plain prior to July 7, 1899, the said William C. Whitney and the other defendants, just above mentioned being assured of the success of the said scheme did on the 11th day of July, 1899, through the said "organizers," who acted for and under the direction of the said "Syndicate" cause to be incorporated under the laws of the State of

New Jersey, the said Distilling Company of America with the capital aforesaid. The incorporators of the said Company mentioned in the certificate of incorporation were George E. P. Howard, Francis R. Foraker and Walter S. Dryfoos, who were employees of the firm of Root, Howard, Winthrop & Stimson, the attorneys for the
863 said William C. Whitney and the said individual defendants.

On the following day (July 12, 1899) the said incorporators held their first meeting and elected a board of directors, consisting of the following persons, who were also the agents and employees of the said "Syndicate" and their attorneys, and as employees and representatives acted solely under their instructions: George E. P. Howard, Francis R. Foraker, Walter S. Dryfoos, Roland B. Harvey, David J. Gallert, Lester A. Pyatt, David Nelson, Hoyt F. Spooner, Raymond G. Shipman, Rudd C. Rann and L. W. Ahrens. That on the same day (July 12, 1899), the said board of directors, thus elected and constituted by the said "Syndicate" received in the form of a proposed contract dated July 12, 1899, a proposition from P. Lewis Anderson and Henry D. Macdona, the "organizers" of the said Distilling Company of America under said prospectus, and two of the defendants herein, and the agents and representatives of the other defendants, to deliver to the said Distilling Company of America the stock of the "Constituent Companies" deposited under the said plans hereinbefore set forth, and 95 per cent. of the stock of the Hannis Distilling Company and $1,500,000 in cash in exchange for $31,250,000 of the preferred stock and $46,250,000 of the common stock of the said Distilling Company of America, except such proportion thereof as they caused to be reserved in the treasury of the said Distilling Company to be exchanged for the stock of such stockholders of said "Constituent Companies" as had not deposited their shares under said prospectus; and said proposed contract drawn up by the attorneys for said "Syndicate" at their request and presented to the said Distilling Company of America at the first meeting of its directors by the said P. Lewis Anderson and Henry D. Macdona, two of the defendants herein and the agents and representatives of the others was by a vote of the said directors hereinbefore mentioned, who were also the employees, agents and representatives of the "Syndicate" accepted, and the president and secretary of the company were authorized by said Board of Directors to execute the said contract and to carry it out by the issuance of the stock of the Distilling Company of America; and the said contract was thereafter executed and performed, and the stock of the Distilling Company of America was issued in the amount mentioned in said contract, and the St. Paul Distillery was not included in said contract and was not acquired by the Distilling Company of America.

VIII. That the said "organizers" acting for and on behalf of the said "Syndicate," thereupon received $31,250,000 of preferred and $46,250,000 of common stock, being the entire issued capital stock of said Distilling Company of America, and on receiving said entire issued capital stock of said Distilling Company, viz.,
864 $31,250,000 of preferred and $46,250,000 of common stock, thereupon caused to be transferred on the books of the

company $20,540,000 of the preferred and $32,890,000 of the common stock to the Central Trust Company, which distributed the said stock to the holders of stocks of the said "Constituent Companies" who had subscribed under said prospectus for stock of said Distilling Company, and out of the balance, viz., $10,710,000 preferred and $13,360,000 common, they caused to be transferred to George H. Jarden, William Brice, Ephraim Brice and John McGlynn, as a committee of stockholders of the Hannis Distilling Company, $250,000 of the preferred and $250,000 of common stock (less 2½ shares of each kind of stock which they caused to be transferred nominally to said State Trust Company in partial exchange for ten shares of the Hannis stock, which were directors' qualifying shares), and the remainder thereof they caused to be transferred to the said Whitney and the defendants Ryan, Smith, Widener, Elkins, Dolan, Olcot, Brady, Grant, Flower, Ehrich, Waterbury, Rice, Bradley, Sheldon, Cardeza, Anderson and Macdona, and their agents and employees.

IX. On or about June 22, 1899, the stocks of said "Constituent Companies" were reasonably worth and were selling at about the following prices, respectively:

The said Standard Company on the New York Stock Exchange for $64 for each share of the preferred and $47 for each share of the common stock; the Manufacturing Company on said New York Stock Exchange for $32 for each share of preferred stock and $11 for each share of the common stock; the Kentucky Company on the open market in New York for $61 for each share of the preferred and $18 for each share of the common stock, and the said Spirits Distributing Company for $60 and $20 for each share of the first and second preferred stock respectively, and that said stocks were of such value at the time of the formation of the Distilling Company of America, as hereinbefore set forth; that, according to the terms of such deposit and subscription contained in said prospectus, and according to the then market value of the stock so deposited by the stockholders of said "Constituent Companies," they subscribed for and received stock of the Distilling Company of America at and for the price of about $65 for each share of the preferred and $35 for each share of the common stock of the said Distilling Company of America, and the stock of the said Distilling Company of America sold in open market at about said respective prices when first issued, to wit, July, 1899, and for some time thereafter. The highest price at which the stocks of the said Distilling Company of America have sold have been about $70 per share for each share of the preferred stock and about $35 for each share of the common stock. The plaintiff alleges, however, that the capital stock of the Hannis Distilling Company, the amount of which was wil-
865 fully and fraudulently suppressed in said prospectus, although the amount of all the "Constituent Companies" was fully stated therein, consisted of only $1,000,000, and that the price paid by the said "organizers" as the agents and representatives of the members of said "Syndicate," and by the members of said "Syndicate" for said stock of said Hannis Distilling Company on or about July 13, 1899, was only $1,500,000 in cash and $250,000,

par value, of preferred stock, and $250,000 par value, of common stock of said Distilling Company of America, and the said Hannis Distilling Company and the stock thereof was not then and never has been worth more than the said sum of $1,500,000; but nevertheless the said "Syndicate" caused to be issued to themselves $10,450,000 of the preferred stock and $13,110,000 of the common stock of said Distilling Company of America for a sum of money not exceeding $3,000,000. That the amount paid by the members of said "Syndicate," that is about $3,000,000 for said $10,450,000 of preferred and $13,110,000 of the common stock of said Distilling Company of America was equal to about $20 for each share of the preferred stock and less than $10 for each share of the common stock of said Distilling Company of America, as against $65 for the preferred and $35 for the common stock of said Company paid by the stockholders of the "Constituent Companies," yielding by this transaction to the said "Syndicate" a profit in fraud of the "Constituent Companies" and of the said Distilling Company of America and its stockholders of about $45 per share on upwards of 100,000 shares of the preferred stock of the said Distilling Company of America, and $25 per share on upwards of 130,000 shares of the common stock thereof appropriated and acquired by them as aforesaid, being an aggregate fraudulent profit of $7,750,000, which amount is still due and owing by them to said Distilling Company of America.

That said profit and issue of said stock to said "Syndicate" was in fraud of the right of the stockholders of the said "Constituent Companies" and of said Distilling Company and of its stockholders, including the plaintiff.

That the price of the stock of said Distilling Company of America, as the result of the taking by the said Whitney and others of so much stock without consideration, has declined in open market from about $65 per share for the preferred and $35 per share for the common, at which the same sold in July, 1899, and at which prices respectively the stockholders of the "Constituent Companies" subscribed therefor at the time of the formation of said Distilling Company of America to a price of $17 per share for the preferred and $4 per share for the common.

X. Plaintiff further alleges that the entire scheme for the formation of said Distilling Company of America herein set forth
866 was not a legitimate business operation intended for the benefit and improvement of the business of said "Constituent Companies" and the profit of its stockholders, but was purely a stock jobbing operation conceived and executed in the manner hereinbefore set forth by said "Syndicate," in order that they might, without the knowledge and consent of the stockholders of the "Constituent Companies," and of the Distilling Company of America and its stockholders, appropriate to themselves a large amount of the stock of said Distilling Company without paying any consideration therefor, and in fraud and derogation of the rights of the stockholders of said "Constituent Companies" and of the said Distilling Company of America and of the stockholders thereof. The plaintiff further alleges that neither at the time of the issuance

of the prospectus and circular and the making of the advertisement, hereinbefore mentioned, nor at the time of the execution or performance of the contract dated July 12, 1899, referred to in Paragraph VII. hereof, nor at any time did the defendants Anderson and Macdona, and the other members of said "Syndicate" defendants herein, own any shares of stock in the Distilling Company of America, and they did not have any of the stock of said Distilling Company to sell, and simply formed the plan hereinbefore set out for the purpose of getting the stockholders of the "Constituent Companies" to join them in the consolidation in such a way as to enable them secretly and by concealing their own interest therein, to take a large profit from the organization of said Distilling Company of America. The said Whitney, Ryan and others, members of said "Syndicate" never revealed to the stockholders of the "Constituent Companies" or to the Distilling Company of America, or to its stockholders or its board of directors or officers or to any one, except to themselves, that they intended to make any profit, or that they did make a profit, or that they or any of them had any interest in the Hannis Distilling Company or its stock, or that they or any of them had an option on the stock of the Hannis Distilling Company; and the Distilling Company of America has never ratified the taking of the said stock by them. The said William C. Whitney and the other individual defendants hereinbefore mentioned have sold a large portion of the said stock, and have never accounted to the Distilling Company of America for any portion thereof. That the actual plan contemplated and actually carried out by the said "organizers" and said "Syndicate" in organizing said Distilling Company of America, was to secure subscription by stockholders of said "Constituent Companies" to the capital stock of the Distilling Company of America to enable the members of said "Syndicate" to secure a secret profit at the expense of the stockholders of said "Constituent Companies" and said Distilling Company of America and its stockholders, and that said agreement and prospectus issued to the stockholders of said "Constituent Companies"
867 was a mere form to enable said "organizers" and "Syndicate" to secure said subscriptions and thus enable them to secure said secret profit. That it was part of the plan of said "organizers" and said "Syndicate" when they issued said prospectus to the stockholders of said "Constituent Companies," and when they caused said Distilling Company of America to be organized, to turn their large secret stock profit into money by selling the stock to the public, and thus get into the Distilling Company of America other stockholders in place of themselves and their representatives, and that they have sold a large proportion of said secret stock profit to the public.

XI. That the plaintiff herein did not learn of the facts herein set forth until the month of June, 1903, and that as soon thereafter as he could be advised by counsel and in said month of, 1903, and before the commencement of this action, the plaintiff, being at that time a stockholder in the Distilling Company of America, duly and fully informed the said distilling company and its said board of directors of all the facts herein set forth, and duly demanded of the

board of directors of said company, and the said company; that the said board of directors take and institute on behalf of the Distilling Company of America, and cause it to take and institute, and that said company take and institute legal proceedings against the said William C. Whitney, Ryan, Smith, Widener, Elkins, Dolan, Olcott, Brady, Grant, Fowler, Ehrich, Waterbury, Rice, Bradley, Sheldon, Cardeza, Anderson and Maclona, to make them account to the Distilling Company of America for the said preferred and common stock of the said company which they had taken and retained as a secret profit as aforesaid, and without paying the defendant company any consideration therefor, and the said Distilling Company of America and its directors have, before the commencement of this action, refused and neglected, and still refuse and neglect to bring the said legal proceedings, or any proceedings whatsoever. The defendant Samuel M. Rice is president of the Distilling Company of America, and he and Edson Bradley, as plaintiff is informed and believes, are directors of and members of the Executive Committee of said Distilling Company, and it would be useless to expect them to cause said company to sue the defendants herein; and said refusal was fraudulent and unwarranted and made simply because the defendants Rice and Bradley and friends of theirs and the other defendants are officers in said company and in control of its operations and policies.

XII. That on or about February 2, 1904, William C. Whitney died in the City of New York, leaving a last will and testament wherein he appointed Harry Payne Whitney, who resides in the City of New York, sole executor thereof, and thereafter such proceedings were had in the Surrogate's Court of Nassau County
868 that on or about March 5, 1904, the said will was duly admitted to probate in said Court by the Surrogate of Nassau County, and letters testamentary were thereupon issued out of said Court by said Surrogate to Harry Payne Whitney, as executor of the last will and testament of the said defendant William C. Whitney, and the said Harry Payne Whitney thereupon duly qualified as such executor, and is now such executor.

Wherefore, the plaintiff, on behalf of himself and all other stockholders of the Distilling Company of America, prays for judgment as follows:

First. That the defendants be ordered, directed and compelled to account to the defendant the Distilling Company of America for each and all of said $10,460,000 of preferred stock and $13,110,000 of common stock retained by them as a secret profit as aforesaid, and any other stock or money retained by them as a secret profit.

Second. That the defendants be ordered, directed and compelled to account to the defendant corporation for all of the stock issued at the time of the organization of the company.

Third. That a Referee be appointed with power to state an account of the amount of said stock and money that the defendants have received and for what they have received them, the amount of said stock that they still have, and the amount of said stock that they have sold and the price received therefor, and the prices at which the stock of the said defendant company has been sold, both by the com-

pany and at public sale, and the market value of the stock of said defendant company at such time after the incorporation of said company as the market value can be determined, and the amount of damage and loss suffered by the Distilling Company of America by reason of the transactions hereinbefore set forth, and that the amount determined to be due to be directed to be paid into the treasury of the said company by the defendants.

Fourth. That the defendants be ordered, directed and compelled to pay the costs and disbursements of this action.

Fifth. That the plaintiff have such other and further relief as to the Court may seem just in the premises.

McELHENY & BENNETT,
Attorneys for Plaintiff, 15 William Street, New York City.

STATE OF NEW YORK,
County of New York, ss:

Edwin Blum, being duly sworn says: That he is the plaintiff in the above entitled action; that the foregoing third amended
869 complaint is true to his own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

EDWIN BLUM.

Sworn to before me this 20th day of April, 1905.

WM. M. BENNETT,
Notary Public, N. Y. Co.

EXHIBIT A.

Deposit Agreement.

Whereas, P. Lewis Anderson and Henry D. Macdona, both of the City and State of New York, hereinafter called organizers, propose to create under the laws of the State of New Jersey, or of some other State to be approved by the counsel of the organizers, a corporation to be known as the Distilling Company of America (or some other name satisfactory to the organizers), hereinafter called the Corporation, the object of which Corporation shall be, among other things, the manufacture, sale, distribution and warehousing of whiskey, spirits and alcohol, which Corporation shall have an authorized capital stock of one hundred and twenty-five million dollars ($125,000,000.00), consisting of fifty-five million dollars ($55,000,000) of preferred stock, evidenced by five hundred and fifty thousand (550,000) shares of seven per cent. (7%) cumulative preferred stock and seventy million dollars ($70,000,000) common stock, evidenced by seven hundred thousand (700,000) shares of common stock. The charter of the corporation shall contain such other provisions as the organizers and their counsel may approve; and

Whereas, There have heretofore been organized and are now in existence in the following companies:

(a) American Spirits Manufacturing Company (hereinafter called Manufacturing Co.), organized under the laws of New York, having an issued capital stock of seven million dollars ($7,000,000.00) five per cent. (5%) non-cumulative preferred stock, and twenty-eight million dollars ($28,000,000.00) common stock;

(b) Kentucky Distillers and Warehouse Co. (hereafter called Kentucky Co.), organized under the laws of New Jersey, having an issued capital stock of ten million five hundred thousand dollars ($10,500,000.00) seven per cent. (7%) cumulative preferred stock, and eighteen million five hundred thousand dollars ($18,500,000) common stock;

870 (c) Spirits Distributing Company (hereinafter called Distributing Co.), organized under the laws of New Jersey, have an issued capital stock of one million two hundred and fifty thousand dollars ($1,250,000.00) six per cent. (6%) cumulative preferred stock; one million five hundred and seventy-five thousand dollars $1,575,000) two per cent. (2%) non-cumulative second preferred stock, and three million six hundred and seventy-five thousand dollars ($3,675,000.) common stock; all of said common stock being now owned by the Standard Distilling and Distributing Company hereinafter referred to;

(d) Standard Distilling and Distributing Company (hereinafter called Standard Co.), organized under the laws of New Jersey, having an issued capital stock of eight million dollars ($8,000,000.) seven per cent. (7%) cumulative preferred stock, and sixteen million dollars ($16,000,000) common stock;

Whereas, The organizers contemplate that the Corporation shall acquire and become the owner of at least a majority of the entire issued capital stock of the Manufacturing Co., of the Kentucky Co., and of the Standard Co., and each of them, and shall also acquire and become the owner of at least a majority of the entire issued preferred stock of the Distributing Co; and

Whereas, The organizers contemplate that the Corporation shall acquire and become the owner of either the rye properties hereinafter named or of the entire capital stock (less such nominal number of shares as shall be necessary to qualify directors thereof) a certain other Company which may be organized (which other Company is hereinafter called Rye Co.), and which Rye Co., if organized, shall acquire by purchase or otherwise become the owner of the following rye distilling properties:

(a) At least ninety-five per cent. (95%) of the entire capital stock of Hannis Distilling Company of Philadelphia and Baltimore; and

(b) St. Paul Distillery; and

Whereas, The organizers further contemplate that the Corporation shall be furnished with a cash working capital of at least one million five hundred thousand dollars ($1,500,000); and

Whereas, The organizers contemplate that the Corporation shall retain in its treasury enough of its preferred and common stock with which to enable it to acquire, if in its discretion it should so desire (but without any obligation so to do), by exchange or purchase, or otherwise, all of the remaining stock of the Manufacturing Co., of the Kentucky Co., of the Standard Co., and of the preferred stock

of the Distributing Co., upon the same or a similar basis to that herein provided for the acquisition of said majority stock of the Manufacturing Co., of the Kentucky Co., of the Standard
871 Co., and of said majority preferred stock of the Distributing Co.; and

Whereas, the organizers further contemplate that in addition to so much of its preferred and common stock that is to remain in the treasury of the Corporation for the acquisition by the Corporation of the remaining stock of the Manufacturing Co., of the Kentucky Co., of the Standard Co., and of the preferred stock of the Distributing Co., as hereinbefore recited, the Corporation shall also retain in its treasury for future purposes twenty-three million seven hundred and fifty thousand dollars ($23,750,000) of its preferred stock, and twenty-three million seven hundred and fifty thousand dollars ($23,750,000) of its common stock; and

Whereas, It is further contemplated that the organizers shall, as a purchase price, receive from and be paid by the Corporation thirty-one million two hundred and fifty thousand dollars ($31,250,000) of its preferred stock, and forty-six million two hundred and fifty thousand dollars ($46,250,000) of its common stock for all of the said issued capital stock of the Manufacturing Co., for all of the said issued capital stock of the Kentucky Co., for all of the said issued capital stock of the Standard Co., and for all of the said issued preferred stock of the Distributing Co., and for said one million five hundred thousand dollars ($1,500,000) cash working capital, and for said rye properties or the entire capital stock of said Rye Co., less the directors' qualifying shares aforesaid, and [illegible] for every said share of said stock of the Manufacturing Co., the Kentucky Co., the Standard Co. and the Distributing Co., not turned over and transferred by the organizers to the Corporation, there shall be deducted and retained by the Corporation from said purchase price an appropriate amount of the preferred and common stock of the Corporation, calculated upon the basis hereinafter specified; and

Whereas, For the purpose of carrying out this agreement, the Central Trust Company of New York (hereinafter called Trust Company) is hereby designated and made the Depository hereunder; and

Whereas, The undersigned are respectively the holders and owners of the certain number of preferred and common shares of said Manufacturing Co., of the Kentucky Co., of the Standard Co., and of the preferred stock of the Distributing Co., set opposite their respective names; and

Whereas, The undersigned are willing and desire to sell, transfer and assign their said respective shares to the organizers, for and in consideration and upon the basis of exchange hereinafter specified;

Now, therefore, in consideration of the premises and in further consideration of the sum of one dollar ($1.00) to each of
872 the undersigned by the organizers in hand paid, the receipt of which by each of the undersigned is hereby respectively acknowledged, the undersigned do hereby severally, but not jointly, agree to and with the organizers as follows:

I. The undersigned do hereby severally agree to sell to the organizers and do deposit with the Trust Company, properly indorsed in blank, and bearing the proper revenue stamps, certificates representing certain of the preferred and common shares of the Manufacturing Co., the Kentucky Co., the Standard Co. and of the preferred shares of the Distributing Co., the amount of which is designated opposite their respective names. The Trust Company shall issue appropriate temporary negotiable receipts evidencing such deposits.

II. For each of said preferred shares and each of said common shares so deposited hereunder, the undersigned respectively shall be entitled to receive from the Central Trust Company when this agreement shall have become operative and when and as the new securities shall have been received by said Trust Company, the following:

For every said preferred share of the Manufacturing Co. fifty per cent. (50%) thereof in preferred stock of the Corporation;

For every said common share of the Manufacturing Co., twenty-five per cent. (25%) thereof in common stock of the Corporation;

For every said preferred share of the Kentucky Co. eighty-five per cent. (85%) thereof in preferred stock and fifteen per cent. (15%) thereof in common stock of the Corporation;

For every said common share of the Kentucky Co. seventy per cent. (70%) thereof in common stock of the Corporation;

For every said preferred share of the Standard Co. eighty-five per cent. (85%) thereof in preferred stock and fifteen per cent. (15%) thereof in common stock of the Corporation;

For every said common share of the Standard Co. sixty per cent. (60%) thereof in common stock of the Corporation;

For every said share of first preferred stock of the Distributing Co. eighty per cent. (80%) thereof in preferred stock and twenty per cent. (20%) thereof in common stock of the Corporation;

For every said share of second preferred stock of the Distributing Co. twenty per cent. (20%) thereof in preferred stock and twenty per cent. (20%) thereof in common stock of the Corporation.

873 III. This agreement shall not become binding, operative and effective unless there shall have been deposited hereunder with the Central Trust Company or under similar agreements certificates representing a majority of the entire issued capital stock of the Manufacturing Co., Kentucky Co., Standard Co., and of each of them, and of the preferred stock of the Distributing Co.

The Central Trust Company may, in its discretion, in lieu of the actual deposit with it of certificates for shares, accept an agreement in writing to make such deposit upon five days' notice from the Trust Company so to do; and the deposit when made shall be deemed to have been made within the time limited or extended as herein provided. In computing a majority of stock to render this agreement operative there shall be included any and all shares as to which obligations to deposit the same shall be accepted by the Trust Company.

IV. When this agreement has become binding, operative and effective, the Central Trust Company shall deliver to The State Trust

Company all of the stock deposited hereunder upon the Central Trust Company receiving from The State Trust Company shares of stock of the Corporation adequate and sufficient to pay the said purchase price of the stock so deposited hereunder.

V. June 30, 1899, is hereby designated as the date of the expiration of the time for the deposit of the shares hereunder, but such time may be extended, not exceeding thirty days thereafter by agreement between the organizers, the Central Trust Company and The State Trust Company; and in case The State Trust Company shall not within thirty days after said June 30, 1899, or after the expiration of any extended time, notify the Central Trust Company that the organizers are ready to complete the purchase of the shares so deposited hereunder, the shares deposited hereunder, shall be returned by the Central Trust Company without charge to the depositor of the same respectively, or to the holders of said receipts upon the surrender to the Central Trust Company of said receipts duly endorsed.

VI. For the purpose of convenience copies of this instrument may be signed, and when so signed all of such copies shall be considered as originals, and signatures thereto shall be considered the same as though appended to one copy thereof.

VII. The deposit with the Central Trust Company of shares hereunder shall have the same force and effect as though the one making such deposit signed this instrument.

Dated New York, June 21, 1899.

874 EXHIBIT B.

To the Stockholders of American Spirits Manufacturing Company, Kentucky Distilleries and Warehouse Company, Spirits Distributing Company and Standard Distilling and Distributing Company:

An agreement has been lodged with The State Trust Company contemplating the formation of The Distilling Company of America with an authorized capital stock of $55,000,000 seven per cent. (7%) cumulative preferred stock and $70,000,000 common stock which the organizers propose shall be applied towards the purchase of the capital stock of the above-mentioned companies, and certain rye distillery properties, and for an additional working capital of $1,500,000, leaving in the treasury of the new company for future purposes $23,750,000 of its preferred stock and $23,750,000 of its common stock.

The basis proposed by the organizers for the purchase of the stock of the above mentioned companies is as follows:

For preferred stock of the American Spirits Manufacturing Company, 50 per cent. of preferred stock of the new company.

For common stock of the American Spirits Manufacturing Company, 25 per cent. in common stock of the new company.

For preferred stock of the Kentucky Distilleries and Warehouse Company, 35 per cent. in preferred stock and 15 per cent. in common stock of the new company.

For common stock of the Kentucky Distilleries and Warehouse Company, 70 per cent. in common stock of the new company.

For first preferred stock of the Spirits Distributing Company, 30 per cent. in preferred stock and 20 per cent. in common stock of the new company.

For second preferred stock of the Spirits Distributing Company, 20 per cent. in preferred stock and 20 per cent. in common stock of the new company.

For preferred stock of the Standard Distilling and Distributing Company, 85 per cent. in preferred stock and 15 per cent. in common stock of the new company.

For common stock of the Standard Distilling and Distributing Company, 60 per cent. in common stock of the new company.

A deposit agreement has been lodged with the Central Trust Company of New York, and the stockholders of the existing companies desiring to avail of the benefits of that agreement are requested to deposit their certificates with the Central Trust Company and receive deposit receipts therefor. The time within which to deposit shares of stock under the agreement will expire on June 30, 1899.

The said deposit agreement will not become operative until
875 & 876 the owners of a majority of the issued capital of the American Spirits Manufacturing Company, Kentucky Distilleries and Warehouse Company, and Standard Distilling and Distributing Company, and of the issued preferred stock of the Spirits Distributing Company shall agree to sell their holdings upon the above basis.

A number of the large shareholders have already signed the deposit agreement and the proposed basis of sale has received the approval of the officers and directors of each of the companies. The legality of the plan has been approved by the general counsel of all of the existing companies.

Copies of the deposit agreement may be obtained from the Central Trust Company of New York, of No. 54 Wall Street, New York, and The State Trust Company, of No. 100 Broadway, New York.

It is intended that the stock retained in the treasury of the new company will in due course be applied to the purchase of other rye distilleries and towards the procurement of a further working capital of three million five hundred thousand dollars ($3,500,000). The foregoing, with the present working capital of the existing companies will make an aggregate working capital of over ten millions dollars ($10,000,000).

New York, June 20, 1899.

T. H. WENTWORTH.
Secy. American Spirits Mfg. Company.
T. H. WENTWORTH.
Secy. Kentucky Distilleries and Warehouse Company.
N. E. D. HUGGINS.
Secy. Spirits Distributing Company.
N. E. D. HUGGINS.
Secy. Standard Distilling and Distributing Company.

MORAN, KRAUS & MAYER,
Counsel.

Copy.
Attest,

——— ———, *Clerk.*

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877 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court.

No. 8098. In Equity.

OLD DOMINION COPPER MINING & SMELTING COMPANY
v.
ALBERT S. BIGELOW.

No. 8099.

SAME
v.
SAME.

Before Braley, J.

Appearances:

Messrs. Brandeis, Dunbar & Nutter (Louis D. Brandeis and Edward F. McClennen, Esqs.), Counsel for Complainant:

Alfred Hemenway and J. Wells Farley, Esqs., Counsel for Respondent.

Order Appointing Commissioner.

In the above-entitled cases, at the hearing of the same before Mr. Justice Braley, it is ordered, under the provisions of Chancery Rules, No. XXXV, that Richard H. Jones and John C. Miller be, and they hereby are, appointed commissioners to take the evidence in said cases upon the petition of plaintiff for an injunction to be reported to the full court.

By the Court:

WALTER F. FREDERICK, *Clerk.*

August 11, 1908, as on August 7, 1908.

878 Edward F. McClennen, Sworn.

(By Mr. BRANDEIS:)

Q. Mr. McClennen, you have been counsel, with other members of the law firm of Brandeis, Dunbar & Nutter, for the Old Dominion Copper Mining & Smelting Company in the litigation against Bigelow and against Lewisohn?

A. I have.

Q. And have also been counsel in the litigation undertaken, not only in Massachusetts, but also that in the federal court and the Supreme Court of the United States, and in New Jersey, in the suit there instituted by Mr. Bigelow before the chancellor?

A. I have.

Q. And you are familiar with the course of the proceedings in each of those courts?

A. I am.

Q. Now will you state what that course of proceedings has been and particularly with reference to the course of proceedings in New Jersey, in the suit begun by Mr. Bigelow?

A. Of course most of the course of proceedings, as far as the case in Massachusetts is concerned, is apparent from an inspection of the record of the case here. Some of the things do not appear, and I will refer to them. The case before the full bench was on the printed list for argument in January——

Q. 1908?

A. 1908. At that time I was present at the calling of the list, on January 6, 1908, and Mr. Hemenway said to the court, "I have asked for a postponement of this case until March, so that the other cases the defendant appeals may be argued at the same time;" and the court thereupon announced, through the chief justice, "The court is unanimously of the opinion that the case should be continued, and assigned for the first case at the March sitting." I have inspected the original bill of complaint in New Jersey, and it was——

Mr. HEMENWAY: Wait a moment. You have certified copy of that here, I suppose. If so, I should prefer the certified copy.

Mr. Brandeis says that I may ask a question to clear up matters in your Honor's mind.

(By Mr. BRANDEIS:)

Q. There were two cases pending in the Supreme Court that were heard by Mr. Justice Sheldon?

A. Yes.

Q. And in each of those cases the plaintiff took an appeal?

A. Yes.

Q. And in each of the cases the defendant took an appeal?

A. Yes.

Q. So that there were four cases, and only two of them on the list in January, the appeal of the defendant not having been entered in season, so that——

A. Well, that——

Q. So that wasn't my suggestion that the four cases should
879 be argued together, and that, because of the length of the record which you had ordered printed, it was not ready, and it was impossible to prepare a brief and properly argue the cases at that time?

A. That was substantially your suggestion to the court at that time. The exact fact with reference to the appeals was that we had appealed, and entered the cases, with the entire record, and that the thirty days within which the appeal could be taken by the respondent did not expire until, I think, January 10, and that appeal was taken on the 6th day of January, and the clerk was given this printed slip of the appeal, and that was appended to the record that had already been filed with the clerk of the court for the

commonwealth by us. I do not find, Mr. Hemenway—returning to what you asked me about a moment ago—that I have a certified copy of that bill of complaint.

Q. If you have your own office copy——

A. I have an office copy; that is—well, I had several copies made, of which one is the copy attached to the petition filed in this case for the injunction; and, without having compared it word for word, I practically know that that is the text of the bill filed in New Jersey. That bill was filed on the 26th of February, 1908. The first service that I have ever heard of, that came to my attention in any way, was a service on the 28th of February, 1908, of a restraining order and preliminary injunction. The terms——

Q. Filed on the 26th, you say?

A. Filed on the 26th, and the restraining order issued on that day. The service was made on the 28th. The restraining order, I, in the same way, know, without having compared it word for word, was in the terms of the order, a copy of which is also attached to the petition now filed for an injunction. In the present petition the copy which is annexed contains bodily all the exhibits except Exhibit C, and Exhibit C is in fact one of the printed records, pages 1 to 78 of the case as prepared in the county court, and filed before the full bench, or the Supreme Court for the Commonwealth.

Now at the time that this injunction was obtained the office of the company was in Jersey City, and——

(By the COURT:)

Q. New Jersey?

A. Jersey City, N. J., it being a New Jersey corporation. The local counsel for the company, who signed the bill of complaint, had an office in Jersey City, and I have not heard of his having any office elsewhere, and I believe that he has not. The Court of Chancery of New Jersey is presided over by a chancellor, who has as his advisers seven vice-chancellors, who sit in various parts of the state. The vice-chancellor applied to was the one, with one exception, sitting most remotely from Jersey City; and Jersey City is, as I presume the court knows, judicially, the point of approach to New Jersey from this state.

880 On receiving the service of the order of notice and the preliminary restraining order, Mr. Brandeis and I, on February 28, went to New York, and on February 29, which was Saturday, made an application to the vice-chancellor to modify the restraining order sufficiently to permit of the argument of the case. He said that he would hear us on Monday, and we notified counsel; and on Monday, March 2, we had a hearing before him upon the subject of whether the restraining order would be modified. He declined to modify it, but entered an order advancing the case upon the order of notice to the 11th of March. It had previously been returnable upon the 20th of March. On the 11th of March we had another hearing before him on the question of granting the preliminary injunction. He finally granted the preliminary injunction, expressly reserving any opinion as to the merits of the cause. That

hearing was participated in by Mr. Brandeis, local counsel, and myself for the company; and Mr. Charles H. Tyler and Mr. Bolles and local counsel in New Jersey for Mr. Bigelow. Mr. Farley, of Mr. Hemenway's office, was also present, I believe, at that hearing. He was either present at that hearing or at the hearing when we sought to have the restraining order modified.

(By Mr. HEMENWAY:)

Q. State who were the counsel, please. You said "local counsel."

A. The local counsel for the company were ex-Judge Collins and William H. Corbin, of the firm of Collins & Corbin. They were not present at both hearings, both of them. One was present at one hearing, and the other was present at the other hearing. Counsel for the complainant were John Gritlin—I have forgotten whether he has a middle initial or not—of Jersey City, ex-Judge Van Syckel and John C. Spooner—I think it is John C. Spooner——

Q. Ex-Senator Spooner, you mean?

A. Ex-Senator Spooner, from——

Q. Wisconsin?

A. Wisconsin, and now a member of the New York bar.

Q. And ex-Judge Van Syckel is ex-Judge Van Syckel of Trenton?

A. I will accept that as the fact. I am not aware of that fact, but I dare say that is so. On April 6——

Q. I am not sure whether you, after stating the names of the counsel for the company, made a sufficient pause, so that it will appear that these were counsel for the defence. Mr. Tyler states that you said "counsel for the company." I wish the stenographer would read what you stated about that.

A. The counsel for the company were Mr. Collins, Mr. Corbin, Mr. Brandeis, and myself; and the counsel for Mr. Bigelow were Mr. Tyler, Mr. Bolles,—Mr. Eames was also present, associated with Mr. Tyler,—ex-Senator Spooner, Mr. Gritlin, and Mr. Van Syckel. I think that covers the entire list.

881 Mr. BRANDEIS: And Mr. Farley?

Mr. HEMENWAY: Mr. Farley was not employed.

The WITNESS. On the 6th of April, or a few days before the 6th of April, we gave notice to the other side of a motion to dismiss the bill of complaint. I have not consulted the New Jersey statutes or rules in detail, but I think I know that a motion to dismiss a bill of complaint is equivalent to a demurrer, and that an order granting it disposes of the case, as far as that court is concerned. That case was argued on the 6th of April before the chancellor, Chancellor Pitney. The prior proceedings had been before Vice-Chancellor Walker.

By Mr. BRANDEIS.

Q. The vice-chancellor sitting with the chancellor?

A. On the 6th of April, when the application was made to dismiss the bill before the chancellor, the vice-chancellor was sitting. I ought to say this also, that by the law there, as I am credibly informed, the constitutional authority is in the chancellor. The legislature has enacted that he may have the advice of certain vice-chan-

cellors appointed by him, the labor being more than one man can perform. The judicial officer is the chancellor. The orders bear the form "advised by" so-and-so, "vice-chancellor," but bear the attest of the chancellor.

At the hearing on April 6 Mr. Charles Corbin argued the case for the company, and Mr. Brandeis and I were present. Mr. Charles Corbin was another Mr. Corbin who was a member of the same firm of Collins & Corbin. The argument for Mr. Bigelow was chiefly by Mr. Van Syckel. Mr. Tyler, I think, was present; Mr. Griffin was present; and Mr. Farley, I think, was not. Mr. Eames, I think, was present. Mr. Spooner, I think, was not present. The chancellor reserved his decision.

In the latter part of July, about the 25th to the 28th, we received a telegram from the chancellor that on the following Tuesday he would enter an order dismissing the bill. The following Tuesday was the 4th of August, and we were present before the chancellor at Morristown on the 4th of August,—Mr. Collins, Mr. Brandeis, and I for the company; Mr. Spooner, Mr. Tyler, Mr. Van Syckel, and Mr. Griffin were there for Mr. Bigelow. The chancellor read his opinion from rough notes that he had before him, largely typewritten, and somewhat written, and he stated to us that he would still make verbal corrections in it. It was an opinion that, with rapid reading, took, I should think, about two hours to read, and it took up the various grounds urged why the bill should not be maintained in New Jersey, and passed favorably, I think, upon all of them.

He first entered an order, of which I have a certified copy,
882 allowing certain verbal amendments to the bill of complaint.

He then entered a decree, of which I have a certified copy, dismissing the bill of complaint——

Q. Won't you read that, Mr. McClennen?

Mr. HEMENWAY: Wouldn't it be best to read the bill itself? I have never heard it read, and have no copy of it.

Mr. BRANDEIS: You mean the bill which——

Mr. HEMENWAY: The bill itself.

The WITNESS: Shall I read the original bill, or the amended bill? There are very slight changes in it, but there are some. I should not like, as a physical matter, to have to read both of them.

Mr. HEMENWAY: I am willing that you should read the amended bill.

The WITNESS: The amended bill is as follows [reading]:

[Amended bill attached to petition for injunction filed August 6, 1908. See Pleadings, printed pages 86–104.]

Mr. BRANDEIS: Proceed.

The WITNESS: After the allowance of that amendment, by the order of which I have a copy, the court entered a decree dismissing the bill and dissolving the injunction, and also declined to consider issuing an interim stay unless upon the terms that Mr. Bigelow would furnish a bond for the payment of such decree as might ultimately be entered in Massachusetts or might be entered in New Jersey. Those terms were declined, and no interim stay was ordered.

In announcing his opinion the chancellor dealt with all these claims that are set out in the bill, and stated in terms that under the laws of New Jersey, they were not well founded, that there was not any difference upon the facts as set out in the finding of Mr. Justice Sheldon between the law of Massachusetts and the law of New Jersey; that, in his judgment, there was no difference in policy; that the case was not to be determined by the policy of New Jersey, but was a transitory matter depending upon the rights between the parties, and to be determined by the law of the forum. He dealt with the question of the effect of the decree dismissing the bill against Lewisohn, the decree entered in accordance with the order of the United States Supreme Court, and stated that it seemed to him (I mean his language was) little short of absurd to contend that that could in any manner be a defence by Mr. Bigelow, but that if it was a defence it was as well a defence in the courts of Massachusetts as in the courts of New Jersey. And in like manner he dealt with the other contentions set up in the bill, and stated that none of them were well founded under the laws of the state of New Jersey. His opinion is a very elaborate one, and replete
883 with citations from the New Jersey authorities, as well as from the authorities from our courts, he adopting, apparently, the decision in the case of Carson v. Dunham, of our own court as being a correct exposition of the law.

It appears, if the New Jersey law as a fact is of any interest to your Honor in this connection, that the state of New Jersey has flatly recognized the principle which has been announced by our court, that the court first taking jurisdiction of a case should keep jurisdiction thereof.

In Home Insurance Co. v. Howell, 21 N. J. Eq. 238, a suit had been brought by an insurance company in New Jersey to obtain a cancellation on account of fraud of policies which had been issued in Illinois to a resident of Illinois, covering property in Illinois. Some evidence was taken in that case. The resident in Illinois subsequently brought a suit in Illinois, in the state court, against the company, to realize upon the policies. The company caused that to be removed to the Circuit Court on account of diversity of citizenship,—the United States Circuit Court,—and the resident of Illinois reserved that case for hearing. Thereupon the insurance company in New Jersey applied in the pending suit to the chancellor in New Jersey to grant a restraining order to prevent the going on with the suit in Illinois. That restraining order was granted. A motion was made to dissolve it, and that motion was denied, and the chancellor said,—

"This Court having the power to hear and determine the subject-matter in controversy, and having first obtained possession of the controversy, is fully at liberty to retain it until it shall have disposed of it. The general rule is that as between courts of concurrent and co-ordinate jurisdiction, (and the Circuit Court of the United States and the State Courts are such in certain controversies—such as that involved in this suit, for example—between citizens of different states) the Court that first obtains possession of the controversy

must be allowed to dispose of it, without interference from the co-ordinate court. Riggs v. Johnson County, 6 Wall. 166, 196. In Peck v. Jenness, 7 How. 624, in which it was held, that over a suit pending in a court of Common Pleas of New Hampshire, the District Court of the United States, sitting in bankruptcy could exercise no control either directly or indirectly, by enjoining the plaintiff, the Court said: "It is a doctrine of law too long established to require citation of authorities, that where a court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested
881 or taken away by proceedings in another court. These rules have their foundation not merely in comity, but in necessity. For if the one may enjoin, the other may retort by injunction, and thus the parties be without remedy, being liable for a process for contempt in one, if they attempt to proceed in the other.'

"Nor does it matter that the policies for instance were issued in another state, upon property in that state, and that the loss occurred there. Where a party is within the jurisdiction of this Court, so that on a bill properly filed here this court has jurisdiction of his person, although the subject-matter of the suit may be situated elsewhere, it may, by the ordinary process of injunction and attachment for contempt, compel him to desist from commencing a suit at law, either in this state or in foreign jurisdiction, and of course from prosecuting one commenced after the bringing of the suit in this court. Mead v. Merritt, 2 Paige, 402. The defendant's suit at law was manifestly commenced after the filing of the bill in this cause. The petition so alleged, and the defendant, in his affidavit, made for use in this motion, and read accordingly, does not deny it.

"The bill prayed an injunction to restrain the defendant from bringing suit at law against the complainants on the policies, although no injunction was applied for on the filing of the bill. If bringing a suit at law was not a contempt of this court, under the circumstances, it surely was a proceeding that this Court will discountenance."

(By Mr. HEMENWAY:)

Q. That was an abstract from the opinion, I take it?

A. No; that was a quotation that I was reading from the opinion.

Q. That is what I said,—an abstract of the opinion.

A. Well, my only distinction is, it was not my language; it was the language of the court.

Q. That is the way I understand it.

A. The chancellor, in announcing his opinion, stated that if an error had been made by Mr. Justice Sheldon in his findings of fact, that error was correctible upon appeal to the full bench of Massachusetts, and he saw no reason why he should sit to revise the decision of Mr. Justice Sheldon; if Mr. Justice Sheldon had not made an error as to the facts in his finding, then, in his judgment of the

law of the state of New Jersey, the decrees entered were warranted by the facts found. I am, of course, not stating his exact language; I can't do it at this length of time; but that was the substance of his opinion upon that subject.

With respect to the other matter, the matter of the application to the New Jersey legislature, I don't know that I have personal knowledge with respect to that matter. I have seen the text of the bill that was before the——

885 Mr. HEMENWAY: Well, one moment.

The WITNESS: —that was before the——

Mr. HEMENWAY: Well, one moment. I pray your Honor's judgment.

The WITNESS: I was confining myself entirely to that part that I did have knowledge of.

(By Mr. BRANDEIS:)

Q. Yes. Produce any text of a bill that you know anything about.

A. It is outside the jurisdiction of this court and in the possession, presumably, of the legislative authorities of the state of New Jersey, and I assumed that I was not transgressing the rule in putting in secondary evidence of it, so long as I kept myself within my own knowledge. I have seen the text of the bill, in form, in language, of that attached——

Mr. HEMENWAY: I pray your Honor's judgment on that.

The WITNESS: —of that attached to the petition.

The COURT: Do you object to it?

Mr. HEMENWAY: Yes.

The COURT: Is it signed by Bigelow?

The WITNESS: It is not signed by Bigelow.

Mr. BRANDEIS: We shall have to connect that by other evidence, your Honor. I think we can do that.

The WITNESS: Mr. Tyler is here.

Mr. BRANDEIS: Mr. Tyler is here.

The COURT: Can you show that the petition for legislation is Mr. Bigelow's petition?

Mr. BRANDEIS: I think we can. Mr. Tyler is here, and undoubtedly will admit the facts.

The COURT: You say the petition is out of the jurisdiction?

The WITNESS: The paper is out of the jurisdiction,—the original paper.

The COURT: The witness says that the document is out of the jurisdiction, and he has examined it and knows its substance.

Mr. HEMENWAY: Yes. Does he say that it was signed by Mr. Bigelow?

The WITNESS: I say it was not signed by Mr. Bigelow.

The COURT: No; but counsel say that they propose to connect it and show that it was his act. If they do, I think the evidence is admissible; if they do not, I think it is not admissible. They must show, of course, that it is his act.

Mr. HEMENWAY: I would prefer to be heard later as to its pertinency to this case.

The COURT: I will hear you fully later, if it is at all material.

886 Mr. HEMENWAY: I don't make any admission, because I am not in a position to do that.

The COURT: I understand you can't do it, Mr. Hemenway.

Mr. HEMENWAY: But I will state, from what has just been told me, that I don't propose to put in any evidence that Mr. Bigelow was not responsible for that legislation.

The COURT: Go on.

The WITNESS: Other cases in New Jersey which confirm this same principle, that the court of New Jersey——

Mr. HEMENWAY: One moment. That was ruled in, the contents of that.

The WITNESS: Oh, well, the contents is, in terms, as set out in the petition.

Mr. BRANDEIS: Has that bill been read to the court?

The COURT: Do you say that it is a petition for proposed legislation; is that it? It has not been enacted into a statute?

The WITNESS: It has not been enacted into a statute. It was not passed and the legislature has adjourned.

The COURT: Then it is ended, isn't it?

The WITNESS: It is ended, except as we judge of the future only by the past, and it is one of the grounds for our apprehension that we will not remain unmolested in our effort to get judgment in Massachusetts.

The COURT: When was the New Jersey assembly begun; in January?

Mr. HEMENWAY: In January.

The COURT: Well, you offer it upon the ground that it has some tendency to show further resort by Bigelow to the courts?

The WITNESS: Yes; the text indicates that.

The COURT: That was a petition to the legislature by him?

The WITNESS: As the text will show, your Honor, it was a petition to invest the courts of New Jersey with a jurisdiction which the courts of New Jersey do not now possess.

Mr. BRANDEIS: And which they would not exercise if they did possess it.

Mr. HEMENWAY: You speak for the court?

Mr. BRANDEIS: And which I think the chancellor's decision has just shown that they would not exercise if they possessed it.

The WITNESS: Yes; I think the chancellor's opinion did take the ground rather that, while any court of equity might have jurisdiction to do this thing, as a matter of proper decision in equity it would not exercise that jurisdiction.

887 The COURT: Well, it was really for legislation in aid of a suit which was then pending?

The WITNESS: Yes; it certainly was that.

The COURT: So that, if the jurisdiction was doubtful, to put it be

yond question by granting to the court further power; and that is all determined by the dismissal of the bill, is it not, except that an appeal from the decision of the chancellor——

The WITNESS: I think that——

The COURT: I do not think that you ought to spend any more time on it.

The WITNESS: There are several other cases in New Jersey, among them being New Jersey Zinc Co. v. Franklin Iron Co., 29 N. J. Eq. 422; Title Guaranty & Trust Co. v. Trenton Potteries Co., 56 N. J. Eq. 441; Shaw v. Frye, 69 N. J. Eq. 321; Minchin v. Second National Bank, 36 N. J. Eq. 436, all in support of the proposition that the second court will not injure the litigant in the first court, unde reircumstances such as are presented in the present case.

(By Mr. HEMENWAY:)

Q. All those cases that you mentioned are set forth in your bill, are they?

A. Yes, sir; they are right in the petition.

The COURT: Well, if there are other facts I think we should go on. I don't think you ought to spend any more time on what is fundamental.

Mr. HEMENWAY: Simply I wanted to be sure that I had got them all down.

The WITNESS: That is all, at the moment, I recall of the facts that fairly come within your question, Mr. Brandeis.

Mr. BRANDEIS: Except so far as they appear of record in this court, of record in the proceedings of this court?

The WITNESS: Yes. I have expressly not stated, except incidentally, anything which appears of record in this court. The full printed record is in this court on file.

Mr. BRANDEIS: I suppose that that record may be considered in evidence. That is all.

Cross-examination.

(By Mr. HEMENWAY:)

Q. In reading the bill you omitted to read Exhibit L. Will you state what Exhibit L was, and if you——

Mr. BRANDEIS: He didn't read any of the exhibits, did he, Mr. Hemenway?

Mr. HEMENWAY: No. That is what I am going to ask him about.

888 A. I don't recall, at the moment, Exhibit L.

Q. Is it the trust agreement?

A. F? Isn't that Exhibit F?

Q. I understood from your rapid reading it was Exhibit L, followed by the Old Dominion receipt.

A. Well, it was, in fact, F.

Q. Well, that is the one I wish, and I would like to have you

produce, if you haven't it here, at the next hearing, the original of that, unless you can furnish an exact copy to take the place of the original. Read that, please.

A. Except F is an agreement between the Old Dominion Company, a corporation organized under the laws of Maine, and Charles Sumner Smith and D. Blakely Hoar.

"Whereas, pursuant to a proposal embodied in an agreement signed by F. S. Mosely & Company and others, dated December 30th, 1903, the Old Dominion Company has been organized and is the corporation referred to in said agreement as the Maine Company, and is about to acquire one hundred thousand eight hundred and four (100,804) shares of the capital stock of the Old Dominion Copper Mining and Smelting Company (hereinafter called the Mining Company); and

"Whereas, by Article First, section 6, of said agreement, it is stipulated that upon such acquisition of stock by said Old Dominion Company, it shall provide for realizing upon certain assets of said Mining Company and the distribution of the proceeds thereof, as in said agreement, to which reference is hereby made, more fully set forth; and

"Whereas Charles Sumner Smith and D. Blakely Hoar (hereinafter called the Trustees) have consented to act as trustees, under a declaration of trust of even date herewith executed by them, for the benefit of said assenting stockholders of said Mining Company referred to in said agreement:

"Now, Therefore, This Agreement Witnesseth:

"First. The Old Dominion Company acknowledges that the assets of the Mining Company referred to in Article First, section 6, of the agreement above referred to, comprise certain claims against one Albert S. Bigelow and against the estate of one Leonard Lewisohn, deceased, on which suits are now pending brought by said Mining Company in the Supreme Judicial Court of Massachusetts for the County of Suffolk and in the Circuit Court of the United States for the Southern District of New York, together with the other assets enumerated in the schedule hereto annexed marked 'A.'

"Second. Said Old Dominion Company covenants and agrees with said Trustees to use all reasonable efforts;

889 "1. To cause said Mining Company to realize upon said other assets specified in Schedule 'A' in such a manner as said Trustees may from time to time direct, subject, however, to the provisions hereinafter contained.

"2. To cause said Mining Company actively to prosecute said claims above referred to against said Bigelow and against the estate of said Lewisohn, in such manner and through such counsel and attorneys as said Trustees may from time to time request, and upon like request to make any settlement and adjustment of said claims or any of them, subject, however, to the provisions hereinafter contained.

"3. To cause said Mining Company, if and so far as any sums of money are realized from said other assets or from said claims:

(*a*) To pay all expenses that may have been incurred in realizing

on said other assets or said claims, including the repayment of all sums that may have been advanced by said Trustees and the satisfaction of all liabilities that may have been incurred by them in realizing on said other assets or said claims; or authority to do so;

(*b*) To apply any surplus moneys then remaining to the payment of all debts and unliquidated claims of said Mining Company incurred prior to January 1, 1904, in excess of Twenty five thousand ($25,000) dollars, other than those incurred for new construction;

(*c*) To reserve such part, if any, as said Trustees may request of any surplus then remaining for use in providing for the further expenses of prosecuting said claims and realizing on said other assets, if and so far as the same have not been finally disposed of and realized on;

(*d*) To distribute any surplus then remaining as a dividend among its stockholders, if it lawfully may do so, and if it cannot then lawfully make such a dividend to make the same as soon thereafter as any legal impediment is removed.

"Third. The Old Dominion Company agrees to pay over to said Trustees, after making the deductions hereinafter provided for, any and all sums received by it as a stockholder in said Mining Company, or that would have been so received by it if it had at all times remained the holder of the same proportions of the capital stock of said Mining Company outstanding as all the stock in said Mining Company now held and that may hereafter be acquired by said Old Dominion Company bears to the capital stock of said Mining Company now outstanding, whether so received under the fore-
890 going provisions of this agreement or otherwise, so far as each sum is derived from the other assets and claims of said Mining Company herein referred to.

"Said Old Dominion Company shall first deduct from sums so payable amounts advanced under this agreement by the Old Dominion Company for expenses, including counsel fees of the Old Dominion Interest, so called, in connection with the proposal and agreement dated December 30th, 1903, above referred to. It shall pay over the balance of sums so payable to the Trustees from time to time as the same are received or would have been received for distribution by said Trustees among the assenting stockholders of said Mining Company and their assigns, but without responsibility on the part of said Old Dominion Company for the application of any sum so paid over.

"Fourth. The Old Dominion Company agrees to use all reasonable efforts, so far as it lawfully may in the performance of Article Second, Section 1, of this agreement, to cause said Mining Company to permit said Trustees in the name and behalf of said Mining Company, but for the purposes set forth in this agreement, to take from time to time all such action as said Trustees shall deem desirable in prosecuting or settling or otherwise realizing on or discounting said claims or any of them, of said other assets or any of them; and to cause said Mining Company from time to time and as often as in writing requested, at the expense of said Trustees so far as any expenditure is required but without charge so far as acts by the officers or employees of the Mining Company or of the

Old Dominion Company are concerned, to assist said Trustees in preparing and maintaining any and every suit at law or in equity or other proceedings now pending or that may hereafter be brought to enforce or realize on any of said claims or other assets, and particularly to permit said Trustees to have free access at all reasonable times to the papers and records of said Mining Company relating thereto, and to take for use in any suit or other proceeding any document or books relating to said corporation.

"Fifth. Said Old Dominion Company agrees, in case for any reason it is impossible lawfully to carry out this agreement in the manner hereinbefore provided or any part thereof, to do all that it lawfully and reasonably can do to cause said Mining Company to take such action that said other assets and claims shall be realized on to the best advantage reasonably possible, and the net proceeds thereof as defined in said proposal and agreement distributed among the stockholders in said Mining Company, and all sums received by said Old Dominion Company as a stockholder in said Mining
891 Company or that would have been so received by it had it at all times remained the holder of the same proportion of the capital stock of said Mining Company outstanding that all the stock in said Mining Company now held and that may hereafter be acquired by said Old Dominion Company bears to the capital stock of said Mining Company now outstanding"——

The COURT: What is the object of having that exhibit read? It is utterly impossible for me to grasp it unless I take it and read it myself. It cannot go into the record, because, of course, there is no need of repeating in the record what is already of record as an exhibit.

Mr. HEMENWAY: What is that, your Honor?

The COURT: It will not go into the record, because it is not necessary to put it into the record.

Mr. HEMENWAY: I propose to put it in as an exhibit.

The COURT: You can; but there is no need of having it read. Put it all in as an exhibit. Have it put into the record of the case.

The WITNESS: May I make a suggestion? It is attached to the very petition on which we are proceeding now.

Mr. HEMENWAY: What?

The WITNESS: It is attached to the petition on which we are proceeding now, as an exhibit, so that it is all there.

Mr. HEMENWAY: Yes. The purpose of it, if your Honor please, is to show that this very suit that is being prosecuted against Mr. Bigelow and the suit that is being prosecuted against Mr. Lewisohn are for the benefit of trustees whose beneficiaries are the owners of certain certificates, and that those certificates are sold daily in the market. That goes to the question of discretion in this case.

The COURT: Discretion in this case, as I understand it, is confined to one branch, which was called to my attention yesterday, as to whether Bigelow should be restrained and enjoined from beginning any more suits similar to the New Jersey suit. That is the only question I have to decide; and I understood that petition to be based upon the grounds, which have already been stated here, that, prior to some of the New Jersey cases, the whole four corners of the litiga-

on were being tried out in proceedings here. That I don't know, f course, until I examine the papers and compare them.

Mr. HEMENWAY: Of course I don't know what was represented or ated to your Honor.

92 The COURT: Well, I have told you that I am trying that one issue, Mr. Hemenway. I am trying that one issue, whether Mr. Bigelow shall be restrained and enjoined, while his litigation is pending here, from bringing more suits to try in ther jurisdictions the same question that is now involved here.

Mr. HEMENWAY: I suppose your Honor refers, by "more suits," o the appeal in the pending suit?

The COURT: I have not said anything about the appeal in the ending suit. That is another and distinct question, as to whether e should be restrained and enjoined from going on in the pending ase by perfecting, if he can perfect, an appeal; and on that I do not nderstand that you are apart at all.

Mr. HEMENWAY: I beg your Honor's pardon?

The COURT: I do not understand that you are apart upon the acts, so far as they relate to what has been done in New Jersey, on he present condition of the record there?

Mr. HEMENWAY: I do not think so, your Honor.

Q. Then the position of the suit, if I may make a brief statement of our testimony, is this: that the bill was filed in February last; that hearing—a temporary injunction—was allowed; that subsequently motion to dissolve that temporary injunction was refused; and then further hearing before the chancellor—was that an appeal, or how did you get before the chancellor?

A. That was not an appeal. The chancellor is the constituted ourt there. The vice-chancellors are merely his advisers.

Q. Yes. Well, how did you get it before the chancellor? It was ou that carried it,—that is, the Old Dominion Company that car- ied it—before the chancellor? How did you do that?

A. A motion was filed in the case, addressed to the chancellor, to lismiss the bill for want of equity.

Q. Yes. And that motion was heard, and the chancellor has lismissed the bill and refused to continue the injunction, and that rder was dated August 3?

A. August 4. That hearing was by the chancellor and the orig- nal vice-chancellor, sitting concurrently, and the original vice-chan- cellor concurred in the final judgment.

Q. Was the vice-chancellor there when this opinion was read?

A. He was not. But the chancellor stated—I have no personal knowledge of this—the chancellor stated that the vice-chancellor oncurred in the result, and had expressed no opposition to any prin- iple announced in the opinion.

Mr. BRANDEIS: He sets that out in the opinion.

The WITNESS: Yes; that is set forth there. It is read as being the opinion of the chancellor with the vice-chancellor in concur- rence.

893 Q. Well, now, the defendant, or rather the complainant, Mr. Bigelow, appealed?

1033

A. We are not aware whether he has or not. He expressed an intention to do so.

Q. Now what was said about an appeal at that time by his counsel? He was not present, was he?

A. He was not present. Well, a great deal was said from time to time. Undoubtedly enough was said to indicate that there was an intention to appeal, if that covers your question.

Q. Yes. And within what time must that appeal be perfected?

A. Thirty days, I am informed.

Q. Within thirty days?

A. That is, I haven't investigated the subject directly, but I have been so informed by counsel in New Jersey.

Q. And when could that appeal be entered in court in New Jersey? To what court can it be appealed?

A. The appeal is to the Court of Errors and Appeals. That is the court of last resort, as I understand, both on matters of equity and matters of law.

Q. Yes. That is the highest court in the state?

A. That is the court which is presided over by the chancellor who has just rendered this opinion. I am afraid that I can't state the exact thing which is analogous to our entry here.

Q. When do they meet?

A. The Court of Errors and Appeals comes in, we are advised, on the 10th of September next, but we have no knowledge, beyond experience in other cases, as to when these cases will be reached for argument.

Mr. BRANDEIS: If Mr. Hemenway would like to have me state, merely for the information of the court——

Mr. HEMENWAY: It is not necessary.

Mr. BRANDEIS: This is merely as to the date.

Mr. HEMENWAY: Well, it is the 10th of September, isn't it?

Mr. BRANDEIS: No. The court merely comes in at that time. The appeal is entered, according to Mr. Griffin, to be heard in November, as I understand it.

Q. No other papers, and no other case, has been brought to your attention, other than the appeal of the pending case, has there, on the part of Mr. Bigelow?

A. No, Our apprehension was that there wouldn't be.

Q. Well, of what other suits are you apprehensive? By "you" I mean the corporation that you represent.

A. I am apprehensive of suits the number and place of which will be determined by the ingenuity of counsel, whoever thought of this application to the New Jersey court, and which may be quite as unfounded, and perhaps more unfounded than that in New Jersey. I haven't been able to think of a court where they could legally
894 and properly apply, but before this application to New Jersey was made I should have asserted as a matter of law that there was no court to which they could legally and properly apply. So that my apprehensions are beyond definition.

Q. They are as vague as you state them?

A. Yes. I can say that I have thought of some court to which

another application might be made, but I would rather not tell which court that is, with Mr. Tyler present.

Q. I am quite sure Mr. Tyler would like to hear you say it. Perhaps it is beyond my imagination. I would like to have made as an exhibit, and a part of the record, the Old Dominion certificate, as well as——

A. That is attached to our petition also.

Q. Yes. And you admit that both of them are true copies of the originals in the possession of the plaintiff?

A. Oh, yes; for the purposes of this trial we certainly do. I haven't compared them, but I haven't the slightest doubt that they are.

Redirect examination.

(By Mr. BRANDEIS:)

Q. It is a fact, Mr. McClennen, is it not, that at the hearing before the chancellor on Tuesday last, on August 4, counsel for Mr. Bigelow indicated an intention to renew their application for a stay before the Court of Errors and Appeals in New Jersey, upon its convening on September 10?

A. The conversation was so general that it is a little difficult for me to answer. I certainly reached the conclusion that that was their intention, and that there was also a possibility that they might consider another application to the chancellor for a stay meanwhile.

(By Mr. HEMENWAY:)

Q. Well, didn't you state there that there was nothing that you could do before the 10th of September?

A. No.

Q. Nothing of the kind?

A. No.

Q. Well, did Mr. Brandeis state it?

A. No.

Q. Didn't Mr. Collins state it?

A. No.

Q. You make that denial absolute, without any reservation, do you?

A. Yes.

Mr. HEMENWAY: It is now 4 o'clock.

The COURT: Mr. Brandeis, I can come in Monday at 2 o'clock. About how much longer do you think your hearing is likely to take?

Mr. BRANDEIS: I should not suppose, your Honor, that it would take a very long time; I mean that I do not suppose that on the question of fact——

The COURT: I am not seeking to limit you. I am only trying to get an estimate of the length of time it will take; that is all.

Mr. BRANDEIS: I should suppose that it could be finished in the afternoon.

895 The COURT: Mr. Hemenway, about how much longer should you think it would take?

Mr. HEMENWAY: I should think it could be finished in two hours. Of course you know that——

The COURT: Oh, I understand. I am not seeking to tie you down. I should suppose that if we ran over into Tuesday morning we could finish by 1 o'clock, at any rate?

Mr. HEMENWAY: I should think so.

The COURT: I should suppose that we could finish Monday afternoon and Tuesday forenoon without much doubt.

Mr. HEMENWAY: I should think so.

The COURT: Well, I think I will come in Monday at 2 o'clock.

Mr. BRANDEIS: Does your Honor make any intimation as to any action by Mr. Bigelow in the meantime? Perhaps a stipulation by counsel that no action will be taken will be satisfactory.

Mr. HEMENWAY: If your Honor please, before answering that question, I will say that I am not in a condition to make any stipulation, but if your Honor can stay us from appealing even if we entered an appeal, you can stay us from going any further, so that no trouble would happen.

The COURT: As I said to Mr. Brandeis, on the record, as the matter came up, as it now stands on the record, I cannot see why you are not fully protected. That is to say, if, to-morrow morning, with this proceeding pending, Mr. Bigelow, or anybody in his behalf,—he is domiciled in Massachusetts, as I understand it,—started proceedings elsewhere, and I came to the conclusion that if I had to decide the case this afternoon, I should decide it with you, I should unhesitatingly grant an injunction restraining him, and his servants, agents, and attorneys, from doing anything of the sort.

[Adjourned to 9.30 o'clock a. m. Monday, August 10, 1908.]

BOSTON, MASS., *August* 10, 1908—2 p. m.

The COURT: Proceed.

Mr. BRANDEIS: We have no further evidence, your Honor.

Mr. HEMENWAY: Did you produce those papers that I asked for?

Mr. MCCLENNEN: No, I did not. I assumed that it was
896 simply the text that you wanted, and that when we said copies were correct, that was enough. I can send for them if you wish.

Mr. HEMENWAY: Yes, I shall want them.

Mr. MCCLENNEN: They are in the same terminology as those copies.

Mr. HEMENWAY: It is the action of the corporation that I want.

Mr. MCCLENNEN: That is attached to the petition.

Mr. HEMENWAY: It is an allegation in another case, and I want it as a fact in this case.

Mr. MCCLENNEN: A copy is attached to this very petition.

Mr. HEMENWAY: If your Honor please, the trust deed that Mr. McClennen was reading Friday is attached to this petition, and also a copy of the certificates that have been issued by the corporation. Now what I wish——

Mr. McCLENNEN: What is that?

Mr. HEMENWAY: A copy of the certificate issued by the corporation.

Mr. McCLENNEN: You mean by the trustees.

Mr. HEMENWAY: By the trustees. Now what I would offer to show—they admit that this trust deed was a trust deed made by the corporation——

Mr. McCLENNEN: No.

Mr. BRANDEIS: No, no; the corporation had nothing to do with it.

Mr. McCLENNEN: The trust agreement is between the Old Dominion Company, a corporation organized under the laws of Maine, and Charles Sumner Smith. It has nothing to do with the existing New Jersey Company. The existing company was never a party to it in any way.

Mr. HEMENWAY: I think I would like the originals that I asked for, then; or, as Mr. Tyler suggests, if you have a copy of the deposition of Altmiller, perhaps that will answer the purpose. That was taken by Mr. Tyler. We have the interrogatories on one side.

Mr. McCLENNEN: I have a copy of the deposition that Mr. Tyler took. It is attached to the New Jersey record, but it can be read right from that, or taken out. It can be read right in just as well. I am willing to agree that that deposition may be considered in, if that will save any time, if it is deemed to be relevant by the court.

Mr. HEMENWAY: Mr. Farley will read the deposition.

Mr. FARLEY: It is the deposition of Charles H. Altmiller.

"CHARLES H. ALTMILLER, being first duly sworn, in answer to interrogatories propounded by H. EUGENE BOLLES, Esq., counsel for the defendant, deposes and says.—

897 "Int. 1. What is your full name"?——

The COURT: Are you familiar with that deposition?

Mr. FARLEY: To some extent, your Honor.

The COURT: State what the deponent testified to.

Mr. FARLEY: I should hesitate to do so without first refreshing my recollection.

The COURT: How long is the deposition?

Mr. FARLEY: About eight or nine pages.

The COURT: Very well; read it.

Mr. FARLEY: [Reading:]

"Int. 1. What is your full name?

"Ans. Charles H. Altmiller.

"Int. 2. You live where?

"Ans. Townsend, Mass.

"Int. 3. Have you any connection with the Old Dominion Copper Mining & Smelting Company of New Jersey?

"Ans. Yes.

"Int. 4. What is your connection with that company?

"Ans. Secretary, treasurer, and director.

"Int. 5. How long have you held all three of those offices?

"Ans. I have held the office of secretary and treasurer since 1902. I do not remember the exact date I was chosen director."——

The COURT: How am I to get any aid from your reading? For what purpose do you put in the evidence?

Mr. FARLEY: Mr. Hemenway requested Mr. McClennen, as I think your Honor will remember, to produce a certain trust agreement and a certificate. The deposition in question covers all the facts now to be presented in relation to those two matters, and is offered, in the first place, in lieu of putting in the original trust agreement and certificate which were requested. As to the bearing of that, we submit that it has several bearings in this issue. In the first place, admitting fully that your Honor has the power to enjoin this defendant as within the jurisdiction, at least potentially, it is a matter in which your Honor has a discretion to exercise, and we submit this evidence for the purpose of showing that the character of the litigation in issue in the principal suits is one which should obtain no aid from your Honor's discretion; that it is at present a suit conducted, not for the benefit—not, at least, for the pecuniary benefit—of the real plaintiff, but a suit in which the cause of action, if any there be, has been segregated in the hands of certain trustees, and is carried on for the benefit of speculators,—speculators who, if the issue is successful, will obtain all, or all but a de minimis proportion, of this recovery, except a large percentage which is to
898 go to the trustees of which a member of the firm appearing for the ostensible plaintiff is one; in other words, that it is a litigation which, if not actually, is practically, champertous.

Further, the deposition will show value, the value of the property and the value of the stock. That has a bearing on the question of whether there is any real detriment to either the plaintiff, the practical plaintiff or the ostensible plaintiff, and that they need no exercise of your Honor's discretion for any protection.

Mr. HEMENWAY: Mr. Farley says, admitting that—that was a promise—if, admitting that, your Honor had the power to enjoin—that is what I wish to be heard upon.

The COURT: Go on.

Mr. FARLEY: In other words, to summarize, this deposition, in place of a more extended examination of Mr. McClennen after the production of the documents that were requested, will show that the present plaintiff in this action, or this action or motion, whatever it may be, now pending before your Honor, and also in the original litigation, has in equity no real standing in court.

The COURT: I am not familiar, of course, with the trial of the case on the merits in this court. I am familiar with the decision on the demurrer. Didn't you try this issue before the single judge?

Mr. FARLEY: No, your Honor.

The COURT: No part of it. Did you try it in New Jersey, or any part of it?

Mr. FARLEY: I do not feel that I should state what took place in New Jersey, as I was present merely in the capacity of advising as to the contents of the record in one of the many cases.

The COURT: Do you understand this to be a new position which you are taking——

Mr. FARLEY: In this court.

The COURT: —as to the fact that the name of the Old Dominion Company is simply used for the benefit, as you say, of a band of speculators?

Mr. FARLEY: In this court, your Honor, absolutely. I should limit that by saying that there are one or two lines in the original record of the case as tried before Mr. Justice Sheldon on which that contention might be based, but on which it was not based, and on which it is, perhaps, doubtful whether it can be fully based.

The COURT: Well, do you claim that your suit in New Jersey was upon that basis, and therefore to enjoin the corporation from being used in this way, permitting its name to be used in this way?

Mr. FARLEY: I do not, your Honor, feel that I should answer that question.

899 The COURT: Why shouldn't you answer a question which is important on an issue which I am to determine?

Mr. FARLEY: I would willingly if I could. I can only plead ignorance as an excuse to your Honor. But I will confer with persons who will, I think, be able to inform me in a moment.

The COURT: No. I think that you should be posted on a question which I think is important if the suggestion which you make is borne out by the facts.

Mr. FARLEY: If your Honor will pardon me a moment I will endeavor to ascertain that fact.

The COURT: No, it is for you to answer. If you can't answer it you may proceed with the reading of the deposition.

Mr. HEMENWAY: I did not understand the question that was asked by your Honor. The question asked was in regard to what was tried, or something of that kind?

The COURT: The question was: Mr. Farley says that the suit in the name of the corporation is simply a suit by a band of speculators, using the name of the corporation for certain purposes. I asked him if that issue was tried before a single judge. He thinks it was not really, though there might be something in the record upon which you could predicate such an assumption. I then asked him whether that issue was tried in New Jersey, and he said that he did not know, because he was not there; and I said that some one ought to be able to tell me whether it had been tried or not, but it would take less time to read the deposition through and see what it says there.

Mr. FARLEY: [Resuming the reading of the deposition of Charles Altmiller:]

"Int. 6. How long have you been treasurer of that company?

"Ans. Since April 7, 1902. I have been secretary and treasurer, as I have said; I do not remember when I was appointed a director.

"Int. 7. As such secretary and treasurer have you the custody of the papers and records of the company?

"Ans. I have.

"Int. 8. Are you familiar with its financial transactions and doings?

"Ans. Yes.

"Int. 9. Have you now before you the minutes of the directors' meetings of that company?

"Ans. Yes.

"Int. 10. Are the copies of the records attached to this testimony true copies of the records of the minutes of the meetings of the boards of directors of that company, as they purport to be?

"Ans. Yes.

900 "Int. 11. I now call your attention to the records of the meeting held January 21, 1904, and to a vote passed at that meeting that certain assets named in the vote should be held until the further order of the board as a separate fund, etc., and I will ask you whether or not those assets included the claim in suits in New York against Mr. Lewisohn and in Massachusetts against Mr. Bigelow?

"Ans. No, they did not.

"Int. 12. Will you state what was the total value of the funds so set apart?

"Ans. Well, it is not stated here, but, in round figures, something over $90,000.

"Int. 13. After that meeting were the assets comprising that fund as a matter of fact reduced to cash?

"Ans. They were.

"Int. 14. And were certain expenses with which that fund was charged for the payment subsequently paid out of the fund?

"Ans. Yes. That fund was kept separate and apart, entirely as a bookkeeping matter; as a matter of fact, the money was mingled with other funds of the company, but a separate memorandum account was kept of it, and it was agreed that interest, so far as used for purposes other than those set forth in the vote was charged with certain expenses, a part of which were the expenses of conducting litigation in New York against the Lewisohn estate, and in Massachusetts against Mr. Bigelow, and the expenses of certain litigation against the company in Arizona. In determining the amount to be set apart, the amount of certain other demands against the company had to be first deducted. The fund on December 31, 1907, was $91,657.44. Of this fund $84,557.44 was in cash and is being used by the company for other purposes, and on that amount interest is credited in a memorandum account of this fund at the rate of 6 per cent; the remaining $7000 is represented by 7 per cent school-district bonds, which were in the fund originally and were never sold; on that the company received interest at the rate of 7 per cent.

"Int. 15. What property interests do the trust certificates represent; the trust certificates of the Old Dominion Trust?

"Ans. They represent merely this. The Maine Company has agreed with the trustees of the Old Dominion Trust, so called, that if the Maine Company receives any dividend on its stock in the New Jersey Company, which dividends are derived from certain assets, which consist of this $91,000 fund and the claims against Bigelow and Lewisohn, the Maine Company will pay over to the trustee any such amount as they get in the way of dividend on their holding of the New Jersey Company's stock. The trustees,

under their declaration of trust, have agreed that they will divide the amount so received less expenses among the holders of the trust certificates.

901 "Int. 16. In other words, is this not true: that the holders of the trust certificates are not entitled to receive any payments whatever except such as may be ultimately and indirectly derived by them from this fund of $90,000, and from the proceeds of the two suits pending against Mr. Bigelow in Boston, and the two suits pending against the estate of Lewisohn in New York?

"Ans. That is correct.

"Int. 17. Did you know Mr. Leonard Lewisohn in his lifetime, and did you know Mr. Albert S. Bigelow?

"Ans. Yes, I did know them both.

"Int. 18. Since when have you known them, or known of them, as men interested in mining affairs?

"Ans. Since about 1886.

"Int. 19. Were you familiar with their abilities in managing and operating mines?

"Ans. I was.

"Int. 20. You knew, did you not, that they were instrumental in the organization of the Old Dominion Copper Mining & Smelting Company of New Jersey?

"Ans. I did.

"Int. 21. Now won't you state generally in regard to them, what you know of their experience and ability as owners and operators of mines. And name, if you will, some of the chief mines with which they have been connected.

"Ans. Leonard Lewisohn and Albert S. Bigelow had, prior to the purchase of the Old Dominion properties, in June, 1895, been largely interested in copper-mining companies, and managed and controlled several large copper-mining companies, including the Boston & Montana Mining Company, the Butte & Boston Mining Company, the Tamarack Mining Company, and the Osceola Consolidated Mining Company.

"Int. 22. Will you state whether or not those companies were all well known and successful companies?

"Ans. They were.

"[In answer to interrogatories propounded by Charles H. Tyler, Esq., of counsel for the defendant, the witness further deposes and says,—]

"Int. 23. When did the Maine Company take over the stock of the New Jersey Old Dominion Copper Mining & Smelting Company?

"Ans. About January 15, 1904.

"Int. 24. How many shares did they then take over?

"Ans. They took over at that time over 100,000 shares, and a short time afterwards they acquired a large number of additional shares.

"Int. 25. How many shares of the total 150,000 shares have they acquired by exchange?

"Ans. Somewhere in the neighborhood of 143,000 shares.

902 "Int. 26. So that of the original issue of 150,000 shares of the Old Dominion Copper Mining & Smelting Company of New Jersey, the Maine Company owns all but about 7000 shares?

"Ans. To be correct, I think all but about 6200 shares.

"Int. 27. Has the Old Dominion Copper Mining & Smelting Company of New Jersey, since its stock was thus acquired by the Maine Company, increased its capital stock?

"Ans. Yes.

"Int. 28. To what extent?

"Ans. By 12,000 shares, making 162,000 shares in all.

"Int. 29. What did the Old Dominion Copper Mining & Smelting Company of New Jersey receive for those 12,000 additional shares?

"Ans. Well, $50 a share, or $600,000.

"Int. 30. The par being $25 per share?

"Ans. Yes.

"Int. 31. About when was it sold?

"Ans. About June 1, 1907.

"Int. 32. Was it sold without a commission to an underwriting syndicate readily?

"Ans. Well, we had an underwriting syndicate, but there was no commission.

"Int. 33. So that you readily sold it at twice par?

"Ans. Yes.

"Int. 34. Now to go back to the Maine Company: will you kindly exhibit the balance sheets of the Maine Company, the Old Dominion Company, for each year since its incorporation?

"Ans. I will. Here they are; they are attached hereto. See page 11–14, inclusive.)

"Int. 35. Will you be good enough to state just the process of exchange of shares of the Old Dominion Company of Maine for shares of the Old Dominion Copper Mining & Smelting Company of New Jersey?

"Ans. What was done was this: Prior to the formation of the Maine Company, a large majority of the stockholders of the New Jersey Company had deposited their stock through F. S. Moseley & Company with the National Shawmut Bank; when the Maine Company was organized, the owner of each share of stock in the New Jersey Company so depositing received in exchange for each share in the New Jersey Company one share of stock in the Maine Company and a certificate for one share in the Old Dominion Trust, so called. The New Jersey stock then went to the Maine Company.

"Int. 36. That is to say, there was an exchange of Maine stock for New Jersey stock, share for share, wasn't there?

"Ans. No, not exactly that. For each share in the New Jersey Company which was turned over to the Maine Company, the holder received in exchange a share of stock in the Maine Company

903 and a certificate for one share in the Old Dominion Trust. Those exchanges were all made in Boston, either at the National Shawmut Bank, the depository of the stock, or were made

at our office by the direction of the National Shawmut Bank. Smaller amounts of stock were taken subsequently, and the exchanges were made in such cases at the office of the Maine Company, of which Mr. Smith and I are officers, and where Mr. Smith, one of the trustees under the Old Dominion Trust, has his office.

"Int. 37. Will you kindly exhibit the financial statements of the Old Dominion Copper Mining & Smelting Company, and its balance sheets from year to year, and also all the annual reports that have been issued to the stockholders?

"Ans. I do, and here they are. (See pages 15-17, inclusive, on exhibit annexed.)

"Int. 38. Since the Maine Company acquired the majority of the stock of the New Jersey Company, what has been expended by the New Jersey Company in improvement of its property?

"Ans. There was expended between January 1, 1904, and January 1, 1908, $1,875,627.19.

"Int. 39. Where did this money come from that was so expended?

"Ans. The only sources from which the company has received money other than from its earnings during that period were $600,000 from the proceeds of the new stock sold in August, 1907, and the amounts borrowed from time to time by the company. These loans have varied from $240,818 to $796,675.04.

"Int. 40. So that all of this sum of $1,875,627.19 has come from the earnings of the mine itself except the proceeds of the sale of the 12,000 shares of stock, and except the amounts borrowed?

"Ans. Yes, that is correct.

"Int. 41. How much was owed December 31, 1907, for money borrowed?

"Ans. $712,117.60.

"Int. 42. At this time what did you have in the way of cash in the bank or other quick assets?

"Ans. Do you call supplies quick assets, from your way of looking at it?

"Int. 43. Yes.

"Ans. $1,607,999.02.

"Int. 44. This is exclusive of the mine itself, is it?

"Ans. Yes. Besides the amount we had borrowed, we had what shows on the balance sheet, approximately $533,173.18.

"Int. 45. How much of this seven hundred and odd thousand has been paid off since December, should you say; approximately?

"Ans. None of it.

"Int. 46. How much additional real estate or other prop-
904 erty has the Old Dominion Copper Mining & Smelting Company purchased since January 1, 1904?

"Ans. I should think somewhere about $25,000.

"Int. 47. Is this property so purchased since January, 1904?

"Ans. Yes.

"Int. 48. Had there been any property acquired by the Old Dominion Copper Mining & Smelting Company since 1895, when it was incorporated, to January 1, 1904?

"Ans. Yes, considerable.

"Int. 49. How much?

"Ans. $109,821, it stands on the books.

"Int. 50. How has this money been expended, amounting to $2,352,267.59 since January, 1902, according to your account, up to December 31, 1907?

"Ans. In new plant account.

"Int. 51. What did it amount to on December 31, 1907?

"Ans. On December 31, 1907, it stands at $2,352,267.59.

"Int. 52. How much of this new plant account had been expended to January, 1904?

"Ans. January 1, 1904, we had expended $476,640.40.

"Int. 53. Have you spent, out of earnings, a great deal of money underground since January, 1904?

"Ans. Yes.

"Int. 54. Would that be charged to new plant account?

"Ans. Part of it was; that which went for a new shaft and pumps, for instance.

"Int. 55. But the greater part of it was not?

"Ans. The greater part of it was not.

"Int. 56. How much of it was spent underground?

"Ans. Well, that is something pretty hard to work out and tell; I cannot tell.

"Int. 57. Would it run up to a million dollars?

"Ans. I could not say.

"Int. 58. Well, it is a very considerable amount, isn't it?

"Ans. Yes, it is. It might be well to state, in that connection, that all that is expended underground is in connection with the present and future extraction of ores.

"Int. 59. When did the Old Dominion Copper Mining & Smelting Company pay a dividend?

"Ans. August 1, 1907.

"Int. 60. What was this dividend?

"Ans. One dollar and a quarter per share. That is the only dividend it has ever paid.

"Int. 61. There are no bonds on the property, are there?

"Ans. No.

"Int. 62. What is the situation with reference to this new 12,000 shares that you have issued; are they entitled to participation in the proceeds, if any, of the lawsuits against Lewisohn and Bigelow?

"Ans. No. Those 12,000 shares are held in large part by the Maine Company, and the balance are held by various persons who availed themselves of an opportunity to subscribe. The hold-
905 ers of those shares, like the holders of other shares of the New Jersey Old Dominion Copper Mining & Smelting Company, are entitled to receive any dividend that the New Jersey Company may pay. You must distinguish between the stockholders in the New Jersey Company and the stockholders in the Maine Company. The Maine Company itself, being a large stockholder in the New Jersey Company, receives, and must receive, the dividend that the New Jersey Company pays. A holder of stock in the Maine

Company of course receives only the dividend that the Maine Company pays. Of course the dividend in the Maine Company may be larger or smaller than the dividend in the New Jersey Company; and it is necessary to distinguish clearly between the stocks of those two companies.

"Int. 63. Are the copies hereto annexed of extracts from the New Jersey records true copies thereof?

"Ans. Yes, they are.

"Int. 64. And the same question with reference to the Maine records?

"Ans. Yes."

Mr. HEMENWAY: Will you let me see the petition in this case? [A document is passed to Mr. Hemenway.] Is this the petition that was filed?

Mr. MCCLENNEN: Yes; that is the petition that is now being heard.

THE COURT: A copy of the bill in New Jersey is annexed to your petition?

Mr. MCCLENNEN: Yes, your Honor.

THE COURT: I thought so. And you read from it. I thought it was annexed, but I was not quite sure.

Mr. HEMENWAY: That is what I was looking for, if your Honor please.

Mr. MCCLENNEN: If your Honor please, if it is of interest to your Honor, I, of course, am in position to state to your Honor precisely what occurred in New Jersey with reference to this matter.

THE COURT: No; I can read the bill; it is in the bill. As it was read Friday I did not get anything more than a mere outline of it. This deposition I suppose I shall have a copy of, the deposition that was read?

Mr. FARLEY: Yes, your Honor.

THE COURT: Very well.

Mr. HEMENWAY: I am a little in doubt as to the nature of this petition, and I would like to inquire if it is to be considered as a motion in the cases numbered 8098 and 8099 in equity, or whether it is an original proceeding in order to enjoin us from appearing in the New Jersey court. I think counsel ought to state that be-
906 cause—

Mr. MCCLENNEN: Well, if anything that I can say will make that clearer I shall be very glad to state it.

Mr. HEMENWAY: I had supposed, the numbers not being on the copy that was given to me, that it was an original proceeding, and your Honor will remember that I asked if I would be allowed to put in an answer later, if this was a petition for a temporary injunction.

Mr. MCCLENNEN: I suppose that answering the question will be merely construing the petition from my standpoint, but it is entitled with the name of the principal case, and then begins, "The complainant in the above-entitled cases says as follows," and the numbers are upon this copy. It was designed to be a petition asking for

incidental relief or protection in the main cases, but not as an independent suit.

Mr. HEMENWAY: Here is a certificate of the result of the case in the United States Supreme Court.

Mr. MCCLENNEN: The paper offered by Mr. Hemenway is a certified copy of the record of the United States Circuit Court for the Southern District of New York in the case of the Old Dominion Copper Mining & Smelting Company against Lewisohn. We have no objection to the form of the proof; I presume that it is proper; but we do object to the admission of the testimony as being immaterial matter. If your Honor desires to accept it and rule upon it later, it will be entirely satisfactory to us.

Mr. HEMENWAY: Well, if your Honor please, you may glance through this to see what it is. I will have it marked. I do not think it is necessary to read it all. It is simply that the demurrer was sustained,—that is the judgment of the Court of Appeals, which was, on certiorari, tried by the full bench at Washington. I might state the Supreme Court sustained the Court of Appeals, and the mandate came down in the usual course the 23d day of July last; and in considering that case it may be convenient for your Honor to have this printed opinion of Judge Holmes in the case.

Mr. MCCLENNEN: That is reported, Mr. Hemenway, at 210 U. S. 206.

Mr. HEMENWAY: Yes. I didn't know but it might be convenient, because we do not all of us carry the reports in our pockets.

[A certified copy of the record of the United States Circuit Court for the Southern District of New York, in the case of Old Dominion Copper Mining & Smelting Co. v. Lewisohn, is introduced in evidence and marked "Exhibit I. R. H. J."]

907 COMMONWEALTH OF MASSACHUSETTS,
Suffolk County:

Supreme Judicial Court.

In Equity.

No. 8098.

OLD DOMINION COPPER MINING & SMELTING COMPANY
v.
ALBERT S. BIGELOW.

No. 8099.

SAME
v.
SAME.

Hearing on Matters set up in Supplemental Answers, and for Reversal or Modification of Original Decrees.

Before Hammond, J.

Appearances:

L. B. Brandeis, Esq., E. F. McClennen, Esq., for complainant; Alfred Hemenway, Esq., Eugene Treadwell, Esq., J. W. Farley, Esq., for Defendant.

Order Appointing Commissioner.

In the above-entitled cases, at the hearing of the same before Mr. Justice Hammond, it is ordered, under the provisions of Chancery Rules No. XXXV, at the request of both parties, that George C. Burpee be, and he hereby is, appointed commissioner to take the evidence in said cases to be reported to the full court.

By the Court:

WALTER F. FREDERICK, *Clerk.*

September 29, 1908.

908 BOSTON, *September* 29, 1908.

Evidence.

[George C. Burpee was appointed and sworn as stenographer.]

New York Record.

Mr. FARLEY: The first evidence we offer your Honor is a copy of the New York record. I think perhaps the New York record can well be marked as one exhibit, with the several parts thereof designated

as they are in the answer, so that they may be equally well distinguished and may be easily referred to.

Mr. McCLENNEN: I am a little uncertain just what papers have been included in the record. They may be some that may be immaterial and some that are not.

Mr. FARLEY: I think every paper in the New York litigation is in this that I offer as an exhibit.

Mr. McCLENNEN: Then there may be some papers in the proposed offer to which we object as not being part of the record. If I may see that, perhaps I can tell.

The first paper in the record offered to which we object, as not being part of the record, is what purports to be the opinion of Judge Lacombe of the Circuit Court. We believe that opinion is no part of the record, and object to its being introduced.

HAMMOND, J: What do you say, gentlemen?

Mr. HEMENWAY: Well, if your Honor please, in regard to this matter the course pursued with reference to the testimony, in the taking of this large mass of testimony, was that the objections were made, and Mr. Justice Sheldon, I think, with one or two rare exceptions, admitted everything de bene, stating, when he did so, that if it were admissible it would be before the court, and if not admissible it would be disregarded by them. For that reason, we thought the better way was not to take up time in discussing the testimony.

Mr. McCLENNEN: The difficulty with that arrangement, which was undoubtedly a very reasonable one at the former trial, is that hypothetical questions have been put to a considerable number of gentlemen, members of the New York bar, as we are informed; if this opinion goes in, one hypothesis will be proper; if it stays out another hypothesis will be proper. It is difficult to see how that question can be dealt with unless the opinion is excluded, if it should be; and we think it should be.

Mr. HEMENWAY: That is also admissible as evidence of what the New York law is. If there are questions based upon an hypothesis,
the question whether the hypothesis is based upon admissible
909 or inadmissible evidence seems to me to strengthen the propriety of admitting the evidence and leaving it for the full court to decide as to its ultimate admissibility; especially, if, as I gather from the intimation of your Honor, it is proposed that this testimony taken here points to a reservation for the full court.

Mr. McCLENNEN: I think the decisions in New York and the decisions in the federal court both state with positiveness that the opinion is not part of the record. Therefore it is not one of those questions of grave doubt which would warrant the receiving of testimony with a string attached to it.

HAMMOND, J.: I think, under the circumstances under which this case is heard now, I will admit this language de bene, and note your objection and exception.

Mr. McCLENNEN: I should like to make the same objection and save the same exception to the admission of the opinion of the Cir-

cuit Court of Appeals and the opinion of the Supreme Court of the United States.

HAMMOND, J.: I will admit them de bene; if they are finally adjudged to be admissible, they will be considered by the court which is to consider them; otherwise they will be thrown out. I will note your objection to them and your exception to either one of these opinions.

Mr. HEMENWAY: Of course it is not an objection to the full record, but to a part of the record.

HAMMOND, J.: I understand that goes in de bene.

Mr. McCLENNEN: The record is so voluminous that, while it may be that in other respects I should have no objection to it, yet I should like to save, pending the trial, the right to point out any other part to which I object.

HAMMOND, J.: If there is anything in that document which is now being marked as an exhibit to which you want to object after looking it over, you may have the privilege of doing so.

Mr. FARLEY: I understand the entire record is to be marked as one exhibit?

HAMMOND, J.: Consisting of how many pages?

Mr. FARLEY: I hesitate to say, your Honor.

Mr. McCLENNEN: All those papers have a different letter, have they?

Mr. FARLEY: Yes, with exception of Exhibit R, which has a number of stipulations and so forth.

[The principal part of the record offered is marked "Exhibit 1, G. C. B., Sept. 29, 1908. In three parts;" and each of the two subsidiary sections is marked "Part of Exhibit 1, Sept. 29, '08, G. C. B."]

910 Mr. FARLEY: It is understood, if your Honor please, that that is the record of the first suit, but we offer it in evidence not only for the first suit, but the second.

HAMMOND, J.: The effect of it will be considered hereafter.

Mr. HEMENWAY: To make it clear that these two cases were being tried together. All the evidence in the case is so taken.

Mr. FARLEY: Perhaps it would be too nearly interminable to read the entire (New York) record. The course of procedure is outlined in the supplemental answer.

HAMMOND, J.: I do not think it is necessary to read this record to me now. It contains the allegations and various proceedings, which finally ended in the dismissal of the bill. Unless the other side desires to have it read, I do not think it is necessary to read it. It may be referred to.

Mr. McCLENNEN: I think we would prefer that it should not be read.

HAMMOND, J.: Well, then it goes in, and that is all there is to it. You only put in one record, and that is the record of the 30,000 share suit in New York?

Mr. FARLEY: Yes, your Honor.

[The New York record, Exhibit 1, will be found attached to the defendant's amended answer.]

Previous Testimony.

Mr. FARLEY: I suppose there is no question but what, the decrees having been vacated, and this hearing bearing upon the whole matter, although limited by the rescript to the supplemental answer, the defendant is to have the use of all the evidence heretofore introduced by him, as well as the present evidence now to be introduced? If there be any doubt about it, I should like to raise that question.

HAMMOND, J.: My understanding is, from hearing the rescript read, that this case is sent down for the purpose of hearing and taking such additional evidence upon those answers as the parties desire to put in; do you understand that when the evidence is all taken, then, in connection with the findings of Judge Sheldon—not the evidence before him, but the findings—then the case will be decided?

Mr. FARLEY: Yes, your Honor. There might be possibly some question raised as to whether, in entering new decrees, the defendant could have the advantage, not only of the present evidence, but of the past; also as bearing on this particular question in issue under the supplemental answer, there are portions of the evidence heretofore taken that are relevant to this. We wish to reserve the
911 right to take advantage of that portion which is specifically applicable to this issue, and of all portions as applicable to the general issue.

HAMMOND, J.: Well, I will not decide on that now. I should not decide any way upon that without hearing the other side. I do not see how that question is involved now.

Mr. FARLEY: I merely want to put in a caveat, so that we may not be held to have waived the right to use the previous evidence, or to have rendered it unavailable.

Mr. HEMENWAY: It is always a great deal easier to meet a question in the concrete. There are certain allegations in this answer. One of the allegations is that there was participation in the defence of the 2 suits in common. It will appear by the evidence already in the case that Mr. Treadwell, the associate of Mr. Lauterbach, who were counsel of record in New York, was present in this court and took part in the trial, and his name appears in the printed evidence that was taken. It is not necessary to go back and recall that testimony and put it in now.

HAMMOND, J.: You propose to put that in that is not already in?

Mr. HEMENWAY: Will you please repeat your question? I was interrupted.

HAMMOND, J.: I supposed we were now upon the documentary part of the case, and I thought if you were on that, it would be hardly necessary now to consider this other question which you have in mind.

Mr. HEMENWAY: Not while the documentary evidence is being considered; certainly not.

HAMMOND, J.: I think, therefore, I will consider that when it comes up in the regular offering of testimony.

Mr. HEMENWAY: Shall we offer the testimony that is already in the case?

HAMMOND, J.: Do you think we can decide that question now, while we are considering the documentary evidence?

Mr. HEMENWAY: It might demand consideration, perhaps.

HAMMOND, J.: What testimony do you offer now?

Mr. HEMENWAY: If the testimony that is already in the case is not in for all purposes, then I should have to go through and pick out the portions.

HAMMOND, J.: Well, it is a mere matter of time in discussing this matter. If you want a ruling upon that question, and if you get it now, it will aid in the conduct of the case. I am ready to rule upon it now. What do you now ask to have done? To have considered the evidence that is already in as in on the question of the answer so far as material, and not inconsistent with the findings of Judge Sheldon?

Mr. HEMENWAY: Yes.

912 HAMMOND, J.: Now that raises it.

Mr. MCCLENNEN: We see no objection to that, except the one that we want to know what is being offered. There are twelve hundred pages of testimony, more or less, and included in that there can be but very little.

HAMMOND, J.: Now is there any objection to marking it upon the record and indicating to the other side what of the evidence that is already in you offer as bearing upon the questions raised in this answer?

Mr. HEMENWAY: I think we can do that.

HAMMOND, J.: Very well. Such parts of the evidence as either side claims to bear upon the questions raised by this answer, not inconsistent with the finding which has been made by Mr. Justice Sheldon, may go in; each party to indicate to the other what part they rely on; is that satisfactory?

Mr. HEMENWAY: If it is not, we can come again, if your Honor please.

HAMMOND, J.: Well, in general terms, we will consider that to be the situation.

Deposition of Charles T. Terry.

Mr. FARLEY: If the court please, we will now proceed with the reading of the depositions. The first deposition is that of Charles T. Terry. I take it that the course of proceeding is that these depositions should be opened. We then ask that they be filed and then we put them in evidence. They have not been filed, as they only arrived this morning.

[The deposition of Terry was opened and filed by the clerk.]

Mr. FARLEY: I take it your Honor does not care to have me read

the formal parts of the deposition. I will say of all of these depositions that we offer them as the opinions of experts, who, I believe, qualify by their answers as to what is the New York law, as to the effect of the Lewisohn decree as bearing on actions against Mr. Bigelow of the same, or substantially the same, nature as those now pending before this court.

HAMMOND, J.: That is, the bearing there, you mean?

Mr. HEMENWAY: The bearing there; and, in pursuance of the constitution, it stands the same here.

HAMMOND, J.: I understand; but you are only proceeding on the New York law?

Mr. HEMENWAY: Yes, they are all on the New York law; and the statute, combined with court usage, is the law of the state.

913 Mr. FARLEY: This is the deposition of Charles T. Terry. I will read the interrogatories and the answers, as applicable one to the other.

[The objections of counsel for plaintiff to the interrogatories to Terry and to the answers made by him were orally stated; subsequently the objections to interrogatories were formulated to apply to the same interrogatories put to Terry and other deponents, and in the case of Terry are substituted for the oral objections; the objections to answers vary according to the answers of the several deponents.]

Mr. FARLEY: [Reading:]

"Q. 1. State your name, age, and place of residence.

"A. Charles Thaddeus Terry; forty-one; 62 East Fifty-eighth street, New York city.

"Q. 2. State your occupation and place of business.

"A. Lawyer; 100 Broadway, New York city.

"Q. 3. If, in answer to the preceding interrogatory, you have testified that you are an attorney at law, state when you were admitted to the bar, and in what state or states, and how long you have been engaged in the practice of law in said state or states, and with what firms, if any, you have been or are connected.

"A. In the year 1893, in the state of New York. I have been engaged in the practice of law continuously for fifteen years in the state of New York, and some twelve or fifteen other states, and I was for six years a member of the firm of C. H. & J. A. Young & Terry.

"Q. 4. State what, if any, judicial, or other public or official, positions you hold, or have held.

"A. I have for five years held an appointment by successive governors of the state of New York—the office of commissioner for the state of New York on the uniformity of legislation throughout the United States.

"Q. 5. State any other matters relating to your experience in your profession and as to your familiarity with the law and usages governing the practice in the state and federal courts in New York, both in law and in equity, and also as to your familiarity with the laws and usages of the state of New York relating to former adjudication and estoppel by judgment.

"A. For fifteen years I have been successively lecturer upon law

subjects in the Law School of Columbia University in the city of New York, assistant professor, and professor; held the chair in contracts in that law school. The subjects which I have taught in Columbia law school cover a rather wide range in law and equity in addition to the course in contracts, which is given four hours
914 each week during the whole scholastic year. I have been engaged in suits, during the course of my practice, in various states of the United States, and in the federal courts in New York state and in other states. In the course of my work as instructor in the Columbia law school I have had to investigate and give instruction on the subject of the effect of former adjudications and of estoppel by judgment, and in that connection have examined and given instruction with reference to the laws in the state of New York.

"Q. 6. Assuming that an action in equity is brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters, to recover from him the profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, at a price in excess of the price which they paid for it and of its fair value, and assuming that in this action a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to a similar action, substantially identical with the first and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

"[The plaintiff objects to the 6th interrogatory, on the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced, and it fails to assume material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter sustaining the claim against him upon the merits. It does not assume that there had been a prior decision by the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first.]
915 "[The court overruled the objection, admitted the question, and saved the exception of the plaintiff.]

"A. Its effect would be to bar such action, and, in the language of the decisions, operate as an estoppel by judgment, for the reason that, under the doctrine of res adjudicata, a judgment under the law of the state of New York binds not only the actual parties to litigation, but also those who are in privity with such parties; and in the case of persons jointly interested in and jointly concerned in the transaction which is the subject of a suit, a judgment relating to one of such persons, does, under the law of the state of New York, bind and affect the other, in such a state of facts as assumed in this interrogatory.

"Q. 7. Assuming that two actions in equity are brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters, to recover from him profits alleged to have been received by him and his associates secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, and assuming that such property is alleged to have been sold, pursuant to said joint plan and conspiracy, in two separate parcels, in each of which both promoters were jointly interested, and that said two actions were brought to recover the respective profits received from the sale of the two parcels, respectively, and assuming that the bills of complaint in the two actions were substantially identical, except as to the particular relief sought, and assuming that certain profits were alleged to have been made by said promoters on each parcel, and assuming that in one of said actions a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to two similar actions, substantially identical in form with those above described and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

"[The plaintiff objects to the 7th interrogatory, on the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume material facts,
916 namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there has been a prior decision by the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer

in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first.]

"[The court overruled the objection, admitted the question, and saved the exception of the plaintiff.]

"A. It would operate as a bar to the action or as an estoppel by judgment, for the reasons stated in the answer to the 6th interrogatory, and for the additional reason, based upon the theory of the doctrine of res adjudicata, which is that, in order to put at rest litigation, a determination once made by a court having jurisdiction of the subject matter and of the persons, binds all those who are identified in interest with the parties to the suit, equally with such parties to the suit where such identity of interest arises from the relationship of principal and agent, master and servant, trustee and cestui que trust, or a precisely and thoroughly joint interest with no variation of facts relating to those so jointly interested respectively.

"Q. 8. Have you examined a copy of the record in the action of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn in the Circuit Court of the United States for the Southern District of New York, such as is hereto annexed and marked (1), the respective portions of said record being marked A to R, inclusive?

"[The plaintiff objects to the 8th interrogatory, on the ground that it assumes that the copies shown are the record of the case, whereas, in fact, they contain also copies of the opinion of the court, which are not a part of the record.]

"[The court overruled the objection, admitted the question, and saved the exception of the plaintiff.]

"A. I have.

"Q. 9. Have you examined copies of the proceedings in
917 the above-entitled causes, to wit, the two causes of the Old Dominion Copper Mining & Smelting Co. v. Bigelow in the Supreme Judicial Court in Massachusetts, such as are hereto annexed and marked, respectively, (2) and (3)?

"A. I have.

"Q. 10. Assuming that there were now pending in the courts of the state of New York proceedings against Albert S. Bigelow identical in all respects (except as the practice might require formal changes) with the copies of the proceedings referred to in the 9th interrogatory, and assuming that said courts had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record, copies of which are referred to in the 8th interrogatory, were sufficiently pleaded and proven in defence of said proceedings, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in each of these bills of complaint were respectively, the same persons, and that the contracts, acts, matters, and transactions mentioned in each of these bills of complaint were, respectively, the same contracts, acts, matters, and transactions, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said

court, what would be the effect, under the law and usages of the state of New York, of said decree and record as a defence to said proceedings assumed to be so pending?

"[The plaintiff objects to the 10th interrogatory, on the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the district of New York was upon the merits. It does not assume that there has been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision by the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first. It assumes the action against the second person as being in New York.]

"[The court overruled the objection, admitted the question, and saved the exception of the plaintiff.]

918 "A. It would be a complete defence in bar of the action on the doctrine of res adjudicata or estoppel by judgment.

"Q. 11. Assuming the facts stated in the 10th interrogatory, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewis-ohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would these additional facts affect your answer to the preceding interrogatory?

"[The plaintiff objects to the 11th interrogatory, on the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision by the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first. It assumes the ac-

tion against the second person as being in New York It also assumes that there has been participation on the part of the other in the defence of the suit in the federal court. It also assumes that there has been participation on the part of Bigelow in the defence of the suit against Lewisohn,—of which there is no evidence and of which no evidence can be offered.]

"[The court overruled the objection, admitted the question, and saved the exception of the plaintiff.]

"A. In my judgment, these additional facts would affect the question in that they would be a piece of evidence, and a strong piece of evidence, going to show the identity in interest of Mr. Bigelow and Mr. Lewisohn, that the joint interest of each of those gentlemen was precisely the same in the venture and that each of them so regarded it; otherwise these additional facts would not affect the question.

919 "Q. 12. Assuming the facts stated in the 10th interrogatory, and assuming the facts stated in the 11th interrogatory, and assuming that the participation of the defendant, Bigelow, as stated in the 11th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers to the two preceding interrogatories?

"[The plaintiff objects to the 12th interrogatory, on the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision by the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first. It assumes the action against the second person as being in New York. It also assumes that there had been participation on the part of the other in the defense of the suit in the federal court. It also assumes that there has been participation on the part of Bigelow in the defence of the suit against Lewisohn,—of which there is no evidence and of which no evidence can be offered. It assumes that the plaintiff had knowledge of the participation in the defence,—of which knowledge there is *not* evidence and can be none.]

"[The court overruled the objection, admitted the question, and saved the exception of the plaintiff.]

"A. Not at all.

"Q. 13. Assuming that there were now pending in the courts

of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8098, referred to in the 9th interrogatory, and assuming that the course of the proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree
920 and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8098, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8098 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8098, described in the 9th interrogatory?

"[The plaintiff objects to the 13th interrogatory, on the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision of the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first. It assumes the action against the second person as being in New York.]

"[The court overruled the objection, admitted the question, and saved the exception of the plaintiff.]

921 "A. It would be a bar to the action, operate as a complete defence on the doctrine of res adjudicata, and would operate as an estoppel by judgment.

"Q. 14. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8099, referred to in the 9th interrogatory, and assuming that the course of proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8099, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not determined by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8099 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, and assuming that the bill of complaint in said Circuit Court, and the prayers thereof, relate to one part of an entire transaction comprising said contracts, acts, matters, and transactions, and that the bill of complaint corresponding to the one numbered 8099 in Massachusetts and the prayers thereof relate to another part of the same entire transaction, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8099, described in the 9th interrogatory?

"[The plaintiff objects to the 14th interrogatory, on the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other
922 alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision of the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit

against the other was brought first. It assumes the action against the second person as being in New York.]

"[The court overruled the objection, admitted the question, and saved the exception of the plaintiff.]

"A. Its effect would be to bar the action and operate as a complete defence on the doctrine of res adjudicata, for the reason that under the facts assumed in the interrogatory, the exact identity in interest, so far as the causes of action referred to are concerned, of Bigelow and Lewisohn is clearly established, and a judicial determination as to one of them with respect to that cause of action would necessarily bind or inure to the benefit of the other, as the case might be.

"Q. 15. Assuming the facts stated in the 13th and 14th interrogatories, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would these additional facts affect your answers, or either of them, to the 13th and 14th interrogatories?

"[The plaintiff objects to the 15th interrogatory, on the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision by the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court
923 was for want of parties, namely, the absence of the other, or that the suit against the other was brought first. It assumes the action against the second person as being in New York. It also assumes that there has been participation on the part of the other in the defence of the suit in the federal court. It also assumes that there has been participation on the part of Bigelow in the defence of the suit against Lewisohn,—of which there is no evidence and of which no evidence can be offered.]

"[The court overruled the objection, admitted the question, and saved the exception of the plaintiff.]

"A. My answer is the same as my answer to the 14th interrogatory.

"Q. 16. Assuming the facts stated in the 13th, 14th, and 15th interrogatories, and assuming that the participation of the defendant,

Bigelow, as stated in the 15th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers, or either of them, to the 13th, 14th, and 15th interrogatories?

"[The plaintiff objects to the 16th interrogatory on the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced, and it fails to assume material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern District of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision by the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first. It assumes the action against the second person as being in New York. It also assumes that there has been participation on the part of the other in the defence of the suit in the federal court. It also assumes that there has been participation on the part of Bigelow in the defence of the suit against Lewisohn,—of what there is no evidence and of which no evidence can be offered. It assumes that the plaintiff had knowledge of the participation in the defence,—of which knowledge there is no evidence, and can be none.]

924 "[The court overruled the objection, admitted the question, and saved the exception of the plaintiff.]

"A. My answer to this interrogatory is the same as my answer to the 12th interrogatory.

"Q. 17. If you have not already done so, state your reasons for your answers to interrogatories 6th to 16th, inclusive.

"[The plaintiff objects to the 17th interrogatory on the ground that it is inadmissible for the various reasons assigned for the inadmissibility of the several questions referred to in this, namely, 6th to 16th, inclusive.]

"[The court overruled the objection, admitted the question, and saved the exception of the plaintiff.]

"A. I have already done so."

Mr. FARLEY: That is the end of the direct interrogatory. I will state, without reading them, that Mr. McClennen's objections were duly taken to the same interrogatories which he has objected to upon the hearing.

Mr. MCCLENNEN: The cross-interrogatories the plaintiff puts de bene without waiving the foregoing objections, but expressly insisting thereon.

Cross-interrogatories.

"X. 1. Is it a principle of the law of the state of New York that the law decided in a case in the court of last resort in overruling a demurrer becomes the law of the case, to be applied when the case is heard upon the facts?

"A. Yes, as far as such law is applicable.

"X 2. Is it the law of New York that there is no right of exoneration or contribution between defendants jointly and severally liable ex delicato and not ex contractu?

"A. That is a general principle of the law of the state of New York.

"X 3. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered that Bigelow might—but for said defence, if any—be under a liability to the plaintiff in the suits against Bigelow?

"A. Yes.

"X 4. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability that Bigelow might—but for said defence, if any—be under as a liability jointly with Lewisohn?

"A. Yes.

"X 5. In determining whether or not the decree dismissing
925 the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability jointly and severally with Lewisohn?

"A. Yes.

"X 6. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability arising ex delicto?

"A. Yes.

"X 7. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability ex delicto jointly and severally with Lewisohn?

"A. Yes.

"X 8. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

"A. I think not. At least, not necessarily.

"X 9. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by

the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability ex delicto with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

"A. I think not.

"X 10. Is it a principle of the law of the state of New York that the liability of joint wrongdoers is joint and several?

"A. There is a general proposition of the law of New York to that effect.

"X 11. Is it sometimes a principle of New York law that estoppel by former adjudication must be mutual?

"A. Under some states of facts it is the law of New York that an estoppel by judgment would ['must' in pencil] be mutual; under other states of facts it has been laid down in decisions by the highest court in the state of New York that a judgment of estoppel need not be mutual.

"X 12. If so, what, if any, are all the occasions of which you have knowledge on which they need not be mutual?

"A. Judgment by estoppel need not be mutual in such cases as those contemplated by the court in the case of the Portland
926 Gold Mining Co. v. Stratton's Independence, reported in 158 Fed. Rep. p. 63, one of which is that—

"'In actions of tort such as trespass if the defendant's responsibility is necessarily dependent upon the culpability of any who was the immediate actor and who in an action against him by the same plaintiff for the same tort has been adjudged not culpable, the defendant may have the benefit of that judgment as an estoppel, even though he would not have been bound by it, had it been the other way.'

"And the same principle would apply to any set of instances where the same reason would be found.

"X 13. Assuming that Bigelow took no part in the Lewisohn suit, in your opinion is the law of New York such that Bigelow would have been estopped in another suit to deny his liability as a matter of law on the same facts, by a final decree against Lewisohn in the first suit?

"A. Yes.

"X 14. Assuming that Lewisohn's executors took part in the suits against Bigelow, in your opinion is the law of New York such that said executors would have been estopped in another suit to deny their liability as a matter of law on the same facts, by a final decree against Bigelow in these suits?"

Hammond, J.: I understand that question to be, in substance, that if this complainant prevailed against Lewisohn, then, on the state of facts which is alleged here, Bigelow would have been barred from any defence.

Mr. Farley: I understand that to be one of the possible interpretations of the question.

Mr. McClennen: If my construction is of any importance, that was the intention of the question.

Hammond, J.: Well, that is the view of the question that I got from the hasty reading of it. I don't know that there is anything else about it.

[Mr. Farley continues to read the deposition:]

"A. Yes.

"X 15. Assuming that Bigelow took part in the defence of the suits against Lewisohn's executors, and that the plaintiff knew this, what, by name and reference, are all the decisions, if any, in New York which you have considered, and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation and knowledge,
927 operate as an estoppel in favor of Bigelow?

"A. On the proposition that a former judgment in a controversy in res adjudicata, as to all matters necessarily determined therein, both in respect to the parties to the former action and to their privies, and is a bar to any further litigation as to the matters determined therein, the following:—

Pray v. Hegeman, 98 N. Y. 351.
Jordan v. Van Epps, 85 N. Y. 136.
Smith v. Smith, 79 N. Y. 634.
Clemens v. Clemens, 37 N. Y. 59.
Castle v. Noyes, 14 N. Y. 329.
Doty v. Brown, 4 N. Y. 71.
Griffin v. L. I. R. R. Co., 102 N. Y. 452.
C. P. P. & M. Co. v. Walker, 114 N. Y. 7.
Hymes v. Estay, 116 N. Y. 509.
Thompson v. Saunders, 118 N. Y. 257.
Reich v. Cochran, 151 N. Y. 127.
Earle v. Earle, 173 N. Y. 482.

"Upon the further proposition that the defendant Bigelow occupies in respect to the suit brought in the Circuit Court for the Second Circuit such relation to the parties therein as to give him the benefit of the decree in that action, dismissing the complaint of the plaintiff:—

People v. Stephens, 51 How. Pr. 235, affirmed 71 N. Y. 527.
Williams et al. v. Barkley, 165 N. Y. 48.
Emma Silver Mining Co. v. Emma Silver Mining Co., 7 Fed. Rep. 401.
Doremus v. Root et al., 23 Wash. 710.
Featherstone v. N. & C. Turnpike, 71 Hun. 109, and editor's note to 23 Wash. 710, found in 54 L. R. A. 649.

"X 16. Assuming that Bigelow took part in the defence of the suit against Lewisohn's executors, and that the plaintiff did not know this, what, by name and reference, are all the decisions, if any, in New York which you have considered, and which tend, in your opinion, to support the view that the final decree in favor of

Lewisohn's executors may, by reason of such participation, without plaintiff's knowledge, operate as an estoppel in favor of Bigelow?

928 "A. The same authorities as above cited; and see my answer to the 11th direct interrogatory.

"X 17. Assuming that Bigelow did not take part in the defence of the suit against Lewisohn's executors, what, by name and reference, are all the decisions, if any, in New York which you have considered, and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may operate as an estoppel in favor of Bigelow?

"A. The same as cited in my answer to the 15th cross-interrogatory; and see my answer to the 11th direct interrogatory.

"X 18. Have you considered any decisions or language of the courts in New York which may have any tendency to support the view that there is no estoppel in Bigelow's favor growing out of the decree in favor of Lewisohn's executors?

"A. There is some loose language in some decisions intended by the court to apply only to the specific facts before the court, which were not the facts, nor similar to the facts, in the case at bar, nor which could be construed to cover the case at bar, but the clear weight of authority in the law of the state of New York, as is the clear weight of reason also, is that the decision in favor of Lewisohn would be a bar to an action brought against Bigelow in the state of New York on the same facts.

"[The plaintiff moves that the last portion of the answer be stricken out as not responsive to the interrogatory.]

"[The court overruled the motion, allowed the answer to stand, and saved the exception of the plaintiff.]

"X 19. If so, what, by name and reference, are all of these which you have considered?

"A. I do not now recall them and, as stated in my last preceding answer, they are not authorities relating to the case at bar, but merely loose statements or general statements relating to the specific facts of the case in which the utterances are found.

"[The plaintiff moves, in view of the answer, that the deposition be stricken out, as showing that the witness has not been qualified upon the question, and he not being able to recall even the names of the cases tending to the opposite conclusion.]

"[The court overruled the motion, allowed the answer to stand, and saved the exception of the plaintiff.]

"X 20. Have any arguments been submitted or suggested to you by defendant's counsel, or have you thought of any, in sup-

929 port of the view that there was, by the law of New York, no estoppel in favor of Bigelow growing out of the decree in favor of Lewisohn's executors?

"A. In my judgment, all the arguments, both as a matter of reason and logic and as a matter of law, in the decisions of the state, are in favor of the proposition that the judgment in favor of Lewisohn would be a bar to an action by the same plaintiff against

Bigelow in the courts of the state of New York, and I firmly believe that there are no good arguments, either in logic or reason or based upon any decisions in the New York law, which could be adduced to the contrary, and none such have been suggested to me by defendants's counsel, nor have I thought of any, except that I have prepared myself to state what, to my mind, are clear distinctions between the class of cases of which the case at bar is one, and some decisions which I thought might be cited on the other side.

"[The plaintiff objects to the answer to the 20th cross-interrogatory, and moves that the first part of the answer be stricken out as not responsive.]

"[The court overruled the motion, allowed the answer to stand, and saved the exception of the plaintiff.]

"X 21. If so, what are all of said arguments?

"A. As stated above, there are no such arguments.

"X 22. What, in your opinion, constitues privity under the law of New York to a judgment?

"A. By 'privity,' as used in the law of New York, whether in decisions or otherwise, I understand to be meant either identity of interest in the subject matter or interest by succession or by some other relationship, whether the identity of interest arises from the fact of joint undertaking or transaction or whether such succession or relationship be by virtue of the relation of trustee and cestui que trust, principal and agent, master and servant, assignor and assignee, or the like, and I mean by 'the like,' such relationship as would (going back to the first phrase) mean, in spirit and in substance, the identity of interest.

"X 23. In determining whether there was an estoppel in the present case, have you assumed or considered that Bigelow was in privity to the parties of record in the suit against Lewisohn's executors?

"A. I have assumed, and do consider, that Mr. Bigelow was in privity with the defendants in that suit in the sense and spirit in which the word 'privity' is used in the cases and in the law of the state of New York.

"X 24. In considering whether there was any estoppel in this case, have you assumed or considered that Bigelow had any legal interest to defend in the suit against Lewisohn's executors
930 beyond such interest as he might have to secure a favorable precedent?

"A. I consider that Bigelow had, in the suit against Lewisohn, the very vital interest of defeating the plaintiff in that suit, because he was aware, or should have been aware, that a judgment against Lewisohn's executors in that suit would be fatal to him in an ateion against him upon the same facts.

"X 25. If so, precisely what have you assumed to be said legal interest?

"A. In my judgment if in the suit against Lewisohn's executors, the plaintiff had been successful, the only matter to be litigated in an action upon the same facts against Bigelow in the state of New York would be the character of the relief to be decreed by the

court, the amount of damages, etc.; because the cause of action would have been determined in the previous suit and would have become res adjudicata.

"X 26. Unless Bigelow would have been bound in favor of the plaintiff by estoppel by a decision adverse to Lewisohn's executors, even if Bigelow did not participate in the defence of the suit against them, did Bigelow, in your opinion, have a legal interest to defend in that suit?

"A. The question means nothing to me as it stands.

"[The plaintiff objects to the answer to Cross-Int. 26, and moves that the deposition be stricken out because the witness has disqualified himself to express an opinion upon such a serious question, or because he has sought to evade the question.]

"[The court overruled the motion to strike out, allowed the answer to stand, and saved the exception of the plaintiff.]

"X 27. If so, by precise description, what, in your opinion, was said legal interest?

"A. See my answer to Cross-Int. 25, and also my answer to the 26th.

"X 28. In determining whether there was any estoppel in this case, have you assumed that the plaintiff consented to the participation, if any, by Bigelow in the support of the demurrers of Lewisohn's executors?

"A. No.

"X 29. Is it a principle of New York law that if the defendant in one suit sustains merely the character of a co-trespasser with the defendant in another suit by the same plaintiff, the recovery against one defendant is not thereby made competent evidence against the other?

"A. No.

"X 30. Is it a principle of New York law that the judgment in favor of one of two persons jointly and severally liable for the wrongful conversion of the plaintiff's property is no bar to a subsequent suit against the other because torts are joint and several?

"A. If the action is brought in form upon the joint obliga-
931 tion of the two, a decision in favor of the defendant joint tort feasor will be a bar to an action against the other brought similarly on the joint obligation.

"[The plaintiff objects to the answer as not responsive, asks that it be stricken out, and makes the same motion in regard to the entire deposition.]

"[The court overruled the motion to strike out, allowed the answer to stand, and saved the exception of the plaintiff.]

"X 31. Is it a principle of New York law that an adjudication acts as an estoppel only between the parties thereto or those in privity with them, or, in other words, the estoppel must be mutual?

"A. This question involves two separate questions, both of which I have heretofore answered. As to the mutuality question I have

answered this interrogatory in my answer to Cross-ints. Nos. 11 and 12, and the former part of this question I have answered in my answer to direct Int. 15. This former part of the question I have answered also in my answers variously to the direct interrogatories.

"[The plaintiff objects to the answer to the 31st cross-interrogatory as not responsive, and moves to strike out the deposition as a whole on the ground that the witness has not answered the question.]

"[The court overruled the motion to strike out, allowed the answer to stand, and saved the exception of the plaintiff.]

"X 32. Is it a principle of New York law that a judgment in favor of one co-trespasser may not be used by another co-trespasser not a party to it, by way of estoppel?

"A. No, I think not.

"X 33. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were Bigelow's agents in the suit against them which has been dismissed?

"A. I have assumed that the transactions involved in the suit made the interest of Bigelow and Lewisohn identical in all respects, that their interest in the contract to sell was identical, that they were both parties to those contracts; and it makes no difference whether one considers that Lewisohn was acting as principal for Bigelow in part, or that he was acting as trustee for Bigelow in part, or that the relations of the two men were reversed, and that Bigelow was acting as agent or trustee, because all of those elements are involved in their relationship under the facts as assumed in these interrogatories?

"[The plaintiff objects to the answer as not responsive.]

"[The court overruled the objection, admitted the answer, and saved the exception of the plaintiff.]

"X 34. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were trustees for
932 Bigelow of the stock sought to be recovered in the suit against them which has been dismissed?

"A. My answer to Cross-int. 33 is also in answer to this interrogatory.

"[The plaintiff moves that the deposition be stricken out, as this question has not been answered.]

"[The court overruled the motion, allowed the answer to stand, and saved the exception of the plaintiff.]

"X 35. Is it a principle of New York law that, in action at law against one or some of several joint tort feasors, the controversy may be determined as between the parties before the court,—i. e., the plaintiff and defendant,—and without prejudice to the rights of others; and the judgment will completely determine the controversy between them, and will not be res adjudicata between the plaintiff and any of the joint tort feasors who is not a defendant and may be sued later?

"A. There may be such cases.

"X 36. Have you stated all your reasons for the opinions expressed by you, or the statements made by you, in answer to the 6th, 7th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th direct interrogatories?

"A. All that were called for by those interrogatories and all that occurred to me at the time such interrogatories were put to me.

"X 37. If not, what are all your reasons for the opinion or statements given by you in answer to each of said interrogatories?

"A. I repeat here my answer to the last preceding interrogatory.

"X 38. Have you now stated all your reasons for said answers?

"A. Yes.

"X 39. Were you, prior to the taking of your deposition on the foregoing cross-interrogatories, shown them, or any of them, or any copies of any of them, or given any information concerning the substance of them?

"A. No.

"X 40. Has each of your answers in its final form been given in the language in which it now appears, before you were aware of the substance of any subsequent cross-interrogatory?

"A. I neither saw any of the cross-interrogatories which have now been administered to me nor had the slightest intimation what they, or any of them, was to be in form or in substance in any manner whatsoever; and I learned them only when each of them was put to me subsequently just before I gave my answers to them.

"X 41. Have you since September 22, 1908, discussed in any way with any other person who is named as a witness in the caption to these cross-interrogatories or with any one on behalf of the defendant, any of the subjects dealt with in the foregoing interrogatories
933 or in your answers thereto?

"A. I spent not to exceed five minutes in the office of Honorable Martin L. Stover on the 23d instant, and spoke to him not at all about the subject matter of the interrogatories except to ask him whether he had read over copies of the direct interrogatories which were to be administered to us, and received his reply that he had examined them, and we commented upon the length of the interrogatories. Apart from that, my answer to the question is 'No.'"

CHARLES THADDEUS TERRY.

In the presence of

WILLIAM A. FERGUSON,
Notary Public, New York County, No. 167.

HAMMOND, J.: Are your interrogatories the same in the other depositions?

Mr. FARLEY: Yes, your Honor, both direct and cross they are identical in all the depositions. That is true, is it not, Mr. McClennen?

Mr. MCCLENNEN: Yes.

HAMMOND, J.: How many depositions have you?

Mr. FARLEY: We have twelve here.

HAMMOND, J.: Well, gentlemen, will you step this way a moment?

[Counsel confer with the court at the bench.]

HAMMOND, J.: This case may be suspended until Friday. On Friday you come in with the depositions and they will then be admitted, with your objections and such others as the other side may have.

I understand these depositions are to be now filed?

Mr. HEMENWAY: No, your Honor, not yet; for the reason that we are entitled to look at them. We may not want to file them after we have read them; but the probability is that we shall.

HAMMOND, J.: Well, you will find out by to-morrow morning?

Mr. MCCLENNEN: I really think we should be getting these depositions instanter. I think we ought to proceed as fast as if we were here.

HAMMOND, J.: I understand these depositions are to be looked at by counsel now and filed as rapidly as possible, and I don't see why they cannot be filed as early as to-morrow at 12 o'clock.

Mr. HEMENWAY: I think they can, but it takes almost as long to read them with the eye as it does with the voice. All that I
934 can say is that I will deal in good faith.

Mr. MCCLENNEN: I am perfectly willing to go to Mr. Hemenway's office for them as fast as they read them.

Mr. HEMENWAY: Certainly, as fast as we read them.

HAMMOND, J.: The case goes over to Friday, October 2, 1908.

FRIDAY, *October* 2, 1908.

HAMMOND, J.: [After motions had been disposed of.] I will take up the first case.

The CLERK: Old Dominion Copper Mining & Smelting Co. v. Bigelow.

Mr. HEMENWAY: If your Honor please, in that case we have had copies of the depositions made and have submitted them to counsel for the complainant; and I understand that they are having typewritten their objections, and they will also indicate them in the originals. The originals have not yet been returned from their office, and therefore I suppose that, constructively, what we can do is to send for them.

Mr. MCCLENNEN: I have sent for them; they will be here in a few moments.

Mr. HEMENWAY: So when the original deposition gets here—we will assume its presence now—I will put in the deposition of Guy Fairfax Cary. I will also put in the deposition of James Byrne. I will also put in the deposition of Edward W. Hatch. I will put in the deposition of Charles F. Brown. I will put in the deposition of Martin L. Stover. I will put in the deposition of John B. Stanchfield. I will put in the deposition of William A. Keener. I will put in the deposition of Peter B. Olney. I will put in the deposition of William H. Wadhams. I will put in the deposition of Denis O'Brien. The depositions which we are endeavoring to get, of Alton B. Parker and of John G. Milburn, have not yet arrived. I will put them in when we get them.

Mr. MCCLENNEN: And that of Francis Lynde Stetson: what is your conclusion with reference to that?

Mr. HEMENWAY: I have not offered it.

HAMMOND, J.: Now I assume there are some objections to these depositions.

Mr. HEMENWAY: In regard to those objections, I am told that the

objections are being put into typewriting and will be submitted later.

935 Mr. McCLENNEN: I shall have a copy to hand to the commissioner and one to Mr. Hemenway.

HAMMOND, J.: You have the right to put in your objections when you please.

Mr. McCLENNEN: As to these later depositions, no objections have been made to the answers. As to the questions, a uniform objection has been made as the question has been put to the witness, and I assume that in making up the record those respective objections may be put against each question, and repeated each time.

HAMMOND, J.: Will all your depositions, Mr. Hemenway, take in the whole list of interrogatories which appeared in the first deposition?

Mr. HEMENWAY: Yes, your Honor.

HAMMOND, J.: And you, Mr. McClennen, want the objections which you made to the interrogatories there to apply to the same interrogatories here?

Mr. McCLENNEN: Yes, your Honor.

HAMMOND, J.: Have you any additional objections?

Mr. McCLENNEN: I have put the objections to each deposition in the same form.

HAMMOND, J.: Then it is not worth while to encumber the record by repeating those; but such additional objections as you care to make you may state as the questions are put: if you have any particular objection which will be common to all the answers to some of the questions, you can make that.

Mr. McCLENNEN: There is none such. I assume as the record is printed the objection ought to be repeated so that the court will have before it what the record is.

HAMMOND, J.: The court will be at liberty to understand what the objection is.

Mr. McCLENNEN: I should not want to be responsible for the feeling of the court when it had to refer back to different pages to find the objection.

HAMMOND, J.: My own idea would be that those objections which are common to all the depositions could be stated once, and that would be enough. I do not think the other members of the court will criticise that way of making up the record; they are more anxious to have a record which contains what it should contain, than to have it extended.

Designation of Previous Evidence.

Mr. HEMENWAY: Mr. Farley will make a statement in regard to the evidence that has already been taken.

HAMMOND, J.: The stenographer may take down what you
936 say in regard to that.

Mr. FARLEY: May it please the court, it was suggested at the last hearing that we should call attention to those portions of the evidence previously taken which we should contend were applicable

to the issues raised in these supplemental answers. There are two issues which we conceive are raised by the answers to which that evidence applies. One is what we contend to be the entirety of the entire transaction and its inseverability. In relation to that, we do not feel that there is any particular portion of the evidence which we can exclude. Our contention is that it is an entire transaction, and that the entire evidence shows that, and we have assumed that the evidence already in was in for all purposes. So on that issue we wish to rely on all the evidence as showing the non-severability of the transaction. Beyond the evidence to be used for that purpose for the contention of the defendant, I think the only portions of the record and evidence which we wish to call attention to are those portions wherein it appears that New York counsel participated in the trial, the hearing, the argument, and the taking of the evidence. For instance——

HAMMOND, J.: Where?

Mr. FARLEY: Here, in all the hearings in which the depositions were taken, and, if not in all, in practically all. For instance, the evidence will show, I think, that at the taking of almost all of the depositions, either Mr. Lauterbach, who is counsel in both cases, or Mr. Treadwell, who is his representative, was present; that in several instances Mr. Lauterbach examined the witnesses; in some cases, Mr. Treadwell; then, at the actual hearing before Mr. Justice Sheldon, that Mr. Treadwell, representing Mr. Lauterbach, was present, that he signed, as I understand, an amendment to the pleadings as of counsel, and that he examined at least one of the witnesses.

HAMMOND, J.: Signed what?

Mr. FARLEY: He signed the amended pleadings as of counsel.

HAMMOND, J.: What, in this case?

Mr. FARLEY: Yes, sir.

HAMMOND, J.: As counsel for whom?

Mr. FARLEY: As counsel for Mr. Bigelow. The record will show that in one instance he participated in an argument which arose in regard to an amendment to the plaintiff's bill, and that he was throughout both counsel of record and counsel participating in the hearing here. These facts as spread upon the record and evidence are scattered throughout it, and it would be a long task to refer to the specific pages, and would make, I think, more difficulty than to present it in the present form. So we ask that for this purpose those portions of the whole evidence be considered.

937 Mr. MCCLENNEN: If your Honor please, one of the very reasons why we are desirous of having pointed out what they say may bear on this issue is this: We never have tried the issue that we are now trying. Matter which might have been of not the slightest consequence, or highly objectionable, might have been admitted in the course of the other trial; no one would care to take the time to go out and discuss it, and it might now be assumed to be material. If it was assumed by one side to be material, we should have the opportunity to test the question by making objection to it if we thought it was objectionable. There are many things that are mere trifling matters of typing that might be thought to have a

bearing now that were of absolutely no importance then. If they are to be pressed, we ought to have an opportunity either to object to them for their inadmissibility or to introduce evidence explaining them, if they require explanation, or to introduce evidence in opposition to them if they are not in accordance with the fact. That may become important.

Mr. FARLEY: If your Honor please, I am a little at a loss to know which portion of the statement or suggestion which I have made Mr. McClennen's statement refers to. If, as I understand it, he intends to state that the issue of the entirety of the transaction has not heretofore been in issue, I can only say that I think the most cursory examination of the pleadings and the argument will show that that was one of the defendant's contentions.

HAMMOND, J.: Well, with a view to what?

Mr. FARLEY: With a view to almost every other issue which can arise in the case, and the remedy to be given by this court, the right of the plaintiff to recover at all.

HAMMOND, J.: But not with a view to its bearing in an action against one?

Mr. FARLEY: It may be, as confined to that specific pleading, not, but the entirety of the transaction goes to every possible issue.

HAMMOND, J.: To every point raised in the case?

Mr. FARLEY: The entirety was raised, your Honor.

HAMMOND, J.: It comes up now, does it not, that there was no question of estoppel or the effect of a prior judgment? There was no question as to estoppel prior to this amended answer, I take it.

Mr. FARLEY: No, your Honor. But if your Honor will allow me to state the way it previously arose, I think it will indicate that it is almost identical in its application.

HAMMOND, J.: You may state that, although I think I understand what you will say on that question.

938 Mr. FARLEY: The question of entirety was raised at the hearing and in the argument before Mr. Justice Sheldon to show that the two transactions must stand or fall together, and could not be separated as the plaintiff claims. Now that is exactly the purpose, and the only purpose.

HAMMOND, J.: I do not understand what you mean by your statement that "they must fall together;" do you mean there could be no intervening——

Mr. FARLEY: Yes, your Honor.

HAMMOND, J.: That is what you mean?

Mr. FARLEY: No, sir, it is not joined.

HAMMOND, J.: Then I do not understand.

Mr. FARLEY: The plaintiff sought to divide the transaction, and as to one portion of the transaction claimed recission; as to the other portion it claimed no recission, but claimed damages or profits, or whatever they may be called. We contended at the original hearing that recission, if there were any remedy, was the only possible remedy, and that if recission was granted it could not rescind one portion and allow the other to remain.

HAMMOND, P.: This question of entirety had reference to these transactions?

Mr. FARLEY: Yes.

HAMMOND, J.: And they were all one?

Mr. FARLEY: Yes, your Honor.

HAMMOND, J.: That was with reference to the transactions themselves?

Mr. FARLEY: Yes, your Honor. And that is the only way we now raise the question of entirety. We said at the previous hearing that if the plaintiff did not rescind one he could not rescind the other. We say now, if this is a bar in one action, it is in the other, if they are entire, and we contend that they are; they must stand on this issue, as well as on the other, together.

HAMMOND, J.: That is, the entirety depends on whether it must be considered as one transaction?

Mr. FARLEY: Yes, your Honor.

HAMMOND, J.: And that was involved before, as you claim?

Mr. FARLEY: Yes, your Honor.

HAMMOND, J.: Do you want the evidence of entirety to apply to any other issue than that?

Mr. FARLEY: No, except if I understand your suggestion, we now wish it to apply to our contention that, not only on the issue before raised, if the decrees are to be redrawn, but also on this point,
939 that if it is to be a bar in one action it is equally a bar in the other, because they are linked inseparably together. If I have now stated myself clearly, that is the only way.

HAMMOND, J.: Is there a judgment with reference to both of these separate parts that you speak of as parts of one transaction; that is, is there a judgment in favor of the plaintiff there on the 30,000 shares and on the 100,000 shares, or only on one?

Mr. FARLEY: I can answer that only by saying this: the plaintiff's bill in the first suit here sets forth both transactions in New York, but the prayers for relief are confined to the matters for which relief is here sought by the first bill, disclaiming relief as to the other transaction. We contend the whole transaction is involved as he set it forth, but he disclaims in his prayer his relief as to the other portion.

HAMMOND, J.: What other portion?

Mr. FARLEY: That portion which he here asks and there asks relief for as to the 100,000 share transaction.

HAMMOND, J.: I may be a little dull about it, but, as I understand these bills, they want to get relief for both the 30,000 shares and the 100,000 shares transactions. What I ask you is whether the bill filed in New York asks for relief for the 30,000 shares and the 100,000 shares transactions.

Mr. FARLEY: No, your Honor.

HAMMOND, J.: It asks relief only for the 30,000 shares?

Mr. FARLEY: For the 30,000 shares.

HAMMOND, J.: And that is the one in which judgment was granted in favor of the defendant?

Mr. FARLEY: Yes.

HAMMOND, J.: Now you, having no estoppel in New York expressly in the 100,000 shares transaction, claim that the judgment on the 30,000 share transaction involves this, the transaction being there, and that the judgment for the defendant as to the 30,000 shares, ipso facto, is judgment for the defendant as to the 100,000 shares?

MR. FARLEY: Yes, your Honor.

HAMMOND, J.: And you say that has bearing on the point you claim that the transactions were alike?

MR. FARLEY: Yes, alike and inseverable.

HAMMOND, J.: And on that you want to get in this evidence in the case as tried before Judge Sheldon?

MR. FARLEY: Yes.

HAMMOND, J.: And you contend that whatever evidence was there on that point is applicable to the contention you make here?

940 MR. FARLEY: Yes.

HAMMOND, J.: So much for that. Now what about the other?

MR. FARLEY: Well, about the other, it was not a fact in issue — that is, the participation; it is merely we now claim that there was participation throughout this trial.

HAMMOND, J.: Did they participate in any way except as counsel for Bigelow?

MR. FARLEY: As to that, we shall introduce further evidence; and as part of that evidence of participation we say that the appearance of New York counsel and their participation here, is already apparent on the face of the record and the evidence, having once been put in, should now go in on that point as bearing on this question. Of course, we can now introduce independent testimony; but I take it Mr. McClennen will admit the facts that Mr. Treadwell was here and that Mr. Lauterbach was here.

HAMMOND, J.: I suppose it may be claimed that he was here in the capacity of counsel.

MR. MCCLENNEN: That is one of the reasons why I thought we ought to have the specific parts of the record indicated. There would not be any question but what Mr. Eugene Treadwell, a New York lawyer, appeared in court at the time the case was tried on its merits.

MR. HEMENWAY: And that it was the same Mr. Treadwell?

MR. MCCLENNEN: And that he was the same Eugene Treadwell who, at another time and in another court, had appeared for another client, and had argued a case there. Thus far there would be no difference. But when a record of fourteen hundred pages is offered as if it were a record of an entire transaction, as bearing on this issue, I don't know how we can know what really is being offered. Take this first question of the entirety of the original transaction; at once there is confusion. Your Honor limited the amount of the record that could be introduced by the words that nothing would be allowed here inconsistent with Mr. Justice Sheldon's findings. Mr. Justice Sheldon has made findings and decrees by which he has established that there were two transactions so separate that he has

given two separate decrees in two separate suits based upon those transactions. Now if we do not know exactly what is offered, at once there is going to be very serious difficulty in determining what is in this record for the purpose of this matter of prior communication.

HAMMOND, J.: I have not read Mr. Justice Sheldon's findings in these cases; perhaps I ought to have read them.

Mr. HEMENWAY: It seems to me that a mere statement of
911 the case would make our position perfectly clear as to the evidence already in the case. We do not ask to have that stricken out; they do not ask, on the other side, to have any portion of it stricken out. Therefore, on an appeal of this case upon a reservation, or however it goes up, all the evidence will go up; but, as it seems to me, they are asking a ruling in substance, by their argument, that no part of the evidence already taken shall apply to the amended or supplemental answer. Of course, as broadly as that, they cannot expect that that will be granted. They the suggestion is that we point out the parts we think applicable to the matters in the supplemental answer. When we come to point it out, taking page by page, and there being some eight hundred printed pages of testimony, it would take a long time to sift out that in order to determine its applicability. Now what they claim is, what they desire is, just the same as in a charge given to a jury, that you have got to indicate those portions to which you object, and cannot object to the whole charge. Now they cannot object to the whole evidence; but when they ask us to point out these different pages of testimony, and sift out that which is absolutely immaterial, it imposes upon us a great deal of labor, it seems to me, because one of the facts alleged in the supplemental answer is that it was an entire transaction. Now the evidence as to its entirety runs through all these pages of evidence. Of course there are pages that are immaterial, and that can be stricken out. Therefore we thought our general designation, relying upon it in the general way stated by Mr. Farley, was enough for their purposes. Otherwise, it would take days to do it.

Mr. MCCLENNEN: It seems to me most surprising for Mr. Hemenway to suggest that we are asking to have anything stricken out. If this record now printed is part of this case for the purposes of this issue, it is; it does not require any affirmative action from your Honor. But this was started by Mr. Hemenway saying that they desired to have it considered part of this case. We say if it takes some affirmative action to make it part of this case, if it is not part of the case already of its own force, if it takes some affirmative action, your Honor ought not to take that affirmative action until the particular parts are called to the court's attention; if it is nothing more than that the record is there before the court anyway, and the court cannot help seeing it, why then there is nothing to be said by your Honor or any one of us; but if they want to do this thing which they characterized as having a particular part of the printed record considered as part of the present record, then I say your Honor should not take that action, but should limit the portion of the record that should be considered, as far as it is within your Honor's province, to those things which they now specifically point out, so that we

may have a chance to consider those parts of the record in the light of the issue upon which they are now presented.

912 Mr. HEMENWAY: It seems to me that the answer to that is simply that if the evidence is admitted in the trial of a cause, if it is applicable to any issue, there it is for that purpose; if it is not, it is of no use.

HAMMOND, J.: Well, my understanding of this case, at the present stage of it, is that is was tried before a single justice who came to certain conclusions and stated them; in those decisions he ordered a decree; from that there was an appeal; the appeal carried the propriety of the decree up to the full court upon all the evidence, which is open there for counsel to argue, upon all the evidence and the pleadings then in this case, whether that decree should stand or should be modified in any way. Then it was suggested by counsel for the defendant that there were certain proceedings which had taken place in a case in New York, which had not taken place until after this appeal, which they deemed to be material and vital to the question, and they asked to have an opportunity to have the decree vacated in order that they might file an additional answer setting up this new matter, and if the answer was filed, and they might be heard upon the allegations of it. The answer was filed, and the case is now here to be heard upon those allegations, that the decree should be vacated, that the facts found by the single justice are not to be disturbed, and that this trial is to be raised simply by this answer, with the idea that finally the whole matter was to come before the full court; not generally, I take it, but one way or the other; but the general idea is that finally the whole evidence was to go to the full court and the case there be decided by them as on appeal from a decree on wrong facts, upon all the evidence, with the findings of Justice Sheldon standing. Now I think that no action is needed by this court, by me at this time, with reference to this question of whether the evidence shall be selected now as applicable to the issues of this answer. My idea about it would be that the evidence in the case already in is to be considered by the court on the allegations of this answer, except that no conclusion is to be drawn inconsistent with the conclusions which Mr. Justice Sheldon drew as to the others. Now under that idea I do not think there is any need here of any order in this matter; but if there be need for an order, if it be necessary for the defendant to here put in the evidence which has been already put in which they think is applicable to this case, then I see no answer to Mr. McClennen's claim that, if it be necessary, the evidence should be specified; but I don't think it is necessary.

Mr. HEMENWAY: In regard to one matter, as to the findings of Mr. Justice Sheldon; as I understand the case, Mr. Justice Sheldon's findings stand just as though we were to appeal from them now.

HAMMOND, J.: Exactly.

913 Mr. HEMENWAY: Exactly. And the basis of that rescript was that this whole case was not to be opened.

HAMMOND, J.: I don't see the need for any order one way or the other about that.

Mr. HEMENWAY: I do not know that there is any need of an

order in regard to it, and I didn't think there was until I heard the argument of the plaintiff. I brought the question up by suggesting it, and it was at a time that I did not know but that we would argue the whole case here.

HAMMOND, J.: I think we should all agree that it would be useless work to argue the whole case here.

Mr. HEMENWAY: I think so myself. I would like, if I could, to finish the case to-day, but I have not my evidence here, and I should like it to go over until Monday, when I will specify for him the portions upon which I rely as applicable to this issue.

HAMMOND, J.: I should say it would have to stand, no matter what objection he now makes.

Mr. HEMENWAY: I do not see anything else to do.

HAMMOND, J.: Do either one of you think that there is any need of any order whatever about this?

Mr. HEMENWAY: No, your Honor, I do not think there is need of any order, but in view of what the counsel for the plaintiff has said, perhaps it would be a little wiser in me to point out the testimony.

HAMMOND, J.: Very well.

Mr. HEMENWAY: And I will have it when we finish the case.

HAMMOND, J.: Very well, that may be done, then. I do not believe that the amount of labor will be very great.

Mr. HEMENWAY: What day could we go on and finish the case?

HAMMOND, J.: I assumed we were going on to-day to finish it. Have you anything more that you want to put in?

Mr. HEMENWAY: Yes, there will be some oral evidence.

HAMMOND, J.: Are you prepared to put it in to-day?

Mr. HEMENWAY: I am not prepared to-day.

HAMMOND, J.: Could you be prepared by Monday?

Mr. HEMENWAY: I should be glad if it could go over until Wednesday.

Mr. McCLENNEN: Mr. Brandeis has to go away pretty soon, and he is going to be away until November.

944 Mr. HEMENWAY: Call it Tuesday.

HAMMOND, J.: How long do you think you will take with your oral evidence?

Mr. HEMENWAY: I do not think we will take, with the oral evidence, over an hour.

HAMMOND, J.: What do you say, Mr. McClennen?

Mr. McCLENNEN: I do not know what the oral evidence is to be. We should not have any oral evidence, I do not suppose, if the other side had not. I should think we might go on Monday if your Honor is to be here. I supposed that the oral evidence would go in to-day.

HAMMOND, J.: I supposed we were going to finish to-day; at the same time, I do not think it ought to make much difference. I should prefer to go on Monday. Can you get ready for Monday?

Mr. HEMENWAY: Perhaps on Monday at 2 o'clock.

HAMMOND, J.: Well, I will hear you Monday at 2 o'clock.

Depositions.

Mr. HEMENWAY: The original depositions are all here now.

HAMMOND, J.: I understand they have been filed.

Mr. HEMENWAY: No, they have not been filed; they are to be filed.

HAMMOND, J.: Mr. Clerk, will you file the depositions which are now handed to you? I do not know whether you have used them all or not, or whether you intend to.

Mr. MCCLENNEN: Well, with the exception of Mr. Stetson's, they have all been introduced now as far as they have been returned.

The CLERK: Do you wish to take them out any further?

Mr. HEMENWAY: No.

[Following are the depositions introduced by Mr. Hemenway at page 934. The objections of the plaintiff to the direct interrogatories are the same as those incorporated in the deposition of Charles T. Terry, which commences at page 913. They are introduced here in consolidated form, will not be repeated, but will be referred to in the depositions hereafter printed as commencing at page 945; objections to the answers to cross-interrogatories, if any, will be found in the text of the deposition.]

945 *Memorandum of Objections Made to the Respective Questions to the Following Witnesses.*

Alton B. Parker,
James Byrne,
John G. Milburn,
John B. Stanchfield,
Guy Fairfax Cary,
William H. Wadhams,
Martin L. Stover,
Edward W. Hatch,
Peter B. Olney,
Charles T. Terry,
Charles F. Brown,
William A. Keener,
Denis O'Brien.

To the 6th interrogatory:

On the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there

had been a prior decision by the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first.

To the 7th interrogatory:

On the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence and of which no evidence can be introduced; and it fails to assume material facts, namely, it assumes that the decree dismissing
946 the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision by the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first.

To the 8th interrogatory:

It assumes that the copies shown are the record of the case, whereas, in fact, they contain also copies of the opinions of the court, which are not a part of the record.

To the 10th interrogatory:

On the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision by the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first. It assumes the action against the second person as being in New York.

To the 11th interrogatory:

On the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrevelant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume material facts, namely, it assumes that the decree dismissing the bill
947 of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision by the court of last resort in the suit against him overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first. It assumes the action against the second person as being in New York. It also assumes that there has been participation on the part of the other in the defence of the suit in the federal court. It also assumes that there has been participation on the part of Bigelow in the defence of the suit against Lewisohn,—of which there is no evidence and of which no evidence can be offered.

To the 12th interrogatory:

On the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision by the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first. It assumes the action against the second person as being in New York. It also assumes that there has been participation on the part of the other in the defence of the suit in the federal court. It also assumes that there has been participation on the part of Bigelow in the defence of the suit against Lewisohn,—of which there is no evidence and of which no evidence can be offered. It assumes that the plaintiff had knowledge of the participation in the defence, —of which knowledge there is not evidence and can be none.

948 To the 13th interrogatory:

On the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision by the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first. It assumes the action against the second person as being in New York.

To the 14th interrogatory:

On the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision by the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first. It assumes the action against the second person as being in New York.

To the 15th interrogatory:

On the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts of which there is no evidence, and of which no evidence can be introduced; and it fails to assume
949 material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision by the court of last resort in

the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first. It assumes the action against the second person as being in New York. It also assumes that there has been participation on the part of the other in the defence of the suit in the federal court. It also assumes that there has been participation on the part of Bigelow in the defence of the suit against Lewisohn,—of which there is no evidence, and of which no evidence can be offered.

To the 16th interrogatory:

On the ground that it is immaterial, irrelevant, and incompetent, and calls for an answer which is immaterial, irrelevant, and incompetent. It assumes facts in which there is no evidence, and of which no evidence can be introduced, and it fails to assume material facts, namely, it assumes that the decree dismissing the bill of complaint in the federal court for the southern district of New York was upon the merits. It does not assume that there had been a prior decree against the other alleged promoter, sustaining the claim against him upon the merits. It does not assume that there had been a prior decision by the court of last resort in the suit against him, overruling a demurrer to the same bill of complaint, and that these decisions were in a court having jurisdiction of the other. It does not assume that the other was not a resident of New York, or subject to its jurisdiction, or that one of the grounds of demurrer in said suit in the federal court was for want of parties, namely, the absence of the other, or that the suit against the other was brought first. It assumes the action against the second person as being in New York. It also assumes that there has been participation on the part of the other in the defence of the suit in the federal court. It also assumes that there has been participation on the part of Bigelow in the defence of the suit against Lewisohn,—of which there is no evidence and of which no evidence can be offered. It assumes that the plaintiff had knowledge of the participation in the defence,—of which knowledge there is no evidence and can be none.

950 To the 17th interrogatory:

On the ground that it is inadmissible for the various reasons assigned for the inadmissibility of the several questions referred to in this, namely, 6th to 16th, inclusive.

There should be inserted,—

"The court overruled each objection, admitted the question, and saved the exception of the plaintiff."

Deposition of Guy Fairfax Cary.

The deposition of Guy Fairfax Cary, taken in behalf of the defendant Bigelow, and filed by his counsel, subject to the objections and exceptions of counsel for the complainant, The Old Dominion Copper Mining & Smelting Company, to be found at pages 945–950.

[Commission and notarial certificate omitted.]

Q. 1. State your name, age, and place of residence.

A. My name is Guy Fairfax Cary; I am twenty-nine years old, and reside at No. 54 Park avenue in the borough of Manhattan, city of New York.

Q. 2. State your occupation and place of business.

A. I am an attorney at law, and my place of business is at No. 59 Wall street in the borough of Manhattan, city of New York.

Q. 3. If, in answer to the preceding interrogatory, you have testified that you are an attorney at law, state when you were admitted to the bar, and in what state or states, and how long you have been engaged in the practice of law in said state or states, and with what firms, if any, you have been or are connected.

A. I was admitted to the bar in the state of New York in December, 1904, and have since practised in this state. I am a member of the firm of Cary & Robinson, whose office is at No. 59 Wall street in this city.

Q. 4. State what, if any, judicial or other public or official positions you hold or have held.

A. I have not held official position.

Q. 5. State any other matters relating to your experience in your profession, and as to your familiarity with the law and usages governing the practice in the state and federal courts in New York, both in law and in equity, and also as to your familiarity with the laws and usages of the state of New York relating to former adjudication and estoppel by judgment.

A. I am engaged in general practice, involving the conduct of litigated cases in the state and federal courts in New York
951 and elsewhere, and I have previously, in my practice, had occasion to examine carefully the rules governing the application of the doctrine of res adjudicata and of estoppel by judgment. In preparation for the evidence which I am giving in these causes I have very carefully examined the decisions in this state on those matters.

Q. 6. Assuming that an action in equity is brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters, to recover from him the profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, at a price in excess of the price which they paid for it and of its fair value, and assuming that in this action a final decree upon the merits is entered for the defendant

upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to a similar action, substantially identical with the first and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 945-950.]

A. Under the law of the state of New York, the decree would absolutely bar any recovery by the complainant in the substantially identical action brought against the other promoter in the courts of this state.

Q. 7. Assuming that two actions in equity are brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters, to recover from him profits alleged to have been received by him and his associates secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, and assuming that such property is alleged to have been sold, pursuant to said joint plan and conspiracy, in two separate parcels, in each of which both promoters were jointly interested, and that said two actions were brought to recover the respective profits received from the sale of the two parcels, respectively, and assuming that the bills of complaint in the two actions were substantially identical, except as to the particular relief sought, and assuming that certain profits were alleged to have been made by said promoters on each parcel, and assuming that in one of said actions a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets
952 forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to two similar actions, substantially identical in form with those above described and based upon the same cause of action brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 946-950.]

A. The decree being a final adjudication of a court of competent jurisdiction upon the merits of the transaction out of which both causes of action spring, its effect would be to absolutely bar any recovery by the complainant in the substantially identical actions against the other promoter in the courts of this state.

Q. 8. Have you examined a copy of the record in the action of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn, in the Circuit Court of the United States for the Southern District of New

York, such as is hereto annexed and marked (1), the respective portions of said record being marked A to R, inclusive?

[Objected to; admitted; exception.—See pages 946-950.]

A. I have.

Q. 9. Have you examined copies of the proceedings in the above-entitled causes, to wit, the two causes of the Old Dominion Copper Mining & Smelting Co. v. Bigelow in the Supreme Judicial Court in Massachusetts, such as are hereto annexed and marked, respectively, (2) and (3)?

A. I have.

Q. 10. Assuming that there were now pending in the courts of the state of New York proceedings against Albert S. Bigelow identical in all respects (except as the practice might require formal changes) with the copies of the proceedings referred to in the 9th interrogatory, and assuming that said courts had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record, copies of which are referred to in the 8th interrogatory, were sufficiently pleaded and proven in defence of said proceedings, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in each of these bills of complaint were, respectively, the same persons, and that the contracts, acts, matters, and transactions mentioned in each of these bills of complaint were, respectively, the same contracts, acts, matters, and transactions, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said
953 action against said Lewisohn's executors in said court, what would be the effect, under the law and usages of the state of New York, of said decree and record as a defence to said proceedings assumed to be so pending?

[Objected to; admitted; exception.—See pages 946-950.]

A. Such decree and record under the laws and usages of the state of New York would be an absolute defence to both proceedings.

Q. 11. Assuming the facts stated in the 10th interrogatory, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would those additional facts affect your answer to the preceding interrogatory?

[Objected to; admitted; exception.—See pages 946-950.]

A. They have some tendency to support the answer given to the preceding interrogatory as further exhibiting the community of interests between Bigelow and Lewisohn.

Q. 12. Assuming the facts stated in the 10th interrogatory, and assuming the facts stated in the 11th interrogatory, and assuming that the participation of the defendant, Bigelow, as stated in the 11th interrogatory, was with the knowledge of the plaintiff, how, if at all,

would this additional fact affect your answers to the two preceding interrogatories?

[Objected to; admitted; exception.—See pages 947-950.]

A. The fact here assumed is in line with the facts assumed in the 11th interrogatory, and also has some tendency to support my answers to the 10th and 11th interrogatories.

Q. 13. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8098, referred to in the 9th interrogatory, and assuming that the course of the proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of
954 the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8098, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8098 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8098, described in the 9th intrrogatory?

[Objected to; admitted; exception.—See pages 948-956.

A. The decree and record, if pleaded as assumed, would conclude the plaintiff and afford an absolute defence to the defendant in a proceeding in New York corresponding to No. 8098, referred to in the 9th interrogatory.

Q. 14. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8099, referred to in the 9th interrogatory, and assuming that the course of proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof; assuming that the final decree and record in the case

of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8099, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the
955 Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8099 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, and assuming that the bill of complaint in said Circuit Court and the prayers thereof, relate to one part of an entire transaction comprising said contracts, acts, matters, and transactions, and that the bill of complaint corresponding to the one numbered 8099 in Massachusetts, and the prayers thereof, relate to another part of the same entire transaction, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8099, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

A. Assuming the further facts here stated, the decree and record, if pleaded as assumed, would also conclude the complainant, and afford an absolute defence to the defendant in a cause in New York corresponding to No. 8099 in Massachusetts.

Q. 15. Assuming the facts stated in the 13th and 14th interrogatories, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would these additional facts affect your answers, or either of them, to the 13th and 14th interrogatries?

[Objected to; admitted; exception.—See pages 948-950.]

A. These additional facts would have some tendency to support my answers to the 13th and 14th interrogatories.

Q. 16. Assuming the facts stated in the 13th, 14th, and 15th interrogatories, and assuming that the participation of the defendant, Bigelow, as stated in the 15th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers, or either of them, to the 13th, 14th, and 15th interrogatories?

[Objected to; admitted; exception.—See pages 949-950.]

956 A. The further fact here assumed is in line with the facts stated in the 15th interrogatory, and would have some tendency to support my answers to the 13th, 14th, and 15th interrogatories.

Q. 17. If you have not already done so, state your reasons for your answers to Ints. 6th to 16th, inclusive.

[Objected to; admitted; exception.—See page 650.]

A. I have already partially stated my reasons for my answers to the interrogatories named. The conclusions reflected in my answers are based upon the following considerations:

An examination of the bills in the Massachusetts suits against Mr. Bigelow and in the New York suits against Mr. Lewisohn's executors reveals that the suit relating to the 30,000 share transaction in each jurisdiction and the suit relating to the 100,000 share transaction in each jurisdiction are to all intents and purposes respectively, identical, the only differences being in the parties defendant and in the fact that the absence of Mr. Bigelow from the New York jurisdiction is stated in the Lewisohn bills and the absence of Mr. Lewisohn from the Massachusetts jurisdiction is stated in the Massachusetts bills, and in some minor formal differences. These bills reveal that Bigelow and Lewisohn were joint actors throughout the transactions complained of. The complainant's language is that they conspired together to acquire to themselves the alleged unlawful profits. It sufficiently appears that Lewisohn either occupied the relation to Bigelow of a trustee, agent, or joint adventurer,—and I am inclined to think that if their relationship were the subject of judicial consideration in this state it would be defined as that of joint adventurers for a particular enterprise. We have, then, at the outset, an identity of subject matter of the two litigations, an identity in the form of the bills and in the relief prayed for, and a relation of privity between the defendants. This being so, and their relation to the complainant corporation being the same, it is impossible that a liability should rest upon the one, growing out of their joint acts, while the other went free. There cannot be two rules of law applicable to one and the same state of facts.

Turning now to the result of the litigation in New York, we find that, while the litigation in Massachusetts is still pending, a final decree upon the merits is rendered in favor of the New York defendant. The court rendering the decree was undoubtedly one of competent jurisdiction, and the effect of the decree, according to well-settled principles, must be to bind and estop the parties to the litigation and their privies as to all matters covered by the
957 adjudication or necessarily involved in the litigation leading thereto in all cases where the same matters are sought to be again brought into question. It follows from this, and from the relation of privity between Bigelow and Lewisohn, that if Bigelow was sued in this jurisdicton on matters which have been adjudicated upon in the Lewisohn suit, he would be entitled to the benefit of the Lewisohn decree, not merely as setting up a precedent which

the New York state court would be likely to follow in accordance with the doctrine of stare decisis, but he would be able to avail himself of the decree as an absolute defence in the nature of an estoppel by judgment in the suit against him. The general principle sometimes stated, that an estoppel of this character can exist only where the estoppel would be mutual, cannot be invoked to defeat this conclusion. The general principle is open to certain well-marked exceptions, and has been so limited in this state. I refer, in this connection, to the cases of Stamp v. Franklin, 144 N. Y. 607, and People v. Stephens, 51 How. Pr. 235; and also to the case of Portland Mining Co. v. Stratton's Independence, 158 Fed. Rep. 63.

The remaining question to be considered is the effect of the Lewisohn decree on a suit against Mr. Bigelow in this jurisdiction based upon so much of the transaction as is comprised in the so-called 100,000 share suits. The language of the bills of complaint leaves no room for doubt that, though these matters are sued upon separately, they are really parts of one entire transaction. It follows, therefore, that Mr. Bigelow could avail himself of the decree against the one suit as fully as against the other.

Cross-interrogatories.

Without waiving the foregoing objections, but expressly insisting thereon, the plaintiff puts de bene the following cross-interrogatories:—

X 1. Is it a principle of the law of the state of New York that the law decided in a case in the court of last resort in overruling a demurrer becomes the law of the case to be applied when the case is heard upon the facts?

A. In considering the law of the case to be applied to the facts, the court might conceivably overrule its prior decision when the case came up on demurrer, but, as a practical matter, the doctrine of stare decisis would generally prevent this result, and therefore, subject to this limitation, my answer is that there is such a principle of the law of this state.

X 2. Is it the law of New York that there is no right of exoneration or contribution between defendants jointly and severally liable ex delicto and not ex contractu?

A. Generally speaking, there is no right of exoneration or contribution in New York between defendants jointly and
958 severally liable ex delicto, but this can only be stated as a general rule applicable to ordinary cases of joint tort feasors and is subject to the exception that there may be such right or rights where the liability arises by operation of law from acts innocently intended and free from moral turpitude and not involving wilful wrongdoing.

X 3. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered that Bigelow might—but for said defence, if any—be under a liability to the plaintiff in the suits against Bigelow?

A. If the question refers to Massachusetts and if there were no Lewisohn decree, there would, of course, be a prima facie liability upon Bigelow in the present state of the litigation in Massachusetts; but I assume that the question refers to New York, and my answer is that, if there were no Lewisohn decree, Bigelow's liability would be an open question until determined by our courts, and while I do not think he would be held liable in this state upon the transactions revealed by the bills, I have, of course, considered the possibility of such liability in connection with any general examination of the questions involved in these suits.

X 4. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability that Bigelow might—but for said defence, if any—be under as a liability jointly with Lewisohn?

A. Yes, I have considered this feature of the case.

X 5. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability jointly and severally with Lewisohn?

A. Yes, I have considered this feature also.

X 6. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability arising ex delicto?

A. Yes, I have also considered this.

X 7. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability ex delicto jointly and severally with Lewisohn?

A. Yes; I make the same answer as to the preceding interrogatory.

X 8. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that
959 liability be, under the law of New York, a joint and several liability with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. Interpreting as well as I am able the Massachusetts decision, I understand that its effect is to impose on Bigelow a liability arising out of an equitable tort, so called. Whether, under our law, an equitable liability for the breach of an equitable duty would be a joint and several liability would depend upon the inherent nature of the transactions involved in a given case, and I know of no decision in this state determining the nature of such a liability as that sought to be imposed by the Massachusetts decision, and I cannot, therefore, give a definite answer to the question whether or not a liability of the character referred to would be held to be a joint and several liability under the law of New York.

X 9. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability ex delicto with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. What I have said in answer to the preceding interrogatory upon the question whether such liability would be joint and several applies equally here; but with regard to the additional question, as to whether the liability would be ex delicto or not, I desire to say this: An equitable liability for the breach of an equitable duty might well be referred to as a liability ex delicto in the sense that any breach of duty, equitable or legal, as distinguished from breach of a purely contractual obligation, involves dereliction, but a breach of an equitable duty might impose a liability in the absence of intentional wrongdoing or moral turpitude. In the absence of any decision of our courts known to me on the facts analogous to the facts assumed in this interrogatory, I am unable to state definitely whether our courts would denominate a liability of the character referred to as a liability arising ex delicto.

X 10. Is it a principle of the law of the state of New York that the liability of joint wrongdoers is joint and several?

A. There is such a general principle of our law, but it is subject to limitations and exceptions.

X 11. Is it sometimes a principle of New York law that estoppel by former adjudication must be mutual?

A. Yes.

X. 12. If so, what, if any, are all the occasions of which you have knowledge on which they need not be mutual?

A. Estoppels need not be mutual in cases analogous to Portland Mining Co. v. Stratton's Independence, 158 Fed. Rep. 960 63, and the case of Emma Silver Mining Co. in 7 Fed. Rep. Other instances are referred to in the cases of Stamp v. Franklin, 144 N. Y. 607, and People v. Stephens, 51 How. Pr. 235. There is also a class of cases where there exists a right of contribution or exoneration between the defendants in the respective suits.

X 13. Assuming that Bigelow took no part in the Lewisohn suit, in your opinion is the law of New York such that Bigelow would have been estopped in another suit to deny his liability as a matter of law on the same facts, by a final decree against Lewisohn in the first suit?

A. Under the facts assumed, I am in doubt whether Bigelow would have been estopped to deny his liability in another suit by a decree against Lewisohn in the first suit, but I incline to the opinion that the case would come within the rule of Portland Mining Co. v. Stratton's Independence, above referred to.

X 14. Assuming that Lewisohn's executors took no part in the suits against Bigelow, in your opinion is the law of New York such that said executors would have been estopped in another suit to deny

their liability as a matter of law on the same facts, by a final decree against Bigelow in these suits?

A. This interrogatory is practically the converse of the preceding interrogatory, and my answer is that I am in doubt whether the executors would be estopped in another suit, although I do not think this would necessarily be so.

X 15. Assuming that Bigelow took part in the defence of the suits against Lewisohn's executors, and that the plaintiff knew this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation and knowledge, operate as an estoppel in favor of Bigelow?

A. I suppose this question involves the participation of Bigelow in the defence of the Lewisohn suit, and I desire to say that I have not attached great weight to this circumstance in arriving at my conclusions. I have, however, examined a number of authorities and can at the present time refer to the following:—

Carlton v. Lombard, 149 N. Y. 137.
Woodhouse v. Duncan, 106 N. Y. 527.
Van Koughnet v. Dennis, 68 Hun, 179.
Kelley v. 42d St. Ry. Co., 37 App. Div. 500.

X 16. Assuming that Bigelow took part in the defence of the suit against Lewisohn's executors, and that the plaintiff did not know this, what, by name and reference, are all the decisions, if any, in New York you have considered and which tend, in your opinion, to support the view that the final decree in favor of
961 Lewisohn's executors may—by reason of such participation without plaintiff's knowledge—operate as an estoppel in favor of Bigelow?

A. I refer to the cases cited in my answer to the preceding interrogatory.

X 17. Assuming that Bigelow did not take part in the defence of the suit against Lewisohn's executors, what, by name, and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may operate as an estoppel in favor of Bigelow?

A.—

Castle v. Noyes, 14 N. Y. 329.
Tuing v. Clarke, 9 Hun, 269.
Matter of Estate of Straut, 126 N. Y. 201.
Carter v. Bowe, 41 Hun, 516.
Kerrison v. Stewart, 93 U. S. 155.
People v. Stephens, 51 How. Pr. 235.
King v. Barnes, 109 N. Y. 267.
Greenleaf on Evidence, vol. 1, at page 523.
Pray v. Hegeman, 98 N. Y. 351.
Clemens v. Clemens, 37 N. Y. 174.
Hymes v. Esty, 116 N. Y. 509.

Reich v. Cochran, 151 N. Y. 122, 127.
Griffin v. L. I. R. R. Co., 102 N. Y. 449.
Lorillard v. Clyde, 122 N. Y. 41.

I have examined many other cases which I cannot cite by name and page at the present time.

X 18. Have you considered any decisions or language of the courts in New York which may have any tendency to support the view that there is no estoppel in Bigelow's favor growing out of the decree in favor of Lewisohn's executors?

A. Yes.

X 19. If so, what, by name and reference, are all of these which you have considered?

A. I cannot at the present time refer by name and page to such cases. I have made a careful examination of the New York authorities on this subject without finding any case which might fall within the description of the interrogatory which did not seem to me clearly distinguishable from the case at bar.

X 20. Have any arguments been submitted or suggested to you by defendant's counsel, or have you thought of any, in support of the view that there was by the law of New York no estoppel in favor of Bigelow growing out of the decree in favor of Lewisohn's
962 executors?

A. I have endeavored to anticipate all possible arguments for the plaintiff's position in making up my mind upon this general subject.

X 21. If so, what are all of said arguments?

A. As I have already indicated, there are no such arguments which have impressed me as valid. In brief, the arguments which I have considered are those which might be predicated upon cases announcing the general principle of mutuality of estoppel, cases dealing with the relations of joint tort feasors generally, and cases discussing the question of privity. On all these subjects there are cases which express principles applicable to different states of facts from the present case or are clearly distinguishable from the present case for various reasons, but which suggest possible arguments to the effect that there would be no estoppel in favor of Bigelow. I have found no valid arguments of this character, and therefore cannot state any.

X 22. What, in your opinion, constitutes privity under the law of New York to a judgment?

A. This question can really only be answered with reference to the particular facts of a given case. In general, I understand privity to mean either community of interest by relationship, as, for instance, between a trustee and his cestui que trust, and as between persons jointly acting in pursuance of a common enterprise, or community of interest in a given subject matter.

X 23. In determining whether there was an estoppel in the present case, have you assumed or considered that Bigelow was in privity to the parties of record in the suit against Lewisohn's executors?

A. The defendants of record in the Lewisohn suit were not Mr. Lewisohn, but his executors. I consider, upon the facts shown by the bills and records in the various cases, that Bigelow was in privity

with Mr. Lewisohn in the transactions out of which the litigation has arisen, and I further consider that there is a relation of privity between Bigelow and the Lewisohn executors by reason of their succession in interest to Mr. Lewisohn, deceased.

X 24. In considering whether there was any estoppel in this case, have you assumed or considered that Bigelow had any legal interest to defend in the suit against Lewisohn's executors beyond such interest as he might have to secure a favorable precedent?

A. I consider that his legal interest in that suit was the interest of a proper party defendant, if not a necessary one.

X 25. If so, precisely what have you assumed to be said legal interest?

A. My answer to the preceding interrogatory answers this one also.

X 26. Unless Bigelow would have been bound in favor of the plaintiff by estoppel by a decision adverse to Lewisohn's executors, even if Bigelow did not participate in the defence of the suit
963 against them, did Bigelow, in your opinion, have a legal interest to defend in that suit?

A. I do not understand what "unless Bigelow would have been bound in favor of the plaintiff by estoppel," means, and therefore I cannot answer the question.

X 27. If so, by precise description, what, in your opinion, was said legal interest?

A. I am hampered in answering this question by the fact that the preceding one appears to have been mutilated, and therefore I cannot understand it; but I refer to my answer to the 24th interrogatory.

X 28. In determining whether there was any estoppel in this case, have you assumed that the plaintiff consented to the participation, if any, by Bigelow, in the support of the demurrers of Lewisohn's executors?

A. No.

X 29. Is it a principle of New York law that if the defendant in one suit sustains merely the character of a co-trespasser with the defendant in another suit by the same plaintiff, the recovery against one defendant is not thereby made competent evidence against the other?

A. There is an old decision to this effect in this state in the case of Marsh v. Berry, reported in 7 Cow. 344, but I have not traced the decision to see how it has since been construed, and the distinction between that case and the case at bar seems to me clear.

X 30. Is it a principle of New York law that the judgment in favor of one of two persons jointly and severally liable for the wrongful conversion of the plaintiff's property, is no bar to a subsequent suit against the other, because torts are joint and several?

A. This might be called a broad statement of a principle, but inaccurate, unless limited. For instance, if the first action was predicated upon the joint actions of the defendants, and was brought to establish a liability upon them jointly, a judgment in favor of the defendant first sued would bar any recovery in a subsequent suit against the other defendant.

X 31. Is it a principle of New York law that an adjudication acts as an estoppel only between the parties thereto or those in privity with them, or, in other words, the estoppel must be mutual?

A. The interrogatory states a general principle of New York law, but one which is subject to the qualifications and limitations suggested in my answer to the 12th cross-interrogatory.

X 32. Is it a principle of New York law that a judgment in favor of one co-trespasser may not be used by another co-trespasser not a party to it, by way of estoppel?

A. No, I do not know of such a general principle. I am aware of the case of Lansing v. Montgomery, 2 Johns. 382, but in that case the judgment was not actually pleaded as an estoppel, and the jury found that there was, in fact, no prior judgment.

X 33. In considering the question of estoppel, have you
964 assumed or considered that Lewisohn's executors were Bigelow's agents in the suit against them which has been dismissed?

A. In so far as the executors represented Lewisohn's interest, and Lewisohn had been Bigelow's trustee in the transactions complained of, I think the executors might be considered Bigelow's agents or trustees for the purpose of faithfully conducting the litigation, but I have not assumed or considered that there was any special arrangement or agreement between Bigelow and the executors with regard to the conduct of the suit.

X 34. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were trustees for Bigelow of the stock sought to be recovered in the suit against them which has been dismissed?

A. I refer to my answer to the preceding interrogatory in answer to this interrogatory.

X 35. Is it a principle of New York law that in an action at law against one or some of several joint tort feasors, the controversy may be determined as between the parties before the court,—i. e., the plaintiff and defendant,—and without prejudice to the rights of others; and the judgment will completely determine the controversy between them, and will not be res adjudicata between the plaintiff and any of the joint tort feasors who is not a defendant and may not be sued later?

A. There is no principle of New York law which can be stated in the words used in the interrogatory. The principles governing such cases are always subject to the qualifications and limitations which I have already indicated in my answers to preceding interrogatories.

X 36. Have you stated all your reasons for the opinions expressed by you, or the statements made by you, in answer to the 6th, 7th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th direct interrogatories?

A. I believe I have stated all the reasons called for by such interrogatories, and all that I am now able to state within the limits of this examination.

X 37. If not, what are all your reasons for the opinions or statements given by you in answer to each of said interrogatories?

A. I make the same answer as to the preceding interrogatory.

X 38. Have you now stated all your reasons for said answers?

A. All that I am able to state within the limits of this examination.

X 39. Were you, prior to the taking of your deposition on the foregoing cross-interrogatories, shown them, or any of them, or any copies of any of them, or given any information concerning the substance of them?

A. Yes.

X 40. Has each of your answers in its final form been given in the language in which it now appears before you were aware of the substance of any subsequent cross-interrogatory?

A. No.

965 X 41. Have you, since September 22, 1908, discussed in any way with any other person who is named as a witness in the caption to these cross-interrogatories, or with any one on behalf of the defendant, any of the subjects dealt with in the foregoing interrogatories, or in your answers thereto?

A. Yes, I have generally discussed the case, but not with any of the other persons named as witnesses.

GUY FAIRFAX CARY.

Before me, this 26th day of September, A. D. 1908.

[SEAL.] H. M. HEWSON,
Notary Public, Westchester County.

Certificate filed in New York County.

Deposition of James Byrne.

The Deposition of James Byrne, Taken in Behalf of the Defendant Bigelow, and Filed by His Counsel, Subject to the Objections and Exceptions of Counsel for the Complainant, The Old Dominion Copper Mining & Smelting Company, to be Found at Pages 945–950.

[Commission and notarial certificate omitted.]

Q. 1. State your name, age, and place of residence.

A. My name is James Byrne; my age is fifty-one years; my place of residence is New York city.

Q. 2. State your occupation and place of business.

A. My occupation is attorney and counsellor at law; my place of business is 24 Broad street, New York city.

Q. 3. If, in answer to the preceding interrogatory, you have testified that you are an attorney at law, state when you were admitted to the bar, and in what state or states, and how long you have engaged in the practice of law in said state or states, and with what firms, if any, you have been or are connected.

A. I was admitted to the bar in the state of New York in 1883. I have been actively and continuously engaged in the practice of law in that state ever since. Some time after I was admitted to the bar of the state of New York,—I do not remember exactly when, but

many years ago,—I was admitted to practice in the federal courts in New York. I have been admitted to practice in the United States Supreme Court and in a number of federal and state courts. I have been engaged in litigation in many other states than the state of New York. I have been a member of the firm of Chamber-
966 lain, Carter & Hornblower, Carter, Hornblower & Byrne, Hornblower, Byrne & Taylor, Hornblower, Byrne, Miller & Potter, and am now a member of the firm of Byrne & Cutcheon.

Q. 4. State what, if any, judicial or other public or official positions you hold or have held.

A. I have held no judicial position, except that I have occasionally acted as referee. I have held no public or official position except that I was for several years a trustee of the college of the city of New York.

Q. 5. State any other matters relating to your experience in your profession and as to your familiarity with the law and usages governing the practice in the state and federal courts in New York, both in law and in equity, and also as to your familiarity with the laws and usages of the state of New York relating to former adjudication and estoppel by judgment.

A. I have the familiarity with the laws and usages governing the practice in the state and federal courts of New York that comes from having been connected with many cases in those courts both in law and in equity. I have been engaged in lawsuits in both the state and federal courts of New York, in which defences have been set up relating to former adjudication and estoppel by judgment. Those cases have been contested over many years. I was one of the counsel in the case of Thorn v. De Bretenil, in which several former adjudications were set up as estoppels. The opinion of the appellate division of the Supreme Court of the state of New York for the second department is reported in 86 App. Div. 405. The opinion of the Court of Appeals of the state of New York is reported in 179 N. Y. 64.

Q. 6. Assuming that an action in equity is brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters, to recover from him the profits alleged to have been received by him and his associates secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, at a price in excess of the price which they paid for it and of its fair value, and assuming that in this action a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to a similar action, substantially identical with the first and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 945–950.]

967 A. The decree would, in my opinion, be held in the courts of New York state to be a complete defence. These are my reasons for this opinion: The cause of action of the corporation, according to its own statement, is based on a joint plan and conspiracy. The federal court has held that there was no such joint plan and conspiracy and that the facts alleged to constitute fraud in the sale made in pursuance of such alleged joint plan and conspiracy do not amount to fraud. On the plaintiff's own statement, if the so-called promoter has committed a fraud, his associate has; if he has not committed a fraud, his associate has not; and on the facts stated, the court has held that the so-called promoter is under no liability to the corporation.

In a suit against the associate, the inclination of the court would be—in view of the fact that the corporation has had the one opportunity which, as Judge Choate said in 7 Fed. Rep. public policy gives every man to prove his case, and to which one opportunity it limits every man, and has lost its case on grounds which showed that it had no case against the so-called promoter or his associate; and in view of the desirability of avoiding the chance of the law punishing one man for doing the identical thing for which the law had said the other man ought not to be punished—to hold the former judgment conclusive if there were any precedent that could be said to justify such holding. Such a precedent would be found in the case of People v. Stephens, 51 How. Pr. 235, the judgment in which was affirmed by the general term and by the Court of Appeals.

In that case the state brought an action against four principal defendants, claiming damages for a fraudulent combination and conspiracy in obtaining a contract from the state. Previously the state had commenced an action against two of the same defendants for precisely the same cause, and upon demurrer judgment had been rendered for the defendants. The court held that the judgment on the demurrer in favor of the two defendants was rendered on the merits of the action, and presented a complete estoppel in their favor in the present action, that the two defendants not sued in the former action were in privity with the two defendants in the former action, and the estoppel in their favor was as effectual as the estoppel in favor of the two defendants in the former action.

The intermediate appellate court, the general term, affirmed the conclusions reached by the trial court. The Court of Appeals also affirmed it, and while it put its opinion on two grounds other than those of the trial judge of which I have just spoken, it did not express dissent from them. So far as I know, there never has been any adverse comment on the opinion in 51 How. Pr. 235, that I have referred to.

Q. 7. Assuming that two actions in equity are brought in
968 the federal court for the southern District of New York by a corporation against one of two persons alleged to have been jointly its promoters to recover from him profits alleged to have been received by him and his associates secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization,

and assuming that such property is alleged to have been sold pursuant to said joint plan and conspiracy in two separate parcels, in each of which both promoters were jointly interested, and that said two actions were brought to recover the respective profits received from the sale of the two parcels, respectively, and assuming that the bills of complaint in the two actions were substantially identical, except as to the particular relief sought, and assuming that certain profits were alleged to have been made by said promoters on each parcel, and assuming that in one of said actions a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to two similar actions, substantially identical in form with those above described and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 946-950.]

A. In my opinion it would be a conclusive defence.

Q. 8. Have you examined a copy of the record in the action of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn in the Circuit Court of the United States for the Southern District of New York, such as is hereto annexed and marked (1), the respective portions of said record being marked A to R, inclusive?

[Objected to; admitted; exception.—See pages 946-950.]

A. I have.

Q. 9. Have you examined copies of the proceedings in the above-entitled causes, to wit, the two causes of the Old Dominion Copper Mining & Smelting Co. v. Bigelow in the Supreme Judicial Court in Massachusetts, such as are hereto annexed and marked, respectively, (2) and (3)?

A. I have.

Q. 10. Assuming that there were now pending in the courts of the state of New York proceedings against Albert S. Bigelow, identical in all respects (except as the practice might require formal
969 changes) with the copies of the proceedings referred to in the 9th interrogatory, and assuming that said courts had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record, copies of which are referred to in the 8th interrogatory, were sufficiently pleaded and proven in defence of said proceedings, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in each of these bills of complaint were, respectively, the same persons, and that the contracts, acts, matters, and transactions mentioned in each of these bills of complaint were, respectively, the same contracts, acts, matters, and transactions, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against

said Lewishon's executors in said court, what would be the effect, under the law and usages of the state of New York, of said decree and record as a defence to said proceedings assumed to be so pending?

[Objected to; admitted; exception.—See pages 946-950.]

A. The decree and record would be a complete defence.

Q. 11. Assuming the facts stated in the 10th interrogatory, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would those additional facts affect your answer to the preceding interrogatory?

[Objected to; admitted; exception.—See pages 946-950.]

A. They would not affect it.

Q. 12. Assuming the facts stated in the 10th interrogatory, and assuming the facts stated in the 11th interrogatory, and assuming that the participation of the defendant, Bigelow, as stated in the 11th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers to the two preceding interrogatories?

[Objected to; admitted; exception.—See pages 947-950.]

A. They would not affect it.

Q. 13. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow,
970 identical in all respects with the proceeding numbered 8098, referred to in the 9th interrogatory, and assuming that the course of the proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8098, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8098 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, what, under the laws

and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8098, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

A. A decree and record would be a complete defence.

Q. 14. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8099, referred to in the 9th interrogatory, and assuming that the course of proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8099, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in
971 said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8099 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, and assuming that the bill of complaint in said Circuit Court, and the prayers thereof, relate to one part of an entire transaction comprising said contracts, acts, matters, and transactions, and that the bill of complaint corresponding to the one numbered 8099 in Massachusetts, and the prayers thereof, relate to another part of the same entire transaction, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8099, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

A. The decree and record would be a complete defence.

Q. 15. Assuming the facts stated in the 13th and 14th interrogatories, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal

and on certiorari, how, if at all, would these additional facts affect your answers, or either of them, to the 13th and 14th interrogatories?

[Objected to: admitted; exception.—See pages 948-950.]

A. They would not affect it.

Q. 16. Assuming the facts stated in the 13th, 14th, and 15th interrogatories, and assuming that the participation of the defendant, Bigelow, as stated in the 15th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers, or either of them, to the 13th, 14th, and 15th interrogatories?

[Objected to: admitted; exception.—See pages 949, 950.]

A. They would not affect it.

972 Q. 17. If you have not already done so, state your reasons for your answers to Ints. 6th to 16th, inclusive.

[Objected to: admitted; exception.—See page 950.]

A. My reasons are as follows:

30,000 share case.—The law as to estoppel by judgment in New York is stated in Embury v. Conner, 3 N. Y. 511, at 522, as follows:

"The general rule is, that an allegation on record, upon which issue has been once taken and found and a judgment has been rendered, is, between the parties taking it and their privies, conclusive, according to the finding thereof, so as to estop the parties respectively from again litigating that fact once so tried and found; whether it is plead in bar, or given in evidence."

See also Pray v. Hegeman, 98 N. Y. 351.
Thorn v. de Bretenil, 179 N. Y. 64.

The real estate and mining claim, sold for 30,000 shares of stock, stood in the name of Lewisohn. The offer to sell the property, the title to which stood in his name, was made by Lewisohn.

The suit against Lewisohn, in which judgment has been rendered in his favor, was brought to rescind the contract which had been made in his name in regard to property that stood in his name. It would have been proper to bring a suit to enforce the contract against Lewisohn alone. It was proper to bring a suit to rescind it against Lewisohn alone. The judgment against him, or in his favor, in either case would bind Bigelow, for whom Lewisohn was a trustee.

Matter of Straub, 126 N. Y. 201.
Bracken v. Atlantic Trust Co., 36 App. Div. 67.

In answering the 11th and 12th interrogatories, I have said that the additional facts therein set out would not affect my answer to the 10th interrogatory.

If, for any reason, it should be considered that Bigelow did not stand to Lewisohn in the 20,000 share sale as cestui que trust, it must be admitted that he stood to him in the relation of joint adventurer; and the general principles of partnership are applicable to their relations. See:

Getty v. Devlin, 54 N. Y. 403.
King v. Barnes, 109 N. Y. 267.

973 The suit against Lewisohn which has been decided in his favor was, as the Supreme Court of the United States has said, to rescind the contract for the sale of the real estate and mining claims, and to recover back the consideration. Whether as a partner of Lewisohn or as a principal, Bigelow, in a suit for the rescission of the contract, had an interest in opposing the rescission. He was in such privity with Lewisohn in a suit to enforce or rescind the contract that if he took part in the defence of the action he could not be regarded as a stranger; having such privity, on the assumption that the facts assumed in the 11th interrogatory are true, the judgment *was* binding in his favor as a judgment in favor of the corporation would have been binding against him.

100,000 share case.—The suit against Lewisohn in which judgment has been entered was brought, as stated by Mr. Justice Holmes, "to rescind a sale to it [the Old Dominion Copper Mining Company] of certain mining rights."

The complaint says:

"The complainant desires to rescind the sale. * * * Wherefore the complainant prays that the Court will declare said sale of said parcels of real estate conveyed by said Leonard Lewisohn to the complainant, as hereinbefore set forth, rescinded. * * *"

The decree in the Lewisohn case is an adjudication that there is no right to rescind the sale. It is an adjudication that, inasmuch as Bigelow and Lewisohn owned all the capital stock of the corporation, even though they did not state, when they made the sales to it, that they were making a profit, there was nothing wrongful in the transaction. It is an adjudication that at the time of the sale there was no fiduciary relationship between them and the corporation, because they were the corporation; and one cannot be in a fiduciary relationship to himself—just as one cannot be an agent of himself. It is an adjudication that they were under no duty to provide an independent board of directors for the corporation, and to disclose to that board that they were making a profit in the sale to the corporation. It was an adjudication that if they could properly be called promoters before the corporation was organized or any stock issued, when they became the sole stockholders, and so long as they remained the sole stockholders, they had "stripped themselves of the character of trustees." Those issues are res adjudicata, not only in another suit for the same cause of action, such as the second suit to rescind the sale of the 30,000 shares of stock, or an action in equity or at law for dam-

ages arising from the action of Lewisohn or Bigelow for
974 wrongfully taking from the company the 30,000 shares of stock, but in any other suit where the same issues arise.

The rule is that a judgment upon the question directly involved in a suit is conclusive in a second suit between the same parties and their privies dependent upon the same question, although the subject matter of the second action is different.

All the complaints, both in the two suits against Lewisohn and the two suits against Bigelow, treat the sale of the property of the Baltimore Old Dominion Company and of the real estate and mining claims that stood in the name of Lewisohn as parts of one plan,

scheme, and conspiracy. The two officers were presented and accepted at the same meeting, on July 11, 1895, one immediately after the other, and it was voted at the same meeting to issue the stock in payment therefor.

As was said by the Supreme Court of Massachusetts (74 N. E. 656):

"The scheme of the defendant and Lewisohn, as to this capital stock of $3,750,000 divided into 150,000 shares, was to issue 80,000 shares * * * to the syndicate * * * 20,000 shares * * * to themselves for their services and expenses as promoters, 20,000 shares * * * to the public for cash for working capital * * * and the balance 30,000 shares, * * * * to themselves for the real estate here in question, and this scheme was carried out. * * *

The scheme thus described has been the subject of adjudication in the Lewisohn case and the adjudication made was that it was not wrongful. The fact that the form that the transactions assumed was the making of two contracts of sale does not prevent the adjudication of issues in a suit asking for a rescission of one of the contracts for being conclusive upon similar issues in a suit relating to the other contract.

In the case of Bouchaud, Executor of Brunel, v. Dias, 3 Den. 238, is precisely in point. There one Castro imported goods and on a certain day executed two bonds to the United States for the payment of the duties, on which bonds Brunel, the testator of Bouchard, and the defendant were sureties. The bonds were alike in penalty and condition, except that they were payable at different periods. The plaintiff, as executor of Brunel, paid one of the bonds, and in this action sought to recover one half of the amount from the defendant as a co-surety with the testator. The defence was that the defendant, with the consent of the plaintiff, had been released from his obligation by the Secretary of the Treasury. The defendant gave in evidence the judgment record from which it appeared that the plaintiff had previously sued the defendant for contribution, the declaration in the former case being precisely like the declaration in this case, except that the other bond was set out as a part of the ground of action.

In that action the defendant pleaded in bar the release and
975 consent. The plaintiff demurred and the court rendered judgment for the defendant. The plaintiff objected to the introduction of the record because the bonds were not the same in both suits. The court said, at page 243:

"We have then the judgment of a court of concurrent jurisdiction directly upon the point made by this suit; and nothing is better settled than that such a judgment, so long as it remains in force, is conclusive between the same parties in another action upon the same matter. It is true that there is a shade of difference between the two cases as to the necessary proof on the part of the plaintiff to sustain the action. Different bonds are mentioned in the two declarations. But so far as relates to the principal question in controversy, to wit: the right of the plaintiff to demand and the duty of the defendant as co-surety to make contribution, the two cases are precisely alike. The defence is precisely the same in both actions. The matter

which the plaintiff now attempts to agitate anew is res judicata * * * and the judgment rendered in that action is a conclusive bar to any new litigation of the same matter."

So in the present litigation different shares of stock are mentioned in the prayers for relief. There is hardly, however, the "shade of difference" between the two cases as to what the plaintiff regards as the necessary proof on its part to sustain the action, for presumably it has alleged nothing in any of the actions which it was not necessary for it to prove, and it has alleged exactly the same facts in both. "The matter which the plaintiff attempts to agitate anew" in the 100,000 share case, is res adjudicata and the judgment in the 30,000 share case is a conclusive bar in favor of Lewisohn and his privy, Bigelow, "to any new litigation of the matter."

Cross-interrogatories.

Without waiving the foregoing objections, but expressly insisting thereon, the plaintiff puts de bene the following cross-interrogatories:—

X 1. Is it a principle of the law of the state of New York that the law decided in a case in the court of last resort in overruling a demurrer becomes the law of the case to be applied when the case is heard upon the facts?

A. I so understand it.

X 2. Is it the law of New York that there is no right of exoneration or contribution between defendants jointly and severally liable ex delicto and not ex contractu?

A. I understand that to be the general principle of law,
976 but I also understand the law of New York to be that if one —like a servant, for instance—does a wrongful act in obedience to the request of the superior, not knowing the act to be wrongful, it would be the duty of the superior to indemnify. How far this exception would be extended, and whether it would authorize contribution between defendants jointly and severally liable ex delicto, where they were not knowingly doing a wrongful act, I am unable to say.

X 3. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered that Bigelow might—but for said defence, if any—be under a liability to the plaintiff in the suits against Bigelow?

A. I have not considered that question especially in connection with this case. My opinion would be the same whether Bigelow would or would not, but for said defence, be under a liability to the plaintiff in the suits against him.

X 4. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability that Bigelow might—but for said defence, if any—be under as a liability jointly with Lewisohn?

A. I have considered whether the liability that Bigelow might be under would be a liability jointly with Lewisohn.

X 5. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability jointly and severally with Lewisohn?

A. I have considered whether the liability that Bigelow might be under would be a liability jointly or severally with Lewisohn.

X 6. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability arising ex delicto?

A. To have considered whether the liability which Bigelow might be under would be a liability arising ex delicto.

X 7. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability ex delicto jointly and severally with Lewisohn?

A. I have considered whether it might be a liability ex delicto jointly and severally with Lewisohn.

X 8. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be,
977 under the law of New York, a joint and several liability with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. I have given that question a very great deal of consideration. I understand the decision of the Supreme Judicial Court of Massachusetts to mean that the plaintiff had these courses open to it, and probably a third course. The two courses I mean are, first, to rescind the contract and upon the rescission to sue "upon the implied contract to return the consideration;" the other course, to waive the remedy founded upon the implied contract and to sue for a wrongful act on the part of one occupying a trust relation to the corporation. This latter liability I understand the Massachusetts decision to deem a joint and several liability. Under the law of New York, in my opinion, the corporation might rescind the contract and recover the consideration on an implied contract, which would be a joint liability. If one of the two so-called promoters had contracted in his own name and was, as to the property sold, a trustee for himself and the other, the corporation could rescind and sue him alone. If Lewisohn and Bigelow were promoters and they made a secret profit out of the corporation, and their act was wrongful against the corporation, I should say that the case was like a partnership committing a breach of duty in some matter where they were acting as agents and that a cause of action would lie against them jointly and severally.

X 9. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these

facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability ex delicto with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. I think my answer to Cross-Int. 8 answers this question.

X 10. Is it a principle of the law of the state of New York that the liability of joint wrongdoers is joint and several?

A. In my opinion it is.

X 11. Is it sometimes a principle of New York law that estoppel by former adjudication must be mutual?

A. It is very frequently so said.

X 12. If so, what, if any, are all the occasions of which you have knowledge on which they need not be mutual?

A. The case of People v. Stevens, in 51 Howard's Practice, cited in my answer to the 6th direct interrogatory, is a case which might be cited to the effect that an estoppel need not be mutual. If in that case the plaintiff had sued the two defendants who were not parties to the original suit by the plaintiff, and had claimed that the defendants were bound by the judgment which had been obtained against the two defendants who were parties to the former
978 suit, the defendants in the later suit would not have had their day in court. I do not think, therefore, that the judgment against the defendants in the former case referred to in People v. Stevens would be res adjudicata against the new defendants in a subsequent case reported in 51 Howard's Practice. A judgment against the indemnitors of a sheriff who makes a wrongful levy has been held in — to be an estoppel in a suit subsequently brought against the sheriff. In my opinion the judgment against the indemnitors would not be res adjudicata in a suit against the sheriff. A judgment in favor of one charged with having placed an obstruction in a highway is a bar to a suit against the city, or those of its officials responsible for the highways. In the case of the sheriff and of the obstruction to the highway the person allowed to set up the bar has been indemnified, or has the right to be indemnified, by the other, for that is given as a reason why such person should be allowed to set up the bar, but the fact remains that the estoppels are not mutual. In my opinion the principles laid down by the Circuit Court of Appeals in Portland Gold Mining Co. v. Stratton's Independence, 158 Fed. Rep. p. 68, and by Judge Choate, now a distinguished lawyer of New York in the Emma Mine Case, 7 Fed. Rep., will both be followed in the state courts of New York. I have not, however, examined the case exhaustively on this point.

X 13. Assuming that Bigelow took no part in the Lewisohn suit, in your opinion is the law of New York such that Bigelow would have been estopped in another suit to deny his liability as a matter of law on the same facts, by a final decree against Lewisohn in the first suit?

A. Yes.

X 14. Assuming that Lewisohn's executors took no part in the suits against Bigelow, in your opinion is the law of New York such that said executors would have been estopped in another suit to deny their liability as a matter of law on the same facts, by a final decree against Bigelow in these suits?

A. I do not think that this follows. The grounds upon which I answered that Bigelow would be bound by the judgment against Lewisohn in the New York 30,000 share suit is that the contract was made in the name of Lewisohn; that Lewisohn was a trustee, was the agent authorized by Bigelow to make the contract. I have stated these at length in my answer to the 16th direct interrogatory. In the corresponding Massachusetts suit, the 30,000 share suit against Bigelow, it cannot be said that Bigelow was a trustee for Lewisohn. Bigelow was not the person in whose name the contract was made. The reasons given in the Emma Mine Case, 7 Fed. Rep., and in the Portland Case, 158 Fed. Rep., why a judgment
979 against the plaintiff should bar him, do not apply to a judgment in his favor. In the former case the plaintiff has had his day in court. In the latter Lewisohn has not.

X 15. Assuming that Bigelow took part in the defence of the suits against Lewisohn's executors, and that the plaintiff knew this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation and knowledge, operate as an estoppel in favor of Bigelow?

A. I assume that this question is based on the assumption that the judgment would not operate as an estoppel unless there were participation on the part of Bigelow. On that assumption, the case which I have considered, and which tends, in my opinion, to support the view that a final decree in favor of Lewisohn's executors might, by reason of such participation and knowledge, operate as an estoppel in favor of Bigelow, if there were any such participation, is Castle v. Noyes, 14 N. Y. 329. I have considered other cases, the names of which I do not at this moment recall. I do not understand that the law of the state of New York on this subject is peculiar.

X 16. Assuming that Bigelow took part in the defence of the suit against Lewisohn's executors, and that the plaintiff did not know this, what, by name and reference, are all the decisions, if any, in New York you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation without plaintiff's knowledge, operate as an estoppel in favor of Bigelow?

A. I do not recall any particular case in the courts of New York. In Alexander v. Taylor, 4 Denio, 302, in which it was sought to have a judgment against plaintiff's agent treated as a bar in a suit subsequently brought by plaintiff, the court decided that it was not a bar, saying that the plaintiff did not participate in the replevin suit, and he had no part in the act upon which it was founded; that it did not appear that he had ever heard of the former suit, or the act for which it was prosecuted, until the record of judgment was brought up against him on the trial. In Castle v. Noyes I think it

plainly appears from the facts that the other side must have known that the master took charge of the defence of the servants, but that statement is not in terms in the case as I recollect it. In my opinion the case of Rumford Chemical v. Hygienic Chemical, 159 Fed. Rep. 436, opinion of the Circuit Court of Appeals, Second Circuit, states the general doctrine on the subject. It seems to me participation, rather than knowledge, determines whether a party becomes bound by a former judgment.

X 17. Assuming that Bigelow did not take part in the de-
980 fence of the suit against Lewisohn's executors, what, by name, and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may operate as an estoppel in favor of Bigelow?

A. To the effect that a judgment in a suit against a trustee is binding upon a beneficiary, Matter of Straub, 126 N. Y. 201, Bracken v. Atlantic Trust Co., 36 App. Div. 67. To the effect that the relation of promoters to each other is that of joint adventurers and that the law of partnership is applicable to such relation, Getty v. Devlin, 54 N. Y. 403; King v. Barnes, 109 N. Y. 267. Generally, People v. Stevens, 51 How. Pr. above referred to. I have considered many other decisions, but I have not made notes of them, and there is no particular one that I have especially in mind.

X 18. Have you considered any decisions or language of the courts in New York which may have any tendency to support the view that there is no estoppel in Bigelow's favor growing out of the decree in favor of Lewisohn's executors?

A. I have seen no decision or language of the courts of New York which, in my opinion, support the view that there is no estoppel in Bigelow's favor growing out of the decree in favor of Lewisohn's executors. There are statements in the New York cases to the effect that a judgment in favor of one co-trespasser could not be used by another co-trespasser, not a party to it, by way of estoppel. There are very many statements of the highest court that estoppels must be mutual. These expressions or decisions have, in my opinion, no application to a case by a corporation to rescind a contract against one who is a trustee for another, or against one who is a partner or joint adventurer with another where the partner or joint adventurer participates in the defence of the action; nor to a case like People v. Stevens, 51 How. Pr.

X 19. If so, what, by name and reference, are all of these which you have considered?

A. Lansing v. Monegomery, 2 Johns. 382; Atlantic Dock Co. v. Mayor &c., 53 N. Y. 64, at page 68. My recollection is that I have seen other cases containing the statement about a judgment in favor of one co-trespasser not being a bar to a suit against the other, but I do not recall them now. There are many cases in which the statement is made that estoppel must be mutual. Of course I do not mean that these cases do support the view mentioned in Cross-Int. 18.

X 20. Have any arguments been submitted or suggested to you by defendant's counsel, or have you thought of any, in support of the view that there was by the law of New York no estoppel in favor

of Bigelow growing out of the decree in favor of Lewisohn's executors?

A. No argument has been submitted to me by counsel for the defendant in support of the claim that the decision in the Lewisohn case is not a bar in the Bigelow case, except that they have submitted to me arguments or assumptions which might be made by counsel for the complainant, and have shown by an analysis of the argument and cases that in their opinion the argument was not a good one. They have stated to me that the complainant will doubtless rely upon the argument or assumption that Bigelow and Lewisohn are in the position of joint tort feasors, and that therefore, it will be claimed that a judgment in favor of one is not a bar to a suit against the other. Practically, what has been submitted to me by counsel for the defendants are arguments to show that the arguments that would probably be made by the complainant are not sound ones, and that the cases upon which they will rely are distinguishable from a case where it appears on the plaintiff's statement that the allegations against both alleged joint tort feasors are the same and judgment in favor of one has been rendered on the merits against the other. No argument has occurred to me which I regard as sound. Having frequently had to consider the subject of res adjudicata under the decisions of the state of New York, I knew of the statements that a judgment in favor of one co-trespasser could not be used as a bar in a suit against the other, and the doctrine that judgment against one tort feasor is not a bar to an action against another tort feasor unless the judgment has been satisfied or released.

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X 21. If so, what are all of said arguments?

A. I have answered this cross-interrogatory in my answer to Cross-Int. 20.

X 22. What, in your opinion, constitutes privity under the law of New York to a judgment?

A. It is impossible to answer this question except at great length. In O'Donnell v. McIntyre, 118 N. Y. at page 162, the Court of Appeals say in its general legal signification "stranger" is opposed to the word "privy." By "privy" is meant the mutual or successive relationship to the same rights of property, and "privies" are classified according to the manner of relationship. In Mygatt v. Coe, 124 N. Y. 212, at page 219, the court, quoting says "there are three manners of privities, viz: (1) Privity in case of estate only. (2) Privity in respect to contract only. (3) Privity in respect to estate and contract together. * * * The term privity in estate denotes mutual or successive relationship to the same rights of property." "Privity" is used with reference to estoppel by judgment to describe the relationship between a party to the judgment and some one who is affected by that judgment simply because of his relationship to the party and without his having participated in or even known of the judgment. "Privity" is also used to describe the relationship of a party to another who is a defendant in lawsuit which will justify participating in the defence, and thereby making the judgment binding in favor of or against the person not a party to the record. Thus, in one case, a master is held to be in privity with his servant so as to be bound by the judgment where the

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master assumed control of the litigation; in another case the master is held not to be bound by the judgment against his servant, because he did not participate in the suit.

X 23. In determining whether there was an estoppel in the present case, have you assumed or considered that Bigelow was in privity to the parties of record in the suit against Lewisohn's executors?

A. I have.

X 24. In considering whether there was any estoppel in this case, have you assumed or considered that Bigelow had any legal interest to defend in the suit against Lewisohn's executors beyond such interest as he might have to secure a favorable precedent?

A. I have.

X 25. If so, precisely what have you assumed to be said legal interest?

A. The contract in regard to 30,000 shares was made in the name of Lewisohn intentionally on the part of Lewisohn and Bigelow; the title to the real estate stood in the name of Lewisohn; the corporation had the right to treat Lewisohn as the person with whom it could litigate in regard to the recission of the contract which had been made by him; Lewisohn being dead, they had the right to sue the executors; in any suit to enforce or rescind the contract made by Lewisohn, Bigelow stood to Lewisohn, or Lewisohn's legal representatives upon his death, in the relation of beneficiary, and Lewisohn and his executors in the relation of trustees. By reason of that relationship Bigelow, in my opinion, was a privy in such sense that if he had not participated in the Lewisohn case the judgment would bind him. Lewisohn and Bigelow, if promoters, were, under the laws of New York, joint adventurers, and their relations would be governed generally by the law of partnership. There was a privity between them that there is between partners. If there was not the relationship of trustee and beneficiary between Lewisohn (and after his death his executors) and Bigelow, there was this partnership relation, and the privity there is such that in a suit to rescind the contract, the executors of Bigelow's partner being sued, he had such an interest in sustaining the contract as allowed him to participate, and by participating become bound by the judgment.

X 26. Unless Bigelow would have been bound in favor of the plaintiff by estoppel by a decision adverse to Lewisohn's executors, even if Bigelow did not participate in the defence of the suit against them, did Bigelow, in your opinion, have a legal interest to defend in that suit?

A. He had.

X 27. If so, by precise description, what, in your opinion, was said legal interest?

A. I don't think I can add to my previous answers. He
983 had an interest in the contract which was made by Lewisohn, and he had the interest that any person who contracts as a co-contractor or as a partner would have in having the contract held to be good and valid, and not one subject to recission in a case where he is not a party to the record, but his co-contractor or agent is. I may misunderstand the meaning of Cross-ints. 26 and 27. In a sense it may be said that a man has no interest, legal or otherwise,

in something which cannot affect him. I assume that the question means: Was Bigelow, in the case supposed, a stranger to the suit against Lewisohn, or had he such an interest in the contract which was sought to be rescinded as would result in a decision subsequently that, by participating in the defence of the Lewisohn suit, he became bound by it?

X 28. In determining whether there was any estoppel in this case, have you assumed that the plaintiff consented to the participation, if any, by Bigelow in the support of the demurrers of Lewisohn's executors?

A. In giving my answer to the 10th direct interrogatory and to the 13th and 14th direct interrogatories I have not assumed it, nor in giving my answers to the 11th and 15th direct interrogatories. What I would like to make clear is, I have assumed it only where the interrogatory assumed it. On re-reading the cross-interrogatory, I appreciate that the word "consent" is used, not "knowledge." I have not assumed "consent" in giving any of my answers, only "knowledge," and that only where the interrogatory uses — word "knowledge."

X 29. Is it a principle of New York law that if the defendant in one suit sustains merely the character of a co-trespasser with the defendant in another suit by the same plaintiff, the recovery against one defendant is not thereby made competent evidence against the other?

A. My understanding is that is the New York law, although I do not recall the particular case in which that is so held.

X 30. Is it a principle of New York law that the judgment in favor of one of two persons jointly and severally liable for the wrongful conversion of the plaintiff's property is no bar to a subsequent suit against the other because torts are joint and several?

A. I do not recall a decision in point. The mere fact of a judgment in favor of one of two persons jointly and severally liable for conversion clearly would be no bar to a suit against the other after such judgment. If, however, the judgment in favor of one of two persons jointly and severally liable for the wrongful conversion of the plaintiff's property was upon a state of facts which shows that the conversion was a single act, so that if one of the two persons is guilty the other is, and vice versa, then I should think, in a suit against the second person upon precisely that state of facts, the opinion in People v. Stevens, 51 Howard's Practice, should apply.

984 X 31. Is it a principle of New York law that an adjudication acts as an estoppel only between the parties thereto or those in privity with them, or, in other words, the estoppel must be mutual?

A. That is the general principle of New York law; but see my answer to the 12th cross-interrogatory.

X 32. Is it a principle of New York law that a judgment in favor of one co-trespasser may not be used by another co-trespasser not a party to it, by way of estoppel?

A. There is a statement to that effect in the case of Atlantic Dock Co. v. The Mayor of New York, 53 N. Y. 64, and in Lansing v.

Montgomery, 2 Johns. 382, —, and there is no doubt that unless the case was such as is mentioned in People v. Stevens, and cases like those referred to in my answer to the 12th cross-interrogatory, that doctrine would be applied in New York.

X 33. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were Bigelow's agents in the suit against them which has been dismissed?

A. I have considered that Lewisohn stood in the relation of a trustee to Bigelow, that he was the person in whose name the contract was made for the benefit of himself and another, and was therefore, for the purpose of binding the beneficiary, a trustee. I have considered that during his lifetime the corporation could sue him alone for the rescission of the contract, and on his death it could sue his legal representatives, and therefore that they stood in connection with a suit upon that contract just as a trustee would to Bigelow. I have considered also that Bigelow and Lewisohn were joint adventurers, and that upon Lewisohn's death the executors stood in Lewisohn's place.

X 34. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were trustees for Bigelow of the stock ought to be recovered in the suit against them which has been dismissed?

A. I think I have already answered this question. I have not assumed or considered that Lewisohn's executors were trustees for Bigelow for stock sought to be recovered in the suit against them.

X 35. Is it a principle of New York law that in an action at law against one or some of several joint feasors, the controversy may be determined as between the parties before the court,—i. e., the plaintiff and defendant,—and without prejudice to the rights of others; and the judgment will completely determine the controversy between them, and will not be res adjudicata between the plaintiff and any of the joint tort feasors who is not a defendant and may be sued later?

A. It is, I understand, the principle of New York law that an action at law may be brought against one of several joint tort feasors without joining the others, and that a judgment in that suit will completely determine the controversy between them, and
985 that a judgment against the defendants thus sued will not be res adjudicata between the plaintiff and any of the joint tort feasors who were not made defendants, and the latter could be sued later. The question of whether the judgment in favor of one of the joint tort feasors first sued, where the facts are precisely the same as those in a subsequent suit against others of the joint tort feasors, is res adjudicata has been decided in People v. Stevens, 51 Howard's Practice, in the affirmative, the court asking, "Has it ever been held that upon the same proof against two the same court would be justified in holding the one guilty of actionable conduct whilst the other was not?"

X 36. Have you stated all your reasons for the opinions expressed by you, or the statements made by you, in answer to the 6th,

7th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th direct interrogatories?

A. Yes.

X 37. If not, what are all your reasons for the opinions or statements given by you in answer to each of said interrogatories?

A. I do not think of any other reasons.

X 38. Have you now stated all your reasons for said answers?

A. To the best of my belief I have.

X 39. Were you, prior to the taking of your deposition on the foregoing cross-interrogatories, shown them, or any of them, or any copies of any of them, or given any information concerning the substance of them?

A. I was not.

X 40. Has each of your answers in its final form been given in the language in which it now appears, before you were aware of the substance of any subsequent cross-interrogatory?

A. No, I was very anxious to finish as speedily as possible and I assumed the commissioner was also anxious to have me finish, and after committing myself (to the best of my recollection) to an answer to every interrogatory, I think, but two, I said I would not delay the matter, but would hasten to answer all the interrogatories and then have my answers read over to see that they were grammatical and correct. When I came to the interrogatory requesting a definition of what constituted privity, I thought I would leave that and answer it more or less at length, according as I had more or less time when I had finished with the others, and when I came to the 30th cross-interrogatory, as I did not recall any particular case in point, but thought I might recall a case while going on with the other questions, I said that I would answer that when I had finished. I do not think that my answer to any question has or will be affected by my knowledge of the substance of any cross-interrogatory.

X 41. Have you, since September 22, 1908, discussed in any way with any other person who is named as a witness in the caption to these cross-interrogatories, or with any one on behalf of the defendant, any of the subjects dealt with in the foregoing interrogatories or in your answers thereto?

986 A. I understand the question to be whether I have discussed, with any of the persons named, these cross-interrogatories or any of the subjects dealt with in these cross-interrogatories or my answers thereto. I have not. I saw Mr. Olney by chance on the train Saturday afternoon, and he told me that he had been testifying in the case that morning. I talked with him a very few moments on the general subject of the question raised by the 6th direct interrogatory.

JAMES BYRNE.

Before me,

PERCIVAL WILDS,
[SEAL.] *Notary Public.*

Deposition of Edward W. Hatch.

The Deposition of EDWARD W. HATCH. Taken in behalf of the Defendant, Bigelow, and Filed by His Counsel, subject to the objections and exceptions of counsel for the complainant, The Old Dominion Copper Mining & Smelting Company, to be found at pages 945-950.

[Commission and notarial certificate omitted.]

Q. 1. State your name, age, and place of residence.

A. Edward W. Hatch; fifty-six years old; legal residence, Buffalo, N. Y., domiciled in New York city and practising law therein.

Q. 2. State your occupation and place of business.

A. Lawyer, 3 South William street, New York city.

Q. 3. If, in answer to the preceding interrogatory, you have testified that you are an attorney at law, state when you were admitted to the bar, and in what state or states, and how long you have been engaged in the practice of law in said state or states, and with what firms, if any, you have been or are connected.

A. I was admitted to the bar at Buffalo in the state of New York, in June, 1876. I have been engaged in the practice of the law in the state of New York continuously since my admission to the bar. I at first practised law alone, then formed a co-partnership with Thomas Corlett, afterwards a judge of the Supreme Court of the state of New York, in the city of Buffalo. Upon his election to the Supreme Court bench I entered the firm of Box, Hatch & Norton, and continued in that relation for about three years. In 1905 I became associated with a firm of lawyers in the city of New York under the firm name of Parker, Hatch & Sheehan, and have continued the practice of law in that firm since that time, and am so presently engaged.

987 Q. 4. State what, if any, judicial or other public or official positions you hold or have held?

A. I was elected district attorney of Erie county in 1880, for a term of three years, and was re-elected to the succeeding term of three years, which expired on the 31st day of December, 1886. I was then elected a judge of the Superior Court of Buffalo for a term of fourteen years, and served therein until the last of December, 1895, when I resigned, having, in 1895, been elected a justice of the Supreme Court of the state of New York. I was appointed, on the 1st day of January, 1896, by Governor Morton, a judge of the appellate division of the Supreme Court for the second department, such court sitting in the city of Brooklyn, and served therein as an associate justice of such court until in April, 1900, when I was transferred, by Governor Roosevelt, to the appellate division in the first department, sitting in the city of New York, where I served as an associate justice of such court until the 30th day of September, 1905, when I resigned as a Supreme Court justice of the state of New York, and entered upon the practice of law in the firm of Parker, Hatch & Sheehan.

Q. 5. State any other matters relating to your experience in your profession, and as to your familiarity with the law and usages governing the practice in the state and federal courts in New York, both in law and in equity, and also as to your familiarity with the laws and usages of the state of New York relating to former adjudication and estoppel by judgment.

A. In my service upon the bench and at the bar, I have frequently had occasion to consider the subject matters embraced within this interrogatory, and have written several opinions discussing the legal phases of such questions, and have argued such questions before the courts of the state of New York upon a number of occasions.

Q. 6. Assuming that an action in equity is brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters, to recover from him the profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, at a price in excess of the price which they paid for it and of its fair value, and assuming that in this action a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed, and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to a similar action, substantially identical with
988 the first and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 945, 950.]

A. I think it would be a bar; I think it would be res adjudicata of the question, and a bar to such action if properly pleaded.

Q. 7. Assuming that the two actions in equity are brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters to recover from him profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, and assuming that such property is alleged to have been sold, pursuant to said joint plan and conspiracy, in two separate parcels, in each of which both promoters were jointly interested, and that said two actions were brought to recover the respective profits received from the sale of the two parcels, respectively, and assuming that the bills of complaint in the two actions were substantially identical, except as to the particular relief sought, and assuming that certain profits were alleged to have been made by said promoters on each parcel, and assuming that in one of said actions a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint

sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to two similar actions, substantially identical in form with those above described and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 946–950.]

A. In my opinion it would constitute a bar to the same.

Q. 8. Have you examined a copy of the record in the action of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn, in the Circuit Court of the United States for the Southern District of New York, such as is hereto annexed and marked (1), the respective portions of said record being marked A to R, inclusive?

[Objected to; admitted; exception.—See pages 946–950.]

A. Yes.

989 Q. 9. Have you examined copies of the proceedings in the above-entitled causes, to wit, the two causes of the Old Dominion Copper Mining & Smelting Co. v. Bigelow in the Supreme Judicial Court of Massachusetts, such as are hereto annexed and marked, respectively, (2) and (3)?

A. Yes.

Q. 10. Assuming that there were now pending in the courts of New York proceedings against Albert S. Bigelow identical in all respects (except as the practice might require formal changes) with the copies of the proceedings referred to in the 9th interrogatory, and assuming that said courts had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record, copies of which are referred to in the 8th interrogatory, were sufficiently pleaded and proven in defence of said proceedings, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in each of these bills of complaint were, respectively, the same persons, and that the contracts, acts, matters, and transactions mentioned in each of these bills of complaint were, respectively, the same contracts, acts, matters and transactions, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, what would be the effect, under the law and usages of the state of New York, of said decree and record as a defence to said proceedings assumed to be so pending?

[Objected to; admitted; exception.—See pages 946-950.]

A. In my opinion the effect of the decree would be to constitute a bar to any action against either Lewisohn's executors or Bigelow.

Q. 11. Assuming the facts stated in the 10th interrogatory, and assuming that the defendant, Bigelow, participated, through his

counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would those additional facts affect your answer to the preceding interrogatory?

[Objected to; admitted; exception.—See pages 946-950.]

A. The fact that Bigelow participated in the defence of the action, although not a party thereto, would, in my opinion, simply emphasize the fact that the decree therein constituted a bar against further proceedings for that cause of action until the same should be
999 reversed or set aside; but the mere fact of participation in the defence of such action, in my opinion, would not, and does not, change the legal effect of the decree as a bar to the subsequent action; it would still be and remain a bar, whether Bigelow had participated in the defence or not.

Q. 12. Assuming the facts stated in the 10th interrogatory, and assuming the facts stated in the 11th interrogatory, and assuming that the participation of the defendant, Bigelow, as stated in the 11th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers to the two preceding interrogatories?

[Objected to; admitted; exception.—See pages 947-950.]

A. I have answered the 10th interrogatory that, assuming the facts therein, it constituted a bar against a subsequent action based upon the same matters. As a matter of law, the participation of the defendant, Bigelow, in that defence would not be to add to, or take away from, the strength of the adjudication as a bar to the subsequent action, although it would emphasize the relation between Bigelow and Lewisohn and their joint interest. Its legal effect, however, would not be changed; it would still remain a bar, whether Bigelow participated in the defence or not, and the fact of the knowledge of the plaintiff, while strengthening the legal position, would not, in my opinion, affect the result.

Q. 13. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8098, referred to in the 9th interrogatory, and assuming that the course of the proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8098, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that

said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York,
991 and in said bill of complaint numbered 8098 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8098, described in the 9th interrogatory?

[Objected to: admitted: exception.—See pages 948–950.]

A. It would constitute a bar thereto and be res adjudicata of such question, in my opinion.

Q. 14. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8099, referred to in the 9th interrogatory, and assuming that the course of proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the State of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof; assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8099, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8099 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, and assuming that the bill of complaint in said Circuit Court, and the prayers thereof, relate to one part of an entire transaction comprising said contracts, acts, matters, and transactions, and that the bill of complaint corresponding to the one numbered 8099 in Massachusetts and the prayers thereof, relate to another part of the same entire transaction, what, under the laws and usages of the state of
992 New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceed-

ing corresponding to the cause numbered 8099, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

A. In my opinion it would constitute a defence thereto and be res adjudicata of the question involved.

Q. 15. Assuming the facts stated in the 13th and 14th interrogatories, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would these additional facts affect your answers, or either of them, to the 13th and 14th interrogatories?

[Objected to; admitted; exception.—See pages 948-950.]

A. It would not affect them at all. My opinion is that the decree of the federal court constitutes a binding adjudication of the questions involved therein, and that the court having jurisdiction of the subject matter and of the person had the power to render a valid judgement, and, so far as the plaintiff is concerned, such judgment became binding upon, and may be invoked in favor of, Bigelow, although not a party thereto, and upon the same facts, in an attempt by the same plaintiff to enforce the same cause of action against him, the decree of the federal court becomes in his favor a binding valid adjudication, whether he participated therein or not. The fact, however, of his participation, adds emphasis to the facts surrounding the transaction, in showing the identity of the subsequent cause of action and the person, but in legal effect, in my opinion, it constitutes a bar, whether he participated in the defence or not.

Q. 16. Assuming the facts stated in the 13th, 14th, and 15th interrogatories, and assuming that the participation of the defendant, Bigelow, as stated in the 15th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers, or either of them, to the 13th, 14th, and 15th interrogatories?

[Objected to; admitted; exceptions.—See pages 949, 950.]

A. My answer to this interrogatory is the same as the answer given to the last interrogatory.

993 Q. 17. If you have not already done so, state your reasons for your answers to interrogatories 6th to 16th, inclusive.

[Objected to; admitted; exception.—See page 950.]

A. I annex hereto an opinion delivered after an examination of this case, as my reasons in the law for the answers which I have given.

Cross-interrogatories.

Without waiving the foregoing objections, but expressly insisting thereon, the plaintiff puts de bene the following cross-interrogatories:—

X 1. Is it a principle of the law of the state of New York that the law decided in a case in the court of last resort in overruling a demurrer becomes the law of the case to be applied when the case is heard upon the facts?

A. It may or may not. A demurrer admits the facts averred in the complaint for the purpose of presenting questions of law to the court, but an answer interposed after the decision of the court which puts in issue the facts averred in the complaint, may change the whole application of the law, and the questions of law decided upon the demurrer may have very little application to the questions presented to the trial court for determination.

X 2. Is it the law of New York that there is no right of exoneration or contribution between defendants jointly and severally liable ex delicto and not ex contractu?

A. It is scarcely possible to answer this question. As to the defendant's liability, ex delicto, a judgment against them is satisfied by the discharge of one, whether it be contribution or not, and there can be but one satisfaction, whether against one or the whole. I do not know of any principle which can compel contribution among wrongdoers. As to the actions upon contract, it may be enforced against one or all severally liable.

X 3. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered that Bigelow might—but for said defence, if any—be under a liability to the plaintiff in the suits against Bigelow?

A. I have assumed that the cause of action against Bigelow was precisely the same cause of action as against Lewisohn, the enforcement of which was sought by the same plaintiff.

X 4. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability that Bigelow might—but for said
994 defence, if any—be under as a liability jointly with Lewisohn?

A. If by this question it is meant to propound what would be the legal rule if Lewisohn and Bigelow were joint debtors, then I have so considered it.

X 5. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability jointly and severally with Lewisohn?

A. Yes.

X 6. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability arising ex delicto?

A. Yes.

X 7. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability ex delicto jointly and severally with Lewisohn?

A. Yes.

X 8. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. It would have been a joint and several liability, in my opinion.

X 9. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass., 315, would that liability be, under the law of New York, a joint and several liability ex delicto with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. It would have been a liability under the determination of the court of Massachusetts, as they occupied a fiduciary relation to the corporation, which they had betrayed. The liability would be ex delicto, if I understand that decision.

X 10. Is it a principle of the law of the state of New York that the liability of joint wrongdoers is joint and several?

A. Yes, it is joint and several.

X 11. Is it sometimes a principle of New York law that estoppel by former adjudication must be mutual?

A. Yes.

X 12. If so, what, if any, are all the occasions of which you have knowledge on which they need not be mutual?

995 A. They are always mutual in a sense; they are always required to be mutual in a sense, and that mutuality is absolute when a common plaintiff seeks to enforce a cause of action against persons jointly and severally liable where he procures service upon one in a court of competent jurisdiction and there litigates the questions upon which liability is to be determined as against both, and is defeated; in such a sense, then, the law recognizes the required mutuality when upon the same facts he attempts to proceed against the other person jointly and severally liable to enforce a recovery upon the same facts.

X 13. Assuming that Bigelow took no part in the Lewisohn suit, in your opinion is the law of New York such that Bigelow would have been estopped in another suit to deny his liability as a matter of law on the same facts by a final decree against Lewisohn in the first suit?

A. Yes, upon the same facts.

X 14. Assuming that Lewisohn's executors took no part in the

suits against Bigelow, in your opinion is the law of New York such that said executors would have been estopped in another suit to deny their liability as a matter of law on the same facts, by a final decree against Bigelow in these suits?

A. Yes, upon the same facts.

X 15. Assuming that Bigelow took part in the defence of the suits against Lewisohn's executors, and that the plaintiff knew this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation and knowledge, operate as an estoppel in favor of Bigelow?

A. I have attached but little importance to Bigelow's participation in the defence. I have attached but little importance to this feature of the case, and, consequently, have not examined authorities, if any exist, bearing thereon.

X 16. Assuming that Bigelow took part in the defence of the suit against Lewisohn's executors, and that the plaintiff did not know this, what, by name and reference, are all the decisions, if any, in New York you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation without plaintiff's knowledge, operate as an estoppel in favor of Bigelow?

A. I have considered this question as a mere incident, and as not controlling upon the question of res adjudicata, and have not sought for authorities bearing thereon.

X 17. Assuming that Bigelow did not take part in the defence of the suit against Lewisohn's executors, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the
996 final decree in favor of Lewisohn's executors may operate as an estoppel in favor of Bigelow?

A. They are cited in the opinion written by me attached to the 17th direct interrogatory, and many other authorities not cited in the opinion; those upon which I relied, however, are therein referred to.

X 18. Have you considered any decisions or language of the courts in New York which may have any tendency to support the view that there is no estoppel in Bigelow's favor growing out of the decree in favor of Lewishon's executors?

A. Yes.

X 19. If so, what, by name and reference, are all of these which you have considered?

A. They are all either referred to in the opinion annexed to the 17th direct interrogatory, or are cited in the opinion in the cases of which the title is given. There are a number of other cases that I have examined, the names of which I do not now recall, and there is no library now present to which I can make reference.

X 20. Have any arguments been submitted or suggested to you by defendant's counsel, or have you thought of any, in support of the view that there was by the law of New York no estoppel in favor

of Bigelow growing out of the decree in favor of Lewisohn's executors?

A. Some authorities were submitted to me from Mr. Lauterbach's office, and some statement of what they held accompanied them, but no extended argument of the question was contained in any brief which I examined. I have made a general examination of the subject, both for and against the proposition.

X 21. If so, what are all of said arguments?

A. The answer to the 19th cross-interrogatory answers this interrogatory.

X 22. What, in your opinion, constitutes privity under the law of New York to a judgment?

A. Where a plaintiff brings an action against one only of two parties jointly and severally liable, and against such person and in such action is defeated in his recovery, and judgment absolute passed against him, and thereafter in another action the same plaintiff, upon the same facts, attempts to enforce the same claim against the other party jointly and severally liable, such last-named party stands in privity to the first judgment.

X 23. In determining whether there was an estoppel in the present case, have you assumed or considered that Bigelow was in privity to the parties of record in the suit against Lewisohn's executors?

A. Yes.

X 24. In considering whether there was an estoppel in this case, have you assumed or considered that Bigelow had any legal interest to defend in the suit against Lewisohn's executors beyond such interest as he might have to secure a favorable precedent?

A. Yes.

X 25. If so, precisely what have you assumed to be said legal interest?

A. I have not assumed that Bigelow had any legal interest
997 in the Lewisohn suit during its prosecution. The legal interest which I have assumed that he had was after the judgment was pronounced against the plaintiff upon the facts set up in the complaint.

X 26. Unless Bigelow would have been bound in favor of the plaintiff by estoppel by a decision adverse to Lewisohn's executors, even if Bigelow did not participate in the defence of the suit against them, did Bigelow, in your opinion, have a legal interest to defend in that suit?

A. He had no legal interest to defend in that suit necessarily, because the estoppel of that judgment would not operate to cut him off from any defence which he had, but it did operate to bar the plaintiff therein, after its defeat, from maintaining an action against Bigelow upon those same facts, and upon the same facts in an action against Bigelow the judgment would operate as an estoppel against him; his defence would need to consist in new matter, else he would not have it.

X 27. If so, by precise description, what, in your opinion, was said legal interest?

A. This interrogatory is answered by the answer last preceding.

X 28. In determining whether there was any estoppel in this case, have you assumed that the plaintiff consented to the participation, if any, by Bigelow in the support of the demurrers of Lewisohn's executors?

A. Yes.

X 29. Is it a principle of New York law that if the defendant in one suit sustains merely the character of a co-trespasser with the defendant in another suit by the same plaintiff, the recovery against one defendant is not thereby made competent evidence against the other?

A. I cannot answer this question with any degree of certainty or satisfaction to myself, as I have not examined that question; my impression of the law is that such judgment would not be admissible against the co-trespasser unless the facts upon which the judgment was based in both actions were the same.

X 30. Is it a principle of New York law that the judgment in favor of one of two persons jointly and severally liable for the wrongful conversion of the plaintiff's property is no bar to a subsequent suit against the other, because torts are joint and several?

A. I cannot answer the question at this time.

X 31. Is it a principle of New York law that an adjudication acts as an estoppel only between the parties thereto or those in privity with them, or, in other words, the estoppel must be mutual?

A. Yes.

X 32. Is it a principle of New York law that a judgment in favor of one co-trespasser may not be used by another co-trespasser not a party to it by way of estoppel?

A. Not if the subsequent action is based upon the same facts which defeated the former.

X 33. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were Bigelow's agents in the suit against them which has been dismissed?

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A. I did not put my opinion upon the doctrine of agency.

X 34. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were trustees for Bigelow of the stock sought to be recovered in the suit against them which has been dismissed?

A. There might have been such relations.

X 35. Is it a principle of New York law that in an action at law against one or some of several joint tort feasors, the controversy may be determined as between the parties before the court,—i. e., the plaintiff and defendant,—and without prejudice to the rights of others; and the judgment will completely determine the controversy between them, and will not be res adjudicata between the plaintiff and any of the joint tort feasors who is not a defendant and may be sued later?

A. I cannot conceive of such a case upon the same facts unless there be a recovery upon the part of the plaintiff, and I do not now recall of any such authority in the state of New York where such a case as supposed exists.

X 36. Have you stated all your reasons for the opinions expressed

by you, or the statements made by you, in answer to the 6th, 7th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th direct interrogatories?

A. Substantially, yes.

X 37. If not, what are all your reasons for the opinions or statements given by you in answer to each of said interrogatories?

A. I have nothing to answer to this interrogatory than what I have already stated.

X 38. Have you now stated all your reasons for said answers?

A. The answer to this interrogatory is the same as to the last.

X 39. Were you, prior to the taking of your deposition on the foregoing cross-interrogatories, shown them, or any of them, or any copies of any of them, or given any information concerning the substance of them?

A. No.

X 40. Has each of your answers in its final form been given in the language in which it now appears, before you were aware of the substance of any subsequent cross-interrogatory?

A. Yes, except the 8th and 9th cross-interrogatories, which I declined to answer until I could re-examine the case in the 188th Massachusetts, and the answers to those two interrogatories were suspended until I could make such examination. The remainder of the interrogatories were therefore propounded before such examination was made and the 8th and 9th cross-interrogatories answered.

X 41. Have you, since September 22, 1908, discussed in any way with any other person who is named as a witness in the caption to these cross-interrogatories, or with any one on behalf of the defendant, any of the subjects dealt with in the foregoing interrogatories or in your answers thereto?

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A. No.

EDWARD W. HATCH.

Before me,
PERCIVAL WILDS,
Notary Public.

This is the opinion referred to by witness in his answer to direct interrogatory 17th.

[SEAL.]

PERCIVAL WILDS,
Notary Public.

"COMMONWEALTH OF MASSACHUSETTS:

OLD DOMINION COPPER MINING & SMELTING CO.
v.
ALBERT S. BIGELOW.

"The bill of complaint in this case is in every substantial respect the same as the bill of complaint of this plaintiff against Frederick Lewisohn et al, brought in the United States court held in and for the southern district of New York.

"Therein a demurrer was interposed to the bill of complaint upon the ground, among others, that the complainant failed to state a cause of action and the demurrer was sustained; the case was carried

to the Circuit Court of Appeals, where the judgment was affirmed, and, by writ of certiorari, reached the Supreme Court of the United States, where the decree appealed from was affirmed, and it does not appear that any leave was given to plead over, in consequence of which the judgment became final and absolute; and it was then and there conclusively and distinctly adjudicated that, upon the facts appearing in the complaint, the plaintiff had no cause of action against the defendants therein named.

"The question now arising is whether an action in the state court of the state of New York can be maintained upon the same facts as set forth in the bill of complaint in the federal court. In other words, is the determination of the Supreme Court of the United States res adjudicata of the questions therein involved and binding upon parties and privies thereto as a final and conclusive adjudication?

"In this opinion it is unnecessary to rehearse the facts of the case. For present purposes it is sufficient to say that the defendant Lewisohn in the federal court and the defendant Bigelow in the Massachusetts court stand upon exactly the same footing, so far as liability is concerned, for the things charged against them.

1000 The facts upon which liability could be established, if the law permitted it, are precisely the same in one case as in the other, and whatever defence is possessed by Lewisohn is also possessed by Bigelow. No distinction can be drawn, either of law or fact, as between these two persons. In the case of Lewisohn it has been held that the facts averred, neither at law or in equity, created any liability against him. It would seem to follow that such fact having been established by a binding adjudication, rendered by a court having jurisdiction of the subject matter and of the person, would be conclusive upon the same party plaintiff in that action who proceeded against Bigelow upon the same facts.

"The bills of complaint in each of the above-mentioned cases are quite voluminous. They have been fully set out in the decision of the court of Massachusetts, and in the Supreme Court of the United States, and therefore it is not needful that we rehearse them here.

"The plaintiff in the present case seems to occupy the position of enforcing a plain right of its own and also of enforcing such right as it may represent existing in other persons who would profit by any judgment which it might obtain.

"The defendant, Lewisohn, if he were sued in the state courts of the state of New York, if well advised, would immediately plead in bar judgment rendered in his favor by the federal court, and I am unable to see why such plea would not be effectual in bar of the action.

"In Embury v. Conner, 3 N. Y. 511-522, it was held:

" 'The general rule is, that an allegation on record, upon which issue has been once taken and found, and a judgment has been rendered, is, between the parties taking it and their privies, conclusive, according to the finding thereof, so as to estop the parties respectively from again litigating that fact once so tried and found; whether it is pleaded in bar or given in evidence.'

"See Leavitt v. Wolcott, 95 Id. 212.

"And such judgment, it is said, is 'Res adjudicata and therefore binding upon all the world.'

"Park Hill Co. v. Herriott, 41 App. Div. 324.

"Taking the situation as it exists, it conclusively appears that the relation of Lewisohn and Bigelow is precisely alike, both in
1001 fact and in law, whether there be applied thereto legal or equitable principles. Both were promoters of the same scheme, both were sharers in the ultimate results, both hold the property which they received from the beginning to the end by precisely the same tenure, and obtained the same by the same means.

"Assume that the facts created between the corporation or the subscribers to the stock or to others a fiduciary relation, and, for present purposes, assume that their acts were wrongful: they would then stand in the relation to those to whom they were required to respond as trustees by construction, either in the ordinary relation of trustee and cestui trust or as trustees ex maleficio.

"Brewster v. Hatch, 122 N. Y. 349.

"Matter of Will of O'Hara, 95 Id. 403.

"Under such circumstances how could it be possible to say that the complainant could pursue one trustee and be defeated by a binding solemn adjudication in one tribunal having jurisdiction of the subject matter and of the person, and then in another tribunal or in another action pursue the other trustee upon the same facts and precisely the same grounds and be unaffected by the judgment which had bound his co-trustee? Such, it is believed, is not the law of the state of New York.

"In Castle v. Noyes, 14 N. Y. 329, it was said by one of the most learned judges that the state of New York ever produced, that 'The well settled rule on this subject is that the judgment of a court of competent jurisdiction upon a question directly involved in the suit is conclusive in a second suit between the same parties depending upon the same question although the subject matter of the second action is different.'

"Therein the rule was applied where a prior adjudication had been had between a different party and the defendant, but it was held that as the facts involved in the second action were the same as the first, such party stood in privity to such judgment and consequently it was binding upon him. A long line of authorities support this principle.

"Western R. R. Co. v. Nolan, 49 N. Y. 513.

"Matter of Estate of Strout, 126 N. Y. 201.

"Lawrence v. Schaffer, 19 Misc. 239. (Affirmed 20 App. Div. 80.)

"Applying the doctrine of these cases to the present situation, it would necessarily follow that where trustees exist, no matter
1002 what their character, where liability is to be determined upon a given state of facts, and where the respective litigations relate to the same matter and there could be no change, the result in a determination by one court of competent jurisdiction that no liability exists, must remain the law of that case until reversed,

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and is binding upon all parties and privies in connection therewith, and the party who as a co-trustee or particeps in that transaction may avail himself of such judgment is a privity thereto as against the same plaintiff who defeated in one action, seeks to enforce liability in another. I know of no exception to such rule.

"In the present case the plaintiff was defeated in an attempt to enforce a claimed cause of action by a decisive and final adjudication. That adjudication is binding as against it to enforce the same cause of action against another individual upon the same facts no matter in what court such attempt be made. The rule in such cases is not that of stare decisis but of res adjudicata.

EDWARD W. HATCH."

Deposition of Charles F. Brown.

The Deposition of Charles F. Brown, Taken in Behalf of the Defendant, Bigelow, and Filed by his Counsel, Subject to the Objections and Exceptions of Counsel for the Complainant, The Old Dominion Copper Mining & Smelting Company, to be Found at Pages 945-950.

[Commission and notarial certificate omitted.]

Q. 1. State your name, age, and place of residence.

A. My name is Charles F. Brown; I am sixty-four years of age; I reside at Newburgh, Orange county, N. Y.

Q. 2. State your occupation and place of business.

A. I am a lawyer; my office is at No. 60 Wall street in the city of New York.

Q. 3. If, in answer to the preceding interrogatory, you have testified that you are an attorney at law, state when you were admitted to the bar, and in what state or states, and how long you have been engaged in the practice of law in said state or states, and with what firms, if any, you have been or are connected.

A. I was admitted to the bar in the month of May, 1868, in the state of New York. I was a member of the firm of Cassiday & Brown, practising my profession at Newburgh, N. Y., from that date until the 31st day of December, 1882; I have also practised my profession in the city of New York from some time in the month of March, 1897, until the present time. I have been admitted also to practice in the Circuit Court of the United States for the
1003 Southern District of New York, and also in the Supreme Court of the United States at Washington. Since resuming practice in 1897, I have had no connection with any other lawyer or firm.

Q. 4. State what, if any, judicial or other public or official positions you hold or have held.

A. I have held the position of district attorney and county judge of the county of Orange, state of New York, and justice of the Supreme Court of the state of New York, and during a period of four years I was a member of the second division of the Court of Appeals of the state of New York.

Q. 5. State any other matters relating to your experience in your profession and as to your familiarity with the law and usages governing the practice in the state and federal courts in New York, both in law and in equity, and also as to your familiarity with the laws and usages of the state of New York, relating to former adjudication and estoppel by judgment.

A. Well, I am familiar with the law and usages covering the practice in the state of New York and in the federal courts of New York, both in law and equity; I am familiar with the law and usages in the state relating to former adjudications and estoppel by judgment; I have derived this familiarity during my practice as an attorney at law, and also during my service as judge.

Q. 6. Assuming that an action in equity is brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters to recover from him the profits alleged to have been received by him and his associates secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, at a price in excess of the price which they paid for it and of its fair value, and assuming that in this action a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to a similar action, substantially identical with the first and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 945-950.]

A. It would be conclusive, in my judgment, against the plaintiff in the similar action, if that is the term used there, and would bar any recovery by the plaintiff therein.

1004 Q. 7. Assuming that two actions in equity are brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters, to recover from him profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, and assuming that such property is alleged to have been sold, pursuant to said joint plan and conspiracy, in two separate parcels, in each of which both promoters were jointly interested, and that said two actions were brought to recover the respective profits received from the sale of the two parcels, respectively, and assuming that the bills of complaint in the two actions were substantially identical, except as to the particular relief sought, and assuming that certain profits were alleged to have been made by said promoters on each parcel, and assuming that in one of said actions a final decree upon the

merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed, and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to two similar actions, substantially identical in form with those above described and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 946-950.]

A. It would be conclusive against the plaintiff in the similar actions, and bar any recovery by the plaintiff in those actions.

Q. 8. Have you examined a copy of the record in the action of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn in the Circuit Court of the United States for the Southern District of New York, such as is hereto annexed and marked (1), the respective portions of said record being marked A to R, inclusive?

[Objected to; admitted; exception.—See pages 946-950.]

A. Yes.

Q. 9. Have you examined copies of the proceedings in the above-entitled causes, to wit, the two causes of the Old Dominion Copper Mining & Smelting Co. v. Bigelow in the Supreme Judicial Court in Massachusetts, such as are hereto annexed and marked, respectively, (2) and (3)?

A. Yes.

Q. 10. Assuming that there were now pending in the courts
1005 of the state of New York proceedings against Albert S. Bigelow, identical in all respects (except as the practice might require formal changes) with the copies of the proceedings referred to in the 9th interrogatory, and assuming that said courts had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record, copies of which are referred to in the 8th interrogatory, were sufficiently pleaded and proven in defence of said proceedings, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in each of these bills of complaint were, respectively, the same persons, and that the contracts, acts, matters, and transactions mentioned in each of these bills of complaint were, respectively, the same contracts, acts, matters, and transactions, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, what would be the effect, under the law and usages of the state of New York, of said decree and record as a defence to said proceedings assumed to be so pending.

[Objected to; admitted; exception.—See pages 946-950.]

A. It would be conclusive against the plaintiff in the actions against Bigelow.

Q. 11. Assuming the facts stated in the 10th interrogatory, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would those additional facts affect your answer to the preceding interrogatory?

[Objected to: admitted: exception.—See pages 946-950.]

A. It wouldn't change my answer: I do not attach any weight or importance to the facts set out in the 11th interrogatory.

Q. 12. Assuming the facts stated in the 10th interrogatory, and assuming the facts stated in the 11th interrogatory, and assuming that the participation of the defendant, Bigelow, as stated in the 11th interrogatory, was with the knowledge of the plaintiff, if at all, would this additional fact affect your answers to the two preceding interrogatories

[Objected to: admitted: exception.—See pages 947-950.]

A. I would answer this interrogatory the same as I answered the last.

1006 Q. 13. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8098, referred to in the 9th interrogatory, and assuming that the course of the proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8098, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8098 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8098, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

A. I think it would be conclusive against the plaintiff, and would bar any recovery by the plaintiff against Bigelow.

Q. 14. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8099, referred to in the 9th interrogatory, and assuming that the course of proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8099, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8099 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, and assuming that the bill of complaint in said Circuit Court, and the prayers, thereof, relate to one part of an entire transaction, comprising said contracts, acts, matters, and transactions, and that the bill of complaint corresponding to the one numbered 8099 in Massachusetts, and the prayers thereof, relate to another part of the same entire transaction, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8099, described in the 9th interrogatory

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[Objected to; admitted; exception.—See pages 948-950.]

A. It would be conclusive against the plaintiff, and a bar to any recovery against Bigelow.

Q. 15. Assuming the facts stated in the 13th and 14th interrogatories, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would these additional facts affect your answers, or either of them, to the 13th and 14th interrogatories.

[Objected to; admitted; exception.—See pages 948-950.]

A. My answer would be the same; I do not attach any importance or weight to the facts stated in the 15th interrogatory.

Q. 16. Assuming the facts stated in the 13th, 14th and 15th interrogatories, and assuming that the participation of the defend-
1008 ant, Bigelow, as stated in the 15th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers, or either of them, to the 13th, 14th, and 15th interrogatories?

[Objected to; admitted; exception.—See pages 949, 950.]

A. My answer to this interrogatory is the same as that to the preceding one.

Q. 17. If you have not already done so, state your reasons for your answers to interrogatories 6th to 16th, inclusive.

[Objected to; admitted; exception.—See page 950.]

A. The reasons for the opinion I have expressed in answer to the 10th, 13th, and 14th interrogatories are as follows:—

First. As to the effect of the final judgment entered in favor of Lewisohn's executors in the federal court upon the plaintiff's right to prosecute and recover against Bigelow in the action in Massachusetts wherein it is sought to rescind the sale of the parcels of real estate conveyed to the plaintiff by Lewisohn and recover 30,000 shares of stock issued therefor.

In the transaction upon which both of these actions are based Lewisohn was a trustee for Bigelow and his agent. The allegation of the bill is that Bigelow and Lewisohn, or the two in conjunction for their common benefit, acquired the real estate from Keyser for the same consideration paid for the shares of stock, and that said real estate was conveyed by Keyser to Lewisohn for the common benefit of Lewisohn and Bigelow.

The judgment rendered in favor of Lewisohn's executors upon the demurrer is conclusive upon the plaintiff in any action against Bigelow based upon the same facts upon which recovery was sought against said executors.

This is clearly so, in my opinion, on the ground that a judgment in favor of a trustee or agent is binding upon and inures to the benefit of the beneficiary of the trust or the principal.

Second. As to the effect of the judgment upon both actions pending against Bigelow in the courts of Massachusetts.

Bigelow and Lewisohn stood in mutual relationship to the property and transaction which is made the basis of a recovery in all the actions. They were partners in the enterprise of acquiring the property of the Old Dominion Copper Company of Baltimore City and in selling it to the plaintiff. If there was any wrong done in the transaction, Bigelow and Lewisohn were joint wrongdoers.

Such is the allegation of all the bills. The acts are alleged to have been joint acts done pursuant to a conspiracy between Bigelow
1009 and Lewisohn, and to have been wrongful towards the plaintiff and to the future stockholders therein. The specific al-

legation is that they "conspired to carry out said plan and thereby injured said corporation to be formed as aforesaid [meaning the plaintiff] and the future stockholders in said corporation and to secure for themselves as the promoters and organizers thereof, a large secret profit."

Upon these allegations it is plain that as a legal conclusion Lewisohn could not be held innocent and Bigelow guilty, or that a right to recover damages could exist against Bigelow and not against Lewisohn.

Consequently a judgment in favor of Lewisohn, that the fact alleged in the suit in which the demurrer was sustained created no cause of action, is conclusive against the plaintiff in an action against Bigelow.

Otherwise, we would have two rules of law applied to the same transaction, and diverse legal conclusions against the two alleged wrongdoers arising out of the same facts.

The judgment in favor of Lewisohn's executors is conclusive that in the sale of the property to the plaintiff there was nothing illegal and no wrong done to the plaintiff by either Bigelow and Lewisohn, for, considering the mutual relationship of the parties to the transaction and to the property sold to the plaintiff, if wrong had been done by Bigelow, Lewisohn would have been liable therefor and the demurrer would have been overruled.

Bigelow would clearly have had a right to appear and defend the 300,000 share action in the federal court. He was interested in the subject matter and the legality of his own acts was a subject of judicial inquiry.

The rule of res adjudicata is that the deliberate judgment of a competent tribunal having jurisdiction of a subject matter, is, upon the same state of facts, final and conclusive of the question litigated between the parties and those in privity with them, and forever sets the controversy at rest.

In the application of this rule, the term "parties" is not confined to the parties to the action, but includes all parties to the transaction which was the subject of investigation by the tribunal rendering the judgment.

In the interrogatories addressed to me the same facts are made the basis of a right to recover in the 100,000 share suit as in the 30,000 share suit, the variation existing only as to the specific property conveyed to the plaintiff.

Considering the mutual relation-ship of Bigelow and Lewisohn to
the transaction and to the property, the judgment of the
1010 federal court in the action upon the demurrer is final and con-
clusive as to the title to the property—as to the legality of the transaction—and as to the alleged wrongdoing of both Bigelow and Lewisohn.

The decided cases in the New York court sustain the opinions I have expressed, and the reasons I have stated lead me also to answer the 6th and 7th interrogatories as I have done.

Cross-interrogatories:

Without waiving the foregoing objections, but expressly insisting thereon, the plaintiff puts de bene the following cross-interrogatories:—

X 1. Is it a principle of the law of the state of New York that the law decided in a case in the court of last resort in overruling a demurrer becomes the law of the case to be applied when the case is heard upon the facts?

A. If a demurrer is overruled in the state of New York ordinarily the defendant is given leave to answer, and the case is then heard upon the issues that are raised upon the bill of complaint and the answer. If, however, the answer raises no other question of fact, except such as appeared upon the face of the bill of complaint, why, then, the judgment of the Court of Appeals would be conclusive, and would state the law of the case.

X 2. Is it the law of New York that there is no right of exoneration or contribution between defendants jointly and severally liable ex delicto and not ex contractu?

A. As a general proposition I think it is; but there are some exceptions to the rule.

X 3. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered that Bigelow might—but for said defence, if any—be under a liability to the plaintiff in the suits against Bigelow?

A. I have not assumed that he would be under any liability to the plaintiff, but I have assumed that the liability which Bigelow and Lewisohn would sustain to the plaintiff would be the same, and that each would be responsible for each other's acts.

X 4. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability that Bigelow might—but for said defence, if any—be under as a liability jointly with Lewisohn?

A. I have.

X 5. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability jointly and severally with Lewisohn?

A. I have.

X 6. In determining whether or not the decree dismissing
1011 the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability arising ex delicto?

A. Yes.

X 7. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability ex delicto jointly and severally with Lewisohn?

A. Yes.

X 8. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts, as applied to these facts in said suit, there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. In my opinion, upon the allegations of the bill, Lewisohn and Bigelow are jointly and severally liable; each is liable for the other's acts.

X 9. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts, as applied to these facts in said suit, there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability ex delicto with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. In my opinion it would.

X 10. Is it a principle of the law of the state of New York that the liability of joint wrongdoers is joint and several?

A. Yes.

X 11. Is it sometimes a principle of New York law that estoppel by former adjudication must be mutual?

A. Yes.

X 12. If so, what, if any, are all the occasions of which you have knowledge on which they need not be mutual?

A. I don't think of any at the present moment.

X 13. Assuming that Bigelow took no part in the Lewisohn suit, in your opinion is the law of New York such that Bigelow would have been estopped in another suit to deny his liability as a matter of law on the same facts, by a final decree against Lewisohn in the first suit?

A. Yes.

X 14. Assuming that Lewisohn's executors took no part in the suits against Bigelow, in your opinion is the law of New York such that said executors would have been estopped in another suit to deny their liability as a matter of law on the same facts, by a final decree against Bigelow in these suits?

1012 A. I think they would not; I think the judgment would not have been conclusive upon them in the sense of its being a bar or estoppel against them, but I think the court would undoubtedly have followed the law that was decided in the Bigelow case, assuming the two suits to have been in the same jurisdiction.

X 15. Assuming that Bigelow took part in the defence of the suits against Lewisohn's executors, and that the plaintiff knew this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation and knowledge, operate as an estoppel in favor of Bigelow?

A. I don't think the decree in favor of Lewisohn's executors operates as an estoppel against plaintiff, because Bigelow appeared and took part in the defence: I do not rest my opinion upon any such ground, and I have so stated in my answers to the direct interrogatories.

X 16. Assuming that Bigelow took part in the defence of the suit against Lewisohn's executors, and that the plaintiff did not know this, what, by name and reference, are all the decisions, if any, in NewYork you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation without plaintiff's knowledge, operate as an estoppel in favor of Bigelow?

A. My answer to the preceding interrogatory answers this interrogatory.

X 17. Assuming that Bigelow did not take part in the defence of the suit against Lewisohn's executors, what, by name and reference, are all the decisions if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may operate as an estoppel in favor of Bigelow?

A. Well, I have given no special examination of authorities upon this subject, but I think the case of Castle v. Noyes, 14 N. Y. 329, is an authority which sustains my opinion; also the cases of—

Tyng v. Clarke, 9 Hun, 269.
In the Matter of Strant, 126 N. Y. 201.
King v. Barnes, 109 N. Y. 267.
People v. Stephens, 51 How. Pr. 235; affirmed 71 N. Y. 527.

X 18. Have you considered any decisions or language of the courts in New York which may have any tendency to support the view that there is no estoppel in Bigelow's favor growing out of the decrees in favor of Lewisohn's executors?

A. I have not.

1013 X 19. If so, what, by name and reference, are all of these which you have considered?

A. I have not.

X 20. Have any arguments been submitted or suggested to you by defendant's counsel, or have you thought of any, in support of the view that there was by the law of New York no estoppel in favor of Bigelow growing out of the decree in favor of Lewisohn's executors?

A. No.

X 21. If so, what are all of said arguments?

A. No.

X 22. What, in your opinion, constitutes privity under the law of New York to a judgment?

A. Succession in title to the property involved; succession in blood, or succession in contract. As, for instance, a judgment determining the title to a piece of land would be conclusive as to all purchasers subsequent to the judgment; subsequent purchasers would be said to be in privity with the original parties.

X 23. In determining whether there was an estoppel in the present case, have you assumed or considered that Bigelow was in privity to the parties of record in the suit against Lewisohn's executors?

A. I do not think, in the strict sense of the term, that Bigelow can be said to be in privity with Lewisohn's executors; I put my opinion upon the ground that they are parties to the same transaction and that the same liability attaches to one as attaches to the other upon the facts that are alleged in the several bills of complaint.

X 24. In considering whether there was any estoppel in this case, have you assumed or considered that Bigelow had any legal interest to defend in the suit against Lewisohn's executors beyond such interest as he might have to secure a favorable precedent?

A. I think he had a legal interest to defend, inasmuch as the charge made in the bill against Lewisohn involved his acts, and involved the title to the property which he purchased and conveyed, or caused to be conveyed, to the plaintiff.

X 25. If so, precisely what have you assumed to be said legal interest?

A. I have answered this interrogatory in my answer to the preceding interrogatory.

X 26. Unless Bigelow would have been bound in favor of the plaintiff by estoppel by a decision adverse to Lewisohn's executors, even if Bigelow did not participate in the defence of the suit against them, did Bigelow, in your opinion, have a legal interest to defend in that suit?

A. I think he had a right to appear and defend that suit, one which the courts of the state of New York would recognize and would have permitted him to intervene and serve an answer and defend. I have already stated that I do not think that a judgment in favor of the plaintiff against Lewisohn's executors in another action to which Bigelow was not a party could be said to be conclusive against him or estop him from denying the facts
1014 upon which the recovery was sought, but I also am of opinion that the judgment would have been strong evidence of his liability, and the law involved in the judgment would probably have been followed by the court in an action against Bigelow.

X 27. If so, by precise description, what, in your opinion, was said legal interest?

A. I have already answered this question in response to the 24th, 25th, and 26th cross-interrogatories.

X 28. In determining whether there was any estoppel in this case, have you assumed that the plaintiff consented to the participation, if any, by Bigelow in the support of the demurrers of Lewisohn's executors?

A. I do not attach any weight to the fact that the plaintiff consented to the participation by Bigelow in support of the demurrer of Lewisohn's executors.

X 29. Is it a principle of New York law that if the defendant in one suit sustains merely the character of a co-trespasser with the defendant in another suit by the same plaintiff, the recovery against

one defendant is not thereby made competent evidence against the other?

A. I think the recovery against one defendant is not competent evidence against the other in the case stated.

X 30. Is it a principle of New York law that the judgment in favor of one of two persons jointly and severally liable for the wrongful conversion of the plaintiff's property is no bar to a subsequent suit against the other because torts are joint and several?

A. A judgment in favor of one of two persons who are alleged to be jointly and severally liable for a wrongful conversion of plaintiff's property is a bar to a subsequent suit against the other upon the same state of facts alleged in the suit against the defendant in whose favor the judgment was rendered.

X 31. Is it a principle of New York law that an adjudication acts as an estoppel only between the parties thereto or those in privity with them, or, in other words, the estoppel must be mutual?

A. It is a principle that the judgment operates as an estoppel between those who are parties and those who are in privity with them; ordinarily estoppel must be mutual.

X 32. Is it a principle of New York law that a judgment in favor of one co-trespasser may not be used by another co-trespasser not a party to it, by way of estoppel?

A. No.

X 33. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were Bigelow's agents in the suit against them which has been dismissed?

A. No; I have given no consideration to that fact.

X 34. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were trustees for
1015 Bigelow of the stock sought to be recovered in the suit against them which has been dismissed?

A. No; I have not considered the question of agency or trusteeship further than I have stated in my answer to the 17th direct interrogatory.

X 35. Is it a principle of New York law that in an action at law against one or some of several joint tort feasors, the controversy may be determined as between the parties before the court,—i. e., the plaintiff and defendant,—and without prejudice to the rights of others; and the judgment will completely determine the controversy between them, and will not be res adjudicata between the plaintiff and any of the joint tort feasors who is not a defendant and may be sued later?

A. No.

X 36. Have you stated all your reasons for the opinions expressed by you, or the statements made by you, in answer to the 6th, 7th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th direct interrogatories?

A. Yes.

X 37. If not what are all your reasons for the opinions or statements given by you in answer to each of said interrogatories?

A. I refer to my answer to the preceding interrogatory.

X 38. Have you now stated all your reasons for said answers?

A. Yes.

X 39. Were you, prior to the taking of your deposition on the foregoing cross-interrogatories, shown them, or any of them, or any copies of any of them, or given any information concerning the substance of them?

A. I was not.

X 40. Has each of your answers in its final form been given in the language in which it now appears, before you were aware of the substance of any subsequent cross-interrogatory?

A. Yes.

X 41. Have you, since September 22, 1908, discussed in any way with any other person who is named as a witness in the caption to these cross-interrogatories, or with any one on behalf of the defendant, any of the subjects dealt with in the foregoing interrogatories, or in your answers thereto?

A. No.

CHARLES F. BROWN.

Before me, this 28th day of September, A. D. 1908.

[SEAL.] H. M. HEWSON,
Notary Public, Westchester County.

Certificate filed in New York County.

Deposition of Martin L. Stover.

The Deposition of Martin L. Stover, Taken in Behalf of the Defendant Bigelow, and Filed by his Counsel, Subject to the Objections and Exceptions of Counsel for the Complainant
1016 the Old Dominion Copper Mining & Smelting Company, to be Found at Pages 945-950.

[Commission and notarial certificate omitted.]

Q. 1. State your name, age, and place of residence.

A. My name is Martin L. Stover; I am sixty-two years of age, and I reside in New York city.

Q. 2. State your occupation and place of business.

A. I am an attorney and counsellor at law, and do business at No. 60 Wall street, New York city.

Q. 3. If, in answer to the preceding interrogatory, you have testified that you are an attorney at law, state when you were admitted to the bar, and in what state or states, and how long you have been engaged in the practice of law in said state or states, and with what firms, if any, you have been or are connected?

A. I was admitted to the bar in 1870 at Albany in the state of New York, and have practised law from that time until the present, except during the fourteen years when I was on the bench of the Supreme Court of the state of New York. I am now connected with the firm of Stover, Hull & Freeman.

Q. 4. State what, if any, judicial or other public or official positions you hold or have held.

A. I have been a member of the legislature of the state of New York, and was, for fourteen years, from 1892 to 1906, a justice of the Supreme Court of the state of New York.

Q. 5. State any other matters relating to your experience in your profession and as to your familiarity with the law and usages governing the practice in the state and federal courts in New York, both in law and in equity, and also as to your familiarity with the laws and usages of the state of New York relating to former adjudication and estoppel by judgment.

A. During my term as justice of the court, I sat at trial terms and for two years in the appellate division of the fourth department of the state of New York, and had such experience as would come from the position which I held.

Q. 6. Assuming that an action in equity is brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters, to recover from him the profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, at a price in excess of the price which they paid for it and of its fair value, and assuming that in this action a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after ap-
1017 peal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to a similar action, substantially identical with the first and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 945-950.]

A. My opinion is that it would be a complete bar.

Q. 7. Assuming that two actions in equity are brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters, to recover from him profits alleged to have been received by him and his associates secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, and assuming that such property is alleged to have been sold, pursuant to said joint plan and conspiracy, in two separate parcels, in each of which both promoters were jointly interested, and that said two actions were brought to recover the respective profits received from the sale of the two parcels, respectively, and assuming that the bills of complaint in the two actions were substantially identical except as to the particular relief sought, and assuming that certain profits were alleged to have

been made by said promoters on each parcel, and assuming that in one of said actions a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence of two similar actions, substantially identical in form with those above described and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 946-950.]

A. I think the latter action would be barred by the judgment in the former action.

Q. 8. Have you examined a copy of the record in the action of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn in
1018 the Circuit Court of the United States for the Southern District of New York, such as is hereto annexed and marked (1), the respective portions of said record being marked A to R, inclusive?

[Objected to; admitted; exception.—See pages 946-950.]

A. I have.

Q. 9. Have you examined copies of the proceedings in the above-entitled causes, to-wit, the two causes of the Old Dominion Copper Mining & Smelting Co. v. Bigelow, in the Supreme Judicial Court in Massachusetts, such as are hereto annexed and marked, respectively, (2) and (3)?

A. I have.

Q. 10. Assuming that there were now pending in the courts of the state of New York proceedings against Albert S. Bigelow, identical in all respects (except as the practice might require formal changes) with the copies of the proceedings referred to in the 9th interrogatory, and assuming that said courts had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record, copies of which are referred to in the 8th interrogatory, were sufficiently pleaded and proven and in defence of said proceedings, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in each of these bills of complaint were, respectively, the same persons, and that the contracts, acts, matters, and transactions mentioned in each of these bills of complaint were, respectively, the same contracts, acts, matters, and transactions, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, what would be the effect, under the law and usages of the state of New York, of said decree and record as a defence to said proceedings assumed to be so pending?

[Objected to; admitted; exception.—See pages 946-950.]

A. In my judgment it would be a complete defence and bar to the maintenance of the latter action.

Q. 11. Assuming the facts stated in the 10th interrogatory, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would those additional facts affect your answer to the preceding interrogatory?

[Objected to; admitted; exception.—See pages 946-950.]

1019 A. I should regard it as a circumstance to be considered in the matter, and of some weight, and particularly if such participation and expenditure was done with the knowledge of the complainant in the action.

Q. 12. Assuming the facts stated in the 10th interrogatory, and assuming the facts stated in the 11th interrogatory, and assuming that the participation of the defendant, Bigelow, as stated in the 11th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers to the two preceding interrogatories?

[Objected to; admitted; exception.—See pages 947-950.]

A. As I have stated in my former answer, I think that is a circumstance that may properly be considered in judging the situation, but I should not, however, consider it a controlling consideration.

Q. 13. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8098, referred to in the 9th interrogatory, and assuming that the course of the proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8098, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York, and in said bill of complaint numbered 8098 in Massachusetts, were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in

the proceeding corresponding to the cause numbered 8098, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

1020 A. I think it would be a complete defence.

Q. 14. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8099, referred to in the 9th interrogatory, and assuming that the course of proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8099, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8099 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, and assuming that the bill of complaint in said Circuit Court and the prayers thereof relate to one part of an entire transaction comprising said contracts, acts, matters, and transactions, and that the bill of complaint corresponding to the one numbered 8099 in Massachusetts and the prayers thereof relate to another part of the same entire transaction, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8099, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

A. I think it would be a complete defence.

Q. 15. Assuming the facts stated in the 13th and 14th interrogatories, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence
1021 thereof on appeal and on certiorari, how, if at all, would these additional facts affect your answers, or either of them, to the 13th and 14th interrogatories?

[Objected to; admitted; exception.—See pages 948-950.]

A. I should say that it was a circumstance to be considered.

Q. 16. Assuming the facts stated in the 13th, 14th, and 15th interrogatories, and assuming that the participation of the defendant, Bigelow, as stated in the 15th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers, or either of them, to the 13th, 14th, and 15th interrogatories?

[Objected to; admitted; exception.—See pages 949, 950.]

A. I should not consider it a controlling circumstance, but I should say that other circumstances of the case would make a complete defence even without such a consideration as that—in other words, I should say that, while the expenditure of money and participation in the expense was a matter proper to be considered, it is not of such controlling effect as, of itself, to determine the question either one way or the other.

Q. 17. If you have not already done so, state your reasons for your answers to Ints. 6th to 16th, inclusive.

[Objected to; admitted; exception.—See pages 950.]

A. I can briefly state the reason in this way: that while there are many rules and restrictions, distinguished according to the circumstances of each particular case, in which a former adjudication may be pleaded as a bar, yet, in my judgment, the underlying principle really governing former adjudications is, primarily, that the party seeking to enforce a remedy or to right a wrong shall have a full opportunity to present his case to the court and to have it properly passed upon, or, as is generally expressed, that he shall have his day in court, and having had this opportunity, and having once presented this matter to the court, that question, so far as regards him, is settled, and the judgment is available against him by any one who stands in the like position, as the defendants in the suit which has been heard. This last proposition, the one of privity, is, of course, subject to many distinctions, but the general rule governing that is that all persons in privity with the successful party in the first litigation are entitled to the protection of the judgment. So much for the general proposition involved. As to the particular cases here involved, it seems to me that it would be impossible for the complainant to present a case against one of the defendants, that is, either Bigelow or Lewisohn, without involving the other to
1022 the same extent and in the same manner; in which case, in order to establish his cause of action against either of the defendants, he must necessarily involve the other, and that the action of each is a necessary part of the cause of action against either. A judgment which determines that the action of both of these defendants does not constitute a cause of action in favor of the plaintiff against either of them, necessarily determines that no cause of action exists, and the plaintiff, having been heard, is bound thereafter as to any party acting with or under the direction of the defendant against whom the action was brought.

These are some of the controlling features of the case, but are not by any means an exhaustive statement of the principles and reasoning governing the matters involved.

Cross-interrogatories.

Without waiving the foregoing objections, but expressly insisting thereon, the plaintiff puts de bene the following cross-interrogatories:—

X 1. Is it a principle of the law of the state of New York that the law decided in a case in the court of last resort in overruling a demurrer becomes the law of the case to be applied when the case is heard upon the facts?

A. A final judgment upon a demurrer is an adjudication that the facts are as alleged, and, assuming those facts to be true, no cause of action exists.

X 2. Is it the law of New York that there is no right of exoneration or contribution between defendants jointly and severally liable ex delicto and not ex contractu?

A. Generally, that is the rule.

X 3. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered that Bigelow might—but for said defence, if any—be under a liability to the plaintiff in the suits against Bigelow?

A. If I understand the question aright, there could be no such condition as a judgment that there is no cause of action, and yet that the same state of facts might constitute a cause of action. If they do not constitute a cause of action against Lewisohn, they would not constitute a cause of action against Bigelow, and that the same questions presented in the same manner against Bigelow would result in the same judgment as against Lewisohn.

X 4. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability that Bigelow might—but for said defence, if any—be under as a liability jointly with Lewisohn?

A. If I understand the question, there might have been a joint liability, but the question as to the joint liability is not necessarily controlling.

1023 X 5. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability jointly and severally with Lewisohn?

A. I have considered such features of the case.

X 6. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability arising ex delicto?

A. I have considered all of the facts, and have considered that

the pleader may have undertaken to allege a cause of action ex delicto.

X 7. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability ex delicto jointly and severally with Lewisohn?

A. I have considered that the pleader may have intended to set forth a cause of action ex delicto against Lewisohn and Bigelow, jointly and severally.

X 8. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. I have not the Massachusetts case at hand, and would not like to hazard an opinion without an examination of the case.

X 9. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability ex delicto with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. I have not the Massachusetts case at hand, and am not able to give an opinion upon the case without an examination for that purpose.

X 10. Is it a principle of the law of the state of New York that the liability of joint wrongdoers is joint and several?

A. It is.

X 11. Is it sometimes a principle of New York law that estoppel by former adjudication must be mutual?

A. I do not understand it so.

1021 X 12. If so, what, if any, are all the occasions of which you have knowledge on which they need not be mutual?

A. I should say they need not be mutual in any case where the complainant has been fully heard and the party who is in any relation of privity towards the successful litigant is sought to be held for the same cause of action which has once been adjudicated in favor of the party under whom or through whom privity is claimed, and this notwithstanding that the party seeking to avail himself of the prior adjudication was not a party to the record and not even bound by its judgment.

X 13. Assuming that Bigelow took no part in the Lewisohn suit, in your opinion is the law of New York such that Bigelow would have been estopped in another suit to deny his liability as a matter

of law on the same facts, by a final decree against Lewisohn in the first suit?

A. It is my opinion that he would be so estopped.

X 14. Assuming that Lewisohn's executors took no part in the suits against Bigelow, in your opinion is the law of New York such that said exectuors would have been estopped in another suit to deny their liability as a matter of law on the same facts, by a final decree against Bigelow in these suits?

A. It is my opinion that they would be estopped. I regard the fact of Bigelow's participation in that former action as a circumstance merely, and not controlling.

X 15. Assuming that Bigelow took part in the defence of the suit against Lewisohn's exectuors, and that the plaitniff knew this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation and knowledge, operate as an estoppel in favor of Bigelow?

A. There are authorities of this character. I have not the authorities at hand, but would be glad to furnish them to counsel if counsel would give me the opportunity to do so.

X 16. Assuming that Bigelow took part in the defence of the suit against Lewisohn's exectuors, and that the plaintiff did not know this, what, by name and reference, are all the decisions, if any, in New York you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation without plaintiff's knowedge, operate as an estoppel in favor of Bigelow?

A. I have not the authorities at hand that I have considered, nor am I able at this time to give them. I have examined the questions, but I have not the memorandum of all the authorities that I consulted and am not able at this time, without some examination, to give the authorities that I did consult.

X 17. Assuming that Bigelow did not take part in the de-
1025 fence of the suit against Lewisohn's executors, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may operate as an estoppel in favor of Bigelow?

A. My answer to this cross-interrogatory is the same as to the 16th cross-interrogatory. While I have not a memorandum of the authorities I have examined, I shall be glad to furnish counsel with such authorities if counsel desire it, upon having an opportunity to obtain them.

X 18. Have you considered any decisions or language of the courts in New York which may have any tendency to support the view that there is no estoppel in Bigelow's favor growing out of the decree in favor of Lewisohn's exectuors?

A. The best answer I can make to this question is that during my examination of the question as to the effect of a former adjudication, I examined a great number of authorities, some tending to

the view of the privities required, others to mutuality, and a great number of cases decided upon varying circumstances, each case being, of course, dependent upon the particular circumstances surrounding it. It would be next to impossible, within the limits of an examination of this character, to undertake a digest or synopsis of the cases examined.

X 19. If so, what, by name and reference, are all of these which you have considered?

A. My answer is the same as to the last cross-interrogatory.

X 20. Have any arguments been submitted or suggested to you by defendant's counsel, or have you thought of any, in supoprt of the view that there was, by the law of New York, no estoppel in favor of Bigelow growing out of the decree in favor of Lewisohn's executors?

A. I have received no such argument from the defendant's counsel; I have given the facts of this case consideration and have examined the authorities, and in the course of such examination and consideration, I have necessarily considered that there were differences of opinion with reference to the situation, and have given such considerations as occurred to me, or have been suggested by any examination, such weight as I have deemed them entitled to.

X 21. If so, what are all of said arguments?

A. It would be impossible for me now to recall the various circumstances surrounding the cases that I examined or the suggestions that occurred to me during the examination.

X 22. What, in your opinion, constitutes privity under the law of New York to a judgment?

A. In my judgment, privity, within the rule relating to the conclusiveness of judgment, means the relation to the rights of property and participation in interest in respect to any action, or thing, or connection existing, or arising from an interest in which the parties are interested or affected alike.

1026 X 23. In determining whether there was an estoppel in the present case, have you assumed or considered that Bigelow was in privity to the parties of record in the suit against Lewisohn's exectuors?

A. I have considered that Bigelow was in privity within the rule with the parties of record.

X 24. In considering whether there was any estoppel in this case, have you assumed or considered that Bigelow had any legal interest to defend in the suit against Lewisohn's executors beyond such interest as he might have to secure a favorable precedent?

A. I think that he had the same interest that parties affected alike in a litigation or in the result of a transaction might have, and that his interest in the Lewisohn suit was such that he might have a legal right to intervene, and if the word "legal" in the question is limited to the technical legal result in the action, I should say that his legal interest in the particular action would affect the procurement of a favorable decision.

X 25. If so, precisely what have you assumed to be said legal interest?

A. I have, perhaps, anticipated, by my former answer, the answer to this question. He had a legal interest to protect the enterprise which he was jointly charged with being interested in with Lewisohn, and his legal interest in his cause of action, or upon the cause of action upon which the action was based, was such, I think, as would entitle him to have become a party to the record.

X 26. Unless Bigelow would have been bound in favor of the plaintiff by estoppel by a decision adverse to Lewisohn's executors even if Bigelow did not participate in the defence of a suit against them, did Bigelow, in your opinion, have a legal interest to defend in that suit?

A. I think he may have had a legal interest that he might have defended; whether he was bound to defend or not might be another question.

X 27. If so, by precise description, what, in your opinion, was said legal interest?

A. The legal interest that he had was that he was sought to be charged jointly with Lewisohn; that the situation was such that a hostile adjudication might have embarrassed him and affected his interest.

X 28. In determining whether there was an estoppel in this case, have you assumed that the plaintiff consented to the participation, if any, by Bigelow in the support of the demurrer of Lewisohn's executors?

A. I do not consider the defendant, Bigelow's participation at all controlling, whether consented to or not, as in my judgment the estoppel is complete without such participation.

X 29. Is it a principle of New York law that if the defendant in one suit sustains merely the character of a co-trespasser with
1027 the defendant in another suit by the same plaintiff, the recovery against one defendant is not thereby made competent evidence against the other?

A. The recovery against one co-trespasser is not competent evidence against another.

X 30. Is it a principle of New York law that the judgment in favor of one of two persons jointly and severally liable for the wrongful conversion of the plaintiff's property is no bar to a subsequent suit against the other because torts are joint and several?

A. The general rule is that a judgment against one joint tort feasor is not a bar to an action against another joint tort feasor.

X 31. Is it a principle of New York law that an adjudication acts as an estoppel only between the parties thereto or those in privity with them, or, in other words, the estoppel must be mutual?

A. It need not necessarily be mutual.

X 32. Is it a principle of New York law that a judgment in favor of one co-trespasser may not be used by another co-trespasser not a party to it, by way of estoppel?

A. That is not the inexorable rule.

X 33. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were Bigelow's agents in the suit against them which has been dismissed?

A. I have not considered them as agents.

X 34. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were trustees for Bigelow of the stock sought to be recovered in the suit against them which has been dismissed?

A. I have taken the view that whether Lewisohn was considered a trustee of Bigelow or not in his acts, or whether they were simply considered as acting jointly in a transaction each for the other, the conclusion, to my mind, would be the same.

X 35. Is it a principle of New York law that in an action at law against one or some of several joint tort feasors, the controversy may be determined as between the parties before the court,—i. e., the plaintiff and defendant,—and without prejudice to the rights of others; and the judgment will completely determine the controversy between them and will not be res adjudicata between the plaintiff and any of the joint tort feasors who is not a defendant and may be sued later?

A. The question involves various situations. The courts of New York state dispose of all the rights of the parties when they are before them and adjust the equities between them, and a judgment entered thereon may or may not be conclusive as to other parties, depending upon questions of privity and various other considerations that are apt to be raised in questions involving prior adjudication.

X 36. Have you stated all your reasons for the opinions expressed by you, or the statements made by you, in answer to the 6th, 1028 7th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th direct interrogatories?

A. I believe I have stated that I have not undertaken to state all of the considerations that enter into them, as it is hardly practicable within the limits of this examination.

X 37. If not, what are all your reasons for the opinions or statements given by you in answer to each of said interrogatories?

A. I will answer the question in a general way. In addition to what I have already stated, on direct examination, as to the reasons which have led me to the conclusion that the transactions are identical, there can be no liability of one party without the liability of the other, if it be said that the parties are acting, as the complainant alleges, in a conspiracy. There could hardly be a conspiracy without the joint assent of the two parties; and that, if the state of facts which the New York courts have assumed to be true, and have stated did not constitute a cause of action in any aspect of the case, or upon any construction which could be put upon the bill, it must bar that so far as the plaintiff and Lewisohn are concerned. In no court in the country, therefore, could Lewisohn be called to account for the transactions set up in that action. Second and again, as I stated heretofore in this examination, that, in my judgment, there was that privity with Lewisohn and Bigelow, such independent relation and such joint interest, joint duty, if any, towards the complainant, and altogether such a joint relation, as necessarily constituted them privy within the legal definition. That the complainant recognizes this situation by alleging the fact that

the residence of the two parties was in different jurisdictions, as by way of excuse in making each a party to the bill against the other; that the transaction was such that brought it within the rule laid down in Portland Gold Mining Co. v. Stratton's Independence, 158 Fed. Rep. 63, in which this rule is stated:

"Thus it is settled by repeated decisions that the general rule that one may not have the benefit of a judgment as an estoppel unless he would have been bound by it had it been the other way, is subject to recognized exceptions, one of which is that in actions of tort such as trespass, if the defendant's responsibility is necessarily dependent upon the culpability of another who was the immediate actor, and who in an action against him by the same plaintiff for the same tort, has been adjudged not culpable, the defendant may have the benefit of that judgment as an estoppel, even though he would not have been bound by it had it been the other way. And we think it could not well be otherwise, for when the plaintiff has litigated directly with the immediate actor, the claim that he was culpable, and upon the full opportunity thus afforded for its legal investigation, the claim has been adjudged against the plaintiff, there
1029 is manifest propriety and no injustice in holding that he is thereby concluded from making it the basis of a right of recovery from another who is not otherwise responsible."

In that case the plaintiff and the defendant owned adjoining mines. Defendant leased its properties to one Burbridge. Plaintiff claimed that Burbridge took ores from the property of the plaintiff. In an action brought by the plaintiff against Burbridge and his associates there was a verdict in favor of the defendants and against the plaintiff. A subsequent action was brought against the defendant, Stratton's Independence; and it was claimed that they were the recipients of the ore, and had ratified the acts of Burbridge and his associates. The court there held that the former action was a bar.

And in the Emma Silver Mining Company's case, reported in 7 Fed. Rep. 401, where an agent was sued, after the termination of his agency, and upon the trial of the merits the agency was determined against the plaintiff, the principal, though not a party to the suit, was held to be entitled to avail himself of the judgment as a bar when he was sued by the same plaintiff on the same cause of action."

There are a great many adjudications upon the subject of former adjudications, rights of privies, and other questions that naturally arise, and each case must be judged upon the facts and circumstances surrounding it. In my judgment, as I have stated during the course of this examination, the primal requisite is that the plaintiff shall have one opportunity to be heard in court and fairly test the question as to the liability of the defendant, and that the object of this rule was to prevent successive litigation of the same question, either between the same parties or parties who ought, in all fairness, to be entitled to the benefit of the judgment; that when the plaintiff in this action has had an adjudication that, under no construction which could be put upon his pleading, had he a cause of action, it was an

adjudication upon those facts which bound him and all parties connected therewith, at least such as he himself had alleged in his bill of complaint was necessarily connected therewith. It has seemed to me that in the case in hand the adjudication of the New York court was necessarily an adjudication that there was no cause of action existing in favor of the plaintiff. As the only parties against whom he claimed a cause of action to exist were Bigelow and Lewisohn, and the only cause of action which he claimed against them is the one set forth in each of the bills of complaint, the bills being identical, and in my judgment, under this state of facts, I consider the judgment a bar. These are the principal reasons for my opinion as stated above.

X 38. Have you now stated all your reasons for said answers?

1030 A. I think I have stated substantially, at one time or another during my examination, my reasons for my opinion. I have not cited precedents, as it is not practicable for me to do so on this examination.

X 39. Were you, prior to the taking of your deposition on the foregoing cross-interrogatories, shown them, or any of them, or any copies of any of them, or given any information concerning the substance of them?

A. I have not had any information of the interrogatories until they were read to me during this examination, and I have only known of them as they have been read to me consecutively during the examination.

X 40. Has each of your answers in its final form been given in the language in which it now appears, before you were aware of the substance of any subsequent cross-interrogatory?

A. I have answered each cross-interrogatory before knowing anything about the following ones, and I believe my answers are in the same form except necessary verbal corrections.

X 41. Have you, since September 22, 1908, discussed in any way with any other person who is named as a witness in the caption to these cross-interrogatories, or with any one on behalf of the defendant, any of the subjects dealt with in the foregoing interrogatories or in your answers thereto?

A. I have had no discussion whatever with either of the parties named.

M. L. STOVER.

Before me,

PERCIVAL WILDS,
Notary Public.

[NOTARIAL SEAL.]

Deposition of John B. Stanchfield.

The Deposition of John B. Stanchfield, Taken in Behalf of the Defendant Bigelow and Filed by His Counsel Subject to the Objections and Exceptions of Counsel for the Complainant, The Old Dominion Copper Mining & Smelting Company, to be Found at Pages 945-950.

[Commission and notarial certificate omitted.]

Q. 1. State your name, age, and place of residence.

A. John B. Stanchfield; age, fifty-three; technical residence, Elmira, N. Y., actual residence, the Hoffman House, New York city.

Q. 2. State your occupation and place of business.

1031 A. My profession is that of a lawyer, and I have an office for the transaction of business at Elmira, N. Y., and at No. 5 Nassau street, New York city.

Q. 3. If, in answer to the preceding interrogatory, you have testified that you are an attorney at law, state when you were admitted to the bar, and in what state or states, and how long you have been engaged in the practice of law in said state or states, and with what firms, if any, you have been or are connected?

A. According to my best recollection, I was admitted to the bar of New York in the fall of 1879; I have been actively engaged in the practice of law since that date in the state of New York. From 1877 to 1882 I was in the office, at Elmira, N. Y., of David B. Hill as clerk, and subsequently, during portion of that time, as partner engaged in the practice of the law under the firm name of Hill & Stanchfield; afterwards I became, and am now, at Elmira, N. Y., the head of the firm of Reynolds, Stanchfield & Collin, and am engaged in the practice of the law at New York in my individual name, with no partnership relations.

Q. 4. State what, if any, judicial or other public or official positions you hold or have held.

A. I have never held any judicial place. From about the time of my admission to the bar, and for six years thereafter, I was the prosecuting officer of Chemung county. I have filled different political offices since that time.

Q. 5. State any other matters relating to your experience in your profession, and as to your familiarity with the law and usages governing the practice in the state and federal courts in New York, both in law and in equity, and also as to your familiarity with the laws and usages of the state of New York relating to former adjudication and estoppel by judgment.

A. I have had occasion, during my professional career, to examine the law of New York in regard to the effect of former judgments and the circumstances under which the doctrine of estoppel and res adjudicata can be availed of by litigants.

Q. 6. Assuming that an action in equity is brought in the federal court for the southern district of New York by a corporation against

one of two persons alleged to have been jointly its promoters to recover from him the profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, at a price in excess of the price which they paid for it and of its fair value, and assuming that in this action a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor
1032 of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence of a similar action, substantially identical with the first and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 945-950.]

A. In my opinion it would be held to be a bar on the ground that the controversy raised by the second suit had already been judicially determined in the first suit.

Q. 7. Assuming that two actions in equity are brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters to recover from him profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, and assuming that such property is alleged to have been sold, pursuant to said joint plan and conspiracy, in two separate parcels, in each of which both promoters were jointly interested, and that said two actions were brought to recover the respective profits received from the sale of the two parcels, respectively, and assuming that the bills of complaint in the two actions were substantially identical, except as to the particular relief sought, and assuming that certain profits were alleged to have been made by said promoters on each parcel, and assuming that in one of said actions a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to two similar actions, substantially identical in form with those above described and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted, exception.—See Pages 946-950.]

A. In my opinion the decree would be a bar to the two similar actions, for the same reasons stated in my answer to the 6th interrogatory?

Q. 8. Have you examined a copy of the record in the action of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn in the Circuit Court of the United States for the Southern District of
1033 New York, such as is hereto annexed and marked (1), the respective portions of said record being marked A to R, inclusive?

[Objected to; admitted; exception.—See pages 946-950.]

A. Yes.

Q. 9. Have you examined copies of the proceedings in the above-entitled causes, to wit, the two causes of the Old Dominion Copper Mining & Smelting Co. v. Bigelow in the Supreme Judicial Court in Massachusetts, such as are hereto annexed and marked, respectively, (2) and (3)?

A. Yes.

Q. 10. Assuming that there were now pending in the courts of the state of New York proceedings against Albert S. Bigelow, identical in all respects (except as the practice might require formal changes) with the copies of the proceedings referred to in the 9th interrogatory, and assuming that said courts had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record, copies of which are referred to in the 8th interrogatory, were sufficiently pleaded and proven in defence of said proceedings, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in each of these bills of complaint were, respectively, the same persons, and that the contracts, acts, matters, and transactions mentioned in these bills of complaint were, respectively, the same contracts, acts, matters, and transactions, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, what would be the effect, under the laws and usages of the state of New York, of said decree and record as a defence to said proceedings assumed to be so pending?

[Objected to; admitted; exception.—See pages 946-950.]

A. In my opinion said decree and record would be, under the law and usages of the state of New York, a good and valid defence to said proceedings assumed to be so pending, for the reason that the decree in the action of the Old Dominion Copper Mining & Smelting Company against Lewisohn is a final adjudication of the controversy raised by the pleadings in the two causes of the Old Dominion Copper Mining & Smelting Company against Bigelow.

Q. 11. Assuming the facts stated in the 10th interrogatory, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executor's in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof
1034 through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would those additional facts affect your answer to the preceding interrogatory?

[Objected to; admitted; exception.—See pages 946-950.]

A. In my opinion the additional facts assumed in the 11th interrogatory constitute an element which materially strengthens the validity of the Lewisohn decree as a defence under the authority of Bracken v. Atlantic Trust Co., 36 App. Div. 67, at page 71.

Q. 12. Assuming the facts stated in the 10th interrogatory, and assuming the facts stated in the 11th interrogatory, and assuming that the participation of the defendant, Bigelow, as stated in the 11th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers to the two preceding interrogatories?

[Objected to; admitted; exception.—See pages 947-950.]

A. The additional assumption contained in the 12th interrogatory adds cumulative weight, in my opinion, to the validity of the Lewisohn decree as a defence, although I do not consider that lack of knowledge on the part of the plaintiff of such participation of both parties in the defence of the Lewisohn case would necessitate any change in my answer to the 11th interrogatory.

Q. 13. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8098, referred to in the 9th interrogatory, and assuming that the course of the proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8098, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint
1035 in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8098 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, what under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8098, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

A. In my judgment said decree and record would constitute a

valid defence to the proceeding corresponding to the cause numbered 8098, described in the 9th interrogatory, for the reason that it would constitute a prior adjudication of the same controversy involved in the cause numbered 8098, within the decisions of the courts of this state, on the subject of former adjudications as constituting a bar to future litigation. My reason for such opinion is, briefly, that it clearly appears from the two records that the facts set forth in the two bills of complaint are identical, the transaction involved is the same, the property involved is the same, the relief demanded is the same, and that the situation brings the case squarely within the doctrine that the courts will not permit a second adjudication of the same controversy. I am materially strengthened in this view by the fact that it appears that the transaction upon which both suits are based was in the name of Lewisohn, who was, therefore, in my opinion, under the New York statutes, trustee for Bigelow.

Under the New York Code of Civil Procedure, sec. 449:

"A trustee of an express trust may without joining with him the person for whose benefit the action is prosecuted. A person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust within the meaning of this Section."

It has been uniformly held that the application of this section extends to actions against trustees as well as actions brought by trustees. I am therefore of the opinion that Lewisohn was trustee, that Bigelow was privy to the Lewisohn suit, and that Bigelow's rights were judicially determined in that suit.

Q. 14. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow
1036 identical in all respects with the proceeding numbered 8099 referred to in the 9th interrogatory; and assuming that the course of proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8099, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8099 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and trans-

actions, respectively, and assuming that the bill of complaint in said Circuit Courts and the prayers thereof relate to one part of an entire transaction comprising said contracts, acts, matters, and transactions, and that the bill of complaint corresponding to the one numbered 8099 in Massachusetts and the prayers thereof relate to another part of the same entire transaction, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numberd 8099, dscribd in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

A. Inasmuch as the record described in the 8th interrogatory appears from my examination of it to set forth another transaction relative to the causes of action set forth in the cause numbered 8099, as well as that set forth in the cause numbered 8098, and in view of the additional fact that it clearly appears from the decree and record described in said 8th interrogatory that the United States Supreme Court passed upon the said entire transaction, it is, in my opinion, clear that the decree described in said 8th interrogatory settles the law for both causes 8098 and 8099, and that the bar arising from said decree applies to the cause numbered 8099
1037 as well as that numbered 8098. The reasoning contained in my answer to the 13th interrogatory applies, in my judgment, as well to the 14th interrogatory.

Q. 15. Assuming the facts stated in the 13th and 14th interrogatories, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would these additional facts affect your answers, or either of them, to the 13th and 14th interrogatories?

[Objected to; admitted; exception.—See pages 948-950.]

A. The additional assumption contained in the 15th interrogatory strengthens my opinion that the decree described in the 8th interrogatory is a bar to the causes of action numbered 8098 and 8099.

Q. 16. Assuming the facts stated in the 13th, 14th, and 15th interrogatories, and assuming that the participation of the defendant, Bigelow, as stated in the 15th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers, or either of them, to the 13th, 14th, and 15th interrogatories?

[Objected to; admitted; exception.—See pages 949-950.]

A. The additional assumption contained in the 16th interrogatory adds additional strength, in my view, to the effect of the decree, described in the 8th interrogatory, as a bar.

Q. 17. If you have not already done so, state your reasons for your answers to interrogatories 6th to 16th, inclusive.

[Objected to; admitted; exception.—See page 950.]

A. My reason for the answers given to the interrogatories 6th to 16th, inclusive, is based upon two grounds:

First. It is, in my opinion, not open to question that under section 449 of the New York Code of Civil Procedure, Lewisohn was a trustee on behalf of Bigelow in the transaction on which all of the suits are based, and that, under the same section as construed by the New York courts, an action against Lewisohn judicially determined the rights of Bigelow, so that the final decree in the suit against Lewisohn would be held to be a bar as against Bigelow were Bigelow sued in the New York courts.

1038 Second. While I believe that this first consideration, just stated, is, in itself, conclusive of the question, I am also of the opinion that, even if the transaction had not been in Lewisohn's name alone, still, inasmuch as the bills of complaint in the two New York suits are identical with the two bills of complaint in the Massachusetts suits, with the exception of unimportant differences of names, residences, and formal matters, differing because of the difference in practice, the entire transaction is the same, the property involved is the same, the questions of fact and law involved the same, the relief demanded the same; and that therefore the New York courts would hold that the decree, described in the 8th interrogatory, was a complete and absolute bar to the two causes, numbered 8098 and 8099, in the Massachusetts courts.

Cross-interrogatories:

Without waiving the foregoing objections, but expressly insisting thereon, the plaintiff puts de bene the following cross-interrogatories:

X 1. Is it a principle of the law of the state of New York that the law decided in a case in the court of last resort in overruling a demurrer becomes the law of the case to be applied when the case is heard upon the facts?

A. It is the law of New York that a decision of a court of last resort on a demurrer determines the law upon the facts embodied in the pleadings to which the demurrer was interposed.

X 2. Is it the laws of New York that there is no right of exoneration or contribution between defendants jointly and severally liable ex delicto and not ex contractu?

A. In my judgment, yes.

X 3. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered that Bigelow might—but for said defence, if any—be under a liability to the plaintiff in the suits against Bigelow?

A. As I understand the purport of this question, my answer is, no.

X 4. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability that Bigelow might—but for said defence, if any—be under as a liability jointly with Lewisohn?

A. As I understand the purport of this question, my answer is, no.

X 5. In determining whether or not the decree dismissing the suit

against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability jointly and severally with Lewisohn?

A. As I understand the purport of this question, my answer is, no.

1039 X 6. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability arising ex delicto?

A. As I understand the purport of this question, my answer is, no.

X 7. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability ex delicto jointly and severally with Lewisohn?

A. As I understand the purport of this question, my answer is, no.

X 8. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts, as applied to these facts in said suit, there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. I have not had an opportunity to examine the decision referred to with such detail as to adequately answer the interrogatory.

X 9. On the facts alleged in the present suit against Bigelow, and assuming that, under the law of Massachusetts, as applied to these facts in said suit, there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer, reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability ex delicto with Lewisohn, if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. I have not had an opportunity to examine the decision referred to with such detail as to adequately answer the interrogatory.

X 10. Is it a principle of the law of the state of New York that the liability of joint wrongdoers is joint and several?

A. Yes.

X 11. Is it sometimes a principle of New York law that estoppel by former adjudication must be mutual?

A. It is not necessarily a principle of New York law that estoppel by a former adjudication must be mutual; such may or may not be the rule contingent upon the facts.

X 12. If so, what, if any, are all the occasions of which you have knowledge on which they need not be mutual?

A. I have had no opportunity to examine the case with a view to giving an intelligent answer to this interrogatory.

X 13. Assuming that Bigelow took no part in the Lewisohn suit, in your opinion is the law of New York such that Bigelow
1040 would have been estopped in another suit to deny his liability as a matter of law on the same facts, by a final decree against Lewisohn in the first suit?

A. If final judgment were rendered against Lewisohn in the courts of New York upon the facts appearing in the bills of complaint in these actions, and Bigelow were thereafter sued on the same facts in the courts of New York, he would be estopped from denying liability thereon.

X 14. Assuming that Lewisohn's executors took no part in the suits against Bigelow, in your opinion is the law of New York such that said executors would have been estopped in another suit to deny their liability as a matter of law on the same facts, by a final decree against Bigelow in these suits?

A. In my judgment, yes.

X 15. Assuming that Bigelow took part in the defence of the suits against Lewisohn's executors, and that the plaintiff knew this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation and knowledge, operate as an estoppel in favor of Bigelow?

A. Owing to the shortness of the notice given me, I have no time to furnish the detailed information called for by this interrogatory.

X 16. Assuming that Bigelow took part in the defence of the suit against Lewisohn's executors, and that the plaintiff did not know this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation without plaintiff's knowledge, operate as an estoppel in favor of Bigelow?

A. Owing to the shortness of the notice given me, I have no time to furnish the detailed information called for by this interrogatory.

X 17. Assuming that Bigelow did not take part in the defence of the suit against Lewisohn's executors, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may operate as an estoppel in favor of Bigelow?

A. Owing to the shortness of the notice given me, I have no time to furnish the detailed information called for by this interrogatory.

X 18. Have you considered any decisions or language of the courts in New York which may have any tendency to support the view that there is no estoppel in Bigelow's favor growing out of the decree in favor of Lewisohn's executors?

A. I know, at the present time, of no cases the trend of which would be to support the view that there is no estoppel in Bigelow's favor arising out of the Lewisohn decree.

1041 X 19. If so, what, by name and reference, are all of these which you have considered?

A. My answer to the foregoing cross-interrogatory covers this question.

X 20. Have any arguments been submitted or suggested to you by defendant's counsel, or have you thought of any, in support of the view that there was by the law of New York no estoppel in favor of Bigelow growing out of the decree in favor of Lewisohn's executors?

A. No arguments have been either submitted or suggested to me by counsel for the defence, nor have any presented themselves to me.

X 21. If so, what are all of said arguments?

A. My answer to the foregoing cross-interrogatory covers this question.

X 22. What, in your opinion, constitutes privity under the law of New York to a judgment?

A. A mutual relation to, connection with, and interest in the facts upon which a judgment is rendered is essential to constitute privity.

X 23. In determining whether there was an estoppel in the present case, have you assumed or considered that Bigelow was in privity to the parties of record in the suit against Lewisohn's executors?

A. Yes.

X 24. In considering whether there was any estoppel in this case, have you assumed or considered that Bigelow had any legal interest to defend in the suit against Lewisohn's executors beyond such interest as he might have to secure a favorable precedent?

A. My judgment is that, although not a party to the suit, he nevertheless had a legal interest to defend in the Lewisohn litigation.

X 25. If so, precisely what have you assumed to be said legal interest?

A. The facts charged Bigelow with being practically a partner in the transactions upon which liability against Lewisohn's estate was ought to be predicated; such allegations gave Bigelow a legal interest in the outcome of that controversy.

X 26. Unless Bigelow would have been bound in favor of the plaintiff by estoppel by a decision adverse to Lewisohn's executors even if Bigelow did not participate in the defence of the suit against them, did Bigelow, in your opinion, have a legal interest to defend in that suit?

A. Irrespective of whether or no Bigelow would have been bound by the judgment in favor of the plaintiff, in my opinion, he still had a legal interest that would warrant him in participating in the defence of the Lewisohn suit.

X 27. If so, by precise description, what, in your opinion, was said legal interest?

A. If Bigelow was made aware of the facts alleged in the bill of complaint against Lewisohn in New York, and owing to his connection therewith, as alleged in the complaint, for the purpose of protecting his reputation and property, he invoked the power of the courts of New York to permit him to intervene in that action
1042 and defend the same with like effect as though he had been made a party thereto, such right would have been accorded him.

X 28. In determining whether there was any estoppel in this case, have you assumed that the plaintiff consented to the participation, if any, by Bigelow in the support of the demurrers of Lewisohn's executors?

A. I do not consider the consent of the plaintiff to the participation of Bigelow as of vital consequence in arriving at the opinion I have heretofore expressed; but I have considered it.

X 29. Is it a principle of New York law that if the defendant in one suit sustains merely the character of a co-trespasser with the defendant in another suit by the same plaintiff, the recovery against one defendant is not thereby made competent evidence against the other?

A. I have neither the time nor the opportunity to look up the technical rule as to whether or no a judgment against one defendant is competent evidence against the other; my judgment is that it would not be competent evidence.

X 30. Is it a principle of New York law that the judgment in favor of one of two persons jointly and severally liable for the wrongful conversion of the plaintiff's property is no bar to a subsequent suit against the other because torts are joint and several?

A. The question is not sufficiently clear to enable me to give an intelligent answer to it.

X 31. Is it a principle of New York law that an adjudication acts as an estoppel only between the parties thereto or those in privity with them, or, in other words, the estoppel must be mutual?

A. Ordinarily this would be true, but there are many exceptions to the rule.

X 32. Is it a principle of New York law that a judgment in favor of one co-trespasser may not be used by another co-trespasser not a party to it, by way of estoppel?

A. If the facts alleged against a co-trespasser arose out of the same transaction and are pleaded identically the same, he could avail himself of a judgment in favor of a co-trespasser although he was not a party to the record in that suit.

X 33. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were Bigelow's agents in the suit against them which has been dismissed?

A. No.

X 34. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were trustees for Bigelow of the stock sought to be recovered in the suit against them which has been dismissed?

A. My opinion under the facts set up in the complaint against Lewisohn's executors is that Lewisohn was a trustee for Bigelow.

1013 X 35. Is it a principle of New York law that in an action at law against one or some of the several joint tort feasors, the controversy may be determined as between the parties before the court,—i. e., the plaintiff and defendant,—and without prejudice to the rights of others; and the judgment will completely determine the controversy between them, and will not be res adjudicata between the plaintiff and any of the joint tort feasors who is not a defendant and may be sued later?

A. If the facts alleged in the complaint as to any of the joint tort feasors not before the court were the same as the facts in the cause before the court, then, and in that event, the record before the court would be res adjudicata in the action against the remaining joint tort feasors.

X 36. Have you stated all your reasons for the opinions expressed by you, or the statements made by you, in answer to the 6th, 7th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th direct interrogatories?

A. Yes, according to the best of my recollection.

X 37. If not, what are all your reasons for the opinions or statements given by you in answer to each of said interrogatories?

A. I do not, just at the moment, recall any supplemental reasons to those already expressed.

X 38. Have you now stated all your reasons for said answers?

A. Limited by my answer to the preceding cross-interrogatory, yes.

X 39. Were you, prior to the taking of your deposition on the foregoing cross-interrogatories, shown them, or any of them, or any copies of any of them, or given any information concerning the substance of them?

A. No.

X 40. Has each of your answers, in its final form, been given in the language in which it now appears, before you were aware of the substance of any subsequent cross-interrogatory?

A. Yes.

X 41. Have you, since September 22, 1908, discussed in any way, with any other person who is named as a witness in the caption to these cross-interrogatories, or with any one on behalf of the defendant, any of the subjects dealt with in the foregoing interrogatories or in your answers thereto?

A. No.

JOHN B. STANCHFIELD.

Before me,

PERCIVAL WILDS,
Notary Public.

[SEAL.]

Deposition of William A. Keener.

The Deposition of William A. Keener, Taken in Behalf of the Defendant, Bigelow, and Filed by His Counsel, Subject to the Objections and Exceptions of Counsel for the Complainant, The Old Dominion Copper Mining & Smelting Company, to be Found at Pages 945-950.

[Commission and notarial certificate omitted.]

1044 Q. 1. State your name, age, and place of residence.

A. William A. Keener; age, fifty-two; 2 West 88th street, borough of Manhattan, New York City.

Q. 2. State your occupation and place of business.

A. Lawyer; 115 Broadway, borough of Manhattan, New York City.

Q. 3. If, in answer to the preceding interrogatory, you have testified that you are an attorney at law, state when you were admitted to the bar, and in what state or states, and how long you

have been engaged in the practice of law in said state or states, and with what firms, if any, you have been or are connected.

A. I was admitted to the bar of the state of New York in 1879; I have been actively engaged in the practice of the law since that time except during the periods when I was a professor of law in the Harvard University and subsequently in Columbia University, during which times I acted, from time to time, as counsel. I began the practice of the law as a member of the firm of Ashley & Keener; afterwards I became a member of the firm of Hatch, Keener & Clute; later I became a member of the firm of Keener & Lewis, and am now a member of the firm of Keener, Lewis & Layng.

Q. 4. State what, if any, judicial or other public or official positions you hold or have held.

A. I was at one time a justice of the Supreme Court of the state of New York, by appointment of the governor of the state.

Q. 5. State any other matters relating to your experience in your profession and as to your familiarity with the law and usages governing the practice in the state and federal courts in New York, both in law and in equity, and also as to your familiarity with the laws and usages of the state of New York relating to former adjudication and estoppel by judgment.

A. I was at one time a member of the law faculty of Harvard University, and subsequently a member of the law faculty of Columbia University, and dean of the law school. I have practised in the federal courts of New York state, in the federal courts of Pennsylvania, and have appeared in the United States Circuit Court of Appeals in Massachusetts, and have the information common to lawyers engaged in state and federal practice.

Q. 6. Assuming that an action in equity is brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters, to recover from him the profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, at a price in excess of the price which they paid for it and of its fair value, and assuming that in this action a final decree upon the merits is entered for the defendant upon demurrer, on the ground that
1045 the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to a similar action, substantially identical with the first and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 945-950.]

A. In my opinion it would be a bar to such action.

Q. 7. Assuming that two actions in equity are brought in the

federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters, to recover from him profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, and assuming that such property is alleged to have been sold, pursuant to said joint plan and conspiracy, in two separate parcels, in each of which both promoters were jointly interested, and that said two actions were brought to recover the respective profits received from the sale of the two parcels, respectively, and assuming that the bills of complaint in the two actions were substantially identical, except as to the particular relief sought, and assuming that certain profits were alleged to have been made by said promoters on each parcel, and assuming that in one of said actions a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to two similar actions, substantially identical in form with those above described and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 946-950.]

A. It would, in my opinion, be a bar to such action.

Q. 8. Have you examined a copy of the record in the action of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn in the Circuit Court of the United States for the Southern District of New York, such as is hereto annexed and marked (4), the respective portions of said record being marked A to R, inclusive?

1046

[Objected to; admitted; exception.—See pages 946-950.]

A. Yes.

Q. 9. Have you examined copies of the proceedings in the above-entitled causes, to wit, the two causes of the Old Dominion Copper Mining & Smelting Co. v. Bigelow in the Supreme Judicial Court in Massachusetts, such as are hereto annexed and marked, respectively, (2) and (3)?

A. Yes.

Q. 10. Assuming that there were now pending in the courts of the state of New York proceedings against Albert S. Bigelow, identical in all respects (except as the practice might require formal changes) with the copies of the proceedings referred to in the 9th interrogatory, and assuming that said courts had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record, copies of which are referred to in the 8th interrogatory, were sufficiently pleaded and proven in defence of said proceedings, and assuming that the Leonard Lewisohn and the Albert S. Bigelow

mentioned in each of these bills of complaint were, respectively, the same persons, and that the contracts, acts, matters, and transactions mentioned in each of these bills of complaint were, respectively, the same contracts, acts, matters, and transactions, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, what would be the effect, under the law and usages of the state of New York, of said decree and record as a defence to said proceedings assumed to be so pending?

[Objected to; admitted; exception.—See pages 946-950.]

A. It would, in my opinion, be a bar to such action.

Q. 11. Assuming the facts stated in the 10th interrogatory, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would those additional facts affect your answer to the preceding interrogatory?

[Objected to; admitted; exception.—See pages 946-950.]

A. It would only confirm me in my answer.

1047 Q. 12. Assuming the facts stated in the 10th interrogatory, and assuming the facts stated in the 11th interrogatory, and assuming that the participation of the defendant, Bigelow, as stated in the 11th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers to the two preceding interrogatories?

[Objected to; admitted; exception.—See pages 947–950.]

A. It would not affect my answers at all.

Q. 13. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8098, referred to in the 9th interrogatory, and assuming that the course of the proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8098, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming

that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8098 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8098, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 945–950.]

A. It would, in my opinion, be a bar to such action.

Q. 14. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bige-
1048 low, identical in all respects with the proceedings numbered 8099 referred to in the 9th interrogatory, and assuming that the course of proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8099, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8099 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, and assuming that the bill of complaint in said Circuit Court and the prayers thereof relate to one part of an entire transaction comprising said contracts, acts, matters, and transactions, and that the bill of complaint corresponding to the one numbered 8099 in Massachusetts and the prayers thereof relate to another part of the same entire transaction, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8099, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948–950.]

A. It would, in my opinion, be a bar to such action.

Q. 15. Assuming the facts stated in the 13th and 14th interrogatories, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would these additional facts affect your answers, or either of them, to the 13th and 14th interrogatories?

[Objected to: admitted; exception.—See pages 948–950.]

1049 A. They would only confirm me in my opinion.

Q. 16. Assuming the facts stated in the 13th, 14th, and 15th interrogatories, and assuming that the participation of the defendant, Bigelow, as stated in the 15th interrogaory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers, or either of them, to the 13th, 14th and 15th interrogatories?

[Objected to: admitted: exception.—See pages 949, 950.]

A. It would not affect my answers at all.

Q. 17. If you have not already done so, state your reasons for your answers to interrogatories 6th to 16th, inclusive.

[Objected to: admitted: exception.—See page 950.]

A. Albert S. Bigelow and Leonard Lewisohn were associated together in the joint promotion and sale of certain mining properties to the plaintiff. The plaintiff sued the executors of Leonard Lewisohn in the United States Circuit Court for the Southern District of New York, complaining because of the fraud practised by Lewisohn and Bigelow upon the corporation in effecting the sales.

Bigelow was not made a party defendant to this suit, because of his absence from the jurisdiction, he being a resident of Massachusetts. It has been finally determined that Lewisohn did the corporation no injury, and that the plaintiff has no cause of action against him or his representatives, and a final judgment or decree has been entered accordingly. There is now pending in the Supreme Judicial Court of Massachusetts against Albert S. Bigelow two suits based on the identical facts which have been decided by the United States Supreme Court, in affirmance of the court below, to show no cause of action against Lewisohn.

In the action brought against Lewisohn in the federal court for the southern district of New York, the joint participation of Bigelow with Lewisohn in the fraud practised upon the plaintiff was alleged, and in the action brought in the Supreme Judicial Court of Massachusetts, the participation of Lewisohn with Bigelow in the fraud practised upon the plaintiff is alleged. The facts throughout are identical, and the only apparent reason why Bigelow and Lewisohn were not joined in an action as defendants and thereby multiplicity of action saved, is that one resided in Massachusetts and the other in

New York. The facts in each case being identical, if Lewisohn did no wrong, then Bigelow did none.

I am asked for my opinion as to the effect of the decree in favor of Lewisohn were Bigelow sued in New York instead of in
1050 Massachusetts. No citation of authority is needed in support of the proposition that Lewisohn's executors could plead the decree of the federal court in bar of any action that might be brought by the plaintiff against them in the state court of New York. I have answered that in my opinion Bigelow could avail himself of the Lewisohn decree as a bar to any action brought against him in New York. It is true that he was not named as a party defendant in the Lewisohn suit, but his interests were of necessity involved in that action, and after notice from Lewisohn of its pendency, and after opportunity had been given him to join in the defence, he could not, as between Lewisohn and himself, have litigated any questions necessarily decided in that suit had the plaintiff been successful.

The Ocean Steam Navigation Co. v. Campania Transatlantica Espanola, 144 N. Y. 663, 665.
Carleton v. Lombard and others, 149 N. Y. 137–161.

Had the plaintiff been successful in the Lewisohn suit, and subsequently brought an action against Bigelow in New York, Bigelow could not have litigated between himself and the plaintiff the questions finally adjudicated in the Lewisohn suit as between Lewisohn and the plaintiff.

Castle v. Noyes, 14 N. Y. 329.
Matter of the Estate of Straut, 126 N. Y. 201.

As Bigelow, in the event of the plaintiff's success in the Lewisohn suit, would have been precluded both as to Lewisohn and the plaintiff from litigating the questions therein raised, it would be the height of injustice, now that the plaintiff has failed, not to permit Bigelow to plead the Lewisohn decree as a bar to any action by the plaintiff in New York, and such, it is submitted, is not the law.

But, independent of the fact of Bigelow's participation in the defence of the Lewisohn suit, the relation of the parties to the transaction would preclude the plaintiff from suing successfully Bigelow in New York after the Lewisohn decree. The policy of the courts in New York is to give every suitor an opportunity to try a case on its merits, but it is also the policy of the courts not to encourage unnecessary litigation. When, therefore, a failure to establish a right against A necessarily negatives a right against B, because A was either a sole actor, or a joint actor with B, B can plead the judgment obtained by A in bar of any action brought against him by the plaintiff in the action in which A succeeded.

Feather-stone v. N. & C. Turnpike Road, 71 Hun, 109.
People v. Stevens, 51 How. Pr. 235, 246.

1051 The New York rule is, in my opinion, well expressed in the language used by Judge Choate, in Emma Silver Mining Co.,

Limited, v. Emma Silver Mining Co. of New York and others, 7 Fed. Rep. 401, at page 407.

"It is contended on the part of the complainant that, whatever may be the effect of the judgment as to Park and Baxter, the defendant corporation cannot avail itself of the judgment as a bar, or as a conclusive determination of the facts, because the defendant corporation was not a party to that suit. The weight of authority, however, is that where an agent in a transaction is sued after the termination of his agency, and upon a trial of the merits the issue is determined against the plaintiff, the principal, though not a party to the suit, can avail himself of the judgment as a bar, when he is sued by the same plaintiff on the same cause of action. While the principal, if he had no notice of the former suit, and no opportunity to defend it, may not be concluded by a judgment against the former agent, or made responsible for the agent's bad pleading or blunders in the trial of the cause, because so to conclude him would be to deprive him of his property without due process of law, yet, as regards the plaintiff who has before sued the agent and been defeated, there is no reason why he should not be concluded upon the principle of public policy which gives every man one opportunity to prove his case, and limits every man to one such opportunity. He has had his day in court, and it is immaterial whether he has chosen to test his right as against the principal or the agent in the transaction, provided the issue to be tried was identical as against both."

To summarize, I regard it as immaterial what nomenclature is used to describe the relation which existed between Bigelow and Lewisohn, whether it be that of trustee and cestui qui trust, joint principals, or principal and agent.

The acts complained of were their joint acts, and the facts as to each are identical, and the proof as to each must be identical. The questions involved have been finally disposed of as to Lewisohn in his favor, and in an action in which Bigelow was active. If Lewisohn did no wrong, Bigelow did none, as it is not claimed that he acted independently of Lewisohn. On these facts the Lewisohn judgment would, in my opinion, be a bar to any action brought in New York by the plaintiff against Bigelow.

1052 Cross-interrogatories:

Without waiving the foregoing objections, but expressly insisting thereon, the plaintiff puts de bene the following cross-interrogatories:

X 1. Is it a principle of the law of the state of New York that the law decided in a case in the court of last resort in overruling a demurrer becomes the law of the case to be applied when the case is heard upon the facts?

A. Yes.

X 2. Is it the law of New York that there is no right of exoneration or contribution between defendants jointly and severally liable ex delicto and not ex contractu?

A. Not absolutely; dependent upon circumstances.

X 3. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you as-

sumed or considered that Bigelow might—but for said defence, if any,—be under a liability to the plaintiff in the suits against Bigelow?

A. Yes.

X 4. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability that Bigelow might—but for said defence, if any—be under as a liability jointly with Lewisohn?

A. Yes.

X 5. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability jointly and severally with Lewisohn?

A. Yes.

X 6. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability arising ex delicto?

A. Yes.

X 7. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability ex delicto jointly and severally with Lewisohn?

A. Yes.

X 8. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts, as applied to these facts in said suit, there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. If it be assumed that the decision referred to represents
1053 the law of New York, the liability would be joint and several.

X 9. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts, as applied to these facts in said suit, there is a liability of the general natore decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability ex delicto with Lewisohn, if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. In my opinion, yes, if it is assumed that the decision referred to represents the law of New York.

X 10. Is it a principle of the law of the state of New York that the liability of joint wrongdoers is joint and several?

A. Yes.

X 11. Is it sometimes a principle of New York law that estoppel by former adjudication must be mutual?

A. Yes; subject to exceptions.

X 12. If so, what, if any, are all the occasions of which you have knowledge on which they need not be mutual?

A. It is difficult to formulate a statement covering the law of New York in this regard. There are few cases which are treated somewhat as exceptions to the rule. Speaking generally and broadly, I should say that there is not need of mutuality where it can be said that the party against whom you are pleading a judgment has had an opportunity of establishing his cause of action, and has failed so to do in a case where, because of the relations of the defendant in that case to the defendant in the case in which the judgment is pleaded, it is impossible to say that the plaintiff has a right against the second defendant unless he had a right against the first defendant. Those cases arise where there has been a relation between the defendants against whom the plaintiff is bringing separate actions, and it is necessarily true that the fundamental facts as to a cause of action are identical with reference to the successive defendants and where the principle of law arising from those facts must apply to both defendants.

X 13. Assuming that Bigelow took no part in the Lewisohn suit, in your opinion is the law of New York such that Bigelow would have been estopped in another suit to deny his liability, as a matter of law, on the same facts by a final decree against Lewisohn in the first suit?

A. No; not as between the plaintiff and Bigelow.

X 14. Assuming that Lewisohn's executors took no part in the suits against Bigelow, in your opinion is the law of New York such that said executors would have been estopped in another suit to deny their liability, as a matter of law, on the same facts by a final de-
1054 cree against Bigelow in these suits?

A. No; not as between the plaintiff and Lewisohn.

X 15. Assuming that Bigelow took part in the defence of the suits against Lewisohn's executors, and that the plaintiff knew this, what by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation and knowledge, operate as an estoppel in favor of Bigelow?

A. The cases which I have deemed sufficient to justify the conclusion reached by me are:

Castle v. Noyes, 14 N. Y. 329.
Featherstone v. N. & C. Turnpike Road, 71 Hun, 109.
People v. Stevens, 51 How. Pr. 235.
Matter of the Estate of Straut, 126 N. Y. 201.

I do not think these are all the cases bearing on the question, but they are the only cases I have in mind at present. In my answer to the direct interrogatory I stated that the fact of participation only confirms my opinion, previously expressed to the interrogatory, that the element of participation was eliminated; and, in answer to the direct interrogatory as to the effect of knowledge on the part of the plaintiff, I stated that it did not affect my answer.

X 16. Assuming that Bigelow took part in the defence of the suit against Lewisohn's executors, and that the plaintiff did not know this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation without plaintiff's knowledge, operate as an estoppel in favor of Bigelow?

A. The cases just cited by me are the only cases I have in mind at the moment, though I regard them as representing the general trend of opinion in this state.

X 17. Assuming that Bigelow did not take part in the defence of the suit against Lewisohn's executors, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may operate as an estoppel in favor of Bigelow?

A. The cases I have immediately in mind are:

Featherstone v. N. & C. Turnpike Road (71 Hun, 109);
People v. Stevens (51 How. Pr. 235),—

1055 and the opinion of Judge Choate in Emma Silver Mining Co., Limited, v. Emma Silver Mining Co. of New York and others (7 Fed. Rep. 401, at page 407).

X 18. Have you considered any decisions or language of the courts in New York which may have any tendency to support the view that there is no estoppel in Bigelow's favor growing out of the decree in favor of Lewisohn's executors?

A. No; none that I regard as in conflict with my opinion.

X 19. If so, what, by name and reference, are all of these which you have considered?

A. None that I regard as in conflict with my opinion.

X 20. Have any arguments been submitted or suggested to you by defendant's counsel, or have you thought of any, in support of the view that there was by the law of New York no estoppel in favor of Bigelow growing out of the decree in favor of Lewisohn's executors.

A. No arguments on behalf of the plaintiff have been presented to me by defendant's counsel. The argument which has suggested itself to me on behalf of the plaintiff is that a separate action brought against one alleged wrongdoer cannot be pleaded as a bar by another alleged wrongdoer, for the reason that he was not a party to the action in which the judgment was obtained, and should not therefore, be allowed to avail himself thereof; this argument, I am satisfied, is unsound under the law of the state of New York, in its application to this case.

X 21. If so, what are all of said arguments?

A. I have endeavored to sum them up faithfully in my answer to the preceding interrogatory.

X 22. What, in your opinion, constitutes privity under the law of New York to a judgment?

A. The word "privity" is one I have never been able to define.

X 23. In determining whether there was an estoppel in the present case, have you assumed or considered that Bigelow was in privity to the parties of record in the suit against Lewisohn's executors?

A. In reaching my conclusions I have regarded the transaction as one in which Bigelow and Leonard Lewisohn jointly participated, and as a transaction in which, in any suit brought against Lewisohn,—such as was brought by the plaintiff,—Lewisohn had a perfect right to notify Bigelow of the pendency of the suit, to give him an opportunity to become active in its defence, and that, after such notice and opportunity given, the result would be that as between Lewisohn and Bigelow, Bigelow would be bound as to any of the questions adjudicated in the suit between the plaintiff and Lewisohn. In this sense I have regarded Bigelow as in privity with Lewisohn.

X 24. In considering whether there was any estoppel in this case, have you assumed or considered that Bigelow had any legal interest to defend in the suit against Lewisohn's executors beyond
1056 such interest as he might have to secure a favorable precedent?

A. Yes; as stated in my answer to the last cross-interrogatory.

X 25. If so, precisely what have you assumed to be said legal interest?

A. I have assumed that the joint interest of Lewisohn and Bigelow in the transaction of which the plaintiff complains was of such a character that a decree against Lewisohn would, as between Lewisohn and Bigelow, absolutely bind the latter, should Lewisohn give him notice of the pendency of the action, and an opportunity of appearing to assist in its defence; or should Bigelow, without such request from Lewisohn, appear and take an active part in the defence. Furthermore, I am inclined to the belief that, as to the real estate transferred by Lewisohn to the plaintiff, the relation between Bigelow and Lewisohn might be so clearly one of trustee and cestui que trust that, with or without notice, Bigelow would be bound by the decree; but as to this I express no definite opinion.

X 26. Unless Bigelow would have been bound in favor of the plaintiff by estoppel by a decision adverse to Lewisohn's executors even if Bigelow did not participate in the defence of the suit against them, did Bigelow, in your opinion, have a legal interest to defend in that suit?

A. Yes; if I understand the meaning of the word "legal" in connection with "interest."

X 27. If so, by precise description, what, in your opinion, was said legal interest?

A. It is the interest I have heretofore described in my answers to the 23d and 25th cross-interrogatories.

X 28. In determining whether there was any estoppel in this case, have you assumed that the plaintiff consented to the participation, if any, by Bigelow in the support of the demurrers of Lewisohn's executors?

A. No.

X 29. Is it a principle of New York law that if the defendant in one suit sustains merely the character of a co-trespasser with the defendant in another suit by the same plaintiff, the recovery against one defendant is not thereby made competent evidence against the other?

A. Yes.

X 30. Is it a principle of New York law that the judgment in favor of one of two persons jointly and severally liable for the wrongful conversion of the plaintiff's property is no bar to a subsequent suit against the other because torts are joint and several?

A. A judgment in favor of one of two persons jointly and severally liable for wrongful conversion is no bar to an action against the other unless the relations of the respective defendants to each other are such that the facts and law applying to the one defendant are identical as to the other.

1057 X 31. Is it a principle of New York law that an adjudication acts as an estoppel only between the parties thereto or those in privity with them, or in other words, the estoppel must be mutual?

A. As I have said before, it is a principle of the New York law, subject to exceptions, which exceptions are broad enough, in my opinion, to cover this case.

X 32. Is it a principle of New York law that a judgment in favor of one co-trespasser may not be used by another co-trespasser not a party to it, by way of estoppel?

A. I repeat the answer given to the 30th cross-interrogatory.

X 33. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were Bigelow's agents in the suit against them which has been dismissed?

A. I have not endeavored to work out the relation between the parties in legal nomenclature; whether it was a case of joint trustees ex maleficio, joint equitable tort feasors, joint principals, or principal and agent; I certainly have not looked upon Lewisohn in the New York suit as simply the agent of Bigelow.

X 34. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were trustees for Bigelow of the stock sought to be recovered in the suit against them which has been dismissed?

A. I have not considered a decision of this question necessary in the conclusion reached by me, though, as I have stated before, it seems to me, without reaching a definite conclusion, that at least as to part of the transaction there was a definite relation of trustee and cestui que trust.

X 35. Is it a principle of New York law that in an action at law against one or some of several joint tort feasors, the controversy may be determined as between the parties before the court,—i. e., the plaintiff,—and without prejudice to the rights of others; and the judgment will completely determine the controversy between them, and will not be res adjudicata between the plaintiff and any of the joint tort feasors who is not a defendant and may be sued later?

A. It is a principle of New York law that such a controversy may

be determined with the result indicated in this cross-interrogatory, but that principle is qualified in the manner which I have stated in reply to the 30th cross-interrogatory.

X 36. Have you stated all your reasons for the opinions expressed by you, or the statements made by you, in answer to the 6th, 7th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th direct interrogatories?

A. Yes.

X 37. If not, what are all your reasons for the opinions or statements given by you in answer to each of said interrogatories?

A. I have stated them fully.

X 38. Have you now stated all your reasons for said answers?

A. Yes.

X 39. Were you, prior to the taking of your deposition on the foregoing cross-interrogatories, shown them, or any of them,
1058 or any copies of any of them, or given any information concerning the substance of them?

A. No.

X. 40. Has each of your answers in its final form been given in the language in which it now appears, before you were aware of the substance of any subsequent cross-interrogatory?

A. Yes.

X 41. Have you, since September 22, 1908, discussed in any way with any other person who is named as a witness in the caption to these cross-interrogatories, or with any one on behalf of the defendant, any of the subjects dealt with in the foregoing interrogatories or in your answers thereto?

A. I have had no discussions since September 22 with any one concerning this case, nor have I had any discussion prior thereto with any one. At one time—I do not remember the date—one of counsel for the defendant conferred with me in regard to the case for the purpose of ascertaining my opinion; and, in a light, casual manner, but not for any purpose of discussion, at some time—I cannot give the date—I mentioned to two or three others, who had given an opinion in favor of the defendant, that I had reached a similar conclusion.

WILLIAM A. KEENER.

Witnessed by
WALLACE A. FOSTER.

Deposition of Peter B. Olney.

The Deposition of Peter B. Olney, Taken in Behalf of the Defendant Bigelow, and Filed by His Counsel, Subject to the Objections and Exceptions of Counsel for the Complainant The Old Dominion Copper Mining & Smelting Company, to be Found at Pages 945-950.

[Commission and notarial certificate omitted.]

Q. 1. State your name, age, and place of residence.

A. My name is Peter B. Olney; I am sixty-five years of age, and I reside at Lawrence, Nassau county, Long Island, N. Y.

Q. 2. State your occupation and place of business.

A. I am a lawyer, and my place of business is 68 William street, New York city, borough of Manhattan.

Q. 3. If, in answer to the preceding interrogatory, you have testified that you are an attorney at law, state when you were admitted to the bar, and in what state or states, and how long you have been engaged in the practice of law in said state or states, and with what firms, if any, you have been or are connected.

1059 A. I was admitted to the bar first in the state of Massachusetts in 1866, and afterwards in the state of New York in 1866, and have practiced since then in the state of New York. The first firm with which I was connected was the firm of Barlow, Hyatt & Olney. The next was the firm of Barlow & Olney, and afterwards Olney & Comstock. I have been engaged in the practice of law for forty years and upwards.

Q. 4. State what, if any, judicial or other public or official positions you hold or have held.

A. I was one of the commission of three appointed by an act of the legislature of the state of New York in 1879 to compile public laws affecting the city of New York, and afterwards, under an act of the legislature, a member of the commission to revise said laws. The commission was composed of the late William C. Whitney, then counsel to the corporation, the late George Bliss, and myself. The revision was adopted by the legislature in volume 2 of the laws of 1882, I think. I was appointed district attorney for the county of New York in December, 1883, and acted as such until the 1st of January, 1885. I am now, and have been since 1898, referee in bankruptcy under the present United States bankrupt act.

Q. 5. State any other matters relating to your experience in your profession and as to your familiarity with the law and usages governing the practice in the state and federal courts in New York, both in law and in equity, and also as to your familiarity with the laws and usages of the state of New York relating to former adjudication and estoppel by judgment.

A. I have been in active practice in the courts of the state of New York during the last forty years, and during that period have practised in the state and federal courts, both in law and equity, and in the course of this practice have become fairly familiar with the laws of the state of New York relating to former adjudications and estoppel by judgment. In the case of Thorne v. De Breteuil, reported in 86 App. Div. 405, and 179 N. Y. 64, I had occasion, as counsel in that case, to examine, with a great deal of care, the doctrine of former adjudication and estoppel by judgment as applied by the courts of the state of New York.

Q. 6. Assuming that an action in equity is brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters to recover from him the profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, at a price in excess of the

price which they paid for it and of its fair value, and assuming that in this action a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Su
1060 preme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to a similar action, substantially identical with the first and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 945-950.]

A. I think it would be a bar to the latter action. In case the further element of notice of the litigation and participation therein were present, I have no manner of doubt that the judgment in the former suit would be a bar.

Q. 7. Assuming that two actions in equity are brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters to recover from him profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, and assuming that such property is alleged to have been sold, pursuant to said joint plan and conspiracy, in two separate parcels, in each of which both promoters were jointly interested, and that said actions were brought to recover the respective profits received from the sale of the two parcels, respectively, and assuming that the bills of complaint in the two actions were substantially identical, except as to the particular relief sought, and assuming that certain profits were alleged to have been made by said promoters on each parcel, and assuming that in one of said actions a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to two similar actions, substantially identical in form with those above described and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 945-950.]

A. My answer to this interrogatory is the same as my answer to the 6th.

Q. 8. Have you examined a copy of the record in the action of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn in

the Circuit Court of the United States for the Southern Dis-
1061 trict of New York, such as is hereto annexed and marked (1), the respective portions of said record being marked A to R, inclusive?

[Objected to; admitted; exception.—See pages 946-950.]

A. I have.

Q. 9. Have you examined copies of the proceedings in the above-entitled causes, to wit, the causes of the Old Dominion Copper Mining & Smelting Co. v. Bigelow in the Supreme Judicial Court in Massachusetts, such as are hereto annexed and marked, respectively, (2) and (3)?

A. I have.

Q. 10. Assuming that there were now pending in the courts of the state of New York proceedings against Albert S. Bigelow, identical in all respects (except as the practice might require formal changes) with the copies of the proceedings referred to in the 9th interrogatory, and assuming that said courts had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record, copies of which are referred to in the 8th interrogatory, were sufficiently pleaded and proven in defence of said proceedings, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in each of these bills of complaint were, respectively the same persons, and that the contracts, acts, matters, and transactions mentioned in each of these bills of complaint were, respectively, the same contracts, acts, matters, and transactions, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, what would be the effect, under the law and usages of the state of New York., of said decree and record as a defence to said proceedings assuming to be so pending?

[Objected to; admitted; exception.—See pages 946-950.]

A. I think the decree and record would be a bar and defence to such suit, and if the further element was added of notice to Bigelow and participation by him in the New York litigation, there would be, in my opinion, no doubt that such decree and record would be a complete bar and defence.

Q. 11. Assuming the facts stated in the 10th interrogatory, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would those additional facts affect
1062 your answer to the preceding interrogatory?

[Objected to; admitted; exception.—See pages 946-950.]

A. As I have already stated in answer to the 10th direct interrogatory, notice to Bigelow, and participation by him in the litigation in New York would, beyond any doubt, in my opinion, render

that judgment a complete bar to the Massachusetts suits if brought in the courts of the state of New York.

Q. 12. Assuming the facts stated in the 10th interrogatory, and assuming the facts stated in the 11th interrogatory, and assuming that the participation of the defendant, Bigelow, as stated in the 11th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answer to the two preceding interrogatories?

[Objected to; admitted; exception.—See pages 947-950.]

A. I cannot say that this additional fact would affect my answer.

Q. 13. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8098, referred to in the 9th interrogatory, and assuming that the course of the proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8098, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8098 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, what, under the laws and usages of the state of New York, would be the effect of said decree and
1063 record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8098, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

A. I think that that decree would be res adjudicata, and a bar and defence to the action.

Q. 14. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8099, referred to in the 9th interrogatory, and assuming that the course of proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the sub-

ject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8099, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8099 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, and assuming that the bill of complaint in said Circuit Court and the prayers thereof relate to one part of an entire transaction comprising said contracts, acts, merits, and transactions, and that the bill of complaint corresponding to the one numbered 8099 in Massachusetts and the prayers thereof relate to another part of the same entire transaction, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8099, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

1054] A. I think such decree and record would be a bar and defence to such action.

Q. 15. Assuming the facts stated in the 13th and 14th interrogatories, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would these additional facts affect your answers, or either of them, to the 13th and 14th interrogatories?

[Objected to; admitted; exception.—See pages 948-950.]

A. Adding these assumed facts, I have no manner of doubt but that in the courts of the state of New York the judgment and decree in New York would be an absolute bar to both suits.

Q. 16. Assuming the facts stated in the 13th, 14th, and 15th interrogatories, and assuming that the participation of the defendant, Bigelow, as stated in the 15th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers, or either of them, to the 13th, 14th, and 15th interrogatories?

[Objected to; admitted; exception.—See pages 949, 950.]

A. I cannot say that it would affect my answer.

Q. 17. If you have not already done so, state your reason for your answers to interrogatories 6th to 16th, inclusive.

[Objected to; admitted; exception.—See page 950.]

A. My reasons are the decisions of the courts of the state of New York in applying the doctrine of res adjudicata. Thus our Court of Appeals in Embury v. Connor, 3 N. Y., 522, held that—

"The general rule is, that an allegation on record, upon which issue has been once taken and found, and a judgment has been rendered, is, between the parties taking it and their privies, conclusive, according to the finding thereof, so as to estop the parties respectively from again litigating that fact once so tried and found; whether it is plead in bar, or given in evidence; when it is proper to be given in evidence.

In the subsequent case of Castle v. Noyes, 14 N. Y. 229, the court held that it was "well" settled that such a judgment was con-
1065 clusive in a second suit between the same parties or their privies on the same question, although the subject matter may be different.

Bigelow's relations to the subject matter of the litigation in the New York suit and his identity of interest with Lewisohn were such as to render Bigelow a privy with Lewisohn within the meaning of the rule. In addition, the supplemental answer in the Massachusetts suits alleges that Bigelow had knowledge of the litigation in New York, and fully participated in the defence of that action. The subject matters of the two suits pending in Massachusetts appear to differ in this, that one suit involves transactions with respect to 30,000 shares of stock, and the other the same transactions with respect to 100,000 shares of stock. The question involved is the same in both suits, although the "subject matter" appears to be different.

Under the decisions of our highest court a judgment in a New York court is a bar to both Massachusetts suits if brought in New York. See Doty v. Brown, 4 N. Y. p. 71; Castle v. Noyes, supra.

I think the elements necessary to constitute an estoppel are present here. The decisions of our courts applying these principles are very numerous. I refer to the following decisions, which seem to be especially in point: Woodhouse v. Duncan, 106 N. Y. 537; Pray v. Hegeman, 98 N. Y. 351, opinion, bottom of page 362, at the end; Thorne v. DeBreteuil, 179 N. Y. 64, opinion at page 82; Gleason v. Northwestern Mut. Life Ins. Co., 189 N. Y. 100.

Cross-interrogatories.

Without waiving the foregoing objections, but expressly insisting thereon, the plaintiff puts de bene the following cross-interrogatories:—

X 1. Is it a principle of the law of the state of New York that the law decided in a case in the court of last resort in overruling a demurrer becomes the law of the case to be applied when the case is heard upon the facts?

A. I think it is.

X 2. Is it the law of New York that there is no right of exonera-

tion or contribution between defendants jointly and severally liable ex delicto and not ex contractu?

A. I think it is.

X 3. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered that Bigelow might—but for said defence, if any—be under a liability to the plaintiff in the suits against Bigelow?

A. No.

1066 X 4. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability that Bigelow might—but for said defence, if any—be under as a liability jointly with Lewisohn?

A. Yes.

X 5. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability jointly and severally with Lewisohn?

A. Yes.

X 6. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability arising ex delicto?

A. I assume that the plaintiff charged in the New York suit that the promoters, Bigelow and Lewisohn, to use the language of Justice Holmes, "stood in a fiduciary relation to it," i. e., the plaintiff, and were charged with a breach of their duty as regards the plaintiff.

X 7. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability ex delicto jointly and severally with Lewisohn?

A. I have not specially considered that view except as stated in my answer to the 6th cross-interrogatory.

X 8. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts, as applied to these facts in said suit, there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts, in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability with Lewisohn, if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. In the papers annexed to the interrogatories I do not find in the record the opinion of the Massachusetts Supreme Judicial Court, reported at 188 Mass. 315, and I have not examined the report of that case; hence I cannot answer the question.

X 9. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts, as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts, in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the

law of New York, a joint and several liability ex delicto wtih Lewisohn, if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. I make the same answer to this cross-interrogatory as to the 8th cross-interrogatory.

1067 X 10. Is it a principle of the law of the state of New York that the liability of joint wrongdoers is joint and several?

A. It is.

X 11. Is it sometimes a principle of New York law that estoppel by former adjudication must be mutual?

A. I think it is.

X 12. If so, what, if any, are all the occasions of which you have knowledge on which they need not be mutual?

A. The general rule is that the estoppel shall be mutual. I do not at present recall the exceptions, if any there are.

X 13. Assuming that Bigelow took no part in the Lewisohn suit, in your opinion is the law of New York such that Bigelow would have been estopped in another suit to deny his liability as a matter of law on the same facts, by a final decree against Lewisohn in the first suit?

A. It is.

X 14. Assuming that Lewisohn's executors took no part in the suits against Bigelow, in your opinion is the law of New York such that said executors would have been estopped in another suit to deny their liability as a matter of law on the same facts, by a final decree against Bigelow in these suits?

A. If they had due notice of the litigation, yes.

X15. Assuming that Bigelow took part in the defence of the suits against Lewisohn's executors, and that the plaintiff knew this what, by name and reference, are all the decisions, if any, in New York, which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation and knowledge, operate as an estoppel in favor of Bigelow?

A. Castle v. Noyes, 14 N. Y. 329, opinion of the court at page 335; Bush v. Knox, 2 Hun, 576, opinion of the court at page 578; Gleason v. Northwestern Mutual Life Ins. Co., 189 N. Y. page 100, opinion of the court at the middle of page 102; Woodhouse v. Duncan, 106 N. Y. 527, opinion of the court at page 532; Bracken v. Atlantic Trust Co., 36 App. Div. page 67, opinion of the court at page 71. I think in my examination of the question I came across other cases upon the point, but I do not now recall them.

X 16. Assuming that Bigelow took part in the defence of the suit against Lewisohn's executors, and that the plaintiff did not know this, what, by name and reference, are all the decisions, if any, in New York, which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation without plaintiff's knowledge, operate as an estoppel in favor of Bigelow?

A. In my opinion the plaintiff's knowledge of the participation

is not a material fact. I refer to the cases mentioned in the answer to the 15th cross-interrogatory, in none of which, as I recollect
1068 it, did it appear whether the plaintiff or the other parties to the judgment had or had not knowledge of the notice to, or participation of, the other parties in the litigation.

X 17. Assuming that Bigelow did not take part in the defence of the suit against Lewisohn's executors, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may operate as an estoppel in favor of Bigelow?

A. The decisions in Featherstone v. Turnpike Co., 71 Hun, 109, opinion at page 111; Pray v. Hegeman, 98 N. Y. 351, opinion, bottom of page 362 and at the end; Carter v. Bowe, page 516, opinion at page 518; Matter of Estate of Strant, 126 N. Y. 201, opinion at pages 210, 211. There may be other cases that I examined in looking up the question, but I do not now recall them.

X 18. Have you considered any decisions or language of the courts in New York which may have any tendency to support the view that there is no estoppel in Bigelow's favor growing out of the decree in favor of Lewisohn's executors?

A. I have not found any such cases; hence have not considered them.

X 19. If so, what, by name and reference, are all of these which you have considered?

A. I cannot refer to or give any such cases.

X 20. Have any arguments been submitted or suggested to you by defendant's counsel, or have you thought of any, in support of the view that there was by the law of New York no estoppel in favor of Bigelow growing out of the decree in favor of Lewisohn's executors?

A. The defendant's counsel have not submitted to me any such arguments, but of course I myself have considered the effect of the fact that Bigelow was not a party on record in the New York case. I wish to add that in considering the question I have had in mind the facts set forth in the supplemental answer or answers interposed in the Massachusetts suits and in the records submitted to me, and from time to time various questions have arisen in my mind, but I cannot say that at any time there seemed to be any sound arguments in support of the proposition that the New York judgment would not be a bar in case the Massachusetts action was brought in the courts of the state of New York.

X 21. If so, what are all of said arguments?

A. I think I have answered this question in my answer to the 20th cross-interrogatory.

X 22. What, in your opinion, constitutes privity under the law of New York to a judgment?

A. Privies in estate, the relation of principal and agent, or principal and surety, or master and servant, indentity or substantial of interest in the subject matter of litigation, notice of the litigation, or notice of the former litigation with an opportunity to participate

1069 therein, make the respective parties privies under the laws of the state of New York. I do not claim that this statement comprehends all the cases or privies.

X 23. In determining whether there was an estoppel in the present case, have you assumed or considered that Bigelow was in privity to the parties of record in the suit against Lewisohn's executors?

A. Yes.

X 24. In considering whether there was any estoppel in this case, have you assumed or considered that Bigelow had any legal interest to defend in the suit against Lewisohn's executors beyond such interest as he might have to secure a favorable precedent?

A. Yes.

X 25. If so, precisely what have you assumed to be said legal interest?

A. I think Bigelow was interested to defend that action because his relation to the subject matter and the litigation was such as to render him bound by the judgment therein.

X 26. Unless Bigelow would have been bound in favor of the plaintiff by estoppel by a decision adverse to Lewisohn's executors, even if Bigelow did not participate in the defence of the suit against them, did Bigelow, in your opinion, have a legal interest to defend in that suit?

A. Assuming that Bigelow was not bound by the New York judgment, I think his only interest in defending it would be to obtain, as a precedent, the judgment of a competent court of jurisdiction.

X 27. If so, by precise description, what, in your opinion, was said legal interest?

A. I think I have answered this question in my answer to the 26th cross-interrogatory.

X 28. In determining whether there was any estoppel in this case, have you assumed that the plaintiff consented to the participation, if any, by Bigelow, in the support of the demurrers of Lewisohn's executors?

A. No.

X 29. Is it a principle of New York law that if the defendant in one suit sustains merely the character of a co-trespasser with the defendant in another suit by the same plaintiff, the recovery against one defendant is not thereby made competent evidence against the other?

A. If the trespass or wrong committed by each of the defendants is in all respects the same, my answer to this interrogatory, if I understand it, would be no.

X 30. Is it a principle of New York law that the judgment in favor of one of two persons, jointly and severally liable for the wrongful conversion of the plaintiff's property, is no bar to a subsequent suit against the other because torts are joint and several?

A. No.

X 31. Is it a principle of New York law that an adjudication acts as an estoppel only between the parties thereto or those in privity with them, or, in other words, the estoppel must be mutual?

A. The general rule, as I gather it from the decisions in
1070 New York, is that an estoppel must be mutual, but I am not prepared to say that there are not some exceptions to the rule.

X 32. Is it a principle of New York law that a judgment in favor of one co-trespasser may not be used by another co-trespasser, not a party to it, by way of estoppel?

A. No.

X 33. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were Bigelow's agents in the suit against them which has been dismissed?

A. I think that a quasi relationship of agency existed, and that idea may have been in my mind in considering the question, but I have considered that the facts in the case at bar were more nearly like the facts in the case of Woodhouse v. Duncan, 106 N. Y. 532, opinion.

X 34. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were trustees for Bigelow of the stock sought to be recovered in the suit against them which has been dismissed?

A. I do not think that I have assumed that Lewisohn's executors were trustees for Bigelow of the stock sought to be recovered in the New York suit.

X 35. Is it a principle of New York law that in an action at law against one or some of several joint tort feasors, the controversy may be determined as between the parties before the court,—i. e., the plaintiff and defendant,—and without prejudice to the rights of others; and the judgment will completely determine the controversy between them, and will not be res adjudicata between the plaintiff and any of the joint tort feasors who is not a defendant and may be sued later?

A. If I understand this question, I do not think it can be answered either yes or no, in all cases. If all the joint tort feasors were alleged to be guilty of the same act and those sued succeeded in obtaining a judgment in their favor upon the merits, I think the same plaintiff under the laws of the state of New York would be barred by the judgment in a suit brought by him against the other joint tort feasors.

X 36. Have you stated all your reasons for the opinions expressed by you or the statements made by you in answer to the 6th, 7th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th direct interrogatories?

A. I think I have.

X 37. If not, what are all your reasons for the opinions or statements given by you in answer to each of said interrogatories?

A. I think I have already given them.

X 38. Have you now stated all your reasons for said answers?

A. I think I have.

X 39. Were you, prior to the taking of your deposition on
1071 the foregoing cross-interrogatories, shown them, or any of them, or any copies of any of them, or given any information concerning the substance of them?

A. No.

X 40. Has each of your answers in its final form been given in the language in which it now appears before you were aware of the substance of any subsequent cross-interrogatory?

A. I first answered Cross-Int. 4, understanding that by that question I was asked if I had formed an opinion on the merits of Bigelow's liability, but when my attention, after having heard Cross-Int. 5, was called to the fact that that was not the question asked, I changed my answer as it now appears on the record. I also added another case to my answer to Cross-Int. 15 after having first heard Cross-Ints. 16 and 17. In every other respect I heard none of the subsequent interrogatories before answering.

X 41. Have you, since September 22, 1908, discussed in any way with any other person who is named as a witness in the caption to these cross-interrogatories, or with any one on behalf of the defendant, any of the subjects dealt with in the foregoing interrogatories or in your answers thereto?

A. No, if the question refers to the cross-interrogatories.

I discussed with Mr. Farley, on several occasions when he called at my office, the questions involved.

PETER B. OLNEY.

Before me,

PERCIVAL WILDS,
Notary Public.

Deposition of William H. Wadhams.

The Deposition of William H. Wadhams, Taken in Behalf of the Defendant Bigelow, and Filed by His Counsel, Subject to the Objections and Exceptions of Counsel for the Complainant The Old Dominion Copper Mining & Smelting Company, to be Found at Pages 945-950.

[Commission and notarial certificate omitted.]

Q. 1. State your name, age, and place of residence.

A. My name is William H. Wadhams; age, thirty-four; residence, No. 39 West 11th street, borough of Manhattan, New York city.

Q. 2. State your occupation and place of business.

A. I am a lawyer, with office at No. 1 Nassau street, borough of Manhattan, New York city.

1072 Q. 3. If, in answer to the preceding interrogatory, you have testified that you are an attorney at law, state when you were admitted to the bar, and in what state or states, and how long you have been engaged in the practice of law in said state or states, and with what firms, if any, you have been or are connected.

A. I was admitted to the bar of New York state in 1898; I have been engaged in the practice of law in said state for ten years, and was first connected with Curtis, Mallet-Prevost & Colt, John C. Carlisle, counsel, 20 Broad street, borough of Manhattan, New York city, from October, 1898, to February, 1899; associated with Charles P. Latting, Esq., United States loan commissioner and counsellor at law, 34 Pine street, borough of Manhattan, New York city,

from February, 1899, to October, 1899, when I formed a partnership with Mr. Latting under the firm name and style of Latting & Wadhams, having offices at No. 34 Pine street, borough of Manhattan, New York city; in the fall of 1901 I was appointed law secretary to Mr. Justice John Proctor Clarke, who had been appointed to the supreme bench of New York state by the then Governor Theodore Roosevelt; for three years associated with Charles P. Latting, dissolved the partnership by mutual consent, and was associated with Harris & Towne, 284 Broadway, at the same time continuing the secretaryship with Mr. Justice Clarke; remained with Judge Clarke four years and four months, serving with him while he was a nisi prius justice at trial and equity terms, and also afterwards in the appellate division, first department; in February, 1906, associated in offices with Winthrop & Stimson, 32 Liberty street; January 1, 1908, formed the partnership of Baldwin, Wadhams, Beacon & Fisher, with offices at 31 Nassau street, where I am now engaged in the practice of the law; have not practised outside the state of New York except appearing by courtesy upon arguments in the state of New Jersey.

Q. 4. State what, if any, judicial or other public or official positions you hold or have held.

A. In addition to the secretaryship mentioned in the last answer, I have served as justice of the city court of the city of New York, having been appointed to that office January 14, 1907, by Governor Charles E. Hughes. I served until the expiration of the term on January 1, 1908.

Q. 5. State any other matters relating to your experience in your profession, and as to your familiarity with the law and usages governing the practice in the state and federal courts in New York, both in law and equity, and also as to your familiarity with the laws and usages of the state of New York relating to former adjudication and estoppel by judgment.

A. During my practice at the bar in the state of New York I had devoted myself largely to the litigated side of business; been frequently in the courts, employed as counsel by other at-
1073 torneys, and by reason of my connection with the courts, both as subordinate and as judge, I have had opportunity to work and pass upon proceedings of all kinds, both in law and in equity.

I am also a solicitor in the United States district court and Circuit Court and proctor in admiralty in the United States court, and have appeared in proceedings both in the southern district of New York and in the eastern district of New York. In the course of this practice and on the bench I have had before me for consideration the question of estoppel by judgment and res adjudicata.

Q. 6. Assuming that an action in equity is brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters to recover from him the profits alleged to have been received by him and his associates secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property

to the corporation at the time of its organization, at a price in excess of the price which they paid for it and of its fair value, and assuming that in this action a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to a similar action, substantially identical with the first and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 945-950.]

A. In my opinion it would be a bar which would prevent recovery in the second cause of action.

Q. 7. Assuming that two actions in equity are brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters to recover from him profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, and assuming that such property is alleged to have been sold, pursuant to said joint plan and conspiracy, in two separate parcels, in each of which both promoters were jointly interested, and that said two actions were brought to recover the respective profits received from the sale of the two parcels, respectively, and assuming that the bills of complaint in the two actions were substantially identical, except as to the particular relief sought, and assuming that certain profits were
1074 alleged to have been made by said promoters on each parcel, and assuming that in one of said actions a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to two similar actions, substantially identical in form with those above described and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 946-950.]

A. In my opinion it would be a bar which would prevent recovery in each of the said actions.

Q. 8. Have you examined a copy of the record in the action of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn in the Circuit Court of the United States for the Southern District of

New York, such as is hereto annexed and marked (1), the respective portions of said record being marked A to R, inclusive?

[Objected to; admitted; exception.—See pages 946-950.]

A. I have examined the records to familiarize myself with the proceedings, but have not minutely examined all the details of it. I am familiar with the proceedings and its history.

Q. 9. Have you examined copies of the proceedings in the above-entitled causes, to wit, the two causes of the Old Dominion Copper Mining & Smelting Co. v. Bigelow in the Supreme Judicial Court in Massachusetts, such as are hereto annexed and marked, respectively, (2) and (3)?

A. Yes.

Q. 10. Assuming that there were now pending in the courts of the state of New York proceedings against Albert S. Bigelow, identical in all respects (except as the practice might require formal changes) with the copies of the proceedings referred to in the 9th interrogatory, and assuming that said courts had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record, copies of which are referred to in the 8th interrogatory, were sufficiently pleaded and proven in defence of said proceedings, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in each of these bills of complaint were, respectively, the same persons, and that the contracts,
1075 acts, matters, and transactions mentioned in each of these bills of complaint were, respectively, the same contracts, acts, matters, and transactions, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, what would be the effect, under the law and usages of the state of New York, of said decree and record as a defence to said proceedings assumed to be so pending?

[Objected to; admitted; exception.—See pages 946–950.]

A. In my opinion it would be a bar which would prevent recovery in the said proceedings.

Q. 11. Assuming the facts stated in the 10th interrogatory, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would those additional facts affect your answer to the preceding interrogatory?

[Objected to; admitted; exception.—See pages 946-950.]

A. A. It would not affect my answer. It would merely give me additional reason for making the same answer.

Q. 12. Assuming the facts stated in the 10th interrogatory, and assuming the facts stated in the 11th interrogatory, and assuming that the participation of the defendant, Bigelow, as stated in the 11th interrogatory, was with the knowledge of the plaintiff, how, if

at all, would this additional fact affect your answers to the two preceding interrogatories?

[Objected to; admitted; exception.—See pages 947–950.]

A. It would not affect them, it would be the same answer.

Q. 13. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8098, referred to in the 9th interrogatory, and assuming that the course of the proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the
1076 parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8098, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8098 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8098, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948–950.]

A. In my opinion it would be a bar which would prevent recovery.

Q. 14. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8099, referred to in the 9th interrogatory, and assuming that the course of proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8099, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the

parties and of the subject matter in said action against said Lewisohn's executors in said court and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of
1077 complaint numbered 8099 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, and assuming that the bill of complaint in said Circuit Court and the prayers thereof relate to one part of an entire transaction comprising said contracts, acts, matters, and transactions, and that the bill of complaint corresponding to the one numbered 8099 in Massachusetts and the prayers thereof relate to another part of the same entire transaction, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8099, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948–950.]

A. In my opinion it would be a bar which would prevent recovery.

Q. 15. Assuming the facts stated in the 13th and 14th interrogatories, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would these additional facts affect your answers, or either of them, to the 13th and 14th interrogatories?

[Objected to; admitted; exception.—See pages 948–950.]

A. It would not affect my answer. It would merely give me additional reason for making the same answers.

Q. 16. Assuming the facts stated in the 13th, 14th, and 15th interrogatories, and assuming that the participation of the defendant, Bigelow, as stated in the 15th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers, or either of them, to the 13th, 14th, and 15th interrogatories?

[Objected to; admitted; exception.—See pages 949, 950.]

A. It would not affect it. My answer would be the same.

Q. 17. If you have not already done so, state your reasons for your answers to Ints. 6th to 16th, inclusive.

[Objected to; admitted; exception.—See page 950.]

1078 A. My answers are based upon considerations of both reason and authority. In my opinion the judgment entered

upon the determination of the Supreme Court of the United States in Old Dominion Mining & Smelting Company against Lewisohn is a bar which prevents recovery, because it is in law an estoppel by judgment. It will be observed that Lewisohn and Bigelow acted together. From the facts it appears that throughout they were jointly interested in the several steps taken, and each acted for the other and co-operated with the other in bringing about the results of which the plaintiff complains. It is unnecessary to state whether, within the strict definitions of law, they were partners or were engaged in a joint venture. The result would be the same, for in each case they would stand in a relation to each other of identity of interest. The general rule of law in New York state is that an allegation on record upon which issue has ben once taken and found, and a judgment rendered thereon, is, between the parties taking it and their privies, conclusive according to the finding thereof, so as to estop the parties, respectively, from again litigating that fact once so tried and found, whether it is pleaded in bar or given in evidence. This rule was anounced early by the courts in the state of New York, and was formulated, substantially as given by me, in the case of Enbury against Connor, 3 N. Y. 511, and has frequently been reiterated by judges of our courts of highest resort.

Mr. Justice Holmes, writing the opinion of the United States Supreme Court in the case against Lewisohn, states,—

"The ground of the petitioner's case is that Lewisohn the deceased, and one Bigelow, as promoters formed the petitioner, that they might sell certain properties to it at a profit; that they made their sale while they owned all the stock issued, but in contemplation of a large further issue to the public without disclosure for their profit, and that such an issue in fact was made."

From the records annexed to this examination it clearly appears that the actions against Bigelow concerned the same subject matter and were brought for the same purpose, attempting to impose liability upon one who was jointly engaged with Lewisohn in the acts complained of and set forth in the complaint against Lewisohn. Not only does it appear that they were partners or quasi-partners in this joint venture, and that Lewisohn was the agent and representative of Bigelow, but it appears that, as to the property received, Lewisohn was acting by agreement with Bigelow for the benefit of both, and this necessarily constituted Lewisohn a trustee for Bigelow to the extent of his interest in the property. A decree in favor of a trustee under the laws of the state of New York is bind-
1079 ing upon and enures to the benefit of the cestui que trust, or beneficiary. It therefore appears in this case that Lewisohn and Bigelow are privies within the definition as defined in the general rule, both by reason of their identity of interest, being partners in the joint venture set forth, and by reason of the trust relations existing between them. The authorities are in conformity with this opinion. In Freeman on Judgments, sec. 173, it is said,—

"It is not intended that the fact of a legal and equitable title being in different persons shall authorize the same issue to be twice bona fide litigated. A suit by A for the use of B or his, A's trustee is

binding on B. No man can be permitted after adjudicating the matter by his trustees, to disregard that adjudication."

In the matter of Estate of Straut, 126 N. Y. 201, the court said, speaking of trustees:

"In such an action they represent the whole title and interest and their action in the absence of fraud or collusions, is binding upon the beneficiaries. In the action brought by these trustees there is no question between the beneficiaries themselves. The only question to be considered was between the trustees and a stranger to the trust who was alleged to have in his possession, or to be liable to action for certain property belonging to the trust, and in such an action it is well settled now that the beneficiaries are not necessary parties and the authorities are equally clear in the case of agency. Judge Choate, in Emma Silver Mining Company, Limited, v. Emma Silver Mining Company of New York, 7 Fed. Rep. 401, said: 'The weight of authority, however, is that where an agent in a transaction is sued after the termination of his agency and upon a trial of the merits the issue is determined against the plaintiff, the principal, though not a party to the suit, can avail himself of the judgment as a bar when he is sued by the same plaintiff in the same cause of action. While the principal, if he had no notice of the former suit and no opportunity to defend it, might be concluded by a judgment against his former agent, or made responsible for the agent's bad pleading or blunders in the trial of the case, because so to conclude him would be to deprive him of his property without due process of law, yet as regards the plaintiff who has before sued the agent and been defeated there is no reason why he should not be concluded upon that principle of public policy which gives every man one opportunity to prove his case and limits every man to one such opportunity. He has had his day in Court and it is immaterial whether he has testified under this, his right, as
1080 against the principal or the agent in the transaction provided the issue to be tried was identical as against both.'

Castle v. Noyes, 14 N. Y. 329.

Emery v. Fowler, 39 Me. 329.

and cases cited."

Under that rule the judgment rendered on the stated facts in favor of Lewisohn would act, when properly pleaded, as an estoppel, and therefore a bar which would prevent recovery in the actions against Bigelow.

There is another and further reason. In the action in the United States court against Lewisohn the plaintiff charged Bigelow and Lewisohn with the commission of tortious acts, and demanded a rescission of the contract made by them and a return of the purchase price. The success of their cause of action depended upon the establishment of the commission of the court by Bigelow and Lewisohn. The plaintiff chose this form of action, and must be bound by the resulting determination of the courts. The demurrer to the complaint having been sustained, the judgment entered thereon was a determination that the facts alleged in the complaint did not constitute a cause

of action, and therefore necessarily determined that no tort had been committed.

Under the law of the state of New York, where two parties are charged with the commission of a tort there may be but one recovery, although by an anomaly of law a dual pursuit of that recovery is permitted. So where two persons are charged with the commission of a wrong, separate actions may be brought against each, and there may be, by this means, a dual pursuit of the remedy, and separate judgment may be entered against each, but upon the satisfaction of the judgment against either the other is discharged, and that on the theory that there can be but one recovery for a wrong. This was established in the case of Knapp v. Roche, 94 N. Y. 329, in which Chief Justice Ruger, writing for a unanimous court, says:

"Satisfaction by one joint tort feasor has always been held to be available as a bar to an action against another."

So it is held, reciprocally, that where it has once been determined by the court that there is no wrong by reason of the facts alleged by the plaintiff, that must necessarily be an end of the litigation, and the fact that there is no tort and that no wrong has been committed having once been determined in an action against one of the alleged wrongdoers, it follows that in an action against the other the
1081 judgment of the court in which it was determined that there was no wrong operates as a bar or estoppel by judgment. This must be so to sustain continuity of judicial decisions, to put an end to litigation, and to prevent injustice by operation of law. This may be illustrated by the action of People v. Stephens, 51 How. Pr. 235; aff. 71 N. Y. 527. In that case the state brought an action against four defendants claiming damages for a fraudulent combination and conspiracy in obtaining a contract from the state with reference to the performance of public work. It appeared in the trial that previously the state had commenced an action against two of the same defendants upon precisely the same state of facts, which was tried upon a demurrer interposed by the defendants and judgment rendered in their favor. It was held that the judgment was a bar which prevented recovery in the subsequent action, not only against the two defendants previously sued, but also against the other alleged conspirators. The court said, at page 246:

"It is claimed, however, that the former judgment grants no protection to the other defendants because a party may fail to recover against one joint wrongdoer and yet succeed as against the others. That is undoubtedly true when a case turns upon evidence given. The proof may be sufficient to justify a recovery against one, but insufficient as to another. Has it, however, ever been held that upon the same proof against the same parties the Court would be justified in holding one guilty of actionable conduct whilst the other was not? * * * All the facts of the defendants Gale & Stephens set out in the complaint in the former action and which are identical, the same as those contained in the complaint that the parties are here charged with has entered into a confederacy and combination with others, those others being the persons not then sued; and it was of those acts then and now charged this court gravely and solemnly decided

that they were not sufficient to constitute a cause of action. If they were not then are they now? Has the color or complexion changed with the lapse of years or must this Court change its view of the same facts because performed by the parties now for the first time named, though then included as co-conspirators and confederates. When the former judgment requires us to hold that Stephens against Townsend and Burden have done nothing but raise a cause of action to the state we must necessarily be confined to the same rule when we judge their same conduct and acts committed by others in their aid. The former judgment may have been erroneous and might perhaps have been reversed. It stands nevertheless to-day uttering the law which must control our actions in regard to these parties. It is founded upon no technicality, no legal quibble, but rests upon the great con-
1082 servative principle that litigation must cease with an unreversed judgment."

This case was affirmed by the highest court of this state and has never since been questioned, and stands as law of the state of New York to-day.

On the facts presented in this case there is still a further and additional reason, which, however, is not necessary to the opinion I have rendered, but which merely adds another ground for it, namely, it is a rule of law in the state of New York that where one has taken part in litigation and had an opportunity to control and direct it, that he has had his day in court and is bound equally as if he were a party to the litigation. Upon this subject the Court of Appeals, in the case of Carleton v. Lombard, 149 N. Y. 137, states:

"We have seen that the defendant had knowledge of all the correspondence by cable between the plaintiffs and the parties in Calcutta: that it was notified of the commencement of the action and that it participated in the trial. In so far as the issues actually litigated in that case are identical with the issues involved this judgment is binding upon the defendant, in the same way as if it had been a party upon the record."

I have also taken into consideration that the judgment heretofore rendered, and which I have stated in my opinion, if properly pleaded, would be a bar to actions concerning the same subject matter brought against Bigelow, was a judgment upon demurrer under the law of the state of New York. A judgment on demurrer to plaintiff's complaint is conclusive of everything necessarily determined by it, and in this state, where the defendant has failed to take advantage of the opportunity to plead over the judgment which is thereupon entered against him, is under the laws of the state of New York, a final judgment. Among the cases which have so held, are:

Whiteman v. Shankland, 18 How. Pr. 79;
Allen v. Knott, 111 U. S. 472;
Bouchaud v. Dias, 3 Dem. 238,—

in which it was pointed out that it can make no difference whether the facts be proved by deeds and witnesses or be admitted by the parties, whether ore tenus or by pleading. I have therefore concluded, and stated as my opinion, the final judgment on demurrer

by a court of competent jurisdiction upon a question directly at issue between the parties, and which has in this instance been affirmed upon appeal to the court of highest resort, and which forever
1083 closes and estops all parties to the action, and those in privity with them, from questioning its accuracy or justice in another action. As was stated in People v. Stephens, 51 How. Pr., already cited:

"This rule was essential to peace and repose and was preventative of endless and vexatious litigation, and is also so firmly rooted and grounded in every enlightened system of jurisprudence that it is at once conceded and has not now been questioned. That this practice is fully applicable to the judgment rendered upon a demurrer, plaintiffs concede and authorities are abundant to justify such concession."

I may add further that the reason I stated that this judgment would operate as a bar in both actions is that it appeared from the facts clearly that the two actions are a subdivision of one cause of action, the one having to do with the 100,000 shares, and the other with 30,000 shares of the stock of this company, the facts being in all essentials as bearing upon the gravamen of the offence alleged, the same in each case, and the law affecting the transactions and establishing the rights as between the plaintiff and defendants must necessarily be the same, [the] transaction being one, entire, and identical.

There are many other cases to the same effect; authority in support of this opinion is not lacking, and will be found in Hirchbach v. Ketcham, 84 A. D. 258, where the court held that after demurrer had been sustained to the complaint upon the theory that a contract alleged was invalid, and judgment had been entered thereon dismissing the complaint upon the merits, that such an action was a bar which prevented recovery by the same plaintiff in a subsequent action to recover other fees alleged to be due under the same contract; and other cases might be cited.

Cross-interrogatories.

Without waiving the foregoing objections, but expressly insisting thereon, the plaintiff puts de bene the following cross-interrogatories:—

X 1. Is it a principle of the law of the state of New York that the law decided in a case in the court of last resort in overruling a demurrer becomes the law of the case to be applied when the case is heard upon the facts?

A. It certainly is. If when a demurrer is pleaded upon the ground that the facts alleged are not sufficient to constitute a cause of action, and the demurrer is sustained, it is then the law of the case that no cause of action is stated, and in the ordinary course
1084 of action the plaintiff is given an opportunity to plead over, that is, serve an amended complaint within the time specified by the court, generally within twenty days. If he fails to serve such amended complaint and does not plead over the judgment then becomes final, and is given the same force and effect as a final judgment upon the facts. I have given authorities in support of this point

upon my direct examination, and in addition to the New York cases cited, I may refer, also, to the recognition of this principle in the United States court in Yates v. Utica Bank, 206 U. S. 181, and Northern Pacific Ry. Co. v. Slaght, 205 U. S. 132, and Bissell v. Spring Valley Township, 124 U. S. 225, and Bouchaud v. Dias, 3 Den. (N. Y.) 238.

On the other hand, where the demurrer is overruled, it is then the law of the case that the facts alleged do state a cause of action, assuming them all to be true, and the burden rests upon the plaintiff to proceed with the trial and prove such facts.

X 2. Is it the law of New York that there is no right of exoneration or contribution between defendants jointly and severally liable ex delicto and not ex contractu?

A. Yes, it is the law.

X 3. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered that Bigelow might—but for said defence, if any—be under a liability to the plaintiff in the suits against Bigelow?

A. In the first place, the decree was not merely a decree dismissing the complaint against Bigelow, but it was a final judgment upon a demurrer which determined that there was no cause of action in the complaint alleged. I have not undertaken to consider upon the merits the claim made by the plaintiff either against Lewisohn or against Bigelow. I have therefore not considered whether or not Bigelow was liable to the plaintiff upon the merits in the actions brought by the plaintiff against Bigelow, but I have assumed that even if an attempt were made to prove that Bigelow was liable in such actions, that no recovery could be had if the judgment in favor of Lewisohn were properly pleaded, because, regardless of such independent liability, the judgment upon the demurrer in favor of the defendant in the action against Lewisohn would operate as a bar and prevent recovery as against Bigelow.

X 4. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability that Bigelow might—but for said defence, if any—be under as a liability jointly with Lewisohn?

A. Yes.

X 5. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you as-
1085 sumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability jointly and severally with Lewisohn?

A. Yes.

X 6. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability arising ex delicto?

A. Yes.

X 7. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said de-

fence, if any—be under as a liability ex delicto jointly and severally with Lewisohn?

A. Yes.

X 8. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. Yes.

X 9. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability ex delicto with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. Yes.

X 10. Is it a principle of the law of the state of New York that the liability of joint wrongdoers is joint and several?

A. Yes, in most cases.

X 11. Is it sometimes a principle of New York law that estoppel by former adjudication must be mutual?

A. Yes, sometimes.

X 12. If so, what, if any, are all the occasions of which you have knowledge on which they need not be mutual?

A. It is easier to state cases in which they must be mutual than in which they need not be mutual. The general practice, however, is that they need not be mutual in those cases in which the party or his privy against whom the estoppel is raised has been given his day in court, and after that day in court it has been determined upon his own statement of the facts that he has no cause of action. As was stated in Emma Silver Mining Co., Ltd., v. Emma Silver Mining Co. of New York, 7 Fed. Rep. 401, where the agent is sued, the principal is not estopped if he had no notice of the former suit, and no opportunity to defend it, for the reason that he may not
1086 be concluded by a judgment against his former representative and be made responsible for the bad pleading and blunders in the trial of such former representative, as this would be to deprive him of his day in court, and would thus be depriving him of his property without due process of law; but, as regards the plaintiff, he has been defeated in the former suit against the agent, and there is no reason why he should be concluded by the prior adjudication, because the plaintiff has had his day in court and has been given his opportunity and it has been determined that he has no cause of action. In such case, provided the issue is identical, as against both defendants, an estoppel by judgment exists in favor of the party not sued upon the former trial, because of his privity, and yet it is not a case of mutual estoppel.

X 13. Assuming that Bigelow took no part in the Lewisohn suit, in your opinion is the law of New York such that Bigelow would have been estopped in another suit to deny his liability as a matter of law on the same facts, by a final decree against Lewisohn in the first suit?

A. Yes. In this action there was more than the mere relation of agent, but an identity of interest and an identity of subject matter, and upon showing that relationship, or, in other words, proof of the privity, he would be estopped.

X 14. Assuming that Lewisohn's executors took no part in the suits against Bigelow, in your opinion is the law of New York such that said executors would have been estopped in another suit to deny their liability as a matter of law on the same facts by a final decree against Bigelow in these suits?

A. Yes, assuming that the action had been prosecuted and a decree had been entered in the Bigelow actions first.

X 15. Assuming that Bigelow took part in the defence of the suits against Lewisohn's executors, and that the plaintiff knew this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation and knowledge, operate as an estoppel in favor of Bigelow?

A.—

Carleton v. Lombard, 149 N. Y. 137.
Oceanic Steamship Navigation Co. v. Compania Espanola, 144 N. Y. 663.
Village of Port Jarvis v. First National Bank, 96 N. Y. 550.
Woodhouse v. Duncan, 106 N. Y. 527.
Leavitt v. Walcott, 95 N. Y. 212.
Heiser v. Hatch, 86 N. Y. 619.
1087 Demarest v. Darg, 32 N. Y. 281.
Prescott v. Le Conte, 83 A. D. 183.
Kelley v. Forty-second Street Ry. Co., 37 A. D. 509.
Van Koughnet v. Dennis, 68 Hun. 179.
Bush v. Knox, 2 Hun, 576.

X 16. Assuming that Bigelow took part in the defence of the suit against Lewisohn's executors, and that the plaintiff did not know this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation without plaintiff's knowledge, operate as an estoppel in favor of Bigelow?

A. Same as list given in answer to last question.

X 17. Assuming that Bigelow did not take part in the defence of the suit against Lewisohn's executors, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may operate as an estoppel in favor of Bigelow?

A. Upon the question of estoppel generally:—
Enbury v. Connor, 3 N. Y. 511.
Leavitt v. Walcott, 95 N. Y. 212.
Park Hill Co. v. Herriott, 41 A. D. 324.
Western Ry. Co. v. Nathan, 49 N. Y. 513.
Lawrence v. Shaefer, 19 Misc. 239; aff. 20 A. D. 80.
Brewster v. Hatch, 122 N. Y. 349.
Matter of Will of O'Hara, 95 N. Y. 403.
Paulding v. The Chrome Steel Co. et al., 94 N. Y. 329.
Pakas v. Hollingshead, 184 N. Y. 217.
People v. Stephens, 51 How. Pr. 235; aff. 71 N. Y. 527.
Portland Coal Mining Co. v. Stratton's Independence, 158 Fed. Rep. 63.
Emma Silver Mining Co., Ltd., v. Emma Silver Mining Co. of New York, 7 Fed. Rep. 401.
Gleason v. Northwestern Mutual Life Ins. Co., 189 N. Y. 100.
Bates v. Stanton, 1 Duer, 79.
Hirshbach v. Ketchum, 89 A. D. 258.
Freeman on Judgments, secs. 174, 173, 207.
2 Black on Judgments, secs. 789, 781.
1088 Whitman v. Shankland, 18 How. Pr. 79.
Bouchaud v. Dias, 3 Den. 238.
Allen v. Knott, 111 U. S. 472.
Yates v. Utica Bank, 206 U. S. 181.
Northern Pacific Ry. Co. v. Slaght, 205 U. S. 135.
Bissell v. Spring Valley Townships, 124 U. S. 225.
2 Black on Judgments, sec. 709.
Castle v. Noyes, 14 N. Y. 329.
Carter v. Bowe, 41 Hun, 516.
Matter of Estate of Straut, 126 N. Y. 201.
Brackin v. Adirondack Trust Co., 36 A. D. 67.
Rogers v. Rogers, 3 Paige, 379.
Wakeman v. Grover, 4 Paige, 24.
Kerrison v. Stewart, 93 U. S. 155.
King v. Barnes, 109 N. Y. 267.
Wilcox v. Pratt, 125 N. Y. 688.
Lichty v. Lewis, 63 Fed. Rep. 535.
Bush v. Knox, 2 Hun, 576.
1 Greenleaf on Evidence, p. 523.

X 18. Have you considered any decisions, or language of the courts in New York which may have any tendency to support the view that there is no estoppel in Bigelow's favor growing out of the decree in favor of Lewisohn's executors?

A. No.

X 19. If so, what, by name and reference, are all of these which you have considered?

A. None.

X 20. Have any arguments been submitted or suggested to you by defendant's counsel, or have you thought of any, in support of the view that there was by the law of New York no estoppel in favor

of Bigelow growing out of the decree in favor of Lewisohn's executors?

A. No.

X 21. If so, what are all of said arguments?

A. None.

X 22. What, in your opinion, constitutes privity, under the law of New York, to a judgment?

A. I will adopt, as my definition of privity, that stated by Greenleaf in his work on Evidence, vol. 1, sec. 523. This, in my opinion, is the law in the state of New York:

"The term privity denotes mutual or successive relationship to the same rights of property."

1089 And he adds—

"Standing in this relation to the litigating party here bound by the proceedings to which he was a party, is that they are identified with him in interest; and wherever this identity is found to exist all are alike concluded. Hence, all privies, whether in estate, in blood, or in law are estopped from litigating that which is conclusive upon him with whom they are in privity."

X 23. In determining whether there was an estoppel in the present case, have you assumed or considered that Bigelow was in privity to the parties of record in the suit against Lewisohn's executors?

A. Yes.

X 24. In considering whether there was any estoppel in this case, have you assumed or considered that Bigelow had any legal interest to defend in the suit against Lewisohn's executors beyond such interest as he might have to secure a favorable precedent?

A. No, I have not so assumed; I have considered their relative relationship.

X 25. If so, precisely what have you assumed to be said legal interest?

A. In my opinion as to plaintiff, the facts alleged, if true, would constitute them trustees ex male faceo; and, in my opinion, in their relations as to each other they were engaged in a joint adventure as such quasi partners.

X 26. Unless Bigelow would have been bound in favor of the plaintiff by estoppel by a decision adverse to Lewisohn's executors, even if Bigelow did not participate in the defence of the suit against them, did Bigelow, in your opinion, have a legal interest to defend in that suit?

A. Yes.

X 27. If so, by precise description, what, in your opinion, was said legal interest?

A. The joint interest, as stated by me, is that Lewisohn has taken part in the joint venture in which they are alleged to have been engaged, and was therefore part owner in the proceeds of the property; the contract under which the same was obtained the plaintiff was attempting to set aside.

X 28. In determining whether there was any estoppel in this case, have you assumed that the plaintiff consented to the partici-

pation, if any, by Bigelow in the support of the demurrers of Lewisohn's executors?

A. No.

X 29. Is it a principle of New York law that if the defendant in one suit sustains merely the character of a co-trespasser with the defendant in another suit by the same plaintiff the recovery against one defendant is not thereby made competent evidence against the other?

A. Yes, that is so.

1090 X 30. Is it a principle of New York law that the judgment in favor of one of two persons jointly and severally liable for the wrongful conversion of the plaintiff's property is no bar to a subsequent suit against the other because torts are joint and several?

A. Yes, it may be a principle when it is determined that no tort was committed.

X 31. Is it a principle of New York law that an adjudication acts as an estoppel only between the parties thereto, or those in privity with them, or, in other words, the estoppel must be mutual?

A. It is a principle of law that it operates only as to parties and those that are in privity with them,—if you make your definition of privity broad enough; but it does not always follow that an estoppel in a narrow, technical sense must be mutual. I have more fully discussed this in my prior answer. The difficulty of answering questions of this nature is that the terms used may be variously defined.

X 32. Is it a principle of New York law that a judgment in favor of one co-trespasser may not be used by another co-trespasser, not a party to it, by way of estoppel?

A. Yes, it may, where the act complained of is identical, and the subject matter is identical, and it is determined that there was no trespass committed.

X 33. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were Bigelow's agents in the suit against them which has been dismissed?

A. Yes.

X 34. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were trustees for Bigelow of the stock sought to be recovered in the suit against them which has been dismissed?

A. Yes.

X 35. Is it a principle of New York law that in an action at law against one or some of several joint feasors, the controversy may be determined as between the parties before the court,—i.e., the plaintiff and defendant,—and without prejudice to the rights of others; and the judgment will completely determine the controversy between them and will not be res adjudicata between the plaintiff and any of the joint tort feasors who is not a defendant and may be sued later?

A. Yes, this may be so where the determination is to the effect that no tort was committed; as, for instance, it may be held by a jury upon a trial against two joint tort feasors that the evidence es-

tablishes the commission of a tort by one but not by the other, or where actions are separately brought, but on different statements of fact, a judgment may be recovered as against one and not as against the other. This rests, however, upon a diversity of act or a diversity of subject matter, and the use of the words "joint tort feasors" should not be permitted to cause confusion. The law
1091 of the state of New York in this respect is clearly defined, there being two rules, the one rule illustrated by the case of the People v. Stephens, in which co-conspirators were charged with the commission of the same offence upon allegations of the same and identical facts, and in which it was held that a judgment upon a demurrer in favor of two of these co-conspirators was a bar which prevented recovery in a subsequent action against four, the two original named in the first case brought, as well as two additional defendants made parties in a second case, and upon the express ground that the former adjudication was to the effect that no offence had been committed against the law, and therefore, upon such state of facts, no recovery could be had. On the other hand, where the term "joint tort feasor" is used in the sense that two or more persons are charged with the damage done, as distinguished from the acts which brought about such damage, and the damage done is brought about by a diversity of acts, some committed by one of the defendants and others by others of the defendants, it may be and has frequently been held that the one set of acts constitute a tort and that the other set do not; and upon a strict analysis it will therefore be found that in fact the defendants are not joint tort feasors, because there is no tort committed by the one, whereas the tort is determined to have been committed by the other. And so an illustration of this class of cases may be found in the action of Bopp against New York Electric Vehicle Company, in which the appellate division, first department, stated:

"It is well settled that the liability of wrong doers is both joint and several and in an action predicated upon negligence where two or more persons are jointly sued and concurrent acts of negligence are established a recovery can be had against both. If the current act resulting in the injury be not established the jury may exonerate one even against the other."

In my opinion the facts under consideration bring this case clearly within the first class and not within the second class of these cases.

X 36. Have you stated all your reasons for the opinions expressed by you, or the statements made by you, in answer to the 6th, 7th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th direct interrogatories?

A. I have.

X 37. If not, what are all your reasons for the opinions or statements given by you in answer to each of said interrogatories?

A. None others.

X 38. Have you now stated all your reasons for said answers?

A. Yes.

X 39. Were you, prior to the taking of your deposition on the

foregoing cross-interrogatories, shown them, or any of them, or any copies of any of them, or given any information concerning the substance of them?

A. No, not the slightest.

1092 X 40. Has such of your answers in its final form been given in the language in which it now appears, before you were aware of the substance of any subsequent cross-interrogatory?

A. Yes.

X 41. Have you, since September 22, 1908, discussed in any way, with any other person who is named as a witness in the caption to these cross-interrogatories, or with any one on behalf of the defendant, any of the subjects dealt with in the foregoing interrogatories or in any answers thereto?

A. I have not discussed with any of the witnesses named, to my knowledge, in any way connected with the defendant, except that I was requested to give an opinion upon the preliminary motion made for leave to file supplemental answer herein. This request came from John Griffin, Esq., acting on behalf of Mr. Tyler, of Tyler & Young. At that time I questioned him concerning the facts of the case, and learned, in outline, the matters more fully presented by the records annexed to these interrogatories.

WM. H. WADHAMS.

Subscribed and sworn to before me this 28th day of September, 1908.

[SEAL.]

H. M. HEWSON,
Notary Public, New York County, N. Y.

Deposition of Dennis O'Brien.

The Deposition of Denis O'Brien, Taken in Behalf of the Defendant, Bigelow, and filed by his counsel, subject to the objections and exceptions of counsel for the complainant, The Old Dominion Copper Mining & Smelting Company, to be found at pages 945-950.

[Commission and notarial certificate omitted.]

Q. 1. State your name, age, and place of residence.

A. My name is Denis O'Brien; my age is seventy-one years; and my residence is now at Watertown, N. Y.

Q. 2. State your occupation and place of business.

A. I am a lawyer, a member of the bar of the state of New York, entitled to practice in all the courts of the state and the federal courts. My place of business is at present at Watertown.

Q. 3. If, in answer to the preceding interrogatory, you have testified that you are an attorney at law, state when you were admitted to the bar, and in what state or states, and how long you have been engaged in the practice of law in said state or states, and with what firms, if any, you have been or are connected.

A. I was admitted to the bar in May, 1861, in New York
1093 state. It is a little difficult to tell how long I have been engaged in the practice of law, because nearly twenty-five years of my life I have occupied official positions and the rest engaged in the practice of law.

I am not connected with any firm. Prior to 1884 there was a firm of lawyers, of which I was the principal member, at Watertown—there was O'Brien & Emerson, and there was Reynolds & O'Brien, and Wynne & O'Brien.

Q. 4. State what, if any, judicial or other public or official positions you hold or have held.

A. I was the attorney general of the state of New York from the 1st of January, 1884, to the 1st of January, 1888,—two terms. I have been a member of the Court of Appeals of the state of New York from the 1st day of January, 1890, to the 1st day of January, 1908.

Q. 5. State any other matters relating to your experience in your profession, and as to your familiarity with the law and usages governing the practice in the state and federal courts in New York, both in law and in equity, and also as to your familiarity with the laws and usages of the state of New York relating to former adjudication and estoppel by judgment.

A. I have already stated my experience. I have practised since my admission, when I was not holding the position as judge before the bar, both in the state and federal courts.

I think I am reasonably familiar with that question, having had occasion to pass upon it as a judge, and to examine it as a lawyer.

Q. 6. Assuming that an action in equity is brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters to recover from him the profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, at a price in excess of the price which they paid for it and of its fair value, and assuming that in this action a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to a similar action, substantially identical with the first and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 945-950.]

1094 A. In my opinion it would be a bar.

Q. 7. Assuming that two actions in equity are brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its

promoters to recover from him profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, and assuming that such property is alleged to have been sold, pursuant to said joint plan and conspiracy, in two separate parcels, in each of which both promoters were jointly interested, and that said two actions were brought to recover the respective profits received from the sale of the two parcels, respectively, and assuming that the bills of complaint in the two actions were substantially identical, except as to the particular relief sought, and assuming that certain profits were alleged to have been made by said promoters on each parcel, and assuming that in one of said actions a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to two similar actions, substantially identical in form with those above described and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 946-950.]

A. In my opinion it would constitute a good defence and a bar to the actions against the other promoter.

Q. 8. Have you examined a copy of the record in the action of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn in the Circuit Court of the United States for the Southern District of New York, such as is hereto annexed and marked (1), the respective portions of said record being marked A to R, inclusive?

[Objected to; admitted; exception.—See pages 946-950.]

A. I have.

Q. 9. Have you examined copies of the proceedings in the above-entitled causes, to wit, the two causes of the Old Dominion Copper Mining & Smelting Co. v. Bigelow in the Supreme Judicial
1095 Court in Massachusetts, such as are hereto annexed and marked, respectively, (2) and (3)?

A. I think I have read what purports to be a copy of the pleadings in the Massachusetts case.

Q. 10. Assuming that there were now pending in the courts of the state of New York proceedings against Albert S. Bigelow, identical in all respects (except as the practice might require formal changes) with the copies of the proceedings referred to in the 9th interrogatory, and assuming that said courts had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record, copies of which are referred to in the 8th interrogatory, were sufficiently pleaded and proven in defence of said proceedings, and assuming that the Leonard Lewisohn and the

Albert S. Bigelow mentioned in each of these bills of complaint were, respectively, the same persons, and that the contracts, acts, matters, and transactions mentioned in each of these bills of complaint were, respectively, the same contracts, acts, matters, and transactions, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, what would be the effect, under the law and usages of the state of New York, of said decree and record as a defence to said proceedings assumed to be so pending?

[Objected to; admitted; exception.—See pages 946-950.]

A. In my opinion it would constitute a good defence.

Q. 11. Assuming the facts stated in the 10th interrogatory, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would those additional facts affect your answer to the preceding interrogatory?

[Objected to; admitted; exception.—See pages 946-950.]

A. The fact that Bigelow participated in the defence of the suit in the federal courts—that circumstance would greatly reinforce the opinion that I have already expressed.

Q. 12. Assuming the facts stated in the 10th interrogatory, and assuming the facts stated in the 11th interrogatory, and assuming that the participation of the defendant, Bigelow, as stated in
1096 the 11th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers to the two preceding interrogatories?

[Objected to; admitted; exception.—See pages 947-950.]

A. That would make the case still stronger.

Q. 13. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8098, referred to in the 9th interrogatory, and assuming that the course of the proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8098, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said de-

cree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8098 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8098, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

A. In my opinion it would constitute a bar to the action against Bigelow.

Q. 14. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8099, referred to in the 9th interrogatory, and assuming that the course of proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed
1097 to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8099, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8099 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, and assuming that the bill of complaint in said Circuit Court and the prayers thereof relate to one part of an entire transaction comprising said contracts, acts, matters, and transactions and that the bill of complaint corresponding to the one numbered 8099 in Massachusetts and the prayers thereof relate to another part of the same entire transaction, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding

corresponding to the cause numbered 8099, described in the 9th interrogatory?

[Objected to: admitted; exception.—See pages 948-950.]

A. Assuming that the two suits were in New York, the judgment in favor of Lewisohn would constitute a bar to the action against Bigelow.

Q. 15. Assuming the facts stated in the 13th and 14th interrogatories, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would these additional facts affect your answers, or either of them, to the 13th and 14th interrogatories?

[Objected to: admitted: exception.—See pages 948-950.]

A. I have assumed all along, and do now, that the partici-
1098 pation of Bigelow in the defence of the case against Lewisohn is an important element, and, under the circumstances stated in this question, the judgment in favor of Lewisohn can be successfully pleaded by Bigelow in bar.

Q. 16. Assuming the facts stated in the 13th, 14th, and 15th interrogatories, and assuming that the participation of the defendant, Bigelow, as stated in the 15th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers, or either of them, to the 13th, 14th, and 15th interrogatories?

[Objected to: admitted: exception.—See pages 949, 950.]

A. The knowledge of the plaintiff to Bigelow's participation in the defence of Lewisohn strengthens and confirms the opinion that I have expressed as to the legal effect of the former judgment; I regard that additional fact as important, though not absolutely essential.

Q. 17. If you have not already done so, state your reasons for your answers to interrogatories 6th to 16th, inclusive.

[Objected to: admitted: exception.—See page 950.]

A. I think I have already sufficiently stated the reasons, but will say that the general principle that an action once tried and decided shall not again be brought in question applies to the case.

Cross-interrogatories:

Without waiving the foregoing objections, but expressly insisting thereon, the plaintiff put de bene the following cross-interrogatories:

X 1. Is it a principle of the law of the state of New York that the law decided in a case in the court of last resort in overruling a demurrer becomes the law of the case, to be applied when the case is heard upon the facts?

A. Yes, it is to be applied when the case is heard upon the facts,

the same facts as are stated in the pleading to which the demurrer was aimed.

X 2. Is it the law of New York that there is no right of exoneration or contribution between defendants jointly and severally liable ex delicto and not ex contractu?

A. I am inclined to think that, under the law of New York that it is no contribution between wrongdoers.

X 3. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have
1099 you assumed or considered that Bigelow might—but for said defence, if any—be under a liability to the plaintiff in the suits against Bigelow?

A. I have assumed that he might, otherwise there would be no reason for this action.

X 4. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability that Bigelow might—but for said defence, if any—be under as a liability jointly with Lewisohn?

A. Yes, that has entered into my mind in answering the question.

X 5. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability jointly and severally with Lewisohn?

A. I have assumed that, but for the judgment in favor of Lewisohn, Bigelow might be liable, on proper facts, to the plaintiff, jointly and severally with Lewisohn.

X 6. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability arising ex delicto?

A. I have assumed that Bigelow might be liable ex delicto.

X 7. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability ex delicto jointly and severally with Lewisohn?

A. Yes, I have considered that.

X 8. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. I don't know that I understand that question, but I should think it would be a joint and several liability.

X 9. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit, there is a liability of the general nature decided

by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability ex delicto with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. I assume that the facts stated in the pleading against
1100 Bigelow are the same as those stated against Lewisohn; I think it would be a joint and several liability in New York, giving effect to the law of Massachusetts.

X 10. Is it a principle of the law of the state of New York that the liability of joint wrongdoers is joint and several?

A. Yes; the parties who commit a wrong are liable to the injured party either jointly or severally.

X 11. Is it sometimes a principle of New York law that estoppel by former adjudication must be mutual?

A. That is the general rule, though I think there are some exceptions.

X 12. If so, what, if any, are all the occasions of which you have knowledge on which they need not be mutual?

A. I would have to look up the law on that question before stating in what particular cases the estoppel need not be mutual.

X 13. Assuming that Bigelow took no part in the Lewisohn suit, in your opinion is the law of New York such that Bigelow would have been estopped in another suit to deny his liability as a matter of law on the same facts, by a final decree against Lewisohn in the first suit?

A. I am not prepared to say that, without Bigelow's participation in the defence of Lewisohn, the judgment in the federal courts would constitute an estoppel, though I am inclined to think it would.

X 14. Assuming that Lewisohn's executors took no part in the suits against Bigelow, in your opinion is the law of New York such that said executors would have been estopped in another suit to deny their liability as a matter of law on the same facts, by a final decree against Bigelow in these suits?

A. I am not prepared to say that under those circumstances they would be estopped; that is, assuming they did not participate in the suit against Bigelow and they were sued.

X 15. Assuming that Bigelow took part in the defence of the suits against Lewisohn's executors, and that the plaintiff knew this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation and knowledge, operate as an estoppel in favor of Bigelow?

A. I have no means now of referring to the authorities on that question.

X 16. Assuming that Bigelow took part in the defence of the suit against Lewisohn's executors, and that the plaintiff did not know this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewis-

ohn's executors may, by reason of such participation without plaintiff's knowledge, operate as an estoppel in favor of Bigelow?

A. It would take a little time to collect the decisions,
1101 and I am testifying to my general knowledge on the question, without citing cases.

X 17. Assuming that Bigelow did not take part in the defence of the suit against Lewisohn's executors, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may operate as an estoppel in favor of Bigelow?

A. I have not considered the question as to the effect of the Lewisohn judgment, in the absence of the participation of Bigelow in that case; and I do not base my answer upon the authority of any particular case, only on my general impressions as to what the law of New York is.

X 18. Have you considered any decisions or language of the courts in New York which may have any tendency to support the view that there is no estoppel in Bigelow's favor growing out of the decree in favor of Lewisohn's executors?

A. I have not.

X 19. If so, what, by name and reference are all of these which you have considered?

A. I have not considered any particular case, and cannot give you any distinct reference.

X 20. Have any arguments been submitted or suggested to you by defendant's counsel or have you thought of any in support of the view that there was by the law of New York no estoppel in favor of Bigelow growing out of the decree in favor of Lewisohn's executors?

A. No such arguments have been submitted, and I have not attempted to find any authority on that question.

X 21. If so, what are all of said arguments?

A. I refer to my previous answer.

X 22. What, in your opinion, constitutes privity under the law of New York to a judgment?

A. I may not be able now to define privity in the language of the books, but in a general way I can say that one who claims some right derived from another is in privity with that other, though of course the particular cases in which one is said to be in privity with another are various, and not capable of being expressed in any general rule.

I think that one who participates in the defence of an action, being interested in the defence, though not a party, and who is liable, if at all, upon the same transaction which is the subject matter of the action, is in privity with the judgment, though of course, there are other cases where privity exists.

X 23. In determining whether there was an estoppel in the present case, have you assumed or considered that Bigelow was in privity to the parties of record in the suit against Lewisohn's executors?

A. Yes, I have so assumed.

X 24. In considering whether there was any estoppel in
1102 this case, have you assumed or considered that Bigelow had any legal interest to defend in the suit against Lewisohn's executors beyond such interest as he might have to secure a favorable precedent?

A. Yes, I think he had a legal interest in the defence of the suit.

X 25. If so, precisely what have you assumed to be said legal interest?

A. He had a legal interest in defeating the action against Lewisohn, since, if there was a recovery against Lewisohn, there ought to be a recovery against him.

X 26. Unless Bigelow would have been bound in favor of the plaintiff by estoppel by a decision adverse to Lewisohn's executors, even if Bigelow did not participate in the defence of the suit against them, did Bigelow, in your opinion, have a legal interest to defend in that suit?

A. I think he had a legal interest.

X 27. If so, by precise description, what, in your opinion, was said legal interest?

A. The legal interest that he had was to protect himself against the consequences of a favorable judgment by the plaintiff against Lewisohn.

X 28. In determining whether there was any estoppel in this case, have you assumed that the plaintiff consented to the participation, if any, by Bigelow in the support of the demurrers of Lewisohn's executors?

A. I have not assumed that he consented to it in express terms, but I have assumed that he was aware of it.

X 29. Is it a principle of New York law that if the defendant in one suit sustains merely the character of a co-trespasser with the defendant in another suit by the same plaintiff, the recovery against one defendant is not thereby made competent evidence against the other?

A. I think it would be competent evidence, for both participated in the conduct of the action or of the defence.

X 30. Is it a principle of New York law that the judgment in favor of one of two persons jointly and severally liable for the wrongful conversion of the plaintiff's property, is no bar to a subsequent suit against the other because torts are joint and several.

A. I think that it would not be a bar in that case, if I understand the question.

X 31.1 Is it a principle of New York law that an adjudication acts as an estoppel only between the parties thereto or those in privity with them, or, in other words, the estoppel must be mutual?

A. I think it is a general principle of New York law that the estoppel applies to the parties to the action, or those in privity with them.

X 32. Is it a principle of New York law that a judgment in favor of one co-trespasser may not be used by another co-trespasser not a party to it, by way of estoppel?

A. I think it is, if I understand the question.

X 33. In considering the question of estoppel, have you as-
1103 sumed or considered that Lewisohn's executors were Bigelow's agents in the suit against them which has been dismissed?

A. No, I have not considered that particular feature of the case.

X 34. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were trustees for Bigelow of the stock sought to be recovered in the suit against them which has been dismissed?

A. Yes, I think I have considered that as one of the elements in the case.

X 35. Is it a principle of New York law that in an action at law against one or some of several joint tort feasors, the controversy may be determined as between the parties before the court,—i. e., the plaintiff and defendant,—and without prejudice to the rights of others; and the judgment will completely determine the controversy between them, and will not be *res adjudicata* between the plaintiff and any of the joint tort feasors who is not a defendant and may be sued later?

A. Well, I think that is so.

X 36. Have you stated all your reasons for the opinions expressed by you, or the statements made by you, in answer to the 6th, 7th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th direct interrogatories?

A. Those interrogatories are quite complicated and perhaps obscure but I think I have stated all the reasons that occur to me now.

X 37. If not, what are all your reasons for the opinions or statements given by you in answer to each of said interrogatories?

A. My reasons for the answers I have given call for what might be said to be an argument, and I think the reasons sufficiently appear in my previous answers to the direct and cross-interrogatories.

X 38. Have you now stated all your reasons for said answers?

A. Yes; I have stated all the reasons that now occur to me.

X 39. Were you, prior to the taking of your deposition on the foregoing cross-interrogatories, shown them, or any of them, or any copies of any of them, or given any information concerning the substance of them?

A. None at all.

X 40. Has each of your answers in its final form been given in the language in which it now appears, before you were aware of the substance of any subsequent cross-interrogatory?

A. Yes.

X 41. Have you, since September 22, 1908, discussed in any way with any other person who is named as a witness in the caption to these cross-interrogatories, or with any one on behalf of the defendant, any of the subjects dealt with in the foregoing interrogatories or in your answers thereto?

A. No, I have not.

DENIS O'BRIEN.

Before me this 28th day of September, A. D. 1908.

H. M. HEWSON,
Notary Public, Westchester County.

Certificate filed in New York county.

[Adjourned to Monday, October 5, 1908, at 2 p. m.]

1104 MONDAY, *October* 5, 1908—2 p. m.

Deposition of John G. Milburn.

Mr. HEMENWAY: Parties agree that the deposition of John G. Milburn came just a few minutes ago. I assume that the way to deal with it should be that they look it over. We will submit it to you; you can make your objections just the same as to the others, first reading it.

HAMMOND, J.: That is the deposition of whom?

Mr. HEMENWAY: Of John G. Milburn. It has not yet been put in evidence.

[Subsequently the same course was taken in reference to the deposition of Mr. Milburn as with regard to others introduced by counsel for the defendant.]

Deposition of John G. Milburn.

The Deposition of John G. Milburn, Taken in Behalf of the Defendant, Bigelow, and Filed by His Counsel, Subject to the Objections and Exceptions of Counsel for the Complainant, The Old Dominion Copper Mining & Smelting Company, to be Found at Pages 945–950.

Q. 1. State your name, age, and place of residence.

A. My name is John G. Milburn; I am fifty-six years of age; I reside at No. 16 West Tenth street, New York city.

Q. 2. State your occupation and place of business.

A. I am a lawyer; my office is at No. 54 Wall street, New York city.

Q. 3. If, in answer to the preceding interrogatory, you have testified that you are an attorney at law, state when you were admitted to the bar, and in what state or states, and how long you have been engaged in the practice of law in said state or states, and with what firms, if any, you have been or are connected.

A. In April, 1874, in the state of New York. I have been continuously engaged in the practice of law in the state of New York since April 1, 1874, until the present time, with the exception of the period from September, 1882, to June, 1883, when I was professionally engaged in Colorado. From September, 1879, to September, 1882, I was a member of the firm of Sprague, Milburn & Sprague, practising in the city of Buffalo, N. Y.; from the middle of June, 1883, to the first day of February, 1904, I was a member of the firm of Rogers, Locke & Milburn, practising law in the city

of Buffalo; from February 1, 1904, until the present time I have been and now am a member of the firm of Carter, Ledyard & Milburn of the city of New York. During the eight or nine
1105 months I was in Colorado I was associated with the late Senator Edward O. Walcott.

Q. 4. State what, if any, judicial or other public or official positions you hold or have held.

A. No judicial position. For the past four years I have been a member of the commission appointed by the governor of the state, under the authority of the legislature, to consolidate the statutory law of the state. The only other positions I have held have been memberships of temporary commissions, unconnected with legal matters.

Q. 5. State any other matters relating to your experience in your profession, and as to your familiarity with the law and usages governing the practice in the state and federal courts in New York, both in law and in equity, and also as to your familiarity with the laws and usages of the state of New York relating to former adjudication and estoppel by judgment.

A. Well, I have been engaged for over thirty years in the trial and argument of cases in the state and federal courts of the state of New York; in the preparation of briefs for the argument of cases, and of opinions desired by clients. I have had frequently, in connection with my practice and cases, to examine the question of former adjudication and estoppel by judgment under the laws of the state of New York.

Q. 6. Assuming that an action in equity is brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters to recover from him the profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, at a price in excess of the price which they paid for it and of its fair value, and assuming that in this action a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to a similar action, substantially identical with the first and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 945–950.]

A. It would be a bar.

Q. 7. Assuming that two actions in equity are brought in
1106 the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters to recover from him profits alleged to have

been received by him and his associates secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, and assuming that such property is alleged to have been sold, pursuant to said joint plan and conspiracy, in two separate parcels, in each of which both promoters were jointly interested, and that said two actions were brought to recover the respective profits received from the sale of the two parcels, respectively, and assuming that the bills of complaint in the two actions were substantially identical, except as to the particular relief sought, and assuming that certain profits were alleged to have been made by said promoters on each parcel, and assuming that in one of said actions a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to two similar actions substantially identical in form with those above described and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 946–950.]

A. It would bar.

Q. 8. Have you examined a copy of the record in the action of the Old Dominion Copper Mining & Smelting Co v. Lewisohn in the Circuit Court of the United States for the Southern District of New York, such as is hereto annexed and marked (1), the respective portions of said record being marked A to R, inclusive?

[Objected to; admitted; exception.—See pages 946–950.]

A. I have.

Q. 9. Have you examined copies of the proceedings in the above-entitled causes, to wit, the two causes of the Old Dominion Copper Mining & Smelting Co. v. Bigelow in the Supreme Judicial Court in Massachusetts, such as are hereto annexed and marked, respectively, (2) and (3)?

A. I have.

Q. 10. Assuming that there were now pending in the courts of the state of New York proceedings against Albert S. Bigelow, identical in all respects (except as the practive might require formal
1107 changes) with the copies of the proceedings referred to in the 9th interrogatory, and assuming that said courts had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record, copies of which are referred to in the 8th interrogatory, were sufficiently pleaded and proven in defence of said proceedings, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in each of these bills of complaint were, respectively, the same persons, and that the contracts, acts, matters, and transactions mentioned in each of these

bills of complaint were, respectively, the same contracts, acts, matters, and transactions, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, what would be the effect, under the law and usages of the state of New York, of said decree and record as a defence to said proceedings assumed to be so pending?

[Objected to; admitted; exception.—See pages 946–950.]

A. It would be a bar.

Q. 11. Assuming the facts stated in the 10th interrogatory, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would those additional facts affect your answer to the preceding interrogatory?

[Objected to; admitted; exception.—See pages 946–950.]

A. It would not affect the answer I have given except to reinforce it.

Q. 12. Assuming the facts stated in the 10th interrogatory, and assuming the facts stated in the 11th interrogatory, and assuming that the participation of the defendant, Bigelow, as stated in the 11th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers to the two preceding interrogatories?

[Objected to; admitted; exception.—See pages 947–950.]

A. I make the same answer to this interrogatory as to the last preceding direct interrogatory.

Q. 13. Assuming that these were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8098, referred to in the 9th interrogatory, and assuming that the
1108 course of the proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8098, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full

force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8098 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8098, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

A. It would be a bar.

Q. 14. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8099, referred to in the 9th interrogatory, and assuming that the course of proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York, wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8099, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was
1109 based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8099 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, and assuming that the bill of complaint in said Circuit Court and the prayers thereof relate to one part of an entire transaction comprising said contracts, acts, matters, and transactions, and that the bill of complaint corresponding to the one numbered 8099 in Massachusetts and the prayers thereof relate to another part of the same entire transaction, what, under the laws and usages of the state of New York, would be the effect of said decree and record described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8099, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948-950.]

1225

A. It would be a bar.

Q. 15. Assuming the facts stated in the 13th and 14th interrogatories, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would these additional facts affect your answers, or either of them, to the 13th and 14th interrogatories?

[Objected to; admitted; exception.—See pages 948-950.]

A. It would not affect them, excepting to reinforce them.

Q. 16. Assuming the facts stated in the 13th, 14th and 15th interrogatories, and assuming that the participation of the defendant, Bigelow, as stated in the 15th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers, or either of them, to the 13th, 14th, and 15th interrogatories?

[Objected to; admitted; exception.—See pages 949, 950.]

A It would not affect them, except to reinforce them.

1110 Q. 17. If you have not already done so, state your reasons for your answers to interrogatories 6th to 16th, inclusive.

[Objected to; admitted; exception.—See page 950.]

A. The following are my reasons: The bills of complaint in all four actions are based upon an alleged scheme of Bigelow and Lewisohn to acquire certain property, to organize a corporation owned and controlled by them, and to transfer the property to that corporation at a gross overvaluation, receiving in payment therefor capital stock of the corporation to a large amount. In the alleged scheme and all the transactions in its execution, Bigelow and Lewisohn were associated together; they acquired the property for their common benefit; its transfer to the corporation was their common act, and they received the capital stock of the corporation issued in pursuance of it for their common benefit. The acquisition of the stock of the old company from the Simpson executors and Keyser and of the mining claims and other property from Keyser were parts of the same transaction; the transfer of the stock and properties to the new corporation was a single transaction, as was the issue and delivery of the stock of the new company in payment thereof to Lewisohn and Bigelow. Thus the alleged scheme was devised by them both; they were co-owners of the property transferred and co-owners of the stock received for it, and all the acts, from the beginning to end, in the concoction and consummation of the scheme were acts common to them.

This being the situation, it is quite clear to me, after a careful re-examination of the authorities in this state, (1) That the relation of Bigelow to Lewisohn and to the transactions was such that a judgment on the merits in any court of competent jurisdiction, in New

York or elsewhere, in favor of Lewisohn in an action brought by the new corporation against Lewisohn to rescind the transaction or to account for the profits on the theory of their being undisclosed and fraudulent, or in breach of the fiduciary relation of Lewisohn and Bigelow to the new corporation, establishing that no cause of action in its favor arose out of the transaction, would enure to the benefit of Bigelow in any similar suit against him in this state, and be a bar to its prosecution, even if Bigelow had not participated in the defence, and contributed to its expenses; (2) That such a decree in such a suit in favor of Lewisohn as to a part of the property involved in the scheme, and covered by the transfer to the new corporation, would be a bar to any similar suit against Lewisohn with respect to the remainder of the property, and would enure to the benefit of Bigelow in any similar suit against him in the state of New York, and constitute a bar to its prosecution; and (3) That the participation
1111 of Bigelow in the defence of the suit against Lewisohn, or his executors, and his contributing to its expenses,—whether known to the plaintiff or not, and more emphatically so if known to the plaintiff,—puts it, in my judgment, beyond all possible doubt that not only would the decree in favor of Lewisohn enure to the benefit of Bigelow, if the suits against him were pending in the state of New York, and be available to him as a bar, but also, if the decree had been in favor of the complainant, it would be binding upon Bigelow, and enforcible against him in a proper suit or proceeding.

Further, the alleged scheme and transactions in all four suits are identical, the same cause of action is pleaded in all four suits, and the realization between Bigelow and Lewisohn was that of co-actors, co-owners, and co-beneficiaries. The plaintiff has had his day in court as to the scheme and all the transactions it involved, and the cause of action alleged by it; and a court of competent jurisdiction has decreed that it has no cause of action. Such a decree, under the authorities in this state, enures to the benefit of Bigelow in the relation that he was, and is, to Lewisohn and the transactions, though not a nominal party to the record, and particularly so if he actively participated in the defence of the case.

I refer to the following cases, among others, which, in my judgment, sustain my conclusions:

Castle v. Noyes, 14 N. Y. 329.
Bush v. Knox, 2 Hun, 576.
Carter v. Bowe, 41 Hun, 516.
Bates v. Stanton, 1 Duer, 79, 87.
People v. Stephens, 51 How. Pr. 235; (s. c.) 71 N. Y. 612.
Emma Silver Mine Case, 7 Fed. Rep. 401.
Portland Gold Mining Co. v. Stratton's Independence, 158 Fed. Rep. 63.
Woodhouse v. Duncan, 106 N. Y. 527.

Cross-interrogatories.

Without waiving the foregoing objections, but expressly insisting thereon, the plaintiff puts de bene the following cross-interrogatories:

X 1. Is it a principle of the law of the state of New York that the law decided in a case in the court of last resort in overruling a demurrer becomes the law of the case to be applied when the case is heard upon the facts?

A. I should say yes, throughout the case, on the same state of facts.

1112 X 2. Is it the law of New York that there is no right of exoneration or contribution between defendants jointly and severally liable ex delicto and not ex contratu?

A. I should say, generally, yes.

X 3. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered that Bigelow might—but for said defence, if any—be under a liability to the plaintiff in the suits against Bigelow?

A. I have considered that, as well as the other phases of the case.

X 4. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability that Bigelow might—but for said defence, if any—be under a liability jointly with Lewisohn?

A. I have considered that also.

X 5. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under a liability jointly and severally with Lewisohn?

A. I have considered that also.

X 6. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability arising ex delicto?

A. I have considered that also.

X 7. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability ex delicto jointly and severally with Lewisohn?

A. I have considered that also.

X 8. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. I do not think I should characterize the liability as joint and several, using those terms technically, though I think that an action

would be maintainable against both or either, assuming the liability to be as stated in the cross-interrogatory.

X 9. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on
1113 demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability ex delicto with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. It would be ex delicto, in the sense of being founded on wrongful conduct; but I do not regard a suit in equity for an accounting as an action ex delicto.

X 10. Is it a principle of the law of the state of New York that the liability of joint wrongdoers is joint and several?

A. I do not think that the terms "joint" and "several" are accurately used in that connection; under the law of the state of New York, they may all be proceeded against in the same action, or an action will lie against each separately.

X 11. Is it sometimes a principle of New York law that estoppel by former adjudication must be mutual?

A. It is, sometimes.

X 12. If so, what, if any, are all the occasions of which you have knowledge on which they need not be mutual?

A. One instance is—if an agent is sued on a transaction and prevails on the merits, the judgment in his favor would be a bar to a subsequent suit brought on the same cause of action against the principal, though a judgment in favor of the plaintiff would not bind the principal if he was ignorant of the action and took no part in it. That same principle would apply to allied relations or relations similar in principle to that of principal and agent.

X 13. Assuming that Bigelow took no part in the Lewisohn suit, in your opinion is the law of New York such that Bigelow would have been estopped in another suit to deny his liability as a matter of law on the same facts, by a final decree against Lewisohn in the first suit?

A. I do not think he would, though it would be practically conclusive on the principle of stare decisis. See O'Beirne v. Bullis, 158 N. Y. 468.

X 14. Assuming that Lewisohn's executors took no part in the suits against Bigelow, in your opinion is the law of New York such that said executors would have been estopped in another suit to deny their liability as a matter of law on the same facts, by a final decree against Bigelow in these suits?

A. My answer to the last cross-interrogatory answers this interrogatory.

X 15. Assuming that Bigelow took part in the defence of the suits against Lewisohn's executors, and that the plaintiff knew this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's

executors may, by reason of such participation and knowledge
1114 operate as an estoppel in favor of Bigelow?

A. I have not the precise citations at hand, and I cannot, therefore, refer to them off-hand.

X 16. Assuming that Bigelow took part in the defence of the suit against Lewisohn's executors, and that the plaintiff did not know this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation without plaintiff's knowledge, operate as an estoppel in favor of Bigelow?

A. I make the same answer as to the last preceding cross-interrogatory. I do not regard the knowledge of the plaintiff as material if Bigelow did actually participate in the defence of the Lewisohn action by contributing to its expenses and rendering such other aid as was in his power.

X 17. Assuming that Bigelow did not take part in the defence of the suit against Lewisohn's executors, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may operate as an estoppel in favor of Bigelow?

A. I have cited some of the cases, and all of which I have a memorandum before me, in my reply to the last direct interrogatory.

X 18. Have you considered any decisions or language of the courts in New York which may have any tendency to support the view that there is no estoppel in Bigelow's favor growing out of the decree in favor of Lewisohn's executors?

A. I have examined, I should say, nearly all the New York cases on this subject, regardless of their tendency to support either side of this controversy.

X 19. If so, what, by name and reference, are all of these which you have considered?

A. I cannot now refer to any other cases than those I have already mentioned.

X 20. Have any arguments been submitted or suggested to you by defendaant's counsel, or have you thought of any, in support of the view that there was, by the law of New York, no estoppel in favor of Bigelow growing out of the decree in favor of Lewisohn's executors?

A. Counsel for the defendant gave me a reference to many New York cases, covering the question when a prior judgment was a bar and when it was not, and I recall none that lent any countenance to the proposition that the decree in favor of Lewisohn's executors did not inure to the benefit of Bigelow. I certainly have endeavored to think of everything that could be urged for and against that proposition.

X 21. If so, what are all of said arguments?

A. First, (1) That Bigelow was not a party to the record in the Lewisohn suits; (2) That a decree in favor of the plain-
1115 tiff against Lewisohn would not bind Bigelow in the absence of participation on his part in the defence of the Lewisohn

suit; (3) The possible argument that the action was based on tortious conduct, and sounded in tort, with varying grounds of liability.

At this moment I do not recall any other claim or argument that I took into consideraion when I examined the matter.

X 22. What, in your opinion, constitutes privity under the law of New York to a judgment?

A. Among other things, a relation between two parties, springing from a community of interest in property or transactions, or the results of transactions, either direct or through representation.

X 23. In determining whether there was an estoppel in the present case, have you assumed or considered that Bigelow was in privity to the parties of record in the suit against Lewisohn's executors?

A. I have so considered, in a broad sense.

X 24. In considering whether there was any estoppel in this case, have you assumed or considered that Bigelow had any legal interest to defend in the suit against Lewisohn's executors beyond such interest as he might have to secure a favorable precedent?

A. I do not know that he had any so-called legal interest, but to participate in the defence would be the course of a prudent man, not only with reference to securing a favorable decision, but because of the possible consequences to him of an unfavorable decision.

X 25. If so, precisely what have you assumed to be said legal interest?

A. My answer to the last cross-interrogatory covers this cross-interrogatory.

X 26. Unless Bigelow would have been bound in favor of the plaintiff by estoppel by a decision adverse to Lewisohn's executors even if Bigelow did not participate in the defence of the suit against them, did Bigelow, in your opinion, have a legal interest to defend in that suit?

A. I think this cross-interrogatory is answered by what I have said about a legal interest in the answer to the 24th cross-interrogatory.

X 27. If so, by precise description, what, in your opinion, was said legal interest?

A. My answer to the last cross-interrogatory and to the 24th cross-interrogatory disposes of this cross-interrogatory.

X 28. In determining whether there was any estoppel in this case, have you assumed that the plaintiff consented to the participation, if any, by Bigelow in the support of the demurrers of Lewisohn's executors?

A. No.

X 29. Is it a principle of New York law that if the defendant in one suit sustains merely the character of a co-trespasser with the defendant in another suit by the same plaintiff, the recovery against one defendant is not thereby made competent evidence against
1116 the other?

A. In some cases it is, in some cases it is not; depending upon the relation between the co-trespassers other than the mere fact of their having been engaged in a common trespass.

X 30. Is it a principle of New York la wthat the judgment in favor of one of two persons jointly and severally liable for the wrongful conversion of the plaintiff's property is no bar to a subsequent suit against the other because torts are joint and several?

A. That entirely depends upon the relations between the parties guilty of the conversion outside of and distinct from their mere participation in the conversion.

X 31. Is it a principle of New York law that an adjudication acts as an estoppel only between the parties thereto or those in privity with them, or, in other words, the estoppel must be mutual?

A. I do not think it is in all cases.

X 32. Is it a principle of New York law that a judgment in favor of one co-trespasser may not be used by another co-trespasser not a party to it, by way of estoppel?

A. I have already answered this cross-interrogatory.

X 33. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were Bigelow's agents in the suit against them which has been dismissed?

A. This question is not clear to me, but I will say that I have laid no stress on the matter of agency, either between Lewisohn and Bigelow in the transactions, or between Lewisohn's executors and Bigelow in the conduct of the defence.

X 34. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were trustees for Bigelow of the stock sought to be recovered in the suit against them which has been dismissed?

A. In my view of the case, I have laid no stress on any such relation of trusteeship.

X 35. Is it a principle of New York law that in an action at law against one or some of several joint tort feasors, the controversy may be determined as between the parties before the court,—i. e., the plaintiff and defendant,—and without prejudice to the rights of others; and the judgment will completely determine the controversy between them, and will not be res adjudicata between the plaintiff and any of the joint tort feasors who is not a defendant and may be sued later?

A. Certainly; all dependent upon the particular circumstances of each case.

X 36. Have you stated all your reasons for the opinions expressed by you, or the statements made by you, in answer to the 6th, 7th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th direct interrogatories?

A. Yes; all that now occur to me.

X 37. If not, what are all your reasons for the opinions or statements given by you in answer to each of said interrogatories?

A. My answer to the last cross-interrogatory covers this cross-interrogatory.

1117 X 38. Have you now stated all your reasons for said answers?

A. I repeat my answer to the last cross-interrogatory.

X 39. Were you, prior to the taking of your deposition on the foregoing cross-interrogatories, shown them, or any of them, or

any copies of any of them, or given any information concerning the substance of them?

A. Absolutely, no.

X 40. Has each of your answers in its final form been given in the language in which it now appears, before you were aware of the substance of any subsequent cross-interrogatory?

A. Yes, excepting the corrections above made in ink and initialed by myself and the commissioner.

X 41. Have you, since September 22, 1908, discussed in any way with any other person who is named as a witness in the caption to these cross-interrogatories, or with any one on behalf of the defendant, any of the subjects dealt with in the foregoing interrogatories or in your answers thereto?

A. No; about the time mentioned, Mr. Farley, at my request, handed to me the printed bills of complaint and records, copies of which are annexed to the deposition, that I might study them, but we had no discussion in respect to the case at all.

JOHN G. MILBURN.

Before me, the 2nd day of October, 1908.

H. M. HEWSON,
Notary Public, Westchester County.

Certificate filed in New York county.

New York Cases Offered in Evidence by the Defendant.

Mr. HEMENWAY: We propose, if your Honor please, to put in certain New York cases. I had supposed we would not stop to read the cases or to bring the volumes from the law library.

HAMMOND, J.: You may hand in a list of them to the other side and let the reporter also have a list for his report.

[Following is the list furnished by Mr. Hemenway.]

Cases to be put in Evidence as to the Law of New York.

People v. Stephens, 51 How. Pr. 235; aff. 71 N. Y. 527.
Bracken v. Atlantic Trust Co., 36 App. Div. 67, 71; aff. 167 N. Y. 510.
Castle v. Noyes, 14 N. Y. 329.
1118 Tying v. Clarke, 9 Hun, 269.
Matter of Estate of Strout, 126 N. Y. 201.
Russell v. Lasher, 4 Bart. 232.
Woodhouse v. Duncan, 160 N. Y. 527.
Hirschbach v. Ketchum, 84 App. Div. 258.
Pakas v. Hollingshead, 184 N. Y. 211.
Jackson v. Griswold, 4 Hill, 522.
Bates v. Stanton, 1 Deur, 79.
Bouchard v. Dias, 3 Denio, 238.
Oceanic S. N. Co. v. Campagnia Espanola, 134 N. Y. 461.
Oceanic S. N. Co. v. Campagnia Espanola, 144 N. Y. 663.
Carleton v. Lombard, Ayres & Co., 149 N. Y. 137.

Park Hill Co. v. Herriot, 41 App., Div. 324.
Gleason v. N. W. Mutual Life Ins. Co., 189 N. Y. 100.
Doty v. Brown, 4 N. Y. 71.
O'Donnell v. McIntyre, 118 N. Y. 156, 162.
Emma Silver Mining Co., Ltd., v. Emma Silver Mining Co. of New York, 7 Fed. Rep. 401.
Old Dominion &c. Co. v. Lewisohn, 210 U. S. 206.

1119 *Correspondence Between Counsel.*

Mr. HEMENWAY: There is correspondence between the office of counsel for the complainant and counsel for the defendant in this case, and also between counsel for the complainant and counsel for the defendant, Mr. Lauterbach or Mr. Treadwell, in New York in the New York cases.

HAMMOND, J.: Is there any objection to the offer of that?

Mr. HEMENWAY: What I was going to propose in regard to it is to let them take the correspondence, and they can see whether it is correct in matter of substance, and if they have objections to it they can make the same objections as they would if it was offered in court.

HAMMOND, J.: Any objection to that course?

Mr. MCCLENNEN: Do you mean the entire correspondence or only selected portions?

Mr. HEMENWAY: Oh, only selected,—that is, as showing the joint action of counsel.

Mr. MCCLENNEN: I should be very glad to go over the files of the letters proposed rather than to go through the form of having them read.

HAMMOND, J.: That may be done.

[Following is the correspondence submitted by counsel for defendant to counsel for complainant:]

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

SEPT. 4, 1902.
C/B.

Re Old Dominion Copper Mining and Smelting Co.

Walter Lewisohn, Esq., Executor of Estate of Leonard Lewisohn, 11 Broadway, New York City.

DEAR SIR: Upon my return from my vacation I find your letter of August 1st.

If you desire that I should confer with your counsel, Mr. Edward Lauterbach, I shall be glad to arrange for an interview with him at an early date.

1120 The tone of your letter leaves me, however, in doubt as to whether you desire that such conference should be held, or prefer that without such conference the Old Dominion Copper

Mining and Smelting Company shall take such action as it may deem best to protect its interests.

Yours very truly,

LOUIS D. BRANDEIS.

SEPTEMBER 10, 1902.

Louis D. Brandeis, Esq., 220 Devonshire Street, Boston, Mass.

DEAR SIR: I have yours of September 4th. Permit me to correct the statement in the first paragraph of your letter. I have not only never refused, but have been more than ready to furnish any facts in my possession bearing upon the organization of the Old Dominion Copper Mining and Smelting Company or its affairs to which, in my judgment, the Stockholders and Directors of the Company are legitimately entitled. A general verbal request of yours to be allowed to have access to all the papers in relation to the original purchase of the property was very properly refused.

In order, however, that there may be no misunderstanding as to my position in the matter and as to just what information I have refused to give you, will you kindly send me a list of the questions which you wish answered and I shall be pleased to promptly reply to them, if they appear to call for information which your clients should legitimately possess.

If, after receipt of my answers you are still of the opinion that you would like to arrange for an interview with my counsel I shall be prepared to take up the matter then.

My only desire is to have specific points upon which we may base a conference, and it seems to me that the method I have suggested is the shortest way of arriving at such a basis. I think the course I have recommended suggests my answer to the question in the last paragraph of your letter.

Very truly,

A. S. BIGELOW.

1121 SEPTEMBER 11, 1902.

Louis D. Brandeis, Esq., 220 Devonshire Street, Boston, Mass.

DEAR SIR: I have yours of even date. As your request takes in all matters relating also to the late Leonard Lewisohn's connection, I have forwarded your letter to the counsel for the Estate, Mr. Edward Lauterbach, with whom I understand you have been in correspondence on the matter, and shall act according to his instructions. I have telephoned his office this afternoon that an important letter is on the way, so that he may get it to morrow and there be no delay.

Yours truly,

——— ———.

Brandeis, Dunbar & Nutter, 220 Devonshire St.

BOSTON, MASS., *Sept.* 12, 1902.

A. S. Bigelow, Esq., Sears Building, Boston.

DEAR SIR: I received your letter of the 11th this morning, and have not heard from you since.

As our clients are desirous that there should be no delay, I enclose herewith a letter addressed to yourself and the Executors of Leonard Lewisohn relating to a part of the claim concerning which we have written you.

I may add that in the event of no adjustment being reached, we are directed to commence proceedings, and in that event we should like to have an attachment bond in the amount of $500. The claim considerably exceeds that amount, but our clients have expressed a willigness to accept a bond for that amount.

Yours very truly, LOUIS D. BRANDEIS.

(Enc.)

Old Dominion Copper Mining & Smelting Co., Office 35 Congress Street, Boston.

A. S. Bigelow, Esq., and the Executors of the Estate of Leonard Lewisohn, Deceased.

DEAR SIRS: Shortly after the organization of the Old Dominion Copper Mining and Smelting Company, Mr. A. S. Bigelow and Mr. Leonard Lewisohn caused 30,000 shares of the stock of that
1122 Company to be issued to themselves, ostensibly as the consideration for a conveyance to the Company of certain mining properties and claims, the title of which we are advised then stood in the name of Mr. Leonard Lewisohn, and which in the record of the meeting of the Company held July 11, 1895, were described as follows:—

"First. The Old Dominion Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land Office at Tucson, Arizona, Entry No. 267, Lot No. 45, situated in Globe, Mining District, Gila County, Arizona.

Second. The New York Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land Office at Tucson, Arizona, Entry No. 268, Lot No. 46 in Globe Mining District in Gila County, Arizona.

Third. The Chicago Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land Office at Tucson, Arizona, Entry No. 269, Lot No. 41 in Globe Mining District, Gila County, Arizona.

Fourth. The Keystone Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1885, in the United States Land Office at Tucson, Arizona, Entry No. 384, Lot No. 51 in Globe Mining District, Gila County, Arizona.

Fifth. A lot or parcel of land situated near the Bloody Tanks and deeded by E. A. Saxe to the Old Dominion Copper Mining Company, Deed recorded in Book 1 of Deeds to Real Estate at pages 126 and 127 in the office of the Recorder of Gila County, Arizona, and reference is hereby made to said record for a fuller description of said parcel of land."

The Old Dominion Copper Mining and Smelting Company is advised that these shares were issued under circumstances which entitle it to rescind the transaction, and hereby offers to re-convey the

property to you or either of you, or to such person as you or either of you may name, upon the return by you or either of you of the 30,000 shares, or, if and so far as said shares have been disposed of, upon a proper accounting therefor.

Yours truly,

OLD DOMINION COPPER MINING & SMELTING CO.,
By CHARLES S. SMITH, *Pres't.*
CHARLES H. ALTMILLER, *Treas.*

1123 Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

SEPTEMBER 12, 1902.

G/B.

Edward Lauterbach, Esq., 22 William St., New York City.

DEAR SIR: I am in receipt of your letter of the 9th.

I wrote to the executors of the estate of the late Leonard Lewisohn on September 4th in connection with an earlier letter to them of July 24th relating to an important claim of the Old Dominion Copper Mining and Smelting Company against the estate.

In my letter of September 4th to them, I suggested that if they desired, I should be glad to confer with their counsel.

You have no doubt been advised by them, as well as from your correspondence with Mr. Bigelow, of the nature of this claim.

If you deem a conference between us desirable, I shall be glad to do what I can to arrange for such a meeting either here or in New York.

I enclose herewith a letter from the Old Dominion Copper Mining and Smelting Company to Mr. Bigelow and the Executors relating to a part of the transactions on which the claim in question is founded.

Yours very truly, LOUIS D. BRANDEIS.

(Enclosure.)

SEPTEMBER 12, 1902.

Louis D. Brandeis, Esq., 220 Devonshire St., Boston, Mass.

DEAR SIR: Mr. A. S. Bigelow has referred to me your letter to him of the 11th inst. and has, he informs me by mail, communicated to you that, since I represent the Executors of the Lewisohn Estate, and because an interview between us is likely to take place, he refers to the subject of that letter, as well as the matter generally, to me to discuss with you on his behalf as well as on behalf of the Executors.

I shall be glad to hear from you at your convenience so that a meeting may be arranged for.

Very truly yours, EDWARD LAUTERBACH.

1124 Law Offices of Hoadly, Lauterbach & Johnson, 22 William Street, New York City.

Edward Lauterbach, Louis Adler, Ferdinand R. Minrath, Alfred Lauterbach, Henry L. Scheuerman, Eugene Treadwell.

SEPTEMBER 13TH, 1902.

Louis D. Brandeis, Esq., c/o Mess. Brandeis, Dunbar & Nutter, 220 Devonshire St., Boston, Mass.

DEAR SIR: I am in receipt of your letter of the 12th. I think that a conference between us is desirable, and I will be glad to see you at any time, preferring of course to have the meeting take place in New York, if convenient to you, rather than at Boston.

The Republican State Convention takes place on the 23rd, and I shall probably not be in town between Friday of next week and Wednesday thereafter. At any other time that you may indicate I will be at your service.

Very truly yours, EDWARD LAUTERBACH.

SEPTEMBER 13, 1902.

Louis D. Brandeis, Esq., 220 Devonshire Street, Boston, Mass.

DEAR SIR: Further answering your letter of September 12th to Mr. Bigelow, Mr. Edward Lauterbach has called me up today on the telephone and stated that he has received my copy of the Old Dominion Copper Mining and Smelting Company's letter to Mr. Bigelow and the Executors of the Estate of Leonard Lewisohn, and that he has telegraphed you in regard to the matter.

In order to avoid a multiplicity of counsel which would undoubtedly delay matters until they could all be thoroughly informed of the case on the part of their clients, I am authorized to say that Mr. Bigelow is perfectly willing to accept any decision which is arrived at by yourself and Mr. Lauterbach, as representing the Estate
1125 of Leonard Lewisohn, and that any course of procedure agreed upon by yourself and Mr. Lauterbach will be perfectly satisfactory to him and he will consider it binding upon him.

Very truly, G. M. HYAMS.

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

SEPT. 15, 1902.
G/B.

G. M. Hyams, Esq., Sears Building, Boston.

DEAR SIR: I am in receipt of your letters of the 12th and 13th. I am today also in receipt of a letter from Mr. Edward Lauterbach stating that he deems a conference desirable, and I have wired him as follows:—

"Regret cannot be in New York this week. Can see you here Tuesday afternoon, Wednesday forenoon, or Thursday. Imperative matter should be taken up this week."

Very truly yours, LOUIS D. BRANDEIS.

BOSTON, MASS., *Sep.* 15.

Edw. Lauterbach, 22 Wm. St.:

Telegram rec'd very sorry must ask you to come before Friday will arrange for any time Thursday most convenient for you Wednesday morning.

LOUIS D. BRANDEIS.

11 25.

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

SEPTEMBER 18, 1902.
G/B.

Edward Lauterbach, Esq., care A. S. Bigelow, Esq., Sears Building, Boston.

DEAR MR. LAUTERBACH: I enclose herewith copies of the two bills in equity Old Dominion Copper Mining and Smelting Company v. Albert S. Bigelow, which you examined this morning, and which we propose filing in case no judgment is reached.

1126 I shall be glad to delay filing the bills until such time as you may have had an opportunity of duly considering the questions involved, upon our understanding that my clients shall be in no way prejudiced by the delay, and that if there should be occasion to bring the suits, you will arrange for such waivers in respect to time of filing service and pleadings so that the postponement of the commencing of the suits will not result in delay in the progress of the cases.

Yours very truly, LOUIS D. BRANDEIS.

2 enclosures.

SEPTEMBER 20, 1902.

Louis D. Brandeis, Esq., 220 Devonshire Street, Boston, Mass.

DEAR MR. BRANDEIS: In order not to cause any unnecessary delay in the matter concerning which I had the pleasure of conferring with you on Thursday, I came to Boston today for further conference with you and also with Mr. Hemenway, who will probably appear in any action you may bring, for Mr. Bigelow.

I timed my visit unfortunately, since I have ascertained that you would not be at your office today. Tomorrow I go to Saratoga, and since I expect to be Chairman of the Committee on Resolutions at the Convention, will not be able to confer with you again until after the close of the session, which will probably take place on Wednesday or Thursday of next week.

In the meantime, on any question of procedure or furnishing of a bond that may appear to you to be pressing, Mr. Hemenway will be glad to confer with you.

With regards, I am

Very truly yours, EDWARD LAUTERBACH.

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

SEPT. 22, 1902.
G/B.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: I have today a letter from Mr. Lauterbach, in which he tells me that you are acting with him in the matter of the Old Dominion Copper Mining and Smelting Company against Mr. Alfred S. Bigelow.

1127 I enclose you a copy of his letter, and also of my reply under date of today.

Am I right in assuming that in case a settlement is not reached, Mr. Bigelow will furnish the attachment bond for which we have asked.

Yours very truly,

LOUIS BRANDEIS.

(2 enclosures.)

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

SEPT. 27, 1902.
G/B.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: Mr. Lauterbach requests me to arrange with you the matter of bond in the suits of the Old Dominion Copper Mining and Smelting Company v. Albert S. Bigelow which we wish now to file, of which you doubtless have received the copies which we handed to Mr. Lauterbach.

We should like to have an attachment bond in the amount of $500,000. A single bond will be provided it is conditioned to the satisfaction of any decree which may be entered in either or both of the suits.

Will you kindly let me hear from you on Monday morning whether a bond in that form will be agreeable to you, and whom Mr. Bigelow proposes as surety?

Yours very truly,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

SEPTEMBER 29, 1902.
G/B.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: The two bills of Old Dominion Copper Mining and Smelting Company differ only in that which follows article Twenty-fourth.

I understand that you have a copy of the bill proceeding upon a rescission, and I enclose herewith pages 19 and 20 of bill "A," including article twenty-fifth and the prayer.

Yours very truly,

LOUIS D. BRANDEIS.

(Enclosure.)

1128 Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

NOVEMBER 8TH, 1902.
G/B.

Alfred Hemenway, Esq., Tremont Building, Boston.

MY DEAR MR. HEMENWAY: I enclose copy of my letter to Mr. Lauterbach of September 18th, 1902, embodying the understanding referred to in our conversation of this morning, in regard to the time of filing the pleadings, which appears not to have come to your attention before.

Yours very truly,

LOUIS D. BRANDEIS.

(Enclosure.)

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

NOVEMBER 18TH, 1902.
C/B.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: As I told my clients that the defendant's pleadings in the suits of the Old Dominion Copper Mining & Smelting Co. v. Bigelow were due, under the agreement made with Mr. Lauterbach, on November 5th, I am having almost daily inquiries as to whether they have been filed.

I told them ten days ago, after talking with you, that you would take the matter up immediately, and I hope you will be able to file them today or tomorrow.

Awaiting your reply,

Yours very truly,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

MARCH 2, 1903.
G/B.

Edward Lauterbach, Esq., 22 William Street, New York City.

MY DEAR MR. LAUTERBACH: Your telegram asking me to extend the time to answer in Lewisohn suit for 20 days was received after I left the office on Saturday.

1129 You will see from the enclosed copy of the answer in the Bigelow suit, No. 8099, that Mr. Hemenway considered the matter very carefully, and I have no doubt that with this at hand you will be able to get your answer into satisfactory shape by next Friday, March 6th.

If the answer is filed, and at any time during the subsequent 20 days you should wish to amend the answer I will very gladly consent to the filing of such amendment.

I have not extended the time for answering further partly because I felt sure that upon receiving a copy of Mr. Hemenway's

answer you would not deem it necessary, and partly because of the following:

My clients know that an answer is due this week, and I did not feel at liberty to grant an extension beyond this week because of the position in which I was left before with reference to them by Mr. Hemenway's failure to abide by the agreement that I had made with you in regard to the time for filing the answer in the Boston suits. You will remember that when I consented to postpone the beginning of the suit in order that you and Mr. Hemenway might have ample time to consider the questions, we agreed that there should be no delay in the ultimate proceedings resulting from any delay in the commencement of the suit. Under the arrangements which I made with you Mr. Hemenway's answer should have been filed on November 5th. Instead of that Mr. Hemenway did not file the answer until December 2nd. My clients knew of our agreement and the time when the answer was due, and I was considerably embarrassed in my relations with them owing to that fact.

In view of this it seemed to me unwise to extend your time for answering beyond Friday, although, as above stated, I will gladly consent to any amendment of the answer which is filed within the extension now granted.

Yours very truly,

LOUIS D. BRANDEIS.

(1 enclosure.)

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

MARCH 17TH, 1903.

G/B.

Edward Lauterbach, Esq., 22 William St., New York, N. Y.

DEAR MR. LAUTERBACH: After your telephone this morning, stating that you found it was impossible for you to come on on Monday, I communicated with Mr. Hemenway and secured his consent to the adjournment, as you requested, to Tuesday next, March 24th, at ten o'clock a. m., and have just wired you as follows:—

1130 "Hemenway has agreed so we will adjourn taking depositions to Tuesday next as you request. Please mail stipulation, also transcript requested in mine of March seventh."

If the stipulation has not already been mailed to me, will you please sign the enclosed stipulation and return it to me.

If by any chance the transcript from the stock ledger referred to in mine of March 7th has not been completed, will you kindly have it completed at once and mailed to me.

Yours very truly,

LOUIS D. BRANDEIS.

(Enclosure.)

BOSTON, MASS, *Mar.* 17.

Edward Lauterbach, 22 Wm. St.:

Hemenway has agreed so we will adjourn*ing* taking depositions

to Tuesday next as you request. Please mail stipulation, also transcript requested in mine of March seventh.

LOUIS F. BRANDEIS.
12 19 p.

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

MARCH 17, 1903.
G/B.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: Mr. Lauterbach called me up on the telephone yesterday and stated that he had just returned from Kentucky and it would be impossible for him to go on with the taking of the depositions on Wednesday or any later day this week, but that he could go on on Tuesday and other days of next week. I told him I would see whether I could arrange so that I could grant the postponement, and I have, at considerable inconvenience, made such arrangements.

Mr. Lauterbach stated that Mr. Bigelow would not go abroad before May 12th, and also that he had just been in communication,—I was not sure whether with you or Mr. Bigelow or Mr. Hyams—in regard to the matter, and that the adjournment would be agreeable to you and them.

I am willing to grant the adjournment as requested by Mr. Lauterbach if you will agree on his behalf as well as that of the witnesses to proceed on Tuesday March 24th at ten o'clock.

1131 I enclose a draft of agreement for the adjournment, which kindly sign and return to me if the arrangement is satisfactory.

I send you also a copy for your files. I wrote to Mr. Lauterbach yesterday that I would wire him if the adjournment could be arranged. Will you kindly let me hear from you, therefore, as soon as possible?

Yours very truly,

LOUIS D. BRANDEIS.

(2 enclosures.)

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

APRIL 2ND, 1903.
C/G.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: I have a telegram from Mr. Lauterbach, asking that the hearing in Old Dominion v. Lewisohn be postponed from Friday, April 3rd, for one week.

I am willing to agree to this adjournment if you will sign the enclosed agreement for postponement to Friday, April 10th, at ten o'clock, on behalf of both Mr. Lewisohn and the witnesses.

Please return the agreement by bearer. I enclose a copy for your files.

Yours very truly,

LOUIS D. BRANDEIS.

(2 enclosures.)

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

MAY 1ST, 1903.
G/B.

Edward Lauterbach, Esq., 22 William St., New York City.

MY DEAR MR. LAUTERBACH: Confirming our telephone communication on the 29th, I have had the examination of Mr. Bigelow and Mr. Hyams adjourned to Tuesday, May 5th, at ten a. m.

I understand that you have only a few questions to put to Mr. Bigelow, and that you will then proceed with Mr. Hyams.

I trust you have entirely recovered from the effects of the operation.

Yours very truly, LOUIS D. BRANDEIS.

1132 Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

MAY 1ST, 1903.
G/B.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

MY DEAR MR. HEMENWAY: I enclose herewith a copy of my letter of today to Mr. Lauterbach.

Yours truly,

LOUIS D. BRANDEIS

(Enclosure.)

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

MAY 15, 1903.

Edward Lauterbach, Esq., 22 William Street, New York City.

DEAR SIR: I have yours of the 14th.

I will draft the stipulation in regard to taking testimony and send it to you.

I would like to take the testimony of Mr. Meredith and perhaps a few other witnesses, some time next week.

Will you have the kindness to wire me tomorrow morning what days next week will be most convenient for you?

Yours very truly,

LOUIS D. BRANDEIS.
G.

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

MAY 18, 1903.
G/B.

Edward Lauterbach, Esq., 22 William St., New York City.

DEAR MR. LAUTERBACH: I find today your two telegrams of the 16th and 18th, the latter saying that you cannot be here on Thursday, but can go on on Friday, and prefer a day or two next week.

I have just heard from Mr. Hemenway, who says he thinks he

can go on on Friday of this week, but that it is possible that
1133 a case marked for Thursday may prevent; and in the event that he cannot go on on Friday of this week, he can go on on Thursday of next week, May 21st.

I have told him I would see what arrangements I could make for Friday of this week and Thursday of next week, and would then advise him and you.

Yours very truly, LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

MAY 21ST, 1903.
G/B.

Edward Lauterbach, Esq., 22 William St., New York, N. Y.

DEAR MR. LAUTERBACH: I have your telegram of today, notifying me that you will be unable to attend on Thursday of next week. I named that day, understanding it to be the only date that Mr. Hemenway was free. I will see if I can make any other arrangement for next week, and if not, will endeavor to accommodate you by postponing the taking of depositions until the week following.

Yours very truly,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

MAY 21ST, 1903.
G/B.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: In pursuance of our conversation on May 18th, I notified Mr. Lauterbach that we would not take any testimony this week but that he should reserve Thursday of next week, which I understood to be the only day you had open. I have just had a telegram from Mr. Lauterbach saying that he is to be engaged on Thursday but could attend on any other day next week after Monday.

Will you kindly let me know whether there has been any change in your engagements for next week, and if not, whether you will be free the week following.

Yours very truly, LOUIS D. BRANDEIS.

1134 Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

JANUARY 13, 1904.
G.

Re Old Dominion v. Lewisohn.

Edward Lauterbach, Esq., 22 Williams St., New York City.

MY DEAR MR. LAUTERBACH: We should like to take some depositions in this case in Baltimore soon.

Will you have the kindness to let me know what day or days will be most convenient to you?

Awaiting your early reply,

Yours very truly, LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

JANUARY 25, 1904.
C/B.

Re Bigelow-Lewisohn.

Alfred Hemenway, Esq., 334 Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: Mr. Lauterbach asks me to arrange with you for the time for taking depositions in Baltimore and tells me of your immediate engagements.

Will you kindly let me know after what date I may arrange the days?

Yours very truly, LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

Bigelow-Lewisohn.

Edward Lauterbach, Esq., 22 William St., New York City.

DEAR MR. LAUTERBACH: I find that I omitted to acknowledge receipt of your letter of January 23d in regard to the taking of testimony.

1135 Upon communicating with Mr. Hemenway, I found that he was not willing to fix at all a time for the taking of the testimony in Baltimore until he had disposed of the then pressing matters in the Bay State Gas litigation which I understand is coming up for a hearing on the 11th.

Yours very truly, LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.
Removed to top floor.

BOSTON, MASS., *April 6th*, 1904.
C/B.

Re Old Dominion-Lewisohn.

Edward Lauterbach, Esq., 22 William St., New York, N. Y.

MY DEAR MR. LAUTERBACH: I enclose you copy of my letter to Mr. Hemenway of today.

You will recall that when I wrote you on January 13th about taking testimony, you authorized me to fix the earliest time that Mr. Hemenway would give and that he was unable to give me any time then on account of his peremptory assignments in the Gas cases.

Will you kindly let me know whether I am free now to arrange the dates with Mr. Hemenway?

Yours very truly,

LOUIS D. BRANDEIS.

(Enclosure.)

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.
Removed to top floor.

BOSTON, MASS., *April 6th*, 1904.
C/B.

Re Old Dominion-Lewisohn.

Alfred Hemenway, Esq., 334 Tremont Building, Boston, Mass.

MY DEAR MR. HEMENWAY: I understand that the end of the Gas cases is near, and presume that you will again be open to engagements in other matters.

Will you kindly let me know for what time I may endeavor to arrange for taking some testimony in Baltimore, about which you will recall that I last heard from you on January 26th, when you said that you could not take the matter up until the Gas hearing was disposed of.

Yours very truly, LOUIS D. BRANDEIS.

1136 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

APRIL 11, 1904.
G/B.

Old Dominion v. Lewisohn.

Alfred Hemenway, Esq., 334 Tremont Building, Boston.

DEAR MR. HEMENWAY: I have yours of the 9th, and assume that I shall hear from you soon.

I wish that you would let me know at the same time for what week we may set down for argument the demurrer in the Bigelow suit here.

I think that the demurrer should be argued soon.

Yours very truly,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 220 Devonshire Street, Boston, Mass.

APRIL 18, 1904.
G/B.

Old Dominion v. Lewisohn.

Edward Lauterbach, Esq., 22 William St., New York City.

DEAR MR. LAUTERBACH: You will recall that when we were taking testimony in New York last year, I suggested that we take the deposition of Mr. Stanton, but that you and Mr. Hemenway preferred at that time that Mr. Stanton's deposition should be taken in the ordinary course on written interrogatories. We thereupon filed interrogatories to Mr. Stanton and took his deposition on written interrogatories. These interrogatories were at the time taken technically in the Massachusetts case, 8099 Equity. I wish the deposition of Mr. Stanton to be on file also in the New York case.

Will it be agreeable to you to stipulate that the deposition tak in the Boston suit may be used also in the Lewisohn suit?

I enclose herewith a copy of the interrogatories and answers.

Yours very truly,

LOUIS D. BRANDEIS.

(2 enclosures.)

1137 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Bost Mass.

April 21, 1904.
G/B.

Lewisohn.

Edward Lauterbach, Esq., 22 William St., New York City.

Dear Mr. Lauterbach: I have yours of the 20th, in which y ask me to submit to you the form of stipulation which I desire have entered in relation to Mr. Stanton's deposition, and I now e close duplicate copies of same, which I have signed.

Will you kindly sign them and return one copy to me?

Yours very truly,

LOUIS D. BRANDEIS.

(2 enclosures.)

April 28th, 1904.

Louis D. Brandeis, Esq., 161 Devonshire St., Boston, Mass.

Dear Sir: We beg to enclose herewith the stipulation sent to in the case of Old Dominion Copper Co. against Frederick Lewisoh et al. agreeing that a certified copy of the deposition of John Sta ton taken in the Bigelow suit may be filed and read in evidence the Lewisohn suit.

Very truly yours,

HOADLY, LAUTERBACH & JOHNSON.

(Enc.)

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Ma

April 29, 1904.
G/B.

Old Dominion-Lewisohn.

Messrs. Hoadley, Lauterbach and Johnson, 22 William St., N York City.

Dear Sirs: I thank you for yours of the 28th enclosing stipul tion with reference to the deposition of John Stanton. I have n heard from Mr. Hemenway since April 9th in regard to the takin of depositions, and presume that he is in communication with you.

Yours very truly,

LOUIS D. BRANDEIS.

1138 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JUNE 3, 1904.
G/B.

Bigelow-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: I enclose herewith draft of the reservation in Old Dominion Copper Mining and Smelting Company v. Bigelow, 8098 Equity, as prepared by Judge Lathrop.

I am handing a copy of this also to Mr. Cooper for Judge Lathrop's signature.

I have written to Mr. Lauterbach about taking evidence in Boston in the Lewisohn case the latter part of next week or the early part of the week following, and am awaiting a telegram from him letting me know what days, if any, to avoid.

Yours very truly,

LOUIS D. BRANDEIS.

(Enclosure.)

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JUNE 6, 1904.
G/B.

Old Dominion-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: I have heard from Mr. Lauterbach, who asks me not to take any depositions this week, but to arrange with you for the selection of a day next week.

I should like to commence the taking of depositions on Monday next, June 13th, at half past ten.

Will you please let me know at once whether that time will be convenient to you?

I tried to reach you by telephone, but found that you were not in.

Yours very truly,

LOUIS D. BRANDEIS.

1139 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JUNE 7, 1904.
G/B.

Old Dominion v. Lewisohn.

Edward Lauterbach, Esq., 27 William St. New York City.

DEAR MR. LAUTERBACH: I duly received your telegram of the 3d, and have arranged with Mr. Hemenway to take the depositions of some witnesses in Boston at my office on Wednesday next, June 15th, at 10.30 o'clock.

Yours very truly,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JUNE 13TH, 1904.
C/B.

Old Dominion v. Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: I have written Mr. Lauterbach, asking him kindly to have present at the taking of depositions at our office on Wednesday the original subscription or underwriting agreements and other papers put in evidence in connection with the depositions of Messrs. Bigelow and Hyams.

If these papers are in your possession and not in Mr. Lauterbach's, will you please bring them with you?

Yours very truly,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JUNE 21, 1904.
C/B.

Re Old Dominion-Lewisohn.

Edward Lauterbach, Esq., 22 William St., New York, N. Y.

DEAR MR. LAUTERBACH: I presume you have received from Mr. Hemenway copies of the depositions of Mr. Coram and Mr. Stone.

You will note that, in view of your inability to attend at
1140 the taking of the depositions, I agreed that, although the depositions are closed, I would recall Mr. Coram and Mr. Stone in case you wish to cross-examine them.

Will you kindly let me know by return mail whether you do wish to cross-examine them, and if so, what day will be convenient for you for this purpose? I should like to fix some day before June 28th.

I have marked for argument at the October Sitting the demurrer in the suit of Old Dominion Copper Mining and Smelting Company v. Lewisohn.

Yours very truly,

LOUIS D. BRANDEIS.

ARM–V.

JUNE 28TH, 1904.

Louis D. Brandeis, Esq., 161 Devonshire Street, Boston, Mass.

DEAR SIR: Mr. Hemenway has not yet sent us copies of the depositions by Mr. Coram and Mr. Stone. As soon as the same is received Mr. Lauterbach, who has just returned from Chicago, will examine them, and will then reply more definitely to your favor of the 21st inst.

Yours very truly,

HOADLY, LAUTERBACH & JOHNSON.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

SEPT. 9, 1904.
G/B.

Lewisohn.

Edward Lauterbach, Esq., 22 William St., New York City.

DEAR MR. LAUTERBACH: I should like to take, on such day next week as will be most convenient to you, the deposition of Mr. Charles H. Altmiller, and possibly also the deposition of one or more of the other subscribers to the Old Dominion stock.

Will you kindly let me know what day you prefer?

Yours very truly,

LOUIS D. BRANDEIS.

1141 EL/V. SEPTEMBER 10TH, 1904.

Louis D. Brandeis, Esq., 161 Devonshire Street, Boston, Mass.

DEAR MR. BRANDEIS: I have communicated with Mr. Hemenway, who will communicate with you on the subject of the proposed examination of Charles H. Altmiller, and others, subscribers to the Old Dominion stock.

Very truly yours,

EDWARD LAUTERBACH.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

SEPT. 14, 1904.
G/B.

Lewisohn.

Edward Lauterbach, Esq., 22 William St., New York City.

DEAR MR. LAUTERBACH: I have received your letter of the 10th, and since then have heard from Mr. Hemenway that he feels you ought to attend at the taking of the deposition of Mr. Altmiller, and that he has written you to that effect, and that he will le me hear as soon as he hears from you, but that he thought his letter had not been answered because you were not in New York City.

Will you have the kindness to let me know as soon as this reached you when it would be convenient for you to attend at the taking of Mr. Altmiller's deposition.

As I have stated, we shall probably on the same day wish to take the depositions of a few other subscribers to the stock.

Yours very truly,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

SEPT. 20, 1904.
G/B.

Lewisohn.

Edward Lauterbach, Esq., 22 William St., New York City.

DEAR MR. LAUTERBACH: A letter from your office under date of the 15th informed me that my letter to you of the 14th asking you to name a day that would be convenient for you to attend at the taking of the deposition of Mr. Altmiller would be answered upon your return to the office on the 19th.

1142 If you have not already written me, will you kindly wire me on receipt of this on what day you can attend?

Awaiting your reply,
Very truly yours,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

SEPTEMBER 22, 1904.

Re Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston.

MY DEAR HEMENWAY: I received your message last week that Mr. Lauterbach was absent from New York, and that you could not fix a time for taking the depositions here until you should hear from him.

I wrote Mr. Lauterbach accordingly asking him to let me know on what day it would be convenient for him to proceed, and I finally got a telegram yesterday from him saying that he could proceed on any day satisfactory to you.

Before I could communicate with you I have had a telephone from him saying that you say that you cannot go on earlier than the second week of October, but that any day either during the second week of October or before that time on which you can go on will be satisfactory to him.

Is there not some day next week or the week following on which you would be able to attend to the matter, and if not, what day or days during the second week of October will you be able to attend?

Awaiting your reply,
Yours very truly,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

SEPT. 23, 1904.
G/B.

Lewisohn.

Edward Lauterbach, Esq., 22 William St., New York City.

DEAR MR. LAUTERBACH: I have just been talking with Mr. Hemenway, and he has agreed that I might fix Friday, October 7th, for the taking of Mr. Altmiller's deposition.

Will ten o'clock on that day be a convenient time for you to attend at my office?

Yours very truly,

LOUIS D. BRANDEIS.

1143 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

1143

OCTOBER 6, 1904.
G/B.

Old Dominion vs. Bigelow and Lewisohn.

Alfred Hemenway, Esq., 334-338 Tremont Building, Boston, Mass.

MY DEAR HEMENWAY: I have yours of today and am very sorry that you cannot go on with the taking of the depositions to-morrow.

I note that you have already notified Mr. Lauterbach.

As I said yesterday when you mentioned this, I would like to go on on Monday or Tuesday of next week, or if that is not possible, on Wednesday, and I am disappointed at your not letting me know whether you can go on on Monday or Tuesday.

Please let me hear from you.

Very truly yours,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

NOVEMBER 2, 1904.
G/B.

Edward Lauterbach, Esq., 22 William St., New York City.

DEAR MR. LAUTERBACH: 1. I am sorry to report that Judge Townsend's engagements are such that he did not consider it possible to hear our demurrer at his November sitting.

Will you not, nevertheless, complete your brief now so that we may have the case ready for argument as soon as an opportunity arises?

2. I note that you will let me know within a few days whether you wish to cross examine Mr. Altmiller.

Will you also let me have an answer to the matter which we discussed, namely whether you will waive formal proof of those matters testified to by Mr. Altmiller from entries in the various books and papers, and as to some of which he has no personal knowledge.

If you do not wish to consent, I want to call as soon as possible witnesses who can give formal testimony to these matters.

Awaiting your reply,

Yours very truly,

LOUIS D. BRANDEIS.

1144 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

NOVEMBER 3, 1904.
G/B.

Old Dom. v. Bigelow.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: You doubtless know that the demurrer in suit of Old Dominion Copper Mining and Smelting Co. v. Bigelow is on the November list for the Full Bench. Indeed, I understand that you yourself directed the papers to be printed, but in order to avoid the possibility of any misunderstanding, I wrote to say that we shall want to have this demurrer argued when it is reached.

I am led to send this letter because I found that although I had early notified Mr. Lauterbach that we expected to argue the demurrer in the Lewisohn case as soon as reached, and also talked with him about the matter recently in Boston, he seemed entirely surprised to find that it was on the list and he was not prepared to take it up on Tuesday.

Yours very truly,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

NOVEMBER 11, 1904.
G/B.

Re Lewisohn.

Edward Lauterbach, Esq., 22 William Street, New York City, N. Y.

DEAR MR. LAUTERBACH: I have yours of the 9th enclosing check for $35., and have sent you by American Express twelve additional copies of the Demurrer Book.

I am writing to Mr. Hemenway today to ascertain whether he wishes to cross examine Mr. Altmiller &c.

Yours very truly,

LOUIS D. BRANDEIS.

1145 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

NOVEMBER 11, 1904.
G/B.

Re Lewisohn.

Alfred Hemenway, Esq., Tremont Bldg., Boston.

DEAR MR. HEMENWAY: Mr. Lauterbach tells me that he has requested you answer my inquiry whether you wish to have made

any cross examination of Mr. Altmiller, and also whether you will stipulate as to the withdrawal of the objections to the formal parts of Mr. Altmiller's testimony, so as to relieve us from the necessity of making formal proof.

I should be glad if you could let me have a reply by eleven o'clock tomorrow.

Yours very truly,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

DECEMBER 15, 1904.
J–G.

Re Bigelow-Lewisohn.

Edward Lauterbach, Esq., 22 William Street, New York City.

MY DEAR MR. LAUTERBACH: My absence in the South has led to delay in replying to your letter of November 12th.

In pursuance of the suggestion contained in your letter I enclose herewith:

1. Three copies marked "A" of draft of stipulation to be filed in the Lewisohn case # 1 concerning the Altmiller deposition.

It has seemed to me also proper at this time to prepare stipulations covering some other matters in regard to the proof in the Lewisohn cases and also in the Bigelow cases, and I therefore enclose herewith:

2. Drafts marked "B" of stipulations to be filed in both Lewisohn cases covering the filing therein of certified copies of the depositions of the Lewisohns and others which were taken in the Bigelow case, and also concerning the filing of the depositions of Bigelow and others taken in the Lewisohn case, etc.

1146 3. Also for your and Mr. Hemenway's consideration, drafts marked "C" of stipulations to be filed in the two Bigelow cases concerning the filing of the depositions of the Lewisohns and others.

4. Drafts marked "D" of stipulations to be filed in the two Bigelow cases concerning the depositions of Bigelow, Hyams and others which were taken in the Lewisohn suit.

Will you kindly let me know as soon as possible whether these stipulations will be in all respects agreeable to you and Mr. Hemenway, and if you have any suggestions to make, let me have them as promptly as possible.

Yours very truly,

LOUIS D. BRANDEIS.

(Stipulations herewith.)

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JANUARY 10, 1905.
G–B.

Re Bigelow-Lewisohn.

Edward Lauterbach, Esq., 22 William Street, New York City.

DEAR MR. LAUTERBACH: I duly received yours of December 29th.

Are you and Mr. Hemenway content with the form of the stipulations submitted, and if so, will you kindly have them returned to me?

Yours very truly, LOUIS D. BRANDEIS.

ARM–m JANUARY 12, 1905.

Louis D. Brandeis, Esq., 161 Devonshire Street, Boston.

DEAR SIR: In reply to your favor of the 10th inst., we beg to state that the stipulations have just been returned by Mr. Hemingway in the Bigelow-Lewisohn matter together with his suggestions for certain changes to be made therein. We will change the stipulations in accordance with his said suggestions, and send it to you within the next day or two.

Very truly yours,
HOADLY, LAUTERBACH & JOHNSON.

1147 ARM—L.

JANUARY 18TH, 1905.

Louis D. Brandeis, Esq., 161 Devonshire St., Boston, Mass.

DEAR SIR: We have this day sent to Mr. Hemenway the stipulations in amended form in the Lewisohn and Bigelow actions, and have requested him to deliver the same to you providing they meet with his approval.

We will be obliged if upon delivery you will sign a set of the said stipulations so that we can have a full copy for our records.

Very truly yours,

——— ———.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JANUARY 26, 1905.
G/B.

Bigelow-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: When I saw you on the 20th, you expected to be able to let me have the stipulations in a few days.

Have you had time to examine them?

Yours very truly,
LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

FEBRUARY 1, 1905.
G/B.

Bigelow-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: I take the liberty of reminding you that you promised when I saw you on Jan. 20th, to send me the stipulations in the above cases.

Yours very truly, LOUIS D. BRANDEIS.

1148 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

FEBRUARY 13, 1905.
G/B.

Bigelow-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: Will you please let me have the Old Dominion-Bigelow-Lewisohn stipulations today or tomorrow?

Yours very truly,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

FEBRUARY 17, 1905.
G/B.

Old Dominion—Bigelow-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston.

MY DEAR HEMENWAY: I have yours of the 14th inst., enclosing the stipulations in the above cases.

The changes which you and Mr. Lauterbach have made are satisfactory to me.

I think that in the clause "Said waiver being made conditionally upon the production of any and all of the original documents that the respondent shall notify complainant to produce and the complainant hereby stipulates and agrees to produce any and all of the original documents upon receiving notice requiring the production thereof" the word "said" should be substituted for "the" in each instance before the word "original," so that it shall read "all of said original documents," as it might otherwise on its face appear to refer to some other papers.

I have therefore taken the liberty of thus changing the word "the" to the word "said."

We have signed and sent for filing the stipulations in the Bigelow suits and in the Lewisohn suits, and have sent to Mr. Lauterbach a signed copy of all seven stipulations.

Yours very truly,

LOUIS D. BRANDEIS,
D.

1149 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

FEBRUARY 17, 1905.
G/B.

Re Bigelow-Lewisohn.

Edward Lauterbach, Esq., 22 William Street, New York City.

DEAR MR. LAUTERBACH: I have just received from Mr. Hemenway the stipulations with the modifications suggested by you and

him. These are entirely satisfactory to us. I have thought, however, that in the paragraph "Said waiver being made conditionally upon the production of any and all of the original documents that the respondent shall notify complainant to produce, and the complainant hereby stipulates and agrees to produce any and all of the original documents upon receiving notice requiring the production thereof," the word "said" should be substituted for "the" before the word "original," and I have taken the liberty of doing so.

I send you herewith for your files a copy signed by us of all the stipulations filed in the Bigelow and Lewisohn cases.

Yours very truly,

LOUIS D. BRANDEIS.

P. S.—I understand that our demurrer is the third case on the list for argument on Monday next. I am purposing to go over on Sunday afternoon, and spend the night at the City Club, so as to be on hand Monday morning, and I hope to have the pleasure of meeting you then.

(7 enclosures.)

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

FEBRUARY 18, 1905.
G/J.

Old Dominion—Bigelow-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: We have signed and now return to you herewith your copy of the stipulations.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.
G.

(7 enclosures.)

1150 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JUNE 26, 1905.
J/B.

Old Dominion: Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston.

MY DEAR MR. HEMENWAY: I wrote Mr. Lauterbach some days ago that we wished to take the depositions of a number of witnesses who were subscribers for stock, and asked him at what time it would be most convenient for him to come to Boston. He writes me that I should make arrangements with you; that any date that you fix will be agreeable to him, but that he "should prefer to have the depositions taken after the Fourth of July."

Please let me know on what dates it would be convenient for you to attend, and I will endeavor to make my engagements conform, and secure the witnesses for such dates.

Yours very truly,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JULY 11, 1905.
J/B.

Old Dominion—Bigelow-Lewisohn.

Edward Lauterbach, Esq., 22 William Street, New York City.

DEAR MR. LAUTERBACH: Mr. Hemenway has just notified me that he will be at liberty to go any days next week, except Saturday, that will be convenient to you with the taking of the depositons.

Will you kindly let me know what days you can attend next week, and I will endeavor at once to get in touch with the witnesses?

It is growing late in the month, and I fear that some of them may already have left on their vacations.

Awaiting your reply.

Yours very truly,

LOUIS D. BRANDEIS.

1151 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JULY 14, 1905.
J/B.

Old Dominion—Bigelow-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: As arranged with you over the telephone on the 11th, I wrote Mr Lauterbach as to fixing the time for taking the depositions, and he suggests Wednesday, July 19th.

I am therefore endeavering to get together the witnesses for that date, at our office, at ten o'clock.

Yours very truly, LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JULY 14, 1905.
J/B.

Old Dominion—Bigelow-Lewisohn.

Edward Lauterbach, Esq., 22 William Street, New York City.

DEAR MR. LAUTERBACH: I have your telegram and letter of the 13th, suggesting Wednesday, July 19th, for taking the depositions in the above case.

I am endeavoring to get the witnesses together for that date.

I shall expect you and Mr. Hemenway at our office at ten o'clock.

Yours very truly, LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JULY 17, 1905.
J/McC.

Old Dominion—Bigelow-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: At the taking of the testimony in the above matter Wednesday, I desire to examine Mr. Chrimes and for this purpose should like to have all the correspondence of Mr. 1152 Bigelow in connection with the corporation and syndicate during 1895 up to October 1st, particularly the letters already introduced — evidence, and also all the letter books of the various series for the same period.

I assume that it will not be necessary to issue a formal summons to Mr. Chrimes, or for the production of the books and papers, and shall be obliged if you will confirm this.

Yours very truly, LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

SEPTEMBER 30, 1905.
G/B.

Old Dominion vs. Bigelow.
" " vs. Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: We should like to take some further depositions.

Will it be possible for you to attend on either October 12th or 13th, and if neither of those dates is possible, please let me know the earliest date after that which will be convenient for you.

I am communicating also by this mail with Mr. Lauterbach.

Yours very truly, LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

SEPTEMBER 30, 1905.
G/B.

Old Dominion vs. Bigelow.
" " vs. Lewisohn.

Edward Lauterbach, Esq., 22 William Street, New York City, N. Y.

DEAR MR. LAUTERBACH: We should like to take some further depositions.

Will it be possible for you to attend on either October 12th or 13th, and if neither of those dates is possible, please let me know the earliest date after that which will be convenient for you.

I am communicating also by this mail with Mr. Lauterbach.

Yours very truly, LOUIS D. BRANDEIS.

1153 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

OCTOBER 5, 1905.

J/B.

Old Dominion—Bigelow-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: I have yours saying that you know of no objection to taking the depositions on the 13th, and Mr. Lauterbach has also written that that date would suit him if agreeable to you.

We are communicating with Mr. R. Brent Keyser, of Baltimore, with a view to taking his deposition there on that date. Will you please let me know by bearer whether you see anything to prevent your attending at Baltimore on the 13th?

We are communicating with Mr. Keyser this morning.

Yours very truly, LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

OCTOBER 9, 1905.

J/B.

Old Dominion: Bigelow-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: I have your message that you cannot go to Baltimore on the 13th on account of pending cases here, but that you can attend at the taking of testimony in Boston on that date.

Will you therefore kindly have Mr. Chrimes at our office with all of the books and papers produced at his examination on July 20th and also the other books and papers called for in the course of his deposition?

We hope to arrange also for the presence of enough other witnesses to occupy the day.

Yours very truly, LOUIS D. BRANDEIS.

1154 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

OCTOBER 9, 1905.

J/G.

Old Dominion: Bigelow-Lewisohn.

Edward Lauterbach, Esq., 22 William Street, New York City, N. Y.

DEAR MR. LAUTERBACH: Mr. Hemenway has assented to the taking of depositions in Boston on the 13th, and I have just written him as per enclosed copy.

Yours very truly, LOUIS D. BRANDEIS.

(1 enclosure.)

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

October 14, 1905.
J/G.

Old Dominion: Bigelow-Lewisohn.

Edward Lauterbach, Esq., 22 William Street, New York City, N. Y.

Dear Mr. Lauterbach: I have not heard from you by wire or letter in answer to mine of the 12th.

As we desire to arrange for the attendance of witnesses on the 19th, if that date is possible, will you kindly wire me early Monday whether it will be convenient for you to be here on that date? Mr. Hemenway assents to that day subject to your consent.

Yours very truly, LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

October 6, 1905.
G/B.

Old Dominion: Bigelow-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston.

Dear Mr. Hemenway: I have just received a telegram from Mr. Lauterbach reading as follows:—"This week inconvenient. Any day next week after Monday. Arrange with Hemenway."

1155 Will you please let me know on what days next week you can attend for the taking of depositions?

Yours very truly, LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

October 21, 1905.
J/B.

Old Dominion: Bigelow-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston.

Dear Mr. Hemenway: We are arranging, in accordance with my conversation with you last evening, to take the depositions on Friday next, October 27th, at ten o'clock.

Will you therefore kindly have Mr. Chrimes at our office with all of the books and papers produced at his examination on July 20th, and also the other books and papers called for in the course of his deposition?

When I last heard from you, you promised to let us have your answer in the suit of Old Dominion vs. Bigelow by October 15th. If the answer is ready please send me a copy; if not, I hope you will be able to let me have it within the next few days.

Yours very truly, LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

October 21, 1905.
J/B.

Old Dominion: Bigelow-Lewisohn.

Edward Lauterbach, Esq., 22 William Street, New York City, N. Y.

Dear Mr. Lauterbach: I saw Mr. Hemenway yesterday, and agreed with him that we should proceed with the taking of depositions on Friday next, October 27th, at ten o'clock. He said that he would notify you, but to avoid the possibility of any misunderstanding, I write to you direct.

Yours very truly,

LOUIS D. BRANDEIS.

1156 October 23rd, 1905.

Louis D. Brandeis, Esq., 161 Devonshire Street, Boston, Mass.

Dear Mr. Brandeis: Friday next, October 27th will suit my convenience for the taking of the depositions referred to in yours of the 21st.

Yours very truly, EDWARD LAUTERBACH.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass

Oct. 28, 1905.
T/McC.

Re Old Dominion Copper Mining & Smelting Co. vs. Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

Dear Mr. Hemenway: In the Old Dominion case, we desire to take the testimony of several witnesses in and about St. Johnsbury, Vt. Will it be possible for you to attend to the matter on November 2d and 3d? It seems possible that it could be so arranged that all the depositions can be taken on the 2d, but in view of the distance, it would perhaps be better to leave another day open so as to avoid the possibility of having to make two trips.

I am writing to Mr. Lauterbach.

I should like to hear from you if possible today or Monday, and am asking Mr. Lauterbach to telegraph his reply.

Yours very truly,

LOUIS D. BRANDEIS.

P. S.—My partner, Mr. McClennen, will attend to the taking of the above depositions.

1157 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

OCT. 28, 1905.
T/McC.

Re Old Dominion Copper Mining & Smelting Co. vs. Lewisohn.

Edward Lauterbach, Esq., 22 William St., New York, N. Y.

DEAR MR. LAUTERBACH: In the Old Dominion case, we desire to take the testimony of several witnesses in and about St. Johnsbury, Vt. Will it be possible for you to attend to the matter on November 2d and 3d? It seems probable that it could be so arranged that all the depositions can be taken on the 2d, but in view of the distance, it would perhaps be better to leave another day open so as to avoid the possibility of having to make two trips.

I am writing Mr. Hemenway at this time, and shall be obliged if you will let me have your reply by telegraph.

Yours very truly,

LOUIS D. BRANDEIS.

P. S.—My Partner, Mr. McClennen, will attend to the taking of the above depositions.

ET-K.

OCTOBER 31ST, 1905.

Louis D. Brandeis, Esq., 161 Devonshire Street, Boston, Mass.

DEAR SIR: Not hearing from you relative to taking testimony at St. Johnsbury in the Old Dominion case we presume that you have concluded not to go there this week.

There are only two trains from New York, one at nine o'clock in the morning, arriving at 7.30 in the evening, the other at 4.30 in the afternoon, arriving at 3.30 the next morning, which is a very unseasonable hour to arrive at any place, being too early to go to work and too late to go to bed. We desire to have sufficient notice to permit us to leave by the 9 A. M. train.

Yours truly,

——— ———.

1158 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

NOVEMBER 2, 1905.
J/G.

Old Dominion: Bigelow-Lewisohn.

Eugene Treadwell, Esq., Hoadly, Lauterbach & Johnson, 22 William Street, New York City.

DEAR SIR-: I have yours of the 31st.

I had supposed that Mr. Hemenway reported to you that he was unable to attend at the taking of testimony at St. Johnsbury this week, and for that reason it was necessary to postpone the taking of the depositions.

I note your wishes in regard to notice so that you can take the morning train.

Very truly yours,

LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

Nov. 24, 1905.
T/McC.

Old Dominion—Lewisohn.

Eugene Treadwell, Esq., Hoadley, Lauterbach & Johnson, 22 William St., New York, N. Y.

DEAR SIR: Will it be convenient for you to attend the taking of depositions in Vermont on December 7, 8, or 9, if these dates are convenient for Mr. Hemenway?

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

ET-L.

NOVEMBER 27TH, 1905.

Old Dominion—Lewisohn.

Messrs. Brandeis, Dunbar & Nutter, Devonshire St., Boston, Mass.

GENTLEMEN: Yours of November 25th received. December 7th, 8th or 9th will be convenient for me if they are for Mr. Hemenway. Please notify me at least forty-eight hours in advance, as I should have to take the morning train from New York the day previous to the first session.

Yours truly,

——— ———.

1159 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

DEC. 1, 1905.
T/McC.

Old Dominion—Lewisohn.

Eugene Treadwell, Esq., 22 William St., New York, N. Y.

DEAR MR. TREADWELL: Mr. Hemenway is unable to go to Vermont on December 7th, 8th, or 9th. We are writing him relative to the 14th, 15th, or 16th, and shall be glad to know whether these dates would be agreeable to you.

Yours very truly,

LOUIS D. BRANDEIS.

ET-M.

DECEMBER 2ND, 1905.

Old Dominion—Lewisohn.

Louis D. Brandeis, Esq., c/o Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

DEAR SIR: Yours December 1st received.

The 14th, 15th and 16th December will be agreeable to me. Kindly notify me as far as possible in advance if selection made final.

Do I understand that you will expect testimony to commence on the 14th, and also if it is liable to continue on the 16th.

Very truly yours,

——— ———.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

DEC. 4, 1905.
T/McC.

Old Dominion—Lewisohn.

Eugene Treadwell, Esq., Messrs. Hoadly, Lauterbach & Johnson, 22 William St., New York, N. Y.

DEAR SIR: Mr. Hemenway informs us that the 14th of December is agreeable to him for taking the depositions at St. Johnsbury. We will accordingly endeavor to perfect arrangements for this date at once.

We believe that all the depositions can be taken in one day.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

1160 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

DEC. 6, 1905.
T/McC.

Old Dominion—Lewisohn.

Eugene Treadwell, Esq., Messrs. Hoadley, Lauterbach & Johnson, 22 William St., New York, N. Y.

DEAR SIR: We enclose you herewith a stipulation, and copy for your files, for the appointment of commissioner to take depositions at St. Johnsbury. Will you kindly sign and return to us the original.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

Enclosure.

ET-L.

DECEMBER 7TH, 1905.

Old Dominion vs. Lewisohn.

Mess. Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

DEAR SIRS: Yours of 6th with stipulations enclosed received. We herewith return original signed.

Yours truly,

——— ———.

(Enc.)

DECEMBER 12TH, 1905.

To Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

Old Dominion Lewisohn Will session be held St. Johnsbury and where. Also on which day Answer.

EUGENE TREADWELL.

JANUARY 13TH, 1906.

Messrs. Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

GENTLEMEN: We beg to acknowledge receipt of your favor of the 4th instant, addressed to Mr. Treadwell, and in compliance with the request therein contained beg to hand you herewith check for $6.00 to cover one-half of the expense incurred by the employment of a stenographer to take the depositions at St. Johnsbury in the case Old Dominion Company v. Bigelow.

Yours very truly,

HOADLY, LAUTERBACH & JOHNSON.

Enc.

1161 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JAN. 15, 1906.
T/McC.

Old Dominion—Lewisohn and Bigelow.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR SIR: We have just received from Messrs. Hoadley, Lauterbach & Johnson a check for $6 to cover one-half the expense of stenographer in taking the depositions at St. Johnsbury.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

MARCH 2, 1906.
T/McC.

Old Dominion—Lewisohn and Bigelow.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR SIR: Will it be convenient for you to attend the taking of depositions in Connecticut on March 7, 8, or 9? We can probably arrange so that you can leave Boston in the morning and get back on the evening of the same day.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

MARCH 2, 1906.
T/McC.

Old Dominion—Lewisohn and Bigelow.

Edward Lauterbach, Esq., Hoadley, Lauterbach & Johnson, 22 William St., New York, N. Y.

DEAR SIR: Will it be convenient for you to attend the taking of depositions in Connecticut on March 7, 8, or 9? We can probably

arrange so that you can leave New York in the morning and get back on the evening of the same day.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

1162 ET-M. MARCH 3RD, 1906.

Old Dominion v. Lewisohn & Bigelow.

Messrs. Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

GENTLEMEN: The date of March 9th would be preferable to us, subject of course to the convenience of Mr. Hemenway with whom we presume you have arranged.

Yours truly,

——— ———.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

MAR. 5, 1906.
T/McC.

Messrs. Hoadley, Lauterbach & Johnson, 22 William St., New York, N. Y.

GENTLEMEN: Your letter of March is received.

Mr. Hemenway finds that it will not be possible for him to go on this week, or even to fix a date until the conclusion of the case which he is now trying.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

MARCH 27, 1906.
T/McC.

Old Dominion Copper Mining & Smelting Co.,-Lewisohn.

Messrs. Hoadley, Lauterbach & Johnson, 22 William St., New York, N. Y.

GENTLEMEN: We are just writing Mr. Hemenway with reference to an appointment for the taking of testimony. Will it be agreeable to you to attend within a week or two?

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

1163 E. T.-L.

MARCH 28TH, 1906.

Old Dominion Co. vs. Lewisohn.

Messrs. Brandeis, Dunbar & Nutter, 161 Devonshire St., Boston, Mass.

DEAR SIRS: Yours of 27th received. Excepting April 6th and 7th, together with a case in the United States Supreme Court which the clerk of that Court advises may be reached in the week beginning April 9th, it will be agreeable for us to attend the taking of testimony.

Yours truly, —— ——.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

APRIL 17, 1906.
T/McC.

Old Dominion—Lewisohn and Bigelow.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: Can you arrange for the taking of any depositions in Boston at the end of this week or during next week? We should like at least one day for this.

Yours very truly,
BRANDEIS, DUNBAR & NUTTER.
T.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

APRIL 26, 1906.
T/McC.

Old Dominion—Lewisohn & Bigelow.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: As you will recall, we have agreed upon May 12th for taking testimony in New York. We should like to follow this up with some in Boston. Can you go on May 14th and 15th in Boston? If not, will you please let us have the earliest time thereafter that you can go on.

Yours very truly, EDWARD F. McCLENNEN.

1164 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

MAY 7, 1906.
T/McC.

Messrs. Hoadly, Lauterbach & Johnson 22 William St., New York N. Y.

GENTLEMEN: In the taking of testimony on Saturday next before Mr Webb in New York, we should like to offer in evidence some of

the numerous exhibits which were marked for identification at the time of the earlier taking of testimony in New York, and to close the direct examination of the various witnesses then examined, leaving them for your cross-examination. Will it be agreeable to you to have the witnesses in attendance and the exhibits present without summons? Among other exhibits we shall wish to offer in evidence are some from the Lewisohn letter books:

Letters: To Keyser, June 13.
" Brooker, June 25th.
" Shiff, July 12.
" Brooker, July 24.
" Stern, July 24.
" Hawley, July 25.
" Behrens, Aug. 6.
" Henry, Aug. 6.
" Henry, Aug. 26.
" Mainz, Sep. 12.
" Caspary, Oct. 1.

The portions of the Lewisohn books relating to Old Dominion, or a transcript thereof,—they are now marked Exhibits #231, #232, #233.

You will recall that the New York witnesses who have thus far testified are:

Walter Lewisohn.	Albert Lewisohn.
Frederick L. Raheuser.	F. Raheuser.
Adolf Lewisohn.	Jesse Lewisohn.
Frederick Lewisohn.	E. C. Westervelt.

Will you kindly inform us whether it will be agreeable to you to take testimony in Boston on the 15th, 16th and 17th?

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

1165 E. T.-L.

MAY 8TH, 1906.

Old Dominion Co vs. Lewisohn.

Messrs. Brandeis, Dunbar & Nutter, 161 Devonshire St., Boston, Mass.

GENTLEMEN: Yours of May 7th received. It would be impossible to obtain the attendance of the various witnesses you name on Saturday, that being practically a holiday, and unless you have any further direct-examination of them or any of them, we suggest instead that you on that day close their direct-examination on the record, leaving the question of cross-examination to await subsequent decision. Of course, if we conclude not to cross-examine, we can arrange to have the witnesses present at some convenient time to sign their depositions. If, however, we conclude to cross-examine, we can arrange for a further date. Obviously, we could not conclude

their examination on that date together with the testimony of the other witnesses which you expect to take. We will have the exhibits present to enable you to put them in evidence on that day.

We can attend the taking of testimony in Boston on the 15th, 16th and 17th, if agreeable to Mr. Hemenway.

Kindly advise us as far in advance as possible if you conclude to have the sessions on those dates.

Yours truly, —— ——.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

MAY 9, 1906.
T/McC.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: Messrs. Hoadly, Lauterbach & Johnson inform us that they can attend to the taking of testimony in Boston on the 15th, 16th and 17th of May, provided you can. Kindly inform us whether it will be convenient for you to give us all or any of these days?

Yours very truly, EDWARD F. McCLENNEN.

1166 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

MAY 14, 1906.
T/McC.

Old Dominion-Bigelow.

Messrs. Hoadly, Lauterbach & Johnson, 22 William St., New York, N. Y.

GENTLEMEN: Mr. Hemenway cannot go on in taking testimony upon Wednesday and Thursday of this week, but can go on on Tuesday and Wednesday, May 22d and 23d. Will you kindly inform us whether it will be agreeable to you to come to Boston on these days.

Yours very truly,
BRANDEIS, DUNBAR & NUTTER.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

MAY 15, 1906.
T/McC.

Old Dominion-Bigelow.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: We beg to confirm our conversation by telephone that May 22nd and 23rd are reserved for taking testimony in Boston, subject to these dates being satisfactory to Messrs. Hoadly, Lauterbach & Johnson, to whom we have written.

Yours very truly, EDWARD F. McCLENNEN.

E. T.-K.

MAY 15TH, 1906.

Old Dominion vs. Bigelow.

Messrs. Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

DEAR SIR: It will be agreeable for us to attend taking of testimony in Boston on May 22d and 23rd, as suggested in yours of the 14th inst.

Yours truly,

——— ———.

1167 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

MAY 16, 1906.
T/McC.

Messrs. Hoadly, Lauterbach & Johnson, 22 William St., New York, N. Y.

GENTLEMEN: Your letter of May 15th is received, and we have accordingly arranged with Mr. Hemenway to go on on May 22d and 23d at our office in Boston.

Will you kindly bring with you the letters received by Mr. Lauterbach or the Lewisohns between June 1st and October 1st, 1902, from the Old Dominion Copper Mining & Smelting Co., Mr. Brandeis, Mr. Smith, Mr. Altmiller, Mr. Hyams, Mr. Bigelow, or Mr. Hemenway.

Yours very truly,

BRANDIES, DUNBAR & NUTTER.

E. T.-M.

MAY 17TH, 1906.

Old Dominion v. Bigelow.

Messrs. Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Massachusetts.

GENTLEMEN: If for any reason the plan of taking testimony in Boston on Tuesday and Wednesday next is changed, kindly telegraph me early Saturday morning that I may alter other arrangements.

Very truly yours,

——— ———.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JULY 6, 1906.
T/McC.

Messrs. Hoadly, Lauterbach & Johnson, 22 William St., New York, N. Y.

DEAR SIRS: We are just writing Mr. Hemenway for a day in which to take testimony in Boston, as soon after July 13 as he can

devote to this matter. Will you kindly inform us whether you can attend to the matter during the last half of July.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

1168 E. T.-L.

JULY 10TH, 1906.

Old Dominion vs. Bigelow et al.

Messrs. Brandeis, Dunbar & Nutter, 161 Devonshire St., Boston, Mass.

DEAR SIRS: Yours of July 6th received. It appears to have been misdirected at first and subsequently sent on a later date. We can attend on either of the following dates:

July 16, 17, 18, 24, 25, 26, 31, August 1 and 2.

Kindly inform us as far as possible in advance of the date selected.

Yours very truly,

——— ———.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JULY 12, 1906.
T/McC.

Old Dominion—Bigelow.

Messrs. Hoadly, Lauterbach & Johnson, 22 William St., New York, N. Y.

GENTLEMEN: Enclosed herewith are copies of the interrogatories which we have just filed in the Supreme Judicial Court for Suffolk County for the deposition of Maxwell Woodhull. We should be greatly obliged if you would file such cross-interrogatories as you intend as soon as may be.

Yours very truly,

BRANDIES, DUNBAR & NUTTER.

Enclosure.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JULY 14, 1906.
T/McC.

Messrs. Hoadly, Lauterbach & Johnson, 22 William St., New York, N. Y.

GENTLEMEN: Mr. Hemenway informs us that he can go on in Old Dominion on July 24th, in Boston. Accordingly, we will arrange for a hearing at our office at 10 o'clock that morning.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

1169 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

FEBRUARY 8, 1907.
T/McC.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR SIR: We beg to confirm our arrangement with Mr. Farley today postponing the hearing in the case of Old Dominion Copper Mining & Smelting Company v. Lewisohn and Bigelow from February 13th at 9 o'clock to February 15th at 9 o'clock.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

FEBRUARY 11, 1907.
T/McC.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR SIR: In accordance with our conversation with you by telephone this morning, we have communicated with Mr. Treadwell, and he is agreeable to having the hearing in the case of Old Dominion Copper Mining & Smelting Company v. Lewisohn and Bigelow at 9 o'clock on Saturday morning, February 16th, and we will understand that it is so set.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

FEBRUARY 12, 1907.
T/McC.

Old Dominion—Bigelow and Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR SIR: No formal agreement has been signed covering the use in the different suits of the later depositions taken in the cases of Old Dominion Copper Mining & Smelting Company v. Bigelow and Lewisohn. I have accordingly drawn one, including in one
1170 agreement the earlier depositions, and also the latter ones. Will you kindly sign this and return it to us.

In addition to the exhibits, will you please have Mr. Hyams bring with him the original letter of C. H. Altmiller to A. S. Bigelow, dated June 24th, 1902.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

Enclosure.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

MARCH 9, 1907.
B/G/Md.

Re Old Dominion—Bigelow-Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: Are you not able to let us have a reply to our letter of February 18th?

Yours very truly, LOUIS D. BRANDEIS.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

BOSTON, MASS., *March* 19, 1907.
T/McC.

Messrs. Hoadly, Lauterbach & Johnson, 22 William Street, New York, N. Y.

GENTLEMEN: We are desirous of bringing the case of Old Dominion Copper Mining & Smelting Co. v. Bigelow on for hearing before the Court in April, as we called to Mr. Hemenway's attention last January. We are just writing Mr. Hemenway with reference to a specific assignment of the case, and shall be obliged if you will let us know concerning your engagements during April.

We are still anxious to get from you the stipulation dispensing with the formalities concerning the depositions.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

1171 Brandeis, Dunbar & Nutter, 161 Devonshire Street,

BOSTON, MASS., *March* 25, 1907.
T/McC.

Messrs. Hoadly, Lauterbach & Johnson, 22 William St., New York, N. Y.

GENTLEMEN: Mr. Hemenway informs us that it will be impossible for him to try the case of Old Dominion Copper Mining & Smelting Co. v. Bigelow in April, but that he has been trying to arrange for a conference with Mr. Treadwell and Mr. Hyams with a view to determining what further evidence should be offered. Under these circumstances we hope that it will be possible to have the case heard in May.

We understand that Mr. Hemenway has no objection to the form of stipulation relative to the testimony. If you are of the same opinion, we shall be greatly obliged if this formal matter can be disposed of at the present time.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

Brandeis, Dunbar & Nutter, 161 Devonshire Street.

BOSTON, MASS., *April* 30, 1907.
T/McC.

Old Dominion v. Lewisohn and Bigelow.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: As considerable time has elapsed since our conference on April 1st relative to the Old Dominion cases, we think that you have doubtless had opportunity to go into the matter of your contemplated defence and may therefore be in a position to let us know whether you will need more than the two days now set, May 27th and May 28th, to introduce your evidence. If so, we should like to arrange with you at the present time for additional dates in June which will meet your convenience.

As your inability to give the matter your attention this spring will probably prevent a hearing before the Court before the summer adjournment, we are very anxious to have the testimony completed this spring so that there will be no difficulty in having the case heard promptly when the Court comes in again.

Yours very truly, LOUIS D. BRANDEIS.

1172 Brandeis, Dunbar & Nutter, 161 Devonshire Street.

BOSTON, MASS., *May* 20, 1907.
T/McC.

Old Dominion—Bigelow and Lewisohn.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMINGWAY: Messrs. Hoadly, Lauterbach & Johnson have written us in response to our letter of May 15th, written on the same subject as our letters to you of April 30th and May 11th, to which we have no answer, and they express some doubt as to going on in the hearing on May 27th and May 28th. As we have written them in reply, it seems to us, in view of the length of time that has elapsed since we first expressed a desire to dispose of the case this spring, and also since our interview of April 1st when the hearings were set for May 27th and May 28th as days convenient to you, that the hearings should certainly go on these days. We also should like to arrange—before your dates are otherwise filled—to have later dates set in June for further hearing, if they are to become necessary.

Will you please let us know what dates you can give us.

Yours very truly, LOUIS D. BRANDEIS.

MAY 24TH, 1907.

Re Old Dominion Co. vs. Bigelow.

Louis D. Brandeis, Esq., 161 Devonshire Street, Boston, Mass.

DEAR MR. BRANDEIS: I find it impossible to do anything about

the Old Dominion matter on Tuesday the 28th inst. As to a further appointment, I must confer with Mr. Lauterbach.

Yours very truly,

—— ——.

1173 Brandeis, Dunbar & Nutter, 161 Devonshire Street.

BOSTON, MASS., *May* 28, 1907.
T/McC.

Messrs. Hoadly, Lauterbach & Johnson, 22 William St., New York, N. Y.

GENTLEMEN: We are just writing Mr. Hemenway that we shall move on next Tuesday morning to have the case of Old Dominion Copper Mining & Smelting Company v. Bigelow, #8098, assigned for hearing on the merits at an early date in the Autumn in view of Mr. Hemenway's inability to try the case before the Court this Spring.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

Brandeis, Dunbar & Nutter.

MAY 28, 1907.

Alfred Hemenway, Esq., Tremont Building, Boston, Mass.

DEAR MR. HEMENWAY: In view of the difficulty in arranging for any further progress in the case of Old Dominion Copper Mining & Smelting Company v. Bigelow, #8098, we have decided to move next Tuesday morning on the coming in of the Court that the case be set down for hearing on the merits at an early date in the Autumn.

We shall of course prefer to have the case heard during the coming June, but shall not press for an assignment at that time in view of your informing us of your inability to try the case then

Yours very truly,

EDWARD F. McCLENNEN.

ET–L.

MAY 31ST, 1907.

Old Dominion Co.

Messrs. Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.:

GENTLEMEN: We have yours of May 28th, in which you state your intention of having the Bigelow case assigned for hearing at an early date in autumn. It was our understanding had with your Mr. Brandeis, our Mr. Lauterbach and Mr. Hemenway that
1174 these cases should proceed together, and in view of your taking the Lewi-sohn case to the Supreme Court we feel that it is only proper that the Bigelow case should stand until the Supreme Court has passed upon the question. We did not interfere with your course in taking of testimony in these cases, permitting you to have all the time you desired for your convenience, and you occupied

something over two years in making your case. Under all the circumstances it seems to us that you are unduly pressing the Bigelow case to a hearing in Massachusetts. We think that the Bigelow case should not be set down for hearing in the Fall.

Very truly yours,

——— ———.

JUNE 3D, 1907.

Mr. Louis D. Brandeis, 161 Devonshire Street, Boston, Mass.

DEAR MR. BRANDEIS: In accordance with your request over the telephone, I write to tell you that we understand that you will put over the motion in the Old Dominion Case from Tuesday June 4th, until Friday June 7th, this being done at our request owing to Mr. Treadwell's desire to attend the funeral of Judge Townsend of the United States Circuit Court.

Yours very truly,

——— ———

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JULY 12, 1907.
P/B.

Re Old Dominion—Lewisohn.

Messrs. Hoadly, Lauterbach & Johnson, 22 William Street, New York City.

DEAR SIRS: Mr. McClennen and I are making arrangements for the time for taking our vacations.

Will you kindly let me know when you and Mr. Hemenway wish to take depositions in the above cause?

Yours very truly,

LOUIS D. BRANDEIS.

1175 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JULY 12, 1907.
P/B.

Re Old Dominion — Bigelow.

Alfred Hemenway, Esq., Tremont Bldg., Boston, Mass.

DEAR MR. HEMENWAY: Mr. McClennen and I are making arrangements for the time for taking our vacations.

Will you kindly let me know when you and Mr. Lauterbach wish to take depositions in the above cause?

Yours very truly,

LOUIS D. BRANDEIS.

ET-L. JULY 16*th*, 1907.

Louis D. Brandeis, Esq., c/o Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

DEAR SIR: We have your letter. We understand that Mr. Hemenway will inquire from you as to what dates yourself and Mr. Mc-

Lennen desire to take your vacations and arrange the dates for taking testimony accordingly. We shall, under the stipulation, avail ourselves of the testimony taken on those dates.

Yours very truly,

——— ———.

1176 Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

JULY 17, 1907.
B/Md.

Re Old Dominion vs. Lewisohn.

Messrs. Hoadley, Lauterbach & Johnson, 22 William Street, New York City.

DEAR SIRS: We are in receipt of yours of the 16th, and also received under the same date a letter from Mr. Alfred Hemenway in which he says:

"L. D. Brandeis, Esq., c/o Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston.

DEAR MR. BRANDEIS: If you will indicate the time during which you and Mr. McClennen propose to be absent on your respective vacations I can doubtless arrange so that the taking of our testimony in the Old Dominion cases will not interfere therewith.

Yours very truly,

ALFRED HEMENWAY."

I have just written him as follows:

Re Old Dominion vs. Bigelow.

"DEAR MR. HEMENWAY: I have yours of the 16th.

We shall be glad to attend at the taking of testimony in the Old Dominion cases at any time before August 10th, upon receipt of reasonable notice, and if the taking of your testimony has not been completed before then, we shall be glad to resume the taking of testimony after September 3d.

Will you kindly let us know as soon as possible on what days you would like to proceed?"

Yours very truly,

LOUIS D. BRANDEIS.

1177 Brandeis, Dunbar & Nutter, 161 Devonshire Street.

BOSTON, MASS., *Sept.* 4, 1907.
H/McC.

Old Dominion v. Bigelow.

Hoadley, Lauterbach & Johnson, 22 William St., New York City.

GENTLEMEN: Mr. Brandeis and Mr. McClennen have returned from their vacations, and are ready to arrange for an appointment

with you for the taking of testimony, if you intend taking any. It would be particularly convenient for us if such an appointment could be made for an early day and at an early day, as we shall wish to make appointments in other matters so as not to conflict.

Yours very truly,

BRANDEIS, DUNBAR & NUTTER.

Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass.

OCT. 31, 1907.
G/B.

Old Dominion — Bigelow.

Eugene Treadwell, Esq., care Alfred Hemenway, Esq., 335 Tremont Building, Boston.

DEAR MR. TREADWELL: At your request, I have taken from my volume of depositions the copies of the following:

Testimony of Walter Lewisohn,
" " Ferdinand L. Rahaeuser,
Adolph Lewisohn,
Frederick Lewisohn,
Albert Lewisohn,
Jesse Lewisohn,
E. C. Westervelt,

being contained in three volumes, and paged 835 to 1007 both inclusive.

I understand that you will return these to me tomorrow, Friday.

Yours very truly,

LOUIS D. BRANDEIS.

(3 volumes of testimony herewith.)

1178 *Oral Testimony.*

MR. HEMENWAY: I will call Mr. Farley.

JOHN WELLS FARLEY, sworn.

(By Mr. HEMENWAY:)

Q. What is your full name?
A. John Wells Farley.
Q. Your place of business?
A. Tremont building, Boston, Mass.
Q. Associated with Alfred Hemenway?
A. Yes.
Q. Counsel in this case; and you were also one of the counsel of record in this case?
A. Yes.
Q. And have taken part in the preparation and trial of the cases since what time?
A. Since the last of November, 1903.

Q. Now, Mr. Farley, you know Mr. Edward Lauterbach?
A. Yes.
Q. And Mr. Eugene Treadwell?
A. Yes.
Q. Will you state what participation you, as associate with me and with counsel in the case, have had in the New York cases, if any?

Mr. McCLENNEN: That I object to.

HAMMOND, J.: What do you desire to show, Mr. Hemenway?

Mr. HEMENWAY: What I desire to show is that these cases began with correspondence between Mr. Brandeis and Mr. Bigelow, and also between Mr. Brandeis and the executors of Mr. Lewisohn; that in the first instance—this will appear by the correspondence—Mr. Lauterbach was counsel and acted for both parties,—that is, Mr. Bigelow and the executors of Mr. Lewisohn. The evidence already in shows the participation of Mr. Hyams, who was in the employ of Mr. Bigelow, in reference to the testimony and the taking of evidence in these causes; that the evidence for the four cases was taken in Boston, in New York, and in St. Johnsbury, Vt.; that there are various stipulations that appear already in the evidence as to the use of this testimony in all of the cases. Supplementing that testimony by the evidence of Mr. Farley, I propose to show that he has been, in conjunction with myself, in constant communication with Mr. Lauterbach and Mr. Treadwell; that the demurrer that is reported in the 188th Mass., on the argument of it, Mr. Farley was in court, and that the brief upon which that was argued here in Massachusetts was prepared jointly by Mr. Farley, Mr. Treadwell, and myself; that both Mr. Lauterbach and Mr. Treadwell came to Boston several times in conference about these cases, and that in regard to the case in New York, that was argued on demurrer, the preparation of the brief that was used by Mr. Treadwell in his argument was the joint work of Mr. Treadwell, Mr. Farley, and myself; and that
1179 subsequently, when briefs were prepared for the Court of Appeals and the United States Supreme Court, those briefs were the joint work of the same counsel; and that no step has been taken, either in the Boston cases or in the New York cases, except upon joint consultation or knowledge and approval, and that whenever testimony has been taken in the cause it has been taken with the presence of New York counsel when taken in Boston, and of Boston counsel when taken in New York, and also when taken in Vermont; and that from the beginning to this time there has been joint service in defence of the New York suits. That is what I propose to offer as supplementing the evidence already in the case, and that will be put in through the correspondence which I have submitted to counsel.

Mr. McCLENNEN: It seems to me, your Honor, that if all that is offered were established it would be of no importance whatever in the case. If I followed Mr. Hemenway, he and Mr. Farley were counsel for Mr. Bigelow; Mr. Lauterbach and Mr. Treadwell were counsel for the Lewisohns. Their respective clients had two cases pending, an unfavorable decision in either of which would be an extremely undesirable precedent in its effect upon the other. They

consulted with each other in order to find out how best to prevent their becoming an unfavorable precedent for the other, just as if the client of one of them had been named Hayward or Leeson instead of being named Bigelow or Lewisohn, just as they would have done if the precise facts on which the liability arose had been different in each case, but had involved the same principles of law.

HAMMOND, J.: Do you think this evidence has any material bearing, Mr. Hemenway? Do you think that counsel have proceeded in such a way as to make it your duty to put it in?

Mr. HEMENWAY: Well, I do conceive it to be my duty, for this reason; that in one deposition that has been put in the case there is an opinion expressed from which the inference might be found that, but for participation in the defence, it would not be pleadable in bar. I do not think, if I were asked my personal opinion, that it makes any difference whether there was participation or not; I think it turns upon the right of participation, and not the question of actual participation. But to me, on the opinion of a man in high position, I think I ought to offer it, it being, I think, an undisputed fact. Of course, like many facts, it is capable of having the inference drawn from it that we were merely making a precedent, or, in the other case, that our motive was to avoid liability. But that is for the court to determine, not for counsel.

Mr. MCCLENNEN: I should not want to leave uncontradicted the statement that it was an undisputed fact. I do not suppose there would ultimately be any great difference between us as to just what occurred, but I think there may be some difference of opinion
1180 as to whether it constituted a participation in the defence or not.

Mr. HEMENWAY: That is what I meant to say, the inference from the undisputed facts; as to the facts that I have stated, I do not think those would be disputed.

HAMMOND, J.: If I were to [follow my own impression] I should exclude the evidence, because as I have stated to counsel, I believe it to be immaterial. But if counsel think that there is something in this evidence that will help them and be material, I am inclined to let it in subject to the objections that are made by the other side, as I have done in the case of the depositions. I do not intend by this to give anybody rights that he has not or to deprive anybody of any rights that he has. Counsel for the complainant may take such objections to the evidence as they see fit, and those objections will stand against the evidence wherever the case comes up. But under the circumstances, while I think there is a limit beyond which I ought not to go, and while I think this evidence is pretty near the limit, still, on the whole, the evidence may go in and you may have objection to it on the general ground that it is not material, and if there is any particultr question that you think there is any other objection to, you may have that; but upon the general ground you object to this evidence as to participation as immaterial, and it goes in subject to your objection and exception; and that will be so whether you make any other objection while it is being put in or not. If there is anything else except that general objection that is in your mind, you may state it.

Mr. McClennen: Then as to this particular question, I object to it on the ground that it calls upon the witness to draw an inference or conclusion not merely relative to the facts, but also relative to the joint understanding of counsel.

[Question read.]

Hammond, J.: In answering that question you may state what acts you know of which seemed to you to indicate participation. State them.

The Witness: I should like to limit my answer to stating what I have done, in association with Mr. Hemenway, with New York counsel, omitting any interpretation, but merely stating the facts as I recollect them. The first knowledge that I had of this case was, as I have stated, in the fall of 1903. At that time the Massachusetts cases, nominally against Bigelow, were pending, one in the Supreme Court for the county of Suffolk, and the other on a reservation before the full court; and I was asked to assist in the preparation of the brief for the case so reserved. At the same time there was pending before the Circuit Court for the Southern District of New
1181 York a parallel case on a similar demurrer. Practically contemporaneously with the beginning of my preparation I was told—and I state that only to explain my acts—that Hoadly, Lauterbach & Johnson, or their representative, Mr. Treadwell, were also interested in all these cases, which were, as I just said, and are now identical. So I began to communicate with Mr. Treadwell more particularly at that time. I think my first communication with him was at the time of a visit of his here; but at any rate, he made to me numerous suggestions in relation to the brief that Mr. Hemenway was preparing with my assistance. When I say "to me" I mean to me and Mr. Hemenway practically throughout. At the same time I made various suggestions to him as to the brief which he was preparing in the so-called New York case; and our preparation went along practically hand in hand, both conferring with the other, sometimes by letter, sometimes by conference, occasionally by telephone communication between the two cities. As I recollect it, the Massachusetts case was argued first, and subsequent to that, in view of matters which arose in that argument, we made further suggestions to him in relation to the brief in the New York case. After that was decided, briefs so prepared being filed, as I recollect it, after the decision, first of the case in the Circuit Court, and then in the case in Massachusetts, there was a lapse of the taking of the evidence. At any rate, if there was not, I was occupied on something else, so that for a period of, I should say, about a year, as far as I was personally concerned, there was a cessation, though, I think, during that time there was evidence being taken, and I do recollect that at least once, I think more often, Mr. Treadwell came on here and at that time Mr. Hemenway and I conferred with him. And thereafter, until the hearing about a year ago,—a year ago next November,—all action was taken after conference or communication and agreement; so that the defence, either as to the preparation of evidence, the possible cross-examination of witnesses, or the preparation of the law to be expressed in the briefs or otherwise was done under what I will

call, for a short term, jointly; the evidence here was, as I understand, and in fact I know, as I have seen the stipulation, taken under a stipulation whereby it might be used in all four cases; that is, the two in New York and the two here. At such takings, almost every time,—I am inclined to think at every time,—either Mr. Treadwell or Mr. Lauterbach was present. I do not think I was present at the taking of any testimony when Mr. Lauterbach was there, and I state all that I then did as a matter only from seeing the record; but I was present on a number of occasions when Mr. Treadwell, representing Messrs. Hoadly, Lauterbach and Johnson, and, as I understand it, both defendants, was present. While, as far as the Massachusetts cases were concerned, there was only the taking of testimony continuing, there were
1182 arguments and appeals in the New York cases, the New York case being first appealed.

I think I have omitted a step. As I understand it, I think the plaintiff first amended, and we went over this amendment very carefully with Mr. Treadwell to see exactly what we would deduce that they had in their minds; and we made very careful comparisons of the two amendments which they made to them, although I think there was only one which purported to be substantial. Then we conferred with Mr. Treadwell in relation to the argument, so far as there was to be one, before the Circuit Court after amendment; and on the demurrer being sustained, then a more elaborate argument which took place before the Circuit Court of Appeals, and assisted him in the preparation of that brief, at the same time being in communication with him as to the dates when the depositions should be taken; so that we both, as to the evidence and as to the preparation of the law, continued to co-operate and act in conjunction with New York counsel. Then, the demurrer in the New York case being again sustained by the Circuit Court of Appeals, the plaintiff first, I think, sought a stay of execution; and, as I recollect the New York record — I am unable to state whether that was suggested by us or whether Mr. Lauterbach or Mr. Treadwell representing us did it,—but they opposed that stay of execution unless the plaintiff should stipulate, if the petition were refused, they should dismiss the case in Massachusetts. We again conferred as to the writ of certiorari, and, after that was granted, as to the brief before the United States Supreme Court on the final argument. Of course, all through this we were supplied by the New York counsel, perhaps in some instances directly, with the plaintiff's briefs, arguments, and memoranda so far as they could, and we, on the other hand furnished Mr. Treadwell and Mr. Lauterbach with everything that we had. As I have said, Mr. Treadwell was here constantly, and on at least three occasions when I was present Mr. Lauterbach came here and we conferred in Mr. Hemenway's office, consulting as to the whole status of the case, and what, if anything, it was advisable to do in preparation for the defence. Shortly prior to the hearing, which was in November last year, I was preparing some of the evidence in relation to that, and I consulted over the telephone and by conference with New York counsel. Then at the hearing—Oh, I ought to say that, in addition to this, we were kept informed as to the course of correspondence, so far as it

was in any wise different from that with us, from Mr. Brandeis' office to Mr. Treadwell and to Mr. Lauterbach, and both in Mr. Brandeis' correspondence with us and in his correspondence with them the cases were treated jointly and indiscriminately. At the time of the hearing here Mr. Treadwell came on, I think,
1183 three or four days ahead, and we conferred at great length as to the general course, and I and Mr. Hemenway—or Mr. Hemenway and I—discussed the whole matter with him, and he was of counsel with us throughout that hearing, and signed, or I signed in his behalf, as I did for Mr. Hemenway, the pleadings at that time. When the decrees came down after the final hearing, we communicated with him.

(By HAMMOND, J.:)

Q. You mean, of course, after the hearing on the merits before Mr. Justice Sheldon?

A. Yes, your Honor. And I remember he had printed for us and sent to us copies of those findings of alleged facts. It was after that that the argument before the Supreme Court took place, and we continued to co-operate with him in the preparation of that matter. I think I did forget to state that Mr. Hemenway two or three times—and I think I once or twice—went to New York and conferred with Hoadley, Lauterbach & Johnson. I think that is, in substance, all that I now recall, though I may have omitted certain points.

(By Mr. HEMENWAY:)

Q. You have been in my office since 1903, and are still there?

A. Yes.

Mr. MCCLENNEN: In the answer to the preceding question, we object to the statement that Mr. Farley was informed that Hoadly, Lauterbach & Johnson, or Mr. Treadwell, were interested in all these cases, on the ground that it is immaterial.

Mr. HEMENWAY: That may be stricken out.

HAMMOND, J.: You may strike that out.

The WITNESS: I should like to state by whom I was informed.

Mr. MCCLENNEN: I understand the information is stricken out.

HAMMOND, J.: I don't think it is of any consequence.

Q. By whom were you informed?

Mr. MCCLENNEN: I object to that on the ground that there is no such evidence on the record.

HAMMOND, J.: If the information is not of any consequence, it is of still less importance who told him. He only made that statement to explain why it was that, having certain informtaion, he did a certain thing.

The WITNESS: I don't know whether I am required to answer, but I think my answer would perhaps clarify the situation.

HAMMOND, J. (to Mr. McClennen:) Go on.

Mr. MCCLENNEN: I also object to the answer of the witness where he states that the preparation for cross-examination and argument was, if he might so term it, joint, done jointly, on the ground that

that is an inference rather than a statement of fact. I object to that portion of the witness' answer in which he states that
1184 the testimony was taken under a stipulation for use in all the cases, on the ground that that is a statement of what is contained in a written instrument, the production of which will show that there were four stipulations, and that each one was always confined to a particular case; that is, that the stipulation in the Lewisohn case was not participated in by the counsel for Bigelow, and the stipulation in the Bigelow case was not participated in by counsel for Lewisohn; but each stipulation provided that the testimony taken in the other case might be used in that case.

Mr. HEMENWAY: Those stipulations are in the case, as I understand.

Mr. MCCLENNEN: Some of them are, and I dare say all of them are.

Mr. HEMENWAY: They will speak for themselves.

HAMMOND, J.: I suppose if the stipulations are in the case, they will control.

Mr. MCCLENNEN: But the witness' answer does not indicate necessarily that those in the record are the only ones, although he undoubtedly intended to say that.

I also object to that portion of the answer in which he states that they acted, or continued to act, to co-operate in conjunction with New York counsel, on the ground that that is a statement of conclusion, not of a fact.

I object to that portion of his answer in which he says that he forgets whether they opposed, or whether Mr. Lauterbach and Mr. Treadwell, "as representing us," opposed a stay of execution, particularly to that portion of the answer "as representing us," that being a conclusion, not a statement of fact, and not purporting to be something of which the witness himself would have personal knowledge.

I object to that portion of his answer in which the witness states that the cases were treated jointly and indiscriminately in the correspondence and the conferences, on the ground in part that it purports to be——

The WITNESS: I did not so state.

HAMMOND, J.: I think that was your expression; I thought it was rather strong.

The WITNESS: May it please your Honor, that refers to Mr. Brandeis' correspondence.

Mr. MCCLENNEN: I am not sure what the difference between us is.

The WITNESS: The application of my alleged language.

Mr. MCCLENNEN: Well, whatever the context may be, I object to that portion of his answer in which the witness stated that the cases were treated jointly and indiscriminately in certain particulars which appear in the answer of the witness, the objection being in part that that is a statement of conclusion and not a statement of fact, and in part that it is a statement of written communications.

I object also to the statement of the witness that they con-
1185 tinued to co-operate in the preparation of the argument or for the argument before the Supreme Court, again on the ground that that is a statement of conclusion, not a statement of fact.

The WITNESS: I think some of my statements have been misunderstood, so that, in justice to my evidence, I should have an opportunity to explain, and, as far as possible, eliminate the words that I only used descriptively.

Q. To what words do you refer?

A. I refer to the words "jointly," "in conjunction," "jointly and indiscriminately," and there are further facts in relation to the stipulations on which I based what Mr. McClennen now alleges to be a conclusion; but particularly I intended to use the words "jointly," "in conjunction," "jointly and indiscriminately," and "in co-operation" as a short designation of certain facts. If those be conclusions I should like the opportunity of omitting those words and of stating more clearly the facts.

Q. Well, state more clearly the facts.

A. As to the use of the word "jointly" in the preparation between Mr. Treadwell, Mr. Hemenway, and myself, I mean simply that I co-operated with—I mean simply that I talked and conferred and wrote and telephoned to Mr. Treadwell and to Mr. Lauterbach in the same manner as, for instance, I would have done had Mr. Hemenway been in New York.

HAMMOND, J.: You are getting more indefinite still.

The WITNESS: All my conference with him was as fully relating to all the cases as had Mr. Treadwell been counsel.

(By HAMMOND, J.:)

Q. Well, that does not give us any idea. What did you do?

A. I talked over the briefs, corresponded about the briefs, discussed cases, discussed the allegations of the plaintiff, discussed the draft of the pleadings both for the plaintiff and for the defendant; discussed what we conjectured would be the arguments and the inferences and the efforts of the plaintiff, what facts could be eliminated as irrelevant and what facts would be helpful to us when put in evidence. In regard to the stipulations, I used my description as applying to all the four cases, because, as I remember, the four stipulations, if they were separate, were sent under the same cover, and they were treated as a whole by us and by Mr. Lauterbach's office.

Q. What do you mean by "were treated as a whole"?

A. Well, they were all identical, or, if not, practically identical.

HAMMOND, J.: Aren't they in?

Mr. HEMENWAY: I think they are in, yes.

The WITNESS: Those in relation to the Massachusetts cases here are in. There are others relating to the New York cases, one set of which is, I understand, annexed to the Baltimore answers.

1186 Q. Do you agree with Mr. McClennen that each stipulation had reference to one particular case and no reference to others?

A. I agree the stipulations were so drawn in form, but the discussion between counsel was on the assumption, by us, at least, that they all stood or fell together.

HAMMOND, J.: Well, I do not think that is admissible.

The WITNESS: In relation to the words "jointly and indiscriminately" used as applied to Mr. Brandeis' correspondence: by that I mean, in the first place, that Mr. Brandeis, or Mr. McClennen, or his office, kept us informed in many instances of what he was writing about to Mr. Lauterbach, or to Mr. Treadwell, and that a great many of his letters to us, for instance, would be headed "re Lewisohn" or "re Bigelow and Lewisohn," and that many of his letters to Mr. Lauterbach would be headed "re Bigelow" or "re Bigelow-Lewisohn," and that in the letters, as in the headings, the discussion or reference would be to all, as I understood it, of the cases.

HAMMOND, J.: Are those the letters that you are putting in?

Mr. HEMENWAY: Those are the letters that we submit.

HAMMOND, J.: Then I think a description of the letters is immaterial.

Mr. HEMENWAY: That is all.

Mr. MCCLENNEN: In the last answer we object to the statement that the stipulations were treated as a whole.

HAMMOND, J.: I will exclude that. That is clearly outside the line.

Cross-examination.

(By Mr. MCCLENNEN:)

Q. In the cases, Mr. Farley, to which you referred in which the leters were headed "re Bigelow," or "re Bigelow-Lewisohn," or both, you had before you letters referring to the taking of testimony which, under the stipulations, would be admissible in either case?

A. I don't know that I can generalize.

Q. Well, you appeared to be looking at a specific letter at the time you spoke just then.

A. I do not think I was; I may have so appeared, but it was not in fact true. I was running over the whole lot.

Q. Well, then, perhaps, to put it in a negative form, do you remember any letters in which that heading occurs in which the subject under consideration did not purport to be the taking of testimony which, under all the stipulations, was admissible in either case as far as relevant?

A. I understood you to correct me on what those stipulations were in fact. Outside of that, I should have to look over the letters to see whether that is so.

Q. All I ask you is whether you recall any notice in which that is not the fact?

1187 A. I have no recollection one way or the other, because I did not look at them with that in view. I have no doubt I

can prepare myself to answer that question if you wish me to. Do you want me to look all these over [inspecting the letters referred to]?

Q. Had you nearly completed it?

A. I had completed about one third.

Q. If you will, glance along and find any one where that is not a proper characterization?

A. Here is one, for instance, which seems to me to perhaps be a basis for an answer to your question.

Q. What is the date of that letter?

A. April 30.

Q. Of what year?

A. 1907.

Q. Between whom?

A. Mr. Hemenway and Mr. Brandeis. That is, it referred to the general conduct of the defence and not simply to the depositions. Here is a letter which seems to refer to a hearing rather than to the depositions.

Q. Between what parties, and on what date is that one?

A. The same parties, May 20, 1907. There are many of them headed—to Mr. Hemenway—"Old Dominion Bigelow," which also relate to depositions; also to Mr. Bigelow headed "Lewisohn" without Mr. Bigelow's name, which refer to depositions.

(By HAMMOND, J.:)

Q. You used the language "it might be," that in the letters generally in each case between counsel they were headed, sometimes both names, Bigelow and Lewisohn. Now counsel wants to know whether you want that answer to stand with reference to the correspondence generally, or whether you want to confine it to letters about taking depositions.

A. I don't feel I should answer without going through again this entire file, your Honor. As I looked it over, I did not note any such distinction, if there be such.

Mr. HEMENWAY: Inasmuch as this correspondence is to be submitted to counsel, is it hardly worth while to take the time?

HAMMOND, J.: I don't think so. My own opinion of it is that we have got pretty near the end of that which is of any consequence.

The WITNESS: As a matter of fact, all of this correspondence during these dates was practically about depositions. In fact, I don't know that there was any other.

(By Mr. MCCLENNEN:)

Q. I think perhaps the record will be less imperfect in shape if I ask you this: In characterizing the correspondence as being headed in one way or another, you have reference only to those letters which you have offered in evidence at this time?

A. Yes.

Q. So that an inspection of the letters in that regard would show to just what you refer?

A. Yes.

1188 HAMMOND, J.: I think that is a satisfactory way to leave it

Q. [Presenting a pamphlet.] Will you glance at what I hav heretofore always supposed was Mr. Treadwell's brief in the Su preme Court of the United States, and can you point out any part of it which were your creation?

A. Why, no more than I could point out in our brief here no which was mine and which Mr. Hemenway's.

Q. Not by comparison; I shall not charge it against you if yo cannot point it out; I merely ask if you can?

A. Well, I think that the sixth point, as to multifariousness, practically the same as ours. The fifth point, "Rescission in part not permissible:" I remember of talking that over with him, and think talking over the case of Ready v. Pinkham, 181 Mass., esp cially, that partial rescission is not tolerated. I think Mr. Heme way called my attention to Merrill v. Beckwith, to Perley v. Bale and to Morse v. Brackett. I recollect of speaking about those to M Treadwell. The fourth point—I am looking at this brief bac wards—the fourth point, "Albert S. Bigelow is an indispensab party,"—when I say this I mean I think I contributed more to th than to the other parts. I remember about the indispensabili of the several parties one way and the other here, and I went in that, I think, very exhaustively with Mr. Treadwell, and he us that to a considerable extent. I think this third point, where refers to "Rescission, where possible, the sole relief."—I think th is almost entirely his. We discussed that, but I note here one po tion of it which we discussed, and I think this is substantially in cordance with that discussion; that is, the discussion of Parker Nickerson in the coal case and the reading of that. There are po tions here I can hardly—I would prefer not specifically to—des nate, because it might give counsel for the plaintiff a prevision of o brief in the pending case, and I do not think that is, perha proper.

Mr. MCCLENNEN: The accumulations of record have become great we shall probably not reach that far in it.

The WITNESS: It is a question of ability rather than of will suppose. I think this discussion here about Dickerman v. North Trust Co. was more or less the result of what we talked over. I not see it here. There is some discussion here of the Yeiser ca which you alleged in your petition was contrary to the other doctr that we had; I don't know that that appears. We discussed the p here referring to Blum v. Whitney very thoroughly; also Hutch son v. Simpson. A portion of the brief, on page 57, I remem we had a heated discussion over. I remember this grouping—p haps more accurately, subdivision—of the cases as appearing in second point. We discussed that at great length, and I think has made in this case three subdivisions; I think I originally m two.

1189 HAMMOND, J.: Do you care to pursue this any further Mr. MCCLENNEN: Just a little bit further, if I may, y Honor.

The WITNESS: My recollection is—of course it is confused by the fact that we did discuss the thing so much—my recollection is on that you will find that the original division—I may be wrong about this—was into two general classes of cases in which we contend and believe that all cases contrary, so called, to the rule we contend for could be divided, and I think that was a discussion which was put into the third division here. Then this "Other cases cited by petitioner,"—here is this Yeiser case,—that contains a discussion of Hayward v. Leeson and the Old Dominion case. I think the part here relating to Hayward v. Leeson—Mr. Hemenway was counsel in that case, and I think that a good deal of it is what I remember of hearing him speak of. I do not wish to be understood that we wrote this, you understand, but we revised and co-operated.

Q. Were there any respects in which there were minor differences of opinion between you and Mr. Treadwell as to the form or substance of the brief?

A. I do not really know what that question calls for; I am not quite clear what you mean.

Q. Were there any paragraphs or sentences in it, or subdivisions in it, or arrangements in it, which you would have prepared some other way rather than as he puts it?

A. Well, I think in all our briefs there has been a substantial difference in arrangement. I do not feel that I can answer that question without going into the present arrangement of our present view, which would be really pointing out the differentiation.

Q. I did not intend to ask you to indicate the parts in which that occurred; but there were occurrences, then, if I understand you, where you and he differed as to just what was best?

A. Oh, yes, in the arrangement; there is some difference in the arrangement, I think; and I am sure I hope everything in that brief is in ours, and, I trust, some more. I know I have been over this very carefully to see if everything we believed to be material in this is in ours, and it is my fault if it is not.

Q. In those instances in your brief you adopted your own view after giving due consideration to his?

A. Well, of course, Mr. McClennen, in the arrangement, yes; I know there are three or four points where, after considerable discussion, we did change in accordance with his view; in one instance, I think, because he—as to the possible effect on them.

Q. And he did the same way; he took his own arrangement after giving due weight to your suggestions?

A. Why, I suppose so, yes. There are one or two instances there,
I think, where he finally yielded. It was rather as counsel
1190 with equal standing that we conferred with him in the case,
rather than one having the right to overrule the other. If either party had that authority, he never exercised it.

Q. I understood you to refer to the fourth main point in the brief as one that you had to do with to some extent?

A. I think my words were that as to that we had discussed it quite vigorously, were they not?

Q. Well, I cannot carry the precise phraseology of the answer.

A. Let me see.

Q. Now on that, do I understand you that you, while counsel for Mr. Bigelow, were seeking to have Mr. Treadwell, counsel of record for Mr. Lewisohn, contend that suit could not be maintained in New York, or in the Circuit Court in New York, because Mr. Bigelow was not before the court?

A. No.

Q. Were you approving of his course in urging that Mr. Bigelow was an indispensable party, and that, as he did not appear of record the bill could not prevail?

A. Your question contains an erroneous assumption of fact, Mr. McClennen, and I cannot answer it. You will notice that the point is "Albert S. Bigelow is an indispensable party in whose absence a bill for rescission cannot be maintained." So far as your question relates to rescission, I should answer it yes; as it is framed, I should say no.

Q. That is, one of the contentions which you maintained in the New York suit, was that, in certain respects, at least, a bill could not prevail against Lewisohn, because Mr. Bigelow was not before the court?

A. As to rescission, it was my view of the law then, and is now.

(By HAMMOND, J.:)

Q. That includes your work in so far as——

A. In so far as it entailed any preparation of the law on that point, yes.

(By Mr. MCCLENNEN:)

Q. You did not, at the time you were engaged at that labor, consider Mr. Bigelow a party to the suit in New York?

A. Well, I will have to ask you to define the sense in which you use the word "party" before I can answer that.

Q. I will give you the utmost scope.

A. If you mean party of record, I did not then and do not now; if you mean party in the sense that he was, in my opinion, privy, I do and did.

Q. You observe you have now incorporated in your answer the word "privy" which was not in my question. In what sense did you consider him a party,—not a privy, but a party?

A. Well, I think we can fence on the definition of the word "party."

Q. I have no doubt we can, but I don't want you to; I want you to take the most liberal definition you can put upon the word
1191 "party," regardless of the definition I put upon it, and state how you considered Mr. Bigelow a party, not a privy; I am not talking about privy.

A. I am asking you, in asking your question, to define whether you wish me to exclude anything except a party of record, first.

Q. No, if you know of a party applicable to these facts who is not a party of record and who is not a privy, I wish you would state whether Mr. Bigelow was that and what kind of a party you mean.

A. Well, I will try, but it is going to lead me into a discussion of the law. Of course he is not a party of record; that speaks for itself.

(By HAMMOND, J.:)

Q. Well, in what sense is he a party, Mr. McClennen wants to know, as distinguished from a privy?

A. Why, in so far, your Honor, as he is alleged by the plaintiff to be a necessary party, so that they must excuse his being joined, in so far as I considered that he at any time would have had the right to intervene, is he a necessary party; in so far as, if the decision had been adverse to him and the Lewisohns had neglected to have appealed, it is my opinion he could have entered an appeal; in so far as he, through his counsel, introduced anything which he believed important to the defence of the action; in so far as he, through counsel, co-operated in the defence of the action. If those things that he did do not constitute what comes within the definition of the word "party," he was not a party; if they do, he was. I can only state the facts.

(By Mr. MCCLENNEN:)

Q. At the time that the Supreme Court of Massachusetts had decided that this bill was not demurrable and the federal courts had twice decided that it was demurrable, did you then believe that Mr. Bigelow had a right, against the opposition of the other parties in the Lewisohn suit, to go in and insist upon becoming a party defendant?

A. I am not sure under those circumstances, Mr. McClennen; I should question it after the litigation had gone to that extent.

HAMMOND, J.: There, again, I do not think you were paying attention to the question, which calls for your belief at that time.

The WITNESS: I say I hardly think that is so.

HAMMOND, J.: What you believed then, is the question, not what you believe now.

The WITNESS: Well, I hadn't any definite belief then and haven't now; it would be a question of uncertainty then and now. I should want the authorities to examine and consider them at some length. I will say, then, that I believed then, and do now, that if, unless he intervened, his rights would be prejudiced, he could intervene.

Q. That is, you place his right to intervene as a party upon the existence of a right which might be prejudiced by an adverse decision?

A. As far as I have considered it. This is rather a snap judgment.

1192 Q. So if, apart from intervention, his rights would not be prejudiced by an adverse judgment, you didn't ever discuss or believe that he had a right to intervene?

A. I have stated I believe that was a different thing. Whether or not, in view of other facts if I had considered them more fully, I should have changed, I do not know.

Deposition of Alton B. Parker.

Mr. HEMENWAY: We had hoped to have here the deposition of ex-Judge Parker. But it has not come as yet.

HAMMOND, J.: In answer to the same questions?

Mr. HEMENWAY: Yes.

HAMMOND, J.: Well, when you get that, you can pass it over to the other side.

Mr. McCLENNEN: Do you know whether it has been taken or not?

Mr. HEMENWAY: I don't know.

HAMMOND, J.: Anything further, Mr. Hemenway?

Mr. HEMENWAY: Of course we reserve the right to put in the deposition of Mr. Millburn. We have examined it and turned it over to them.

HAMMOND, J.: Well, you will do that to-morrow, I suppose?

Mr. HEMENWAY: Yes.

HAMMOND, J.: Anything in reply?

Mr. McCLENNEN: There is some testimony, your Honor. Before introducing our testimony, part of which is with reference to the law of New York, if Mr. Parker's deposition is to be put in out of order, we should like to have the assurance of counsel that the testimony now put in by us will not be communicated to Mr. Parker.

Mr. HEMENWAY: Certainly we will give you that assurance.

Mr. McCLENNEN: Or the fact of what we have put in?

Mr. HEMENWAY: Or the fact of what you have put in. We shall not communicate with Mr. Parker at all with reference to the matter.

The deposition of Alton B. Parker, taken on behalf of the defendant, Bigelow, was subsequently received, filed by counsel for the defendant and admitted subject to the objections and exceptions of counsel for the complainant, the Old Dominion Copper Mining & Smelting Company, to be found at pages 945-950.

[Commission and notarial certificate omitted.]

1193 Q. 1. State your name, age, and place of residence.

A. My name is Alton B. Parker. I reside at 574 Madison avenue, New York city, and my age is fifty-six years.

Q. 2. State your occupation and place of business.

A. I am a practising lawyer, with an office at No. 3 South William street, New York city.

Q. 3. If, in answer to the preceding interrogatory, you have testified that you are an attorney at law, state when you were admitted to the bar, and in what state or states, and how long you have been engaged in the practice of law in said state or states, and with what firms, if any, you have been or are connected.

A. I was admitted to the bar in May, 1873, in the city of Albany, state of New York, and have been engaged in the practice of law ever since that time, except such portions of it as I spent as a member of the bench. I was a member of a firm before going upon the

bench. The name of the firm was Parker & Kenyon, and was then engaged in practising law at Kingston, N. Y. I left the bench in August, 1904, and for a short time I practised law in the city of New York alone, and three years ago I became a member of the firm of Parker, Hatch & Sheehan, and am still a member of that firm.

Q. 4. State what, if any, judicial or other public or official positions you hold or have held.

A. In addition to the practice of my profession I was surrogate of the county of Ulster from the 1st day of January, 1878, until November, 1885. In November, 1885, I became a justice of the Supreme Court of the state of New York, and while holding that office I served for a short time as a member of the general term, third department, for nearly four years, and during the life of the second division of the Court of Appeals I was a member of that court by designation of the governor. Upon its dissolution I was made a member of the general term of the Supreme Court of the state of New York, which position I held for nearly three years. Subsequently, Governor Black designated me a member of the appellate division of the first department, located in the city of New York, which position I held until my election as chief judge of the Court of Appeals of the state of New York, which took place in November, 1897, in which position I continued until my resignation on the 5th day of August, 1904.

Q. 5. State any other matters relating to your experience in your profession, and as to your familiarity with the law and usages governing the practice in the state and federal courts in New York, both in law and in equity, and also as to your familiarity with the laws and usages of the state of New York relating to former adjudication and estoppel by judgment.

A. Yes. Nothing need be added as an answer to this question beyond my answer to the two preceding questions.

1194 Q. 6. Assuming that an action in equity is brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters to recover from him the profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, at a price in excess of the price which they paid for it and of its fair value, and assuming that in this action a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to a similar action, substantially identical with the first and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 945-950.]

A. In my opinion the decree would be a bar to the second action, if it were pleaded in defence.

Q. 7. Assuming that two actions in equity are brought in the federal court for the southern district of New York by a corporation against one of two persons alleged to have been jointly its promoters to recover from him profits alleged to have been received by him and his associate secretly and fraudulently upon a sale, pursuant to a joint plan and conspiracy by them, of certain property to the corporation at the time of its organization, and assuming that such property is alleged to have been sold, pursuant to said joint plan and conspiracy, in two separate parcels, in each of which both promoters were jointly interested, and that said two actions were brought to recover the respective profits received from the sale of the two parcels, respectively, and assuming that the bills of complaint in the two actions were substantially identical, except as to the particular relief sought, and assuming that certain profits were alleged to have been made by said promoters on each parcel, and assuming that in one of said actions a final decree upon the merits is entered for the defendant upon demurrer, on the ground that the bill of complaint sets forth no cause of action, and that this decree, after appeal to the Circuit Court of Appeals and writ of certiorari to the Supreme Court of the United States, is affirmed and a final decree entered in favor of the defendant upon the mandate of the Supreme Court of the United States, what would be the effect of this decree if pleaded in defence to two similar actions, substantially
1195 identical in form with those above described and based upon the same cause of action, brought against the other promoter in the courts of the state of New York?

[Objected to; admitted; exception.—See pages 946-950.]

A. The decree would be a bar.

Q. 8. Have you examined a copy of the record in the action of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn in the Circuit Court of the United States for the Southern District of New York, such as is hereto annexed and marked (1), the respective portions of said record being marked A to R, inclusive?

[Objected to; admitted; exception.—See pages 946-950.]

A. I have.

Q. 9. Have you examined copies of the proceedings in the above-entitled causes, to wit, the two causes of the Old Dominion Copper Mining & Smelting Co. v. Bigelow in the Supreme Judicial Court in Massachusetts, such as are hereto annexed and marked, respectively, (2) and (3)?

A. Yes.

Q. 10. Assuming that there were now pending in the courts of the state of New York proceedings against Albert S. Bigelow, identical in all respects (except as the practice might require formal changes) with the copies of the proceedings referred to in the 9th interroga-

tory, and assuming that said courts had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record, copies of which are referred to in the 8th interrogatory, were sufficiently pleaded and proven in defence of said proceedings, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in each of these bills of complaint were, respectively, the same persons, and that the contracts, acts, matters, and transactions mentioned in each of these bills of complaint were, respectively, the same contracts, acts, matters, and transactions, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, what would be the effect, under the law and usages of the state of New York, of said decree and record as a defence to said proceedings assumed to be so pending?

[Objected to; admitted; exception.—See pages 946-950.]

A. The doctrine of res adjudicata would apply, and the decree would be a bar to the actions assumed to be pending.

1196 Q. 11. Assuming the facts stated in the 10th Interrogatory, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defense of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would those additional facts affect your answer to the preceding interrogatory?

[Objected to; admitted; exception.—See pages 946-950.]

A. The fact that Bigelow participated in the action brought against Lewisohn would not affect my answer to the 10th direct interrogatory. That fact is immaterial so far as the effect of the decree is concerned.

Q. 12. Assuming the facts stated in the 10th interrogatory, and assuming the facts stated in the 11th interrogatory, and assuming that the participation of the defendant, Bigelow, as stated in the 11th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers to the two preceding interrogatories?

[Objected to; admitted; exception.—See pages 947-950.]

A. It would have no effect on my answer.

Q. 13. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8098, referred to in the 9th interrogatory, and assuming that the course of the proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record

in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8098, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the
1197 Southern District of New York and in said bill of complaint numbered 8098 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, what, under the laws and usages of the state of New York, would be the effect of said decree and record, described in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8098, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948–950.]

A. My answer is that it would constitute a bar to the proceeding assumed to be pending in New York.

Q. 14. Assuming that there were now pending in the courts of the state of New York a proceeding against Albert S. Bigelow, identical in all respects with the proceeding numbered 8099, referred to in the 9th interrogatory, and assuming that the course of proceedings in said courts in said cause had been substantially the same as that shown by the copies of the record annexed to the 9th interrogatory, and assuming that said courts of the state of New York wherein said cause was pending had jurisdiction of the parties and of the subject matter thereof, and assuming that the final decree and record in the case of the Old Dominion Copper Mining & Smelting Co. v. Lewisohn's Executors, copies of which are referred to in the 8th interrogatory, were pleaded in defence of said cause numbered 8099, and assuming that the Circuit Court of the United States for the Southern District of New York had jurisdiction of the parties and of the subject matter in said action against said Lewisohn's executors in said court, and that said decree was based upon the merits of the controversy and was not obtained by fraud, and assuming that said decree was in full force and effect, and assuming that the Leonard Lewisohn and the Albert S. Bigelow mentioned in said bill of complaint in said Circuit Court of the United States for the Southern District of New York and in said bill of complaint numbered 8099 in Massachusetts were, respectively, the same persons, and assuming that the contracts, acts, matters, and transactions mentioned in each of said bills of complaint were the same contracts, acts, matters, and transactions, respectively, and assuming that the bill of complaint in said Circuit Court and the prayers thereof relate to one part of an entire transaction, comprising said contracts, acts, matters, and transactions, and that the bill of

complaint corresponding to the one numbered 8099 in Massachusetts and the prayers thereof relate to another part of the same entire transaction, what, under the laws and usages of the state of New York, would be the effect of said decree and record described
1198 in the 8th interrogatory as a defence in the proceeding corresponding to the cause numbered 8099, described in the 9th interrogatory?

[Objected to; admitted; exception.—See pages 948–950.]

A. I answer the same to this as to the 13th direct interrogatory.

Q. 15. Assuming the facts stated in the 13th and 14th interrogatories, and assuming that the defendant, Bigelow, participated, through his counsel, in the actual defence of said action against Lewisohn's executors in the Circuit Court, and, by a large expenditure of time and money, contributed to and took part in the defence thereof through the entire pendency, including the defence thereof on appeal and on certiorari, how, if at all, would these additional facts affect your answers, or either of them, to the 13th and 14th interrogatories?

[Objected to; admitted; exception.—See pages 948–950.]

A. Such facts would not affect my replies to the 13th and 14th direct interrogatories.

Q. 16. Assuming the facts stated in the 13th, 14th, and 15th interrogatories, and assuming that the participation of the defendant, Bigelow, as stated in the 15th interrogatory, was with the knowledge of the plaintiff, how, if at all, would this additional fact affect your answers, or either of them, to the 13th, 14th, and 15th interrogatories?

A. My answer would remain unchanged.

Q. 17. If you have not already done so, state your reasons for your answers to Ints. 6th to 16th, inclusive.

[Objected to; admitted; exception.—See page 950.]

A. It is the law of New York, as I understand it, that the liability of tort feasors both of whose acts contribute to an injury, is joint and several. The plaintiff may, therefore, make one or all of them defendants.

The decree in the United States courts having been adverse to the complainant in the suit against Lewisohn, the issues are res adjudicata as to him; and the allegations of the bill upon which the decree was rendered having identified in interest Bigelow and Lewisohn, and asserted a mutual relationship in the fraud set out, Bigelow, in my opinion, by the bill is classed as a privy with Lewisohn. Therefore, although Bigelow was not a party to the suit in the United States courts, the issues became res adjudicata as to him. That decree offered as a defence in this state to a similar action, upon the same facts and allegations, would be a complete bar.

1199 *Cross-interrogatories.*

Without waiving the foregoing objections, but expressly insisting thereon, the plaintiff puts, de bene, the following cross-interrogatories:—

X 1. Is it a principle of the law of the state of New York that the law decided in a case in the court of last resort in overruling a demurrer becomes the law of the case to be applied when the case is heard upon the facts?

A. Yes, if the facts proved on the trial are the same as those alleged in the complaint demurred to.

X 2. Is it the law of New York that there is no right of exoneration or contribution between defendants jointly and severally liable ex delicto and not ex contractu?

A. It is the law of New York that there is no right of contribution between defendants jointly and severally liable ex delicto.

X 3. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered that Bigelow might—but for said defence, if any—be under a liability to the plaintiff in the suits against Bigelow?

A. I have assumed throughout that the cause of action alleged against Bigelow and the one alleged against Lewisohn constitutes but one cause of action. In other words, the cause of action alleged against Bigelow is the same as that alleged against Lewisohn.

X 4. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability that Bigelow might—but for said defence, if any—be under as a liability jointly with Lewisohn?

A. I have.

X 5. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability jointly and severally with Lewisohn?

A. I have.

X 6. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability arising ex delicto?

A. Yes.

X 7. In determining whether or not the decree dismissing the suit against Lewisohn would be a defence to Bigelow, have you assumed or considered the liability which Bigelow might—but for said defence, if any—be under as a liability ex delicto jointly and severally with Lewisohn?

A. I have.

X 8. On the facts alleged in the present suit against Bige-
1200 low, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts

in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. Yes, I think it would.

X 9. On the facts alleged in the present suit against Bigelow, and assuming that under the law of Massachusetts as applied to these facts in said suit there is a liability of the general nature decided by the Supreme Judicial Court of Massachusetts in its decision on demurrer reported at 188 Mass. 315, would that liability be, under the law of New York, a joint and several liability ex delicto with Lewisohn if a suit against Lewisohn had not been precluded by a prior adjudication or otherwise?

A. In my opinion it would be a joint and several liability ex delicto.

X 10. Is it a principle of the law of the state of New York that the liability of joint wrongdoers is joint and several?

A. Yes.

X 11. Is it sometimes a principle of New York law that estoppel by former adjudication must be mutual?

A. It is.

X 12. If so, what, if any, are all the occasions of which you have knowledge on which they need not be mutual?

A. I know of none. A judgment binds and estops all parties and their privies. In the case of joint tort feasors, a plaintiff, by suing only one of the tort feasors, elects to take judgment in that action against one only. He could, by bringing in the other parties, make them all bound by the judgment. In any event, he cannot, by his mere election to sue one, circumvent estoppel against himself in an action against another privy when he has been unfortunate in his first suit upon the same facts.

X 13. Assuming that Bigelow took no part in the Lewisohn suit, in your opinion is the law of New York such that Bigelow would have been estopped in another suit to deny his liability as a matter of law on the same facts, by a final decree against Lewisohn in the first suit?

A. Yes, as a matter of law on the same facts.

X 14. Assuming that Lewisohn's executors took no part in the suits against Bigelow, in your opinion is the law of New York such that said executors would have been estopped in another suit to deny their liability as a matter of law on the same facts, by a final decree against Bigelow in these suits?

A. Yes, as a matter of law on the same facts.

X 15. Assuming that Bigelow took part in the defence of the suit against Lewisohn's executors, and that the plaintiff knew this,
1201 what, by name and reference, are all the decisions, if any, in New York, which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation and knowledge, operate as an estoppel in favor of Bigelow?

A. I have not examined authorities because I think the courts of

New York would not take into consideration, as affecting the question, the plaintiff's knowledge of Bigelow's participation in the suit against Lewisohn.

X 16. Assuming that Bigelow took part in the defence of the suit against Lewisohn's executors, and that the plaintiff did not know this, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may, by reason of such participation without plaintiff's knowledge, operate as an estoppel in favor of Bigelow?

A. For the reason given in my last answer, I have not considered it.

X 17. Assuming that Bigelow did not take part in the defence of the suit against Lewisohn's executors, what, by name and reference, are all the decisions, if any, in New York which you have considered and which tend, in your opinion, to support the view that the final decree in favor of Lewisohn's executors may operate as an estoppel in favor of Bigelow?

A. I have examined the cases of People v. Stephens, 51 How. Pr. 235; aff. 71 N. Y. 527; Castle v. Noyes, 14 N. Y. 329; Woodhouse v. Duncan, 106 N. Y. 527; Williams v. Barkley, 165 N. Y. 18, and the cases cited in those opinions.

X 18. Have you considered any decisions or language of the courts of New York which may have any tendency to support the view that there is no estoppel in Bigelow's favor growing out of the decree in favor of Lewisohn's executors?

A. I have not considered any.

X 19. If so, what, by name and reference, are all of these which you have considered?

A. This cross-interrogatory is covered by my answer to the 18th cross-interrogatory.

X 20. Have any arguments been submitted or suggested to you by defendant's counsel, or have you thought of any, in support of the view that there was by the law of New York no estoppel in favor of Bigelow growing out of the decree in favor of Lewisohn's executors?

A. No.

X 21. If so, what are all of said arguments?

A. This cross-interrogatory is covered by my last answer.

X 22. What, in your opinion, constitutes privity under the law of New York to a judgment?

A. As I understand it, privity is a relationship which arises from identity of interest of the parties. The interest may be mutual or, by representation, it may be successive.

1202 X 23. In determining whether there was an estoppel in the present case, have you assumed or considered that Bigelow was in privity to the parties of record in the suit against Lewisohn's executors?

A. I have.

X 24. In considering whether there was any estoppel in this case, have you assumed or considered that Bigelow had any legal interest

to defend in the suit against Lewisohn's executors beyond such interest as he might have to secure a favorable precedent?

A. I assume that he had no legal interest in that suit.

X 25. If so, precisely what have you assumed to be said legal interest?

A. This cross-interrogatory is covered by my last answer.

X 26. Unless Bigelow would have been bound in favor of the plaintiff by estoppel by a deci-ion adverse to Lewisohn's executors, even if Bigelow did not participate in the defence of the suit against them, did Bigelow, in your opinion, have a legal interest to defend in that suit?

A. No.

X 27. If so, by precise description, what, in your opinion, was said legal interest?

A. This cross-interrogatory is covered by my answer to the last interrogatory.

X 28. In determining whether there was any estoppel in this case, have you assumed that the plaintiff consented to the participation, if any, by Bigelow in the support of the demurrers of Lewisohn's executors?

A. I have not assumed so, though I think it did.

X 29. Is it a principle of New York law that if the defendant in one suit sustains merely the character of a co-trespasser with the defendant in another suit by the same plaintiff, the recovery against one defendant is not thereby made competent evidence against the other?

A. Yes.

X 30. Is it a principle of New York law that the judgment in favor of one of two persons jointly and severally liable for the wrongful conversion of the plaintiff's property is no bar to a subsequent suit against the other because torts are joint and several?

A. Yes, I am of that opinion.

X 31. Is it a principle of New York law that an adjudication acts as an estoppel only between the parties thereto or those in privity with them, or, in other words, the estoppel must be mutual?

A. Yes.

X 32. Is it a principle of New York law that a judgment in favor of one co-trespasser may not be used by another co-trespasser not a party to it, by way of estoppel?

A. No.

X 33. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were Bigelow's agent in the suit against them which has been dismissed?

A. I did not assume the relationship of agency.

1203 X 34. In considering the question of estoppel, have you assumed or considered that Lewisohn's executors were trustees for Bigelow of the stock sought to be recovered in the suit against them which has been dismissed?

A. I did not assume they were trustees.

X 35. Is it a principle of New York law that in an action at law against one or some of several joint tort feasors, the controversy may

be determined as between the parties before the court,—i. e., the plaintiff and defendant,—and without prejudice to the rights of others; and the judgment will completely determine the controversy between them, and will not be res adjudicata between the plaintiff and any of the joint tort feasors who is not a defendant and may be sued later?

A. That may be entirely possible; but upon the same facts I think that in a suit against other joint tort feasors, a judgment against plaintiff in the original suit would render the question res adjudicata and the decree would be a bar.

X 36. Have you stated all your reasons for the opinions expressed by you, or the statements made by you, in answer to the 6th, 7th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th direct interrogatories?

A. I think I have.

X 37. If not, what are all your reasons for the opinions or statements given by you in answer to each of said interrogatories?

A. This interrogatory is covered by my last answer.

X 38. Have you now stated all your reasons for said answers?

A. Yes, substantially.

X 39. Were you, prior to the taking of your deposition on the foregoing cross-interrogatories, shown them, or any of them, or any copies of any of them, or given any information concerning the substance of them?

A. Yes; I demanded the right to see the cross-interrogatories.

X 40. Has each of your answers in its final form been given in the language in which it now appears, before you were aware of the substance of any subsequent cross-interrogatory?

A. No.

X 41. Have you, since September 22, 1908, discussed in any way with any other person who is named as a witness in the caption of these cross-interrogatories, or with any one on behalf of the defendant, any of the subjects dealt with in the foregoing interrogatories or in your answers thereto?

A. Yes, I have discussed the matter with my partner, Edward W. Hatch, but I have not discussed it with any of the attorneys for either of the parties to the action.

ALTON B. PARKER.

Before me,
PERCIVAL WILDS,
Notary Public.

1204 *Deposition of William B. Hornblower.*

[Mr. McClennen offered in evidence the deposition of William B. Hornblower, taken on behalf of the plaintiff.]

Mr. HEMENWAY: We would suggest that the same course be taken with that deposition as with the others which have been introduced.

HAMMOND, J.: If there is no objection to that course, you may state what depositions you propose to put in, so that the stenographer can take them down, and let them be handed over to counsel for the defendant for such objection as they want to make.

[Following is the deposition above referred to:]
[Commission and notarial certificate omitted.]

Q. 1. What is your name, age, residence, occupation, and place of business?

A. My name is William B. Hornblower; age, fifty-seven; residence, New York city; occupation, lawyer; place of business, 24 Broad street.

Q. 2. Are you the William B. Hornblower who was named by President Cleveland to be a justice of the Supreme Court of the United States?

A. I am.

Q. 3. What positions have you occupied, and what has been your education, experience, in the study and practice of law in or out of the state of New York, and particularly anything with reference to the law as to former adjudication or estoppel by judgment?

A. The only official positions that I have occupied are—member of the commission appointed by the governor of the state of New York in 1890 under an act of the legislature to propose amendments to the judiciary article of our state constitution; member of a board appointed by act of the legislature in 1904 to consolidate the statutes of the state. I am still acting as a member of this board, known as the board of statutory consolidation, which is to report the result of its work to the legislature at its next session in 1909.

I was educated at Princeton University and Columbia University Law School.

I have had a very varied and general experience in the practice of the law, and in the argument of cases in the state and federal courts, for thirty-three years, including cases in the United States Supreme Court and in the Court of Appeals of New York state, as well as in the subordinate courts—state and federal. I have frequently had occasion to examine the questions involved in the doctrine of res adjudicata in the course of my practice. I argued in the appellate division and in the Court of Appeals the case of Bracken v. Atlantic Trust Co., 36 App. Div. 67; 42 App. Div. 621; 167 N. Y. 510,

1205 That case involved the effect of a former judgment in a suit brought by a trust company at the request of bondholders to foreclose a mortgage as a bar to a subsequent action at law by a bondholder. The question was one rather of merger of a cause of action than of estoppel. In connection with that case, however, I had occasion to examine the general law on the whole subject of res adjudicata.

I have very recently had occasion to re-examine the authorities on the subject of res adjudicata in an action recently brought and now pending in the Supreme Court of this state on behalf of certain stockholders of the New York & Harlem Railroad Company, against certain directors of that company, for an accounting of certain transactions which were involved in a prior litigation between certain other stockholders and the New York & Harlem Railroad Company, in which there was a decision in favor of the defendant, reported

under the title of Continental Insurance Co. v. New York & Harlem R. R. Co., 187 N. Y. 225.

Q. 4. Examine the record in this case, including the record in the case of the same plaintiff against the executors of Leonard Lewisohn, attached to the amendment to the defendant's answer. Assuming (*a*) that the question whether the decree dismissing said suit against Lewisohn's executors is a defence in said suits against Bigelow is to be determined by the law of New York, and (*b*) that the defendant, Bigelow, participated in the actual defence of said action in the Circuit Court, and (*c*) that he assumed with said Lewisohn's executors the joint defence thereof, and (*d*) that the defendant, both through his agents and counsel, has, by large expenditures of time and money, contributed to and joined in and taken part in the defence of said action, and (*e*) that this was with the knowledge of the plaintiff throughout the entire pendency of the aforesaid action,—then in your opinion would or would not said decree of dismissal be a defence to said Bigelow in these suits in Massachusetts?

A. I have examined the copies of records furnished me in the two cases referred to. Making the assumptions set forth in the 4th interrogatory, my opinion is that the decree of dismissal in the suit against Lewisohn's executors would not be a defence to Bigelow in the suits in Massachusetts.

Q. 5. Making assumption (*a*) only, or making assumptions (*a*) (*b*) (*c*) (*d*) only, or making assumptions (*a*) (*b*) (*c*) (*d*) and (*e*), what, in your opinion, is the law of New York relative to the effect of said decree as a defence in the suits against Bigelow, and what are your reasons therefor?

A. Making the assumptions called for by that interrogatory, in my opinion, under the law of New York, said decree would not be a defence to suits against Bigelow. My reasons for this and the answer to the preceding interrogatory are briefly these:

1206 The general principle running through the law of estoppel by a former judgment is that the estoppel must be mutual This principle is so elementary and so constantly reiterated by the courts that it is unnecessary to cite authorities in support of it.

The rule is thus stated by Black in his work on judgments, 2 Black on Judgments, sec. 548:

"In the application of the rule of res judicata it is essential that its operation be mutual. Therefore a party will not be concluded, against his contention, by a former judgment, unless he could have used it as a protection, or as the foundation of a claim, had the judgment been the other way; and conversely, no person can claim the benefit of a judgment, as an estoppel upon his adversary unless he would have been prejudiced by a contrary decision of the case. Thus, where the plaintiff is not a party to the record offered in evidence, not being concluded by it himself, he cannot rely upon it as a technical estoppel upon a garnishee."

Black cites many New York cases in support of this statement. The only case referred to by him to the contrary is a Louisiana decision; as to which, he says, in a footnote,—

"This decision seems to be clearly wrong, as the estoppel certainly would not be mutual. The case does not explain itself."

Among the many cases in this state in which this principle is announced may be cited Lawrence v. Campbell, 32 N. Y. 455, in which the court says, with reference to the effect of a former judgment, "estoppels to be available must be mutual."

In Nelson v. Brown, 144 N. Y. 390, it is said, per Gray, J., referring to a former judgment,—

"She [appellant] was not bound by it, and, therefore, it could not conclude the respondent; under the settled and familiar rule, that the record of a judgment, in order to conclude either of the party litigants, must be conclusive upon both. The operation of the rule must be mutual."

In this connection it must be borne in mind that there is a distinction between the effect of a prior decision by way of estoppel as a bar and the effect of a former decision by way of an adjudication on the questions of law or fact on the principle of stare decisis. It is undoubtedly true that the Circuit Court of the United States for the Southern District of New York would apply the same rule of law to the claim against Bigelow as it has applied to the claim
1207 against Lewisohn's executors, and that if the suit against Bigelow were pending in that court and the same state of facts was set forth in the bill or shown by the testimony, that court would follow its previous ruling in the Lewisohn suit and would dismiss the bill. It is also true that the decree of the Circuit Court of the United States having been affirmed by the Supreme Court of the United States, the rule of law laid down by that court has become binding upon every federal court of inferior jurisdiction, and a suit brought in any federal court against Bigelow upon the same state of facts as appeared or were alleged in the Lewisohn suit would be dismissed by such federal court. As the questions in this case, however, were not federal questions, arising under the statutes or the Constitution of the United States, the decision of the Supreme Court of the United States is no more binding upon the Supreme Court of Massachusetts than would be a similar decision by the Court of Appeals of the state of New York.

The distinction between the doctrine of res adjudicata and the doctrine of stare decisis is well pointed out by the Court of Appeals in the case of Moore v. City of Albany, 98 N. Y. 396. In that case certain persons had a suit against the city of Albany, and recovered judgment, adjudging an assessment levied by the city to be void in a suit brought on behalf of other property owners. The former judgment was held to be not res adjudicata. The court, said, at page 409,—

"It is a general rule that estoppels by judgment must be mutual, that a party cannot claim the benefit of a judgment favorable to him unless he would be bound by a judgment in the same manner if adverse to him. If the judgment in that action had been adverse to the plaintiffs, then it certainly would not have bound William Moore, and he would still have been at liberty to assail the assessment and try all the questions relating thereto de novo upon their merits.

A judgment as to all matters decided thereby and as to all matters necessarily involved in the litigation leading thereto, binds and estops all the parties thereto, and their privies in all cases where the same matters are again brought in question. Such is the doctrine of res adjudicata.

"There is also the doctrine of stare decisis, which is of a different nature. When a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same, and this it does for the stability and certainty of the law."

A further distinction is to be borne in mind between contract cases and tort cases. As a general rule a suit brought against one
1208 of two joint contractors will bar a suit against the other joint contractor, and a decision in favor of one joint contractor, holding that there was no contract liability, can be availed of by the other joint contractor. This rule grows out of the nature of a joint contract, since plaintiff cannot sever his cause of action and must exhaust his rights and remedies in the first suit.

In tort cases, however, the rule is different; the liability of tort feasors is a several liability. The settled law of New York state is that a judgment in favor of one joint tort feasor is not a bar to a suit against another joint tort feasor.

In the early case of Lansing v. Montgomery, 2 Johns. 382, it was held that a judgment in favor of one co-trespasser was not an estoppel to proceedings and judgment against the other co-trespasser.

In Marsh v. Berry, 7 Cowen, 344, it was held that a recovery in favor of one trespasser is not evidence for his co-trespasser.

In Atlantic Dock Co. v. Mayor, 53 N. Y. 68, it is said,—

"A judgment in favor of one co-trespasser may not be used by another co-trespasser, not a party to it, by way of estoppel."

In the very recent case of Gittleman v. Feltman, 122 App. Div. 387, it is held that a judgment "will not be res adjudicata between the plaintiff and any of the joint tort feasors who is not a defendant and may be sued later—for joint tort feasors may be sued separately or together, and nothing but the satisfaction of a judgment against one or more of them or a release of the cause of action, will bar an action against the others."

The only case in this state that I know of, which is in apparent conflict with this doctrine is the case of People v. Stephens, 51 How. Pr. 235. That was an opinion at nisi prius upon a motion made after trial at circuit for a non-suit. The suit was brought by the People of the State against William C. Stephens, Thomas Gale, and others. Its object was to recover damages sustained by reason of a contract made between the state and the defendant Stephens, which contract, immediately upon its execution, was, with the consent of the state, assigned by the defendant Stephens to the defendant Gale, who, as the complaint averred, represented as well himself as the defendants Belden and Denison, and said Gale and said Belden and
Denison have performed the contract.

1209 It appeared that a prior suit had been brought by the plaintiffs, the People, against two of the present defendants, Wil-

liam C. Stephens, the original contractor, and Thomas Gale, the assignee, the object of the suit being to set aside the agreement, which is the subject of controversy in the second suit, on account of the identical alleged unlawful and illegal acts urged as the grounds of recovery in the second suit, and also to recover the damages which the state had sustained up to the time of bringing the action by reason of such contract and the execution thereof.

To the former complaint a demurrer had been interposed, which demurrer had been sustained and final judgment given for the defendants upon the demurrer. This judgment was pleaded as a bar to the second suit. It appears, however, that the plaintiff tried out the second suit upon the facts and did not rely upon the former judgment. It is true that the court granted the non-suit partially upon the ground of estoppel by judgment, and laid down the doctrine in broad terms to the effect that the judgment of a court of competent jurisdiction upon a question directly at issue between parties unless reversed, forever concludes and estops all parties to the action and those in privity with them from questioning its accuracy or justice in another action. The court further held that the defendants who were parties to the second suit were privies to the parties who were named in the first suit.

It appears, however, that the decision in the first suit might well have been held binding on the principle of stare decisis, as a decision by the same court upon the law of the case to the effect that no cause of action was set forth in the complaint. The court says on this subject,—

"Has it, however, ever been held that upon the same proof against two the same court would be justified in holding the one guilty of actionable conduct whilst the other was not? The tribunal which would administer justice upon such principle would deserve to be stripped of its judicial functions, and be condemned to eternal infamy."

Judge Westbrook, however, does not rely upon the bar of the former judgment, but proceeds to discuss the case upon the second ground for a non-suit, and holds, upon the evidence, that plaintiff was not entitled to recover.

When this case came before the Court of Appeals in 71 N. Y. 527, the court affirmed the judgment of non-suit, but did not discuss the subject of res adjudicata, nor in any way approve of the views of the trial court on this subject. The decision of the Court of Appeals was based on the ground that an act of the legislature passed in 1870 was

intended as a final disposition of the whole matter and as a
1210 waiver of any claim for fraud, and operated to validate the
transactions and to ratify the contracts subject to the powers

therein conferred, to annul the same; and that by omitting so to terminate them and by going on under them, the state officers clearly manifested that they did not deem the contracts injurious, and elected, on behalf of the state, to proceed with and abide by them. The omission of the Court of Appeals to discuss, or in any way refer to, the effect of the former judgment is most significant, and is in

effect a ruling that the court did not regard the decision of the lower court as sustainable upon that theory.

So far as the decision by Judge Westbrook at circuit can be considered to hold that a judgment of a court of one jurisdiction rendered against one of several conspirators or tort feasors, or in favor of one of several joint conspirators or joint tort feasors will be a bar to an action in another jurisdiction against the other conspirators or joint tort feasors, it is, in my opinion, entirely unsupported by any decision of the Court of Appeals of this state which has come to my notice, and is at variance with what I regard as the settled law of this state on the general subject.

It is further to be observed, with regard to the decision of Mr. Justice Westbrook, that he says, at page 247,—

"All the acts of the defendants Gale and Stephens set out in the complaint in the former action, and which are identically the same with those contained in the complaint in the present, are charged as done in confederacy and combination with others, those others being the present defendants, not then sued; and it was of those acts, then and now charged, this court gravely and solemnly decided and adjudged, in the language of the demurrer, that they were not 'sufficient to constitute a cause of action.' If they were not then, are they now? Has their color or complexion changed with the lapse of years, or must this court change its view of the same facts because performed by parties now for the first time named, though then included as co-conspirators and confederates?"

In other words, Judge Westbrook's decision rests upon the ground that the rulings of the court are binding upon the same court in a subsequent suit on the principle of stare decisis. It is also to be noted that the judge calls attention, on page 248, to the fact that as the state had, by its agent duly authorized, "agreed for a consideration, to be bound by a judgment of this Court, the estoppel of the judgment is supplemented by the agreement," referring, in this connection, to the case of People v. Stephens and others, 52 N. Y. 306, 309, 310.

1211 So far as this case of People v. Stephens may be interpreted as holding that one of several co-tort feasors is bound by or can avail himself of a judgment in favor of his co-tort feasor in a suit to which he himself was not a party, it stands alone, so far as I know, in the jurisprudence of this state. It is at variance with the current authority of the state, and I do not regard it as stating correctly the law of this state on the subject.

It is true that a judgment is binding, not only upon upon those who are actually party defendants to the suit, but upon persons who stand in privity to the defendant. I do not understand that a joint tort feasor stands in privity with his co-tort feasors within the meaning of this rule. The rule is applied in favor of and against a party who claims title to certain property under or through the party to the record. It also applies to cases of principal and agent, master and servant, trustee and cestui que trust, and to cases where there is a liability over by way of indemnity. This last class of cases covers suits against sureties and numerous other classes of cases where the

party to the record has a remedy over against a third party. In such cases, however, in order to be bound by the judgment, the third party must ordinarily be notified of the suit and given a right to come in and defend, or he must have actually come in and defended it, in order to be bound by the suit. It is to be noted, in this connection, that under the settled law of this state there is no liability for contribution as between tort feasors, and therefore no remedy over where one tort feasor is sued severally and judgment obtained against him.

This is distinctly held in Gilbert v. Finch, 173 N. Y. 455, and numerous other cases. The cases in this state which hold that a party, not a party to the record, is bound or can avail himself of a judgment as a bar, all come under one or the other foregoing classes enumerated. To go through the cases in detail and analyze them would involve a long and unnecessary discussion. I understand that I am only called upon to express my opinion as a New York lawyer with regard to the result of the cases themselves, without referring to them in detail.

Pray v. Hegeman, 98 N. Y. 351, for instance, is a case where privity of title to property is involved.

Clemens v. Clemens, 37 N. Y. 59, is a similar case where parties claiming title under or through a party to the record are held bound by the judgment.

Castle v. Noyes, 14 N. Y. 329, is a case of master and servant.

Smith v. Smith, 79 N. Y. 634, and numerous other cases, are cases of parties liable over by way of indemnity on the principles applicable to suretyship, warranty, or otherwise.

1212 I know of no case in this state going so far as to hold that participation in the defence of a suit by one not a party nor a privy in the sense above set forth, by way of contributing to the expense of the suit, with or without the knowledge of the plaintiff, binds him by the judgment or entitles him to take the benefit of the judgment as a bar. There are some dicta in the cases intimating such a rule, but there are no decisions to that effect. In my opinion, the law of this state on this subject is in accordance with the rule laid down by the United States Supreme Court in Litchfield v. Goodnow, 123 U. S. 549, and Stryker v. Goodnow, 123 U. S. 527. In the former case the court said,—

"She interested herself in securing a favorable decision of the questions involved as far as they were applicable to her own interests, and paid part of the expenses; but there was nothing to bind her by the decision. If it had been adverse to her interest, no decree could have been entered against her personally either for the land or for the taxes."

In the latter case the court said,—

"We have not overlooked the fact that a brief was filed at the hearing in this court on behalf of the Railroad Company to support the claim of Wolcott that the title of that Company was the best. Such a proceeding did not make the Railroad Company a party to the suit, or bind it by the decree. Being interested in the question to be decided, the company was anxious to secure a judgment that could not be used as a precedent against its own claims in any litigation that might thereafter arise in respect to its own property. It is not an

uncommon thing in this court to allow briefs to be presented by or on behalf of persons who are not parties to the suit, but who are interested in the questions to be decided, and it has never been supposed that the judgment in such a case would estop the intervenor in a suit of his own which presented the same questions. It could be used as a precedent, but not as an estoppel in the second suit."

It seems to me very clear that a judgment in favor of the plaintiff in the suit brought against Lewisohn's executors would not have been res adjudicata as against Bigelow, whether his participation in the suit was or was not with the knowledge of the plaintiff. If a judgment in favor of the plaintiff would not have been binding upon Bigelow, then, on the doctrine that estoppels must be mutual, it follows that it is not a binding adjudication in his favor. I do not understand how the question of plaintiff's knowledge can be important, as plaintiff could not very well have prevented Bige-
1213 low from taking part in the defence and in assisting in compensating counsel. It does not appear and is not claimed, so far as I know, that he ever appeared in his own name in any way, shape, or form, in the suit pending in New York, in which the judgment was obtained, or that counsel appeared in his name. It seems to me that merely aiding pecuniarily in the argument of a question of law arising upon a demurrer, in the decision of which question of law the person so contributing is interested for the reason that the same principle may be applied against him on the ground of stare decisis, does not make him a party to the record so as to be bound by an adverse decree or to avail himself of a favorable decree. I do not understand that there is any decision in this state holding otherwise.

It has been suggested, however, that Lewisohn occupied a representative position in this suit and that he was either a trustee or agent for Bigelow, and that, therefore, a decree against Lewisohn would have bound Bigelow, and a decree in favor of Lewisohn would avail Bigelow. It is true that the property for which the corporation issued its stock was put into the name of Lewisohn with Bigelow's consent. It is also true that the plaintiff prayed for rescission of the transaction by which the property was conveyed to the company and stock issued in lieu thereof. It further appears, however, from the bill that the real object of the bill was to obtain an accounting for the stock of the company alleged to have been wrongfully issued, pursuant to a conspiracy between Lewisohn and Bigelow, in which they were equally tort feasors. It is not claimed that Bigelow's stock was ever held in the name of Lewisohn. The stock was issued to Lewisohn in his own name and to Bigelow in his own name. This suit is brought to recover for the stock issued in exchange for the conveyance. It is the value of this stock for which an accounting is sought.

The liability to account for the stock is a several liability of Lewisohn and Bigelow. On receiving the stock neither one acted as trustee for the other or as agent for the other. The fact that, as part of the transaction leading up to and resulting in the delivery of the stock, the title to certain property stood in the name of Lewisohn does not, in my opinion, make a case in which Bigelow would have

been bound by a judgment against Lewisohn or is entitled to claim the benefit of a judgment in favor of Lewisohn.

The principle under which promoters of a corporation are held liable to account for secret profits obtained is laid down in the case of Getty v. Devlin, 54 N. Y. 403, and in Brewster v. Hatch, 122 N. Y. 348. In the latter case I was counsel for the appellants, and obtained a decision establishing the liability of the promoters to account to stockholders. The principle of those cases, as I un-
1214 derstand it, is that promoters occupy a fiduciary relation to the company and to its original stockholders and owe a duty of full disclosure, and cannot make a secret profit at the expense of the other stockholders who were participants in the formation of the corporation. The court discusses in these cases the rights of the parties inter sese and uses language which indicates that they are partners. I do not understand, however, that it follows from the principle laid down in these cases that one of the promoters is so far the agent or representative of the other promoters as to make a suit for an accounting against one of them without joining the others res adjudicata against the others not sued; to so hold would, it seems to me, be to violate the elementary principles of justice, which require that every man shall have his day in court. If, therefore, a judgment against one of the promoters would not bind the other promoters, it necessarily follows from the principle already announced that a judgment in favor of one promoter would not avail the other promoters. Nor do I regard the use of general phrases such as "identity of interest" or "joint undertaking" as furnishing any definite of accurate test with regard to the effect of a former judgment. It is my opinion that where a former suit is not based upon a contract, as to which technical rules apply with regard to merger of the cause of action, it is necessary to bring the former suit within one of the well-established exceptions, as already indicated, in order to avoid the effect of the general principle that a judgment in order to be available in favor of the party must also be available in favor of the other party as against him on the principle of mutuality.

It is also to be noted that the former suit was not a suit against Lewisohn himself, but against Lewisohn's executors, and the executors were not trustees, and never had been trustees, of any property or stock for Bigelow. In this connection I refer the court to the case of Thomson v. American Surety Co., 170 N. Y. 109. I have not, however, deemed it necessary to discuss this question, as my opinion on the other questions makes it unnecessary to have considered this point.

Nor have I considered the question of whether the judgment against the complainant in the United States court suit is to be regarded as a judgment upon the merits within the meaning of section 1209 of the New York Code of Civil Procedure.

There are a great number of New York decisions which discuss the effect of a prior judgment in a subsequent suit between the same parties where the issues are different, but where the prior suit might have included the same issues, or where the issues raised in the latter

suit were impliedly decided by the former judgment. I have not considered it material to the present inquiry to discuss these cases.

I have confined myself to a consideration of the precise ques-
1215 tion presented to me, namely, the effect of a former adjudication upon one not a party to the record in the former suit, and his right to avail himself of a former adjudication as a bar.

To sum up my reasons for my opinion, as already given, I do not regard Bigelow as being in privity with Lewisohn within the meaning of that phrase as used in the decisions as to res adjudicata, nor do I regard Lewisohn as standing in the position of trustee or agent so as to be the representative of Bigelow in the suit, so that Bigelow would be bound by a judgment against Lewisohn. In my opinion Lewisohn and Bigelow were joint tort feasors. A judgment against one would not bind the other, nor would a judgment in favor of one avail the other in another jurisdiction, nor in the same jurisdiction, except on the principle of stare decisis, or by way of precedent.

New York Cases Introduced by Plaintiff.

Mr. McCLENNEN: I also desire to introduce cases decided by the New York courts and the statutory provisions of law.

HAMMOND, J.: Have you got a list of them there?

Mr. McCLENNEN: I have a list that is not quite complete; I want to add a few more. If I may simply do as Mr. Hemenway has done, I will hand the commissioner a copy.

HAMMOND, J.: Very well. You may hand a copy to Mr. Hemenway, and they may be considered as in. You had better send a copy to the stenographer, also, like that which you send to Mr. Hemenway, so that he can use it.

[Following is the list of cases subsequently submitted:]

Stevens v. Central Nat. Bank, 144 N. Y. 50.
Genet v. Del. & Hudson Co., 170 N. Y. 278.
Same v. Same, 162 N. Y. 172.
Same v. Same, 122 N. Y. 505.
Petrie v. Trustee, 92 Hun., 81.
In re Broderick, 56 N. Y. Supp. —.
Randall v. N. Y. El. Co., 149 N. Y. 211.
Kochler v. Hughes, 148 N. Y. 507.
Clarke v. Lourie, 82 N. Y. 580.
Code of Civil Procedure, sec. 1209.
Genet v. Del. & Hudson Co., 171 N. Y. 278.
1216 Same v. Same, 136 N. Y. 593.
Borden v. Fitch, 15 Johns. 121.
Lansing v. Montgomery, 2 Johns. 382.
Marsh v. Berry, 7 Cowen, 344.
Calkins v. Allerton, 3 Barb. 171.
Tyng v. Clarke, 9 Hun, 269.
Atlantic Dock Co. v. N. Y., 53 N. Y. 64.
Gittleman v. Feltman, 122 App. Div. 385.
Kolb v. National Surety Co., 176 N. Y. 233.

Andrews v. Murray, 23 Barb. 354.
Peck v. Ellis, 2 Johns. Ch. 131.
Miller v. Fenton, 11 Paige, 18.
Barrett v. Third Ave. R. Co., 45 N. Y. 628.
Mitchell v. Allin, 25 Hun, 543.
Bath v. Rowland, 82 N. Y. Supp. 841.
Booth v. Powers, 56 N. Y. 22.
Russell v. McCall, 141 N. Y. 437.
Snyder v. Barber, 18 N. Y. 468.
Robinson v. Smith, 18 Johns. 459.
Moss v. McCullough, 5 Hill, 131.
McMaster v. Vernon, 3 Duer, 249.
Brow v. Birdsall, 29 Barb. 549.
Livingston v. Bishop, 1 Johns. 290.
Parks v. N. Y., 98 N. Y. Supp. 94.
Lawrence v. Campbell, 32 N. Y. 455.
Craig v. Ward, 3 Abb. (N. S.) 235.
Brennan v. Bath, 3 Daly, 489.
Castle v. Noyes, 14 N. Y. 329.
Thomas v. Hubbell, 15 N. Y. 405.
Carleton v. Lombard, Ayres & Co., 149 N. Y. 137.
Ocean Nav. Co. v. Campania Co., 144 N. Y. 663.
Albany Sav. Inst. v. Burdick, 87 N. Y. 40.
Prescott v. La Conte, 178 N. Y. 585.
Heiser v. Hatch, 86 N. Y. 614.
Bush v. Knox, 2 Hun, 576.
Fake v. Smith, 2 Abb. Dec. 76.
1217 Konitzky v. Meyer, 49 N. Y. 571.
Smetzer v. White, 92 U. S. 390, 394.
Alexander v. Taylor, 4 Denio, 302.
Featherstone v. Turnpike Co., 71 Hun, 109.
Moore v. Albany, 98 N. Y. 396.
Trimmer v. Rochester, 130 N. Y. 401.
Tifft v. Buffalo, 25 App. Div. 376.
Wallace v. New York, 53 App. Div. 187.
Stone v. N. Y., 184 N. Y. 124.
Lawrence v. Hunt, 10 Wend. 80.
Fowler v. Bowery Bank, 47 Hun, 399.
Remington Paper Co. v. O'Doherty, 81 N. Y. 474.
Scott v. Brennan, 9 Daly, 226.
Croft v. Bassett, 24 Barb. 31.
Douglas v. Howland, 24 Wend. 35.
Jackson v. Griswold, 4 Hill, 522.
Miller v. White, 50 N. Y. 137.
McMahon v. Macy, 51 N. Y. 155.
Craft v. Coykendall, 34 Hun, 285.
Goddard v. Benson, 15 Abb. Prac. 191.
Chapman v. Frank, 5 N. Y. Supp. 448.
Campbell v. Hill, 16 N. Y. 575.
People v. Knickerbocker, 106 N. Y. 619.
O'Brien v. Browning, 49 How. Pr. 109.

Smith v. Smith, 79 N. Y. 634.
Dibble v. Dimmock, 143 N. Y. 549.
Morehouse v. Brooklyn Co., 185 N. Y. 520.
MacArdell v. Olcott, 62 N. Y. App. Div. 127.
New York Code, 281.
2 Bliss Am. Code, 20, 21.
Thomson v. American Surety Co., 170 N. Y. 109.
Thorne v. De Breteuil, 86 App. Div. 405; 179 N. Y. 64.
Gleason v. Northwestern, 189 N. Y. 100.
Carter v. Bowe, 41 Hun, 516.
In re Straut, 126 N. Y. 201.
Bracken v. Atl. Trust Co., 30 App. Div. 67.
1218 Getty v. Devlin, 54 N. Y. 403.
King v. Barnes, 109 N. Y. 267.
Brunell v. Dias, 3 Den. 238.
O'Donnel v. McIntyre, 118 N. Y. 156, 162.
Mygatt v. Coe, 124 N. Y. 212.
Emma Mines Case, 7 Fed. Rep. 401; 159 Fed. Rep. 36.
Pray v. Hegeman, 98 N. Y. 351.
Jordan v. Van Epps, 85 N. Y. 427.
Clemens v. Clemens, 37 N. Y. 59.
Doty v. Brown, 4 N. Y. 41
Griffin v. Long Island R. R. Co., 102 N. Y. 449.
C. P. P. & M. Co. v. Walker, 114 N. Y. 7.
Thomson v. Sanders, 118 N. Y. 252.
Reich v. Cochran, 151 N. Y. 122.
Earle v. Earle, 173 N. Y. 480.
Williams v. Barcley, 165 N. Y. 48.
People v. Stephens, 51 How. Pr. 235.
Doremus v. Root, 23 Wash. 710; 54 L. R. A. 649, and note; 4 N. Y. 71.
Portland Gold Mining Co. v. Stratton, 158 Fed. Rep. 68.
Rumford Chem. Co. v. Hygienic Chem. Co., 159 Fed. Rep. 36.
Stamp v. Franklin, 144 N. Y. 607.
Van Koughnet v. Dennis, 68 Hun, 179.
Kelly v. 42d St. R. R. Co., 39 App. Div. 500.
Kerrison v. Stewart, 93 U. S. 155.
Lorilland v. Clyde, 122 N. Y. 41.
Park Hill Co. v. Herriott, 41 App. Div. 34.
In re Will of O'Hara, 95 N. Y. 403.
Brewster v. Hatch, 122 N. Y. 349.
Western R. R. Co. v. Nolan, 48 N. Y. 513.
Lawrence v. Schaffer, 19 Misc. 239; aff. 20 App. Div. 80.
Freeman on Judgments, secs. 173, 174, 287.
Black (2) on Judgments, secs. 709, 781, 789.
Emery v. Fowler, 39 Me. 329.
Knapp v. Roche, 94 N. Y. 329.
Whiteman v. Shankland, 18 How. Pr. 79.
1219 Allen v. Knott, 111 U. S. 472.
Hirshbach v. Ketcham, 84 App. Div. 258.

Yates v. Utica Bank, 203 U. S. 181.
No. Pac. Ry. v. Slaght, 205 U. S. 132.
Bissell v. Spring Valley, 124 U. S. 225.
Port Jarvis v. First Nat. Bank, 96 N. Y. 550.
Demarest v. Darg, 32 N. Y. 281.
Prescott v. Le Conte, 83 App. Div. 482.
Park Hill Co. v. Herriott, 41 App. Div. 324.
Paulding v. Chrome Steel Co., 94 N. Y. 329.
Pakas v. Hollingshead, 184 N. Y. 217.
Bates v. Stanton, 1 Duer, 79.
Wilcox v. Pratt, 125 N. Y. 688.
Lichty v. Lewis, 63 Fed. Rep. 535.
1 Greenleaf on Evidence, sec. 523.
Bopp v. N. Y. Elec. Vehicle Co., 78 App. Div. 337.
Cassidy v. Sauer, 114 App. Div. 673.
Shaw v. Broadbent, 129 N. Y. 114.
Genet v. Delaware & Hudson Co., 2 App. Div. 491.
Same v. Same, 14 App. Div. 177.
Moore v. Tracy, 7 Wend. 229.
Diet v. Hyman, 129 N. Y. 351.
Gerrod v. Stagg, 10 How. Pr. —.
St. John v. Andrew, 192 N. Y. 382.
Mallory v. Horan, 49 N. Y. 111.
Marsh v. Masterton, 101 N. Y. 401.
Stowell v. Chamberlain, 60 N. Y. 272.
Converse v. Sickler, 146 N. Y. 200.
Rudd v. Cornell, 171 N. Y. 114.
Shaw v. Bradstreet, 129 N. Y. 114.
Hoag v. Greenwich, 133 N. Y. 152.
People v. Dalton, 52 App. Div. 371.
Collins v. Hydorn, 135 N. Y. 320.
Getty v. Devlin, 70 N. Y. 504.
Eisenlord v. Clum, 126 N. Y. 552.
House v. Lockwood, 137 N. Y. 259.
1220 Lorillard v. Clyde, 102 N. Y. 59.
Towle v. Forry, 14 N. Y. 423.
Woodhouse v. Duncan, 106 N. Y. 527.

Mr. McClennen: I am sorry to say we shall not be able to get all of our evidence in this afternoon, your Honor.

Hammond, J.: Well, get it in as fast as you can.

Stipulations.

Mr. McClennen: I will offer the stipulation in the case of the Old Dominion Copper Mining & Smelting Co. v. Frederick Lewisohn et al., relating to the taking of depositions in Vermont.

I, perhaps, ought to have said, your Honor, that in offering this testimony we desire to be understood as still insisting on our objection to the materiality of the evidence relative to actual participation in the New York case.

HAMMOND, J.: I understand that to be your position.

Mr. MCCLENNEN: I will also offer two other stipulations relative to the taking of testimony in the New York cases.

Also the general stipulation of May 27, 1903, relative to the taking of testimony in Old Dominion Copper Mining & Smelting Co. v. Frederick Lewisohn et al.

Also the stipulation of April 2, 1903, relative to the taking of the further testimony of Mr. Bigelow and Mr. Hyams.

[Following are the stipulations put in evidence under this offer:]

Circuit Court of the United States for the Southern District of New York.

8332.

OLD DOMINION COPPER MINING & SMELTING COMPANY
v.
FREDERICK LEWISOHN et al.

Stipulation.

In the above-entitled case it is hereby stipulated that depositions may be taken for use therein of witnesses residing in the state of Vermont before G. C. Frye, or any other notary public in said state, with like effect as if a commission were duly issued
1221 to him by this court, and that the taking of said depositions may begin at the office of said notary in St. Johnsbury on December 14, 1905.

BRANDEIS, DUNBAR & NUTTER,
Attorneys for Complainant.
HOADLY, LAUTERBACH & JOHNSON,
Attorneys for Respondents.

A.

Circuit Court of the United States, Southern District of New York.

In Equity.

#8332.

OLD DOMINION COPPER MINING & SMELTING COMPANY
v.
FREDERICK LEWISOHN et al.

Stipulation.

The respondents hereby reserve the right of cross-examination of Charles H. Altmiller, if he be again called to testify, by either party, and waive any further or formal proof of the records of the plaintiff

corporation, of the entries in the books of account and check books of the plaintiff corporation testified to by Mr. Altmiller, and of the letters and other documents produced by Mr. Altmiller, and stipulate and agree that Mr. Altmiller's deposition, and the exhibits thereto annexed setting out the contents of the record book, extracts from the books of account, check book, stock-certificate books, and stock-transfer book, and certain certificates of stock, letters, and other documents produced by him, may be read in evidence and used in like manner and with the same effect in all respects as if full and formal proof of the same had been made, reserving, however, all rights to object to the relevancy, competency, and materiality of the interrogatories and answers and of the matters testified to by said deponent and of the said exhibits.

Said waiver being made conditionally upon the production of any and all of said original documents that the respondents shall notify complainant to produce, and the complainant hereby stipulates and agrees to produce any and all of said original documents upon receiving notice requiring the production thereof.

HOADLY, LAUTERBACH & JOHNSON,
Solicitors for Respondents.

1222 B.

Circuit Court of the United States, Southern District of New York.

In Equity.

#8332.

OLD DOMINION COPPER MINING & SMELTING COMPANY
v.
FREDERICK LEWISOHN et al.

In the above-entitled cause it is stipulated and agreed between the parties:

That copies certified by Willoughby L. Webb, commissioner, of the depositions of Walter Lewisohn, Ferdinand L. Rahaeuser, Adolph Lewisohn, Frederick Lewisohn, Albert Lewisohn, Jesse Lewisohn, and Edward C. Westervelt, taken in the case of Old Dominion Copper Mining & Smelting Co. v. Bigelow, No. 8099 Equity, pending in the Supreme Judicial Court for Suffolk county, Massachusetts, may when completed be filed in the above-entitled cause by the complainant at any time before the taking of testimony therein is closed, and may be read and used in evidence in this cause by either party with the same effect as if the same had been regularly taken in said cause before an examiner.

And it is further stipulated and agreed that the depositions of Albert S. Bigelow, Godfrey M. Hyams, Joseph A. Coram, Galen L. Stone, and Charles H. Altmiller, taken before Howland Twombly, Esq., notary public, for use in the above-entitled cause, may be filed in the above-entitled cause by the complainant at any time before

the taking of the complainant's testimony in chief therein is closed, and may be read and used in evidence in this cause by either party with the same effect as if the same had been regularly taken in said cause before an examiner. Reserving, however, to each party all rights to object to the relevancy, competency, and materiality of any of said depositions or the documents therein referred to, and to any of the interrogatories or answers therein contained, and reserving the right of the respondents to cross-examine Charles H. Altmiller, one of said witnesses, if he be again called to testify by either party.

HOADLY, LAUTERBACH & JOHNSON,
Solicitors for Respondents.

1223 Circuit Court of the United States for the Southern District of New York.

In Equity. No. 1.

#8332.

OLD DOMINION COPPER MINING & SMELTING COMPANY
v.
FREDERICK LEWISOHN et al.

It is hereby agreed that the defendants shall not be called upon to take any testimony until the plaintiffs close their testimony in chief, and that the time for taking the plaintiff's testimony is hereby extended until such time as shall be agreed upon by the parties, or fixed by order of court, and that upon the closing of the plaintiff's testimony in chief, the defendants shall have reasonable time for taking testimony, to be agreed upon by the parties or fixed by the court; and that thereafter the plaintiffs shall have a reasonable time for taking testimony in reply, to be agreed upon by the parties or fixed by the court.

BRANDEIS, DUNBAR & NUTTER,
For Plaintiffs.
HOADLY, LAUTERBACH & JOHNSON,
Attorneys for Defendants.

Boston, May 27, 1903.

Circuit Court of the United States, Southern District of New York.

No. 1. In Equity.

#8332.

OLD DOMINION COPPER MINING & SMELTING COMPANY
v.
FREDERICK LEWISOHN et al.

Agreement.

In the above-entitled cause, the taking of the depositions of Albert S. Bigelow and Godfrey M. Hyams before Howland Twombly,

Esq., having been adjourned to Friday, April 3, 1903, at 10 o'clock a. m., and the defendants having requested that the taking of said depositions be further adjourned to Friday, April 10, 1903;

Now, therefore, it is hereby agreed by the parties to said suit that the taking of said depositions be so adjourned, and by said witnesses respectively, that they will appear at said adjourned
1224 date at the office of Brandeis, Dunbar & Nutter, Room 17, 220 Devonshire street, Boston, Mass., at 10 o'clock in the forenoon.

BRANDEIS, DUNBAR & NUTTER,
Attorneys for Plaintiff.
ALFRED HEMENWAY,
Special Attorney for Defendant.
ALFRED HEMENWAY,
Attorney for A. S. Bigelow and Godfrey M. Hyams.

Boston, April 2, 1903.

Additional Correspondence Between Counsel.

Mr. McCLENNEN: I will put in evidence the letter of Mr. Lauterbach to Mr. Brandeis, dated September 20, 1902.

A letter from Mr. Lauterbach to Mr. Brandeis, dated September 26, 1902.

A letter from Mr. Brandeis to Mr. Hemenway, dated September 27, 1902.

A letter from Mr. Brandeis to Mr. Hemenway, dated March 17, 1903.

Mr. HEMENWAY: All these letters are to be submitted to me in the same way I submitted mine to you, and if I have any objections I can make them then?

Mr. McCLENNEN: Yes.

[Following are the letters referred to in this offer:]

G. M. Hyams,
Sears Building, P. O. Box 5104, Boston.

SEPTEMBER 20, 1902.

Louis D. Brandeis, Esq., 220 Devonshire Street, Boston, Mass.

DEAR MR. BRANDEIS: In order not to cause any unnecessary delay in the matter concerning which I had the pleasure of conferring with you on Thursday I came to Boston today for further conference with you and also with Mr. Hemenway, who will probably appear in any action you may bring, for Mr. Bigelow.

I timed my visit unfortunately, since I have ascertained that you would not be at your office today. Tomorrow I go to Saratoga, and since I expect to be Chairman of the Committee on Reso-
1225 lutions at the Convention, will not be able to confer with you again until after the close of the session, which will probably take place on Wednesday or Thursday of next week.

1321

In the meantime, on any question of procedure or furnishing of a bond that may appear to you to be pressing, Mr. Hemenway will be glad to confer with you.

With kind regards, I am,

Very truly yours, EDWARD LAUTERBACH.

BOSTON, MASS., *September* 26, 1902.

DEAR MR. BRANDEIS: I regret exceedingly that I had not the pleasure of meeting you.

Conferences with my clients, the Lewisohns, after a full investigation of the claim that was made on behalf of the Old Dominion Company, have been had by me.

They believe, and I have so advised them, that there is no claim which is made which they recognize as valid, and they must leave you to take such steps on behalf of the Company as you deem advisable.

As I have already informed you, Mr. Hemenway represents Mr. Bigelow, and I suggest that you confer with him as to any proceedings you desire to initiate, and as to the bond that you require.

With many thanks for your courtesy, and with regret that I cannot have the pleasure of a personal interview with you, I am,

Yours very truly,

EDWARD LAUTERBACH.

(Dictated to A. H. G. at office of Mr. Brandeis.)

SEPT. 27, 1902.
G/B.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: Mr. Lauterbach requests me to arrange with you the matter of bond in the suits of the Old Dominion Copper Mining and Smelting Company v. Albert S. Bigelow which we wish now to file, of which you doubtless have received the copies which we handed to Mr. Lauterbach.

We should like to have an attachment bond in the amount of $500,000. A single bond will do provided it is conditioned to the satisfaction of any decree which may be entered in either or both of the suits.

1226 Will you kindly let me hear from you on Monday morning whether a bond in that form will be agreeable to you, and whom Mr. Bigelow proposes as surety?

Yours very truly,

LOUIS D. BRANDEIS.

MARCH 17, 1903.
G/B.

Alfred Hemenway, Esq., Tremont Building, Boston.

DEAR MR. HEMENWAY: Mr. Lauterbach called me up on the telephone yesterday and stated that he had just returned from Kentucky and it would be impossible for him to go on with the taking of the depositions on Wednesday or any later day this week, but

that he could go on on Tuesday and other days of next week. I told him I would see whether I could arrange so that I could grant the postponement, and I have, at considerable inconvenience, made such arrangements.

Mr. Lauterbach stated that Mr. Bigelow would not go abroad before May 12th, and also that he had just been in communication—I was not sure whether with you or Mr. Bigelow or Mr. Hyams—in regard to the matter, and that the adjournment would be agreeable to you and them.

I am willing to grant the adjournment as requested by Mr. Lauterbach if you will agree on his behalf as well as that of the witnesses to proceed on Tuesday, March 24th, at ten o'clock.

I enclose a draft of agreement for the adjournment, which kindly sign and return to see if the arrangement is satisfactory.

I send you also a copy for your files. I wrote to Mr. Lauterbach yesterday that I would wire him if the adjournment could be arranged. Will you kindly let me hear from you, therefore, as soon as possible?

Yours very truly, LOUIS D. BRANDEIS.

(2 enclosures.)

Extracts from Respondents' Brief in United States Supreme Court Case.

Mr. McCLENNEN: I offer in evidence from the brief of Mr. Treadwell in the Supreme Court of the United States, pp. 84, 85, 86.

Mr. HEMENWAY: That I object to.

HAMMOND, J.: It may go in, subject to Mr. Hemenway's objection and exception.

[Following is a copy of the pages of the brief referred to:]

1227

Fourth Point.

Albert S. Bigelow is an indispensable party in whose absence a bill for rescission cannot be maintained.

(1) The bill discloses the joint interest of Albert S. Bigelow and of Leonard Lewisohn, defendants' testator.

This disclosure is distinct, emphatic and repeated.

The rescission sought is of the transfer to the complainant of certain mines and mining claims known as the Old Dominion Mine, the New York Mine, the Keystone Mine, and a certain parcel of land in Arizona, all of which had formerly been owned by the stockholders of Old Baltimore Company, the title being held by one William Keyser (Record, p. 3, fol. 4), and from him acquired by the said Bigelow and the said Lewisohn.

The complainant in folio 5 states that prior to May 24th, 1895, Bigelow and Lewisohn formed the plan of acquiring the said property held by Keyser; that (fol. 9, paragraph seventh) on or about

June 13, 1895, Bigelow, in conjunction with Lewisohn, for the purpose of carrying out their plan made an agreement with Keyser.

"In pursuance of this plan and conspiracy they required said Keyser to undertake to convey said claims and real estate to them without payment of any additional consideration upon said executors assenting thereto."

And (fol. 10, paragraph eighth) that Bigelow and Lewisohn for their common benefit acquired from Keyser the said property theretofore standing in his name.

The complaint further states (fol. 10):

"Said conveyance was made to said Leonard Lewisohn and the title to said property was acquired by him for the common benefit of himself and said Bigelow, as hereinafter set forth, and as a part of the plan and conspiracy hereinbefore set forth."

The complaint further states (fol. 18):

"The stock of said Baltimore Old Dominion Company and said parcels of real estate were acquired in the manner aforesaid with intent on the part of said Leonard Lewisohn and of said Bigelow to sell said property of said Baltimore Old Dominion Company and said parcels of real estate for a much larger price."

1228 The complaint further states (fol. 19):

"By the transactions above set forth said Bigelow and said Leonard Lewisohn carried out their said plan and conspiracy * * * and acquired * * * for themselves as they claimed * * * all the property conveyed by said Leonard Lewisohn to the complainant * * * thereupon did sell * * * and also sold * * * all the property conveyed to said Leonard Lewisohn." * * *

The complaint further states (fol. 28):

"Thereafter, to wit, on or about September 12, 1902, the complainant offered to said Bigelow and to the respondents to rescind the sale and conveyance to it from said Leonard Lewisohn of said parcels of real estate in Arizona, to wit, the parcels known as the Old Dominion Mine, the New York Mine, the Chicago Mine, Keystone Mine, and parcel of real estate," etc.

Not alone from the general tenor of the complaint is the joint interest of Bigelow and Lewisohn apparent. Their joint interest is distinctly pleaded, so that there is no doubt, that the transaction sought to be rescinded was a joint one on the part of Lewisohn and Bigelow.

In fact the complaint offers an excuse for omitting Bigelow as a defendant (fol. 29) based on his non-residence within the district.

The formal offer of the real estate to the complainant company was made in the name of Lewisohn (p. 20), probably because the legal title thereto stood in his name, although the property had been, as the complaint repeatedly states, acquired by both Bigelow and Lewisohn for their common benefit, and that they (Bigelow and Lewisohn) sold the same to the complainant.

It will be noted, however, that the formal offer contained a reference to the interest of Bigelow and a request to pay the consideration, namely, 30,000 shares of stock, to Bigelow as well as Lewisohn.

Extracts from Complainant's Brief Filed in Chancery of New Jersey.

Mr. McCLENNEN: I offer in evidence from the brief of Mr. Spooner, counsel for Mr. Bigelow in the New Jersey case——

Mr. HEMENWAY: That is subject to my objection.

HAMMOND, J.: Certainly, it will have to take the same course. It goes in subject to the exception of Mr. Hemenway.

1229 Mr. McCLENNEN: Page 38, the words on that page.—

"The defendant seeks to escape the force of the estoppel by the statement that Bigelow and Lewisohn were tort-feasors, and that under the familiar rule of law a judgment against one tort-feasor is not an estoppel in favor of the other tort-feasor when sued by the plaintiff for the same alleged tort. But Bigelow and Lewisohn are not sued as tort-feasors."

Also on page 47 of that brief the words,—

"This is not what 'mutuality' of estoppel means, as we understand it. What it means is that there would be no estoppel in favor of Bigelow, unless if the decree in New York had been against Lewisohn, it would have also inured to the benefit of the company on the question of liability as against Bigelow, a proposition which we do not contest."

Mr. HEMENWAY: That is subject to my objection and exception.

HAMMOND, J.: I suppose they are positions taken in that case inconsistent, or claimed by you to be inconsistent, with those taken here?

Mr. McCLENNEN: Yes, your Honor.

HAMMOND, J.: And the objection is on the ground that they were taken in that case? The objection, whatever it is, you may have. The stenographer will minute it.

Mr. HEMENWAY: That is under the New Jersey law; our contention here is that it is under the New York law.

HAMMOND, J.: Very well.

Mr. McCLENNEN: I also offer from the New Jersey bill of complaint the following, from page 22:—

"And your orator further shows to your Honor that in view of the premises the determination of the controversies existing between the defendant Company and your orator and the Lewisohn estate should be and is properly cognizable before this Honorable Court to prevent a multiplicity of suits and to prevent injustice through technical conflicts in different jurisdictions, and to the end that a decision might ultimately be reached binding on all the parties in conformity with the spirit of the laws of the state of New Jersey, under whose laws said corporation was organized and the duties and obligations of the parties were created and exist."

Mr. HEMENWAY: That is subject to my objection.

HAMMOND, J.: The same exception.

1230 *Testimony from Printed Record.*

Mr. McCLENNEN: I also call attention in the old printed record to the matters on pages 313, 586, 603, 754, 757, 502, 517, 518, 555.

Mr. HEMENWAY: I object, on the ground that it is already in evidence and does not need to be repeated. I came to your Honor's theory in regard to pointing out evidence, assuming that the whole evidence was before the court.

Mr. McCLENNEN: That is all, if your Honor please, of my testimony, but one witness whom I cannot locate, but who will be here the first thing to-morrow morning.

HAMMOND, J.: What do you propose to show by him?

Mr. McCLENNEN: I desire to show the New York law.

HAMMOND, J.: An oral witness.

Mr. McCLENNEN: Yes, your Honor.

HAMMOND, J.: How long will it take you to examine him?

Mr. McCLENNEN: I should not suppose the direct examination of him would require more than half an hour; perhaps a little more.

HAMMOND, J.: You must be prepared to go on. That will close your evidence?

Mr. McCLENNEN: Yes, your Honor.

HAMMOND, J.: We will adjourn until to-morrow morning at half past nine.

[Adjourned to Tuesday, October 6, 1908, at 9.30 a. m.]

TUESDAY, *October* 6, 1908.

Letter, Brandeis to Hoadly, Lauterbach & Johnson.

Mr. McCLENNEN: In view of the letters introduced by the other side, which I have now read, I should like to put in a letter dated June 1, 1907, from Mr. Brandeis to Hoadly, Lauterbach & Johnson, as follows:—

"JUNE 1, 1907.
B/Md.

Messrs. Hoadly, Lauterbach & Johnson, 22 William Street, New York City.

DEAR SIRS: I am in receipt of your letter of May 31st in which you say:

" 'It was our understanding had with your Mr. Brandeis, our Mr. Lauterbach and Mr. Hemenway that these cases should proceed together, and in view of your taking the Lewisohn case to the Supreme Court we feel that it is only proper that the Bigelow case should stand until the Supreme Court has passed upon the question.'

1231 I must state most emphatically that it never was my understanding that the Bigelow case and the Lewisohn case 'should proceed together,' and I am at a loss to know how that idea could have arisen in your minds. It was understood at certain times that we should take testimony to be used in both of the cases, but it never

was stated or suggested, so far as I know, by any one, prior to the call that Mr. Hemenway and Mr. Treadwell made on me on April 1st, that the Bigelow and the Lewisohn cases should proceed together. When that suggestion was made by Mr. Hemenway and Mr. Treadwell at the conference on April 1st at my office with Mr. McClennen and me, I stated emphatically that there never was any such understanding. The only understanding that we ever had, which I think you will find specifically mentioned in the correspondence and covered by the stipulation, was that you should have a reasonable time for taking testimony after we closed our testimony.

As to the time occupied by us in taking our testimony, which you say was something over two years, I must remind you that a very large part of that time was consumed in delays occasioned by the fact that either you or Mr. Hemenway was unable to fix earlier dates. It is now many months since we closed our testimony, and it is nearly a year since we stated to you that our testimony was practically closed and that we desired you to prepare to take yours.

You cannot fail to recall that this matter was fully discussed when Mr. Treadwell and Mr. Hemenway were at our office at the taking of testimony on July 24, 1906, when we told you that we had practically closed our testimony and desired you to prepare for taking yours.

Yours very truly, LOUIS D. BRANDEIS.

P. S.—We will make the motion for an assignment in the Bigelow case on Tuesday next."

Oral Testimony.

CHARLES ANDERSON BOSTON, sworn.

(By Mr. MCCLENNEN:)

Q. Your full name, Mr. Boston?
A. Charles Anderson Boston.
Q. Your residence?
A. New York city.
Q. You are a member of the bar of New York?
A. I am.
Q. Will you state briefly your education and experience in the practice of law?

A. I was educated at the Baltimore City College and at the
1232 Johns Hopkins University; I graduated in law at the University of Maryland in, I think, 1886; I was admitted to practice at the bar of Baltimore city, and shortly afterward of the Court of Appeals of the state of Maryland. I was admitted to practice in the courts of New York in the year 1889, I think. In the year 1893 I was admitted to practice in the Supreme Court of the United States. I have been admitted to practice in the southern, eastern, and northern districts in the state of New York, in the circuit and district courts of the United States. I have also been admitted to practice in other districts in the Circuit Court of the United States. I have practiced chiefly in the city of New York, in the courts of

New York, but I have practiced also in the city of Baltimore, in the Court of Appeals in Maryland, and in the Supreme Court of the United States. I have been engaged in litigation in the federal courts, in several of the Circuit Courts in various districts, and in the district courts, and in some of the districts, as I now recall, in Iowa, Missouri, Kentucky, Maine, New Jersey, and have also been engaged in the Court of Chancery in New Jersey. I have had a general experience in the practice of law. I was engaged in the law department of the Title Guarantee & Trust Company of the city of New York, for about three years, examining questions particularly relating to real-estate law, including the effect of judgments on titles to real property. I subsequently became a member of the firm of Baldwin & Boston in the city of New York, and was a member of that firm for eight years. I left that association and became associated with the firm of Hornblower, Miller & Potter in New York city in the year 1901, and on the dissolution of that firm, in the year 1906 or the year 1907, on the withdrawal of Mr. Byrne, I became a member of the present firm of Hornblower, Miller & Potter, and am still a member of that firm. That has been my general experience with respect to the practice of law. I don't know that you asked me for any particular experience in respect to——

Q. I was going to ask in respect to your experience with the subject of res adjudicata or estoppel by judgment.

A. I have had occasion to consider that question with some frequency. My present recollection is that the first special examination of the subject that I made was in the litigation which is reported under the name of Baldwin v. State of Maryland, in 89 Md. and 179 U. S. I made an examination at that time of the subject of res adjudicata because there had been previous litigation respecting the same question in the same two courts reported in earlier volumes of Maryland and of the United States. I afterwards had occasion to examine it with particular regard to the law of New York in the case of Hirshbach v. Bock, subsequently reported in the case of Hirshbach v. Fitzgerald, which is reported in, I think, at least three of the reports of the appellate division, and in the
1233 145th and 157th N. Y. The questions, as I remember, which are considered in those reports are not questions of res adjudicata, but I had to consider the subject for two reasons. The action was an action brought in behalf of a creditor of the Madison Square Bank, suing for himself and others similarly situated, and I had to consider the effect of such a judgment upon the rights of other creditors. That was one of the questions involved at the trial, and the complaint was dismissed by Mr. Justice Stover. His dismissal was subsequently reversed by the appellate division, and his dismissal was subsequently affirmed by the appellate division in the case of Hirshbach v. Fitzgerald, 157 N. Y.; but only seventeen out of one hundred and ten defendants in that case had appealed to the Court of Appeals, and the appellate division had granted a new trial, so that when we came back for a new trial, as I remember it, some of the defendants had not appealed to the Court of Appeals and I had to consider particularly the effect of the judgment of the Court

of Appeals affirming the judgment of dismissal; so that I studied the subject of res adjudicata, at that time, with great care.

I was of counsel in the case of Thorne v. De Breteuil, which is reported in 179 N. Y., and then once more I studied the subject because there the questions were questions merely of the identity of the issues; the parties were the same. I have had occasion lately to consider the subject very carefully in respect to three litigations now pending in my office: the case of Johnson v. Victoria Chief Copper Mining & Smelting Co., where I have had occasion to consider the effect of a judgment on demurrer in New Mexico between the same parties in the same cause of action, and in the case of the bankruptcy of the Randolph American Coal Company, now pending in St. Louis, and in the case of the Slater Trust Co. v. Reed and others, growing out of the failure of the Randolph Company, now pending in the United States Circuit Court for the Southern District of New York, in which there has been a decision on demurrer, though I do not think it has yet been reported in the Federal Reporter. I had to consider in that case the effect of a representative action upon my clients who were not represented on the record in that action, the action being brought by one bondholder in behalf of himself and others similarly situated. My bondholders were pursuing their own actions and had not joined in the particular action before the court. So that I have had those occasions to consider the subject of res adjudicata in its application to the particular question and generally. I have also made a very careful examination of the subject, anew, with respect to the record in the present action.

Q. Can you give me some idea of how much time you have expended on this particular examination with a view to testifying?

A. I was engaged in a desultory way for about a week, in connection with my other duties, giving a portion of my time as frequently as I could, to the study of this subject in its general aspects, but on Friday, as I remember, week before last, I abandoned all other work and devoted my-self exclusively to the consideration of this subject, and have been engaged on it continuously ever since to the exclusion of practically all other professional work.

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Q. Have you examined a copy of the record in the case of the Old Dominion Copper Mining & Smelting Co. v. Leonard Lewisohn brought in the Circuit Court for the Southern District of New York, on this demurrer?

A. You mean against the executors of Leonard Lewisohn?

Q. Yes.

A. I have.

Q. Have you examined a copy of the record in the present case of the Old Dominion Copper Mining & Smelting Co. v. Albert S. Bigelow?

A. I have.

Q. In your opinion, assuming that the question whether the decree dismissing the bill of complaint against the executors of Leonard Lewisohn is a bar to the present action is a question to be determined by the law of the state of New York, under the law of the state of

New York does that decree of dismissal operate as a bar to the actions against Albert S. Bigelow?

A. I answer that question on the assumption that it is governed by the law of the state of New York; I would not wish to be understood as expressing an opinion that it is, but assuming that it is, then the action in the Circuit Court of the United States, in New York, is not a bar to the present action.

Q. Will you state in detail your reasons for that conclusion?

A. There are two reasons that would lead me to that conclusion, before I reach the general subject of the effect of a dismissal of one suit on the merits on another suit brought against another person in a different jurisdiction as a joint or several wrongdoer or as a co-wrongdoer. I will approach that subject last. The preliminary matters are simpler, and therefore, I think, should be spoken of first. I have considered very carefully the judgment of dismissal itself, and I am not satisfied that that judgment was a judgment on the merits. We have in the state of New York, in our code of civil procedure, sec. 1209, which I understand applies not only to judgments in the state courts, but would apply to judgments at law in the federal courts. I would not understand that it applies to judgments in equity in federal courts, but I am asked to assume that this is construed by the law of New York. On that assumption, if section 1209 of our code of civil procedure is available, then it must appear on the judgment roll itself that the dismissal was on the merits. It is not necessary that the words "on the merits" should appear in the judgment of dismissal, but it is necessary that it shall clearly appear from the judgment roll that the dismissal was on the merits, else it will not preclude the beginning of a new suit for the same cause of action. It was
1235 said in one New York case, as I remember, that the reason for the adoption of section 1209 of the code of civil procedure was that the rule which had formerly obtained at law should also obtain in equity, and that equity decrees of dismissal which formerly would have been construed to go to the merits, unless the contrary appeared, were now to be construed as judgments at law, which it seems were formerly construed as not disposing of the merits of the case, unless it clearly appeared from the judgment roll that the merits of the case had been disposed of. In speaking of the judgment roll, I refer particularly to what we consider the judgment roll in New York. It does not include opinions, it does include the pleadings, the order for dismissal, and the decree itself, and in the case of the present decree it would include the mandate of the Supreme Court of the United States and the decree of affirmance. Without looking at the opinions of these courts, but looking only at the judgment roll—and I have authority for doing that under the decisions in the state of New York, particularly, as I remember, in one of the cases of Genet v. Delaware & Hudson Co., 170 N. Y. 278, and 162 N. Y. 172; also in Converse v. Sickler, 146 N. Y. 290—looking only at the judgment roll, and excluding the opinions of the court, I find what, it seems to me, is undoubtedly true, that this decree, considering the decree below, as well as the decree of affirmance, was a dismissal of this case for want of equity. I would not consider that the dismissal of a case for want

of equity was a complete disposition of the issues between the parties. I think it has been practically so said in the case of Rose v. Hawley, 133 N. Y. 315, a case in which it was said that section 1209 does not apply to bills in equity, citing Genet v. Delaware & Hudson Co., 163 N. Y. In Rose v. Hawley, as I remember, it was said that the dismissal of a bill of complaint in equity does not dispose of the issue, that an action might have been brought at law. And it would seem to me that this action might have been brought at law for damages. It would seem to me that in the new matter on which this action was originally retained to this court, had resolved itself into an action for damages, and I do not think that the dismissal of the case for want of equity would preclude the beginning of a new suit for damages at law.

The second of the preliminary matters which I think I ought to get out of the way is the identity of the parties here; I mean the character of the parties. This is not a suit against Leonard Lewisohn, it is a suit against Leonard Lewisohn's executors; and whatever might be the law with respect to the effect of a suit against Leonard Lewisohn I do not understand that his executors stand in the same relation to Mr. Bigelow that Mr. Lewisohn himself would have sustained. I think my view in that particular is borne out in the case of Thomson v. American Surety Co., 170 N. Y. 109, where it is said, in
1236 effect,—I do not attempt to quote the words,—that a surety is not bound by a judgment against the executors of a trustee on whose bond he became liable. If the judgment had been recovered against the trustee himself, the surety of the trustee would have been bound, but the judgment not having been recovered against the trustee himself, but having been recovered against the executors of the trustee, the court said that the executors of the trustee sustained no trust relation, they sustained no relation to the estate of their testator; that they were merely responsible for the funds which came into their hands, and that in that respect they were not trustees, that they could not have administered the trust, that they could not have accounted for the trust estate except to the extent of the assets of the decedent which came into their hands. So therefore, it seems to me that Mr. Lewisohn's executors were in no sense in privity with Mr. Bigelow and in no sense represented Mr. Bigelow; and in no sense was a judgment in favor of Mr. Lewisohn's executors a judgment of which Mr. Bigelow could avail himself independent of the subject of participation. I will come to the subject of participation later.

Now I come to what I consider the main subject here, so far as it calls for an elaborate explanation. In my opinion, the matter is already disposed of by the two points that I have already made. Assuming, however, for the purpose of the subsequent discussion, that the first judgment was on the merits, and that the executors of Mr. Lewisohn sustained the same position to Mr. Bigelow that Mr. Lewisohn himself would have sustained, I come to the question whether, under the law of New York, the dismissal of the bill on the merits against Mr. Lewisohn would have availed Mr. Bigelow, independent of the question of participation. I think that under the law of New

York it would not have availed Mr. Bigelow. There are a number of decisions in New York which, in my opinion, are still authorities, never have been overruled, which expressly determine that question. There are also a number of obiter dicta in recent opinions of the Court of Appeals which, if accepted as the law of New York, would expressly overrule the contention. There are also, in my opinion, a number of other decisions in the Court of Appeals in New York where the question has not been raised or discussed, which are inconsistent with the principle. I will take those cases up in their order.

There are a number of decisions in the state of New York which contain broad expressions in which it is said that a judgment on the same questions precludes all parties, however interested in the controversy, or interested in the subject matter of the controversy. None of those cases decide the precise question now in issue. Each of those cases was on a different subject, where it is apparent from the
1237 context and the character of the controversy, to my mind, that when they spoke of interest they did not refer to the interest of the wrongdoer, or the interest of a man who sustained the same relation to Lewisohn that Bigelow did in this case. I will take up those cases as I recall them at a later stage and show how, in my opinion, each of them is distinguishable from the present case. But I want to show, at present, that the general proposition of those cases, that it affects everybody in interest, is not the law of New York, except as it applies to people having interests which were discussed in those cases. There is one decision in New York, a special-term decision, made on a motion to dismiss a complaint at the trial, on which some people based a conclusion that that case established the law of New York. That case is the case of People v. Stephens, reported in 51 Howard's Practice, decided by Judge Westbrook, at circuit, on a motion to dismiss the complaint. He granted the motion, and he stated, as I read the opinion, that he considered the judgment against the co-wrongdoers binding upon men who had not been parties to the former suit; not binding upon them, but that they could have availed themselves of the dismissal of the complaint. His reasons are reasons which indicate that the principle which he applied was the rule of stare decisis. I think he said that the judgment was an estoppel; he at least said that the judgment was a bar; but his reasons were that any court which would give two different decisions against different parties on the same state of facts would merit eternal infamy. Now that is the expression, in very harsh terms, of the rule of stare decisis, as I understand it. But, notwithstanding the fact that he expressed the opinion that the case was one where the rule of estoppel worked, he elaborately discussed the merits of the cause, and showed that on its merits the cause should have been dismissed and the motion granted. The case was appealed to the Court of Appeals.

In another case the Court of Appeals, in discussing the question of res adjudicata,—I think it is the case of Leavitt v. Walker, 95 N. Y. 212,—said that if a case was decided by a former adjudication, it was unnecessary to discuss the merits of the case. If we were to apply that same rule to the appeal in the case of People v. Stephens, we would immediately jump to the conclusion that the former judgment

was not a bar. There were two opinions in the Court of Appeals. The case is reported in 70 N. Y., as I remember. One, the principal opinion, was by Judge Rapallo; the other, a concurring opinion, by Judge Allen, as I recall. Judge Rapallo said that numerous points of law had been raised in the argument, but they would decide the case on the point which they deemed to control it; and then, instead of deciding the case on the ground of res-adjudicata or on the ground of stare decisis, they went into a discussion of the merits of the case, and decided that, from the facts of the case, the plaintiff, the
1238 state of New York, had, through the action of its legislature or one of its boards, waived its cause of action.

Now the Court of Appeals has said in one case,—I think it is Moore v. City of Albany, 98 N. Y. 396,—that a special-term decision does not establish the law, and that they will not, in the subsequent litigation involving the same facts, consider themselves bound to follow the decision of a special term in a former case merely because it was not appealed; that they will not consider themselves bound to follow the rule of stare decisis. So that, in my opinion, a special-term decision which has gone to the Court of Appeals on appeal, and which has been affirmed for a different reason from the reason assigned below, does not establish the reason assigned below as the law of New York. As far as I know—and I have made very diligent search—there is no case in the state of New York other than the case of People v. Stephens, in the circuit, which was tried at the circuit—the circuit, formerly, in New York was a court which tried jury issues, issuing out of the Supreme Court, and it was a court of co-ordinate jurisdiction with what I have styled the special term, which was a term held by one judge for the trial of jury causes—the case of People v. Stephens has never been followed in New York on that point, as far as I know. It was quoted once in New York in another case, but not on that point, but on another point altogether, and was not quoted or cited in the Court of Appeals. So that, I do not understand, should establish the law. On the contrary, I consider that the law is firmly established to the contrary.

The question has arisen in several cases. It arose in the case of Moore v. Tracy, 7 Wendell, 236; in the case of Marsh v. Berry, 7 Cowan, 344; in the case of Lansing v. Montgomery, in 2 Johns. 381. In each of those cases the question was, to my mind, in point, and the decisions are express decisions on this subject.

There have been expressions by the appellate division by the Court of Appeals in other cases which, in my opinion, are a direct contradiction of the principle said to have been laid down in People v. Stephens by the circuit decision. Those cases—

Or, there is another case before I go to the Court of Appeals, the case of Calkins v. Allerton, 3 Barbour, 171, where the expression appears to be obiter dictum; also in the case of Atlantic Dock Company against the Mayor and City of New York, in 53 N. Y., at page 64.

There has been a recent decision by the appellate division in the second department of New York—the case of Gittleman v. Feltman, 122 App. Div. 385,—where it seems that there was a direct expression to the contrary. My recollection is that the case was affirmed

by the Court of Appeals, but that particular part of the ap-
1239 pellate court decision was not cited or quoted. My own opinion is that the expression there was obiter dictum, although there might be a difference of opinion about that; there might be a conclusion that it was directly involved.

Now, in the absence of controlling authority, obiter dicta, particularly in the Court of Appeals, are guides to the arrival at what is the law. But in view of the decisions in the earlier part of the history of New York which have never been reversed, and which were of higher authority than the Circuit Court decision in People v. Stephens, and in view of what I deem obiter dicta in the later Court of Appeals in New York decisions, I not only do not see how it is possible to say that the New York law is established to the contrary, but I think it is firmly established in support of my view. It is true, as far as I know, that the cases which I have cited are all of the cases that have an immediate and direct bearing on the proposition. But I have said that there are cases which, in my opinion, are so far inconsistent with it, that is, so far inconsistent with the decision in People v. Stephens that they practically establish that the law of New York is to the contrary of what was decided by the Circuit Court in People v. Stephens. In the last case which has been reported, so far as I can discover, from the Court of Appeals in New York, the case of St. John v. Andrew Institute, 192 N. Y., a volume of reported cases which is not yet bound, the Court of Appeals had occasion to consider the effect of the reversal of a judgment by the Court of Appeals upon the rights of a legatee, under a will, who had appealed from the judgment. He had not appealed. The Court of Appeals reversed the judgment, or reversed it as far as the appellant was concerned. The question of his rights depended upon the construction of the will. The construction of the will was such that if the appellant's rights were what the Court of Appeals had decided then the rights of his co-defendant, who had not appealed, were exactly the same, because they arose on the same state of facts. Their legacies were similar, and they both claimed under the same document—the will; and the court below had adjudged their rights with respect to the construction which it had given to the will; that is, the Court of Appeals distinctly construed the will, and only reversed as to the person who had appealed. A motion was made by the person who had not appealed,—a motion of remittur,—so as to include him in the reversal and give him the benefit of the action of the Court of Appeals on the appeal taken in the same suit. But the Court of Appeals said, "No, he has not appealed, his interests are several." Now there comes in an illustration by the limitation by the Court of Appeals' decision of the effect of the words which it had used in their opinions that any one interested in the subject matter in dispute could take advantage of a judgment. If that is a principle of law, then a legatee whose rights have been involved
1240 in a dispute, and have been adjudged by the court below, has such an interest in the subject matter of the suit that he ought to get the benefit of the reversal as well as his co-defendant similarly situated who has appealed. But the Court of Appeals said,

"No: their interests are several, although the interest of the man who did not appeal was not represented on appeal by his co-defendant, who was the appellant." They cited with approval, and as the foundation of their decision and as the precedent on which they relied, the case of Gerrod v. Stagg in 10 Howard Practice. That case was a case where two wrongdoers, accused, as I remember, of libel in the same suit, had suffered judgment in the court below. One of them appealed and the Court of Appeals reversed the judgment as to the appellant, but left it standing as to his co-tort feasor. The co-tort feasor moved the court on appeal—it was not the Court of Appeals; we have an intermediate court of appeal in our state—he moved the court on appeal to amend its remitter so as to include reversal with respect to him moving it, because it appeared in the decision of the court on appeal that they were of the opinion that the appellant had not established a cause of action. And they reversed against the appellant on the ground that it did not appear from the plaintiff's own testimony that he had any cause of action. In that opinion they said,—

"The interests of these co-defendants are several and not joint. We could not have reversed the judgment if it were joint without rversing it as to all parties whether they had appealed or not. Judgments against wrongdoers being several and their liability being several, and there being no contribution between them, there is no reason why we should reverse as to the co-tort feasor who has not appealed."

Now the Court of Appeals in this very latest case that I speak of, in 192 New York, relied upon that case as a precedent, and quoted the language of that case. I am not sure that that does not establish, as the law of New York now, that a judgment of dismissal against one of two wrongdoers sued on the same state of facts does not avail the other wrongdoer. And that is true, even though it be in the same case; but it strikes me that it is much more true if it be in different cases.

Therefore I say that it seems to me that the cases in New York are inconsistent with any such theory, as well as there being cases which have declared the express contrary.

Further than that, perhaps another dictum, but I do not know that it is a dictum, is a definition of privity which is used by the Court of Appeals in the opinion in Atlantic Dock Co. v. Mayor, 53 N. Y., at page 64. In defining privity in that case, the court cites a definition which it says is taken from the case of Sprague
1241 v. Wait, in 19 Pickering in this state. But when we examine the case of Sprague v. Wait, we find that the action was an action against a tort feasor engaged in the same tort, and that the court of Massachusetts decided. By the way, it was stated in that case that it was admitted that if the defendants were guilty they were equally and jointly guilty. In that case the defendants were not sued jointly, they were sued severally, and the cases came on for trial together on the same state of facts. It was admitted at the trial of the two cases tried together that if the defendants were

guilty they were equally and jointly guilty. One of the questions in that case which was a case for a trespass, quare——

Mr. HEMENWAY:——clausen fregit.

THE WITNESS: I have not used that phrase for so long I cannot quote it; we do not talk Latin much in the New York courts.

The question at issue in this case was whether the place where the trespass was committed was a public highway. It had previously been decided in the case of one of the tort feasors that the locus in question was a public highway, therefore he was not guilty, could not be guilty, of a trespass against the plaintiff's right. A judgment was introduced against both defendants, or was introduced in the cases which were tried together; but your court in the two cases held that the judgment in the circuit against Wait was a bar against the man, with respect to the man, who had been previously tried, but was no bar against the man who was accused of having committed the wrong with him; and so the court on review, as I remember, reversed the judgment as to one of the defendants and affirmed it with respect to the other. Now the question there, is how far, by citing a Massachusetts case as authority or precedent for the definition of privity, the Court of Appeals of New York adopted with it the exception from the definition. My idea is that if a court refers to a case for a definition, and the case defines the word, and then says that the facts before it do not come within the definition, that in adopting that decision as a precedent the Court of Appeals of New York also decided that the case which the court of Massachusetts held did not come within its definition of privity, was not within the definition of privity and that was henceforth to be understood to be in New York.

Not only that, but similar cases arise in New York in the citation by the courts of New York of Litchfield v. Goodnow, 123 U. S. My recollection is that, in the case of Litchfield v. Goodnow, the Supreme Court of the United States decided that participation in an action did not amount to such representation in the action that a party would be bound merely because of his participation. That case has been cited with approval in New York, again, as I remember,
1242 in the case of definition of privity. So that it might well be contended that by adopting the definition of privity as used in Litchfield v. Goodnow, the Court of Appeals of New York had also adopted the exception. The case in which Litchfield v. Goodnow is cited as a precedent for the definition of privity is the case of Williams v. Barclay, 165 N. Y. 18.

So it seems to me that it is clear that the law of New York is not established to the contrary of what I say; it also seems to me that it is established affirmatively as I say, for the reasons which I have assigned. If my reasons are not good, my opinion is not good.

Now as to what the law of New York is. It is not peculiar, it is to the effect that parties and privies are estopped by a judgment in which the same question was litigated or might have been litigated. Now and again the Court of Appeals has at times used the expression "might have been litigated," and at subsequent times has

spent its time in explaining what it meant by "might have been litigated." The latest case in which it limits the expression "might have been litigated" is the case of Earle v. Earle, 173 N. Y. 480. It was not a tort case; it was tort in one sense, because it was a suit against delinquent trustees for an accounting, and the various beneficiaries of the trust were made parties to the suit. Two of them appeared, asserted their interest in the trust, and asked for an affirmative judgment; the third appeared and defaulted; she asked for no affirmative judgment. Finally judgment was entered in the case, but it did not grant this defendant any relief, the defendant who had defaulted. It did grant the defendants who had claimed affirmative relief a money judgment against the trustees for the amount of their share in the estate. Subsequently the defendant who had suffered a default, but who was a party to the former litigation, brought suit against the trustees for an accounting of her share of the estate. But she was immediately met by the defence: "Why, while your rights were not litigated in the former suit, they could have been litigated; you were made a defendant for the purpose of presenting your rights, and you didn't do it; now you are barred." But the Court of Appeals said, "No, she didn't have to litigate her affirmative rights in that case, that she could suffer a default without barring her rights, and could re-litigate them." That is an extreme illustration. There is another case where a woman was made party to a suit to foreclose a mortgage. She defaulted; the property was sold subject to her dower. The purchaser took a deed of the property subject to her dower. After her husband's death she brought suit to admeasure her dower, and the purchaser defended on the ground she was not entitled to dower. And the court said her dower was not litigated; it might have been litigated, but it was not essential to any of the issues that
1213 were raised by the parties. By the way, I have not given a reference to the latter case, but I will; I will find it and give it later.

So it very clearly appears that the two phrases, "interest in the subject matter" and "might have been litigated," are used with respect to the particular cases before the court, and have not the same meaning as they would have if used popularly, and none of them decide the present situation.

Now it is not all privies who are bound. In Campbell v. Hill, 16 N. Y. 575, there is a discussion of cases in which privies are bound and why they are bound. It is there stated that whether a privy is bound depends in each case upon the character of the privity. It is rather difficult, in the short time at my command, to classify all of the cases in which persons have been held to be privies to a judgment; but, as a general thing, they are people who are represented in the action by a party to the action, or whose interest is represented in the action by a party to the action, or people who are indemnitors of a party to the action, or have undertaken to indemnify against the result of the action; or people who subsequently take the same property which is involved in the action and take it with the rights which have been decided by the action, or people who sustain the

relation to each other of principal and agent, master and servant, principal and surety, indemnitor and indemnitee, and similar relations, where either there is a responsibility over or there is a union of interests in the question decided, and where the persons' rights will be adjudged in the case. But none of the cases which I have considered—and I have not considered a very great many—extend that doctrine to co-wrongdoers; they are all people where the judgment works as an estoppel, I mean as an estoppel between the parties, —they are all people who sustain relations to each other than that of equal wrongdoers. There is a class of cases where people who are responsible for wrongdoing are regarded as estopped or entitled to take advantage of the cases of other wrongdoers, or of the actual wrongdoer, but those are invariably cases where somebody is responsible for the wrongdoing of another and has not himself participated in the wrongful act. Every one of the cases to which I refer will be found to come within that category. A type is the case of Featherstone v. Turnpike Co., in 71 Hun, I think, page 109; but there are several other cases in the state of New York and in the Court of Appeals. The Court of Appeals cases, as I remember, all have to do with municipalities, and the principle was first established with respect to municipalities, that a municipality having a right of action against an actual wrongdoer was in such privity with him that it was affected by the judgment, a judgment that no cause of action existed against the wrongdoer.

1244 There is a class of cases where judgments operate against strangers, but those cases are all cases where the judgment is the ascertainment of a fact, and the fact is not the entire subject of litigation, but is merely part of the subsequent action. They are well illustrated, first, by the cases where the question in a subsequent action is whether a man sustained the relation of principal and agent to another man, or whether two people sustained or now sustain to each other the relation of husband and wife, and the judgment establishing the relation between the two parties is held to be the best evidence that the relation exists; it is not put on the ground of estoppel, it is put on the ground that the judgment is the ascertainment of that particular fact between the two people who were most interested in the fact. There is another class of cases where a man having been defeated in a suit, or having succeeded in a suit, is subsequently himself estopped from offering the effect of that judgment in a suit against entire strangers. The reason for that is that the man has once chosen a position which is inconsistent with the position that he now assumes. Illustrations of that are cases where a man sues for conversion. Under the doctrine of the law, when the judgment is entered, the title to the property passes to the judgment debtor. After that, he is no longer the owner of the property, and he could not recover against a stranger for a trespass on or damage to the property, because he could not prove that he was the owner of the property. He has had the litigation with the man as the result of which the title to the property actually passed; but the judgment is not to operate as an estoppel except it proves the fact that the man no longer has title to the thing with respect to which he sues. So if a

man assumes an absolutely inconsistent position and sues with respect to the state of facts which he alleges to exist, and recovers in such a suit, he cannot afterwards, in respect to a stranger, take a position which is at variance with the position he took in the first place; that is because it is in the nature of a conclusive admission against him that the state of facts which he now alleges does not exist.

There is a class of cases where a man is not bound by a judgment because he has contracted to pay the judgment. In such cases our courts hold that he is bound by the judgment between third parties because he has undertaken to pay that judgment, and in such cases he is not entitled to notice of the action.

Now I come to the subject of the effect of participation. I find no decision and, in my opinion, it is not the law of New York that mere participation in an action binds the party participating. There are numerous cases to the contrary. The strongest case to the contrary is that of People v. Knickerbocker Life Ins. Co. in 106 N. Y., where the receiver of the Knickerbocker Company actually partici-
1245 pated in the Supreme Court of the United States in a suit against the life-insurance company, and asked the Supreme Court of the United States to amend its former determination so as to permit the action to be tried over again, and on his application the United States Supreme Court did it, and the case was subsequently tried, went by default, there being nobody to represent the corporation at the trial. That judgment was pleaded against the receiver. But the Court of Appeals said that participation in that manner by the receiver was not such a participation in the action,—that he was not bound by the result of the action.

(By Mr. HEMENWAY:)

Q. One moment. In regard to participation, was that included in your question?

A. I am asked to examine the record, and the record alleges participation, as I remember. My recollection is that the record in the amended, new supplemental answer here expressly alleges participation.

Mr. HEMENWAY: It does, and I was mistaken in supposing you referred to looking at that record. I thought you meant the record in New York.

The WITNESS: No, the record in this case.

Mr. McCLENNEN: Perhaps that was my fault, but I intended to put it once for all.

The WITNESS: I understood I was to refer to both records in order to discover what the effect of the New York case was on the Massachusetts case, and I could not express an opinion with reference to the effect of the New York case without knowing what the Massachusetts case was too, so I have read both records and am answering with respect to both records.

Every case that I have found where participation played any part in the result is a case where a man had a right, which the law allowed him, to appear and protect his interests. I do not understand

that Mr. Bigelow here had a right to appear for the protection of any interest. My reason for that is that it is the law of New York that there is no contribution between wrongdoers. It is also the law of New York that the satisfaction of a judgment against any wrongdoer is a complete satisfaction of the entire cost of the case, although a mere recovery against one wrongdoer is not a complete satisfaction of the cause of action, but you can have as many recoveries as there are wrongdoers, and not one will bar another. When I speak of recovery, I mean the entry of the judgment as distinguished from its satisfaction. Therefore I consider that Mr. Bigelow had no interest to protect in that suit. And having no interest to protect, the suit was inter alios, and he had no right to interfere; bearing in mind, also, that the thing here which was in litigation were the assets of the estate of Leonard Lewisohn. Leonard Lewisohn had no right to contribution from Bigelow. His executors, if they had paid the judgment, would have no right to appeal to Bigelow to con-
1246 tribute. And so Bigelow had no interest in the subject matter of the dispute. He had, perhaps, a praiseworthy desire to get a decision as a precedent in litigation. But I have already referred to the case of Litchfield v. Goodnow, where mere participation in the duties did not amount to participation in the suit. Bigelow was not interested except so far as he wanted to get a precedent in the suit out of the state rather than going into it, because recovery in that suit and payment by the executors of Leonard Lewisohn would have extinguished the cause of action. So that I cannot understand, and I am not of the opinion, that Bigelow had any interest to protect in that suit. Our Court of Appeals has distinguished between an interest in litigation and interest in the event of the litigation. It has done so in this very case of St. John v. Andrew Institute, in 192 N. Y., and it is illustrated by reference to a case where a judge is disqualified from sitting in a case because of his interest. If he merely has an interest in the determination of the question as a question of law, he is not, as a matter of law, disqualified from sitting in a case. Now the law of New York is that all the persons who are bound or affected by a judgment are those who have an interest to protect in the action and the rights secured to them by the law to appear in the action. I think Mr. Bigelow had no right in this case, because he was not liable with respect to any possible recovery in this case, and this judgment would not have affected him in any possible way. I think he had no interest to protect. He had no interest in this case, and he had no right to appear in this case because there was no contribution in this case. He was not in any sense represented in the case, his interests were not involved in the action, and he was not a necessary party in the case.

I have tried to discover, in my own mind, why strangers are not bound by litigation. The rule used to be——

(By Mr. Hemenway:)

Q. One moment. Is that in answer to the interrogatory?

A. Yes, I think it is. There are two reasons, and those reasons have been used by the Court of Appeals in New York, and I think they have a direct bearing. I may not have so phrased it that you can see

its bearing, but I think I will come to it in an instant. One reason is that strangers have had no day in court, but that is only one reason. The other reason is that there must be mutuality. Mutuality, as I understand it, is, if the judgment had gone the other way, it would have been operative in favor of the person who in that event would have been a successful party. It has been established many times in New York that in order for a judgment to be an estoppel it must be mutual. The cases are—

Nelson v. Brown, 144 N. Y. 384.
Collins v. Hydon, 135 N. Y. 320.
1247 Masten v. Olcott, 101 N. Y. 152.
Moore v. Albany, 98 N. Y. 396.
Remington Paper Co. v. O'Doherty, 81 N. Y. 474.
Atlantic Dock Co. v. Mayor, 53 N. Y. 64.
Booth v. Powers, 56 N. Y. 22.

And any judgment here, in my opinion, would have lacked the element of mutuality. I do not think a judgment recovered here in favor of the plaintiff would have had any effect whatever upon Mr. Bigelow. Here the element of mutuality was lacking. And all the cases that I have cited decide that mutuality is an effectual factor in estoppel by judgment. Mere inconsistency between the results reached between strangers in respect to the same state of facts does not make it a rule that a judgment must be an estoppel. Where the litigation occurs in the same court, the court will adopt the rule of stare decisis, and will apply the same principles of law to the same state of facts. In passing on the subject of interests in the litigation, as distinguished from interest in the event, as where no property rights are really involved, I cite the cases of—

Collins v. Hydon, 135 N. Y. 320.
Eisenlord v. Clum, 126 N. Y. 552.
Wallace v. Strauss, 113 N. Y. 238.

The case of Collins v. Hydon, 135 N. Y. 320, is an interesting, and I think a pertinent, case here. There, in a former suit, an individual *had* [was] made an assignee for the benefit of creditors. He himself was a judgment creditor. He sought to set aside a previous conveyance of the property as a fraud, and he was defeated on the issue of fraud, and it was decided in the first case that there was no fraud. Of course he could not set aside the deed, for it was not a fraud. In that suit he was assignee for the benefit of creditors, and sued as such. He subsequently brought suit in his own right as judgment creditor to set aside the deed, and he was met with this judgment; and yet the Court of Appeals held that he was not precluded by the former judgment because it distinguished as between his interest as assignee for the benefit of the creditors and his individual interest in the second suit, and he was not precluded on the question of fraud by the prior judgment. Yet it is difficult for us to distinguish actually between a man appearing in court in a representative capacity and appearing in court in an individual capacity where he has an interest in the same question, the

question of fraud. Yet the court held that his participation
1248 as assignee for the benefit of creditors, his actually being the plaintiff for the benefit of creditors, did not bind him on the judgment when he sued subsequently in his own individual capacity. Now the reason for that is, and it is established by a long line of cases, that the issues must be identical.

And now I come to the identity of issues. A vast majority of cases in New York in which the question of identity of interests has arisen, are cases where there was a disputed fact; but in the New York case against Lewisohn's executors there was no disputed fact; the facts were all admitted, so that we must consider what the issue was. The issue, as I understand it, is whether a cause of action had been stated against the executors of Leonard Lewisohn, and it was decided that no cause of action, in equity at least, had been established against the executors of Lewisohn. But I do not understand that is the issue here. I understand that the issue here is whether there is any cause of action against Bigelow; and there being no representation of Bigelow by Lewisohn's executors, the issue is not the same within my understanding of the authorities of New York with respect to the identity of issues. One rule which the New York authorities lay down for the purpose of determining the identity of issue is whether any additional evidence would be necessary to establish a second cause of action. If additional evidence would be necessary to establish a second cause of action, then, as a general rule, the issue is not identical. I understand additional evidence of facts, requiring additional proof, are alleged by the amendment in this action, in the Massachusetts action, to the original bill of complaint, setting up additional facts. If those additional facts are material to the present issues, then the present issues have not been decided in the prior judgment in accordance with the practice and decisions which I understand to be accepted in New York. I do not think that the liability of Mr. Bigelow could have been determined on the pleadings in the New York action. That is an additional reason why, to my mind, the issues in the New York case were not identical with the issues here. Nor do they come within the proposition that they might have been litigated. They might not have been litigated on the record as it was made. It is possible, perhaps, that if Mr. Bigelow had asked to be admitted as a party, he might have been admitted; I cannot tell; I do not know. I do not think it would have been optional with the court to have admitted him, because I do not think he had any interest to protect, and I doubt if he was even a proper party to the New York suit, and I think the court, even if he had sought to have been admitted, would have been justified in refusing to admit him, because there was no issue made with him; there was no pursuit of him, and none of his property was in litigation in that suit, but all of the
1249 property which would be affected pending the result of the suit was the assets of the estate of Leonard Lewisohn in the hands of his executors.

Now I come to the question of representation. It is a rule in New York that if a person is represented in a suit and his interests are

adjudicated, or the interests of his representative are adjudicated, that the adjudication binds his interest, so far as it is represented. But I do not understand that there was any interest represented here. I have repeatedly said that in my view, sustained, I think, by the decision of the Court of Appeals in Thomson v. American Surety Co., 107 N. Y., in no sense did the executors of Leonard Lewisohn represent any interest of Bigelow's. They were not his trustees; they did not have any of his property in their hands; all the property was the estate of Leonard Lewisohn, and they had no right of contribution against Bigelow. The mere fact that their testator at a previous stage in his existence had been trustee for Bigelow,—if he were trustee for Bigelow,—I am not sure that he was trustee for Bigelow; he may have been trustee; after he acquired the property he may have been trustee, not for Bigelow, but for this plaintiff corporation. If the plaintiff corporation had been formed and had not been constituted of the same individuals, it could have enforced the administration of the trust in its favor without bringing Bigelow into the suit. So I very much doubt whether Leonard Lewisohn was ever trustee for Bigelow, because he had none of Bigelow's property in his hands. The stock was delivered not to Lewisohn, but to Bigelow, so that Lewisohn was never accountable for any property to Bigelow.

I don't doubt—I do doubt, for the reason I have stated, I doubt if Lewisohn, at any time, was trustee of Bigelow. But if we should assume that Lewisohn was at any time trustee for Bigelow, that trust was fully administered, and no longer did any property of Bigelow remain in his hands, and he could not recover of the trust property; he could not reimburse himself out of the trust property, because he did not have any of it in his hands. In order to do so, he would have had to sue somebody else, and then he would have run up against the principle of no contribution against wrongdoers. As bearing on this question I cite the case of Russell v. McCall, 141 N. Y. 455. It is true that our code of civil procedure, section 449, provides that the trustee of an express trust can bring a suit with respect to the trust without suing the beneficiaries of his trust. In the first place, that is an express trust. In the second place, it does not in terms apply to plaintiffs; it may have been judged to apply to the defendants as well. I understand that there is some little contention that it does, but be that as it may, I do not think it can possibly be contended here that any statute of the state of New York has any
1250 effect upon the proper or necessary parties, or with a suit in equity in the federal court in New York. So I dismiss that section 449 of our code without any more talk on that subject, because I think it is plainly inapplicable to a suit in the federal court, and that our courts have distinguished between a suit on contract and a suit against a contract. I made that distinction in the recent case of Cassidy v. Sauer, reported in 114 Appellate Division, and affirmed in the Court of Appeals; I think the affirmation was in 187 N. Y., but perhaps that was at a later stage of the case. The appellate division there made a distinction between suing on a contract and suing in opposition to a contract, suing to set aside the contract,

In that case, the president of a corporation had bought some land in his own name with the funds of the corporation, and admitted that he held it as the property of the corporation. He made a deed under seal in his own name, and subsequently he brought suit to set aside the deed on the ground of fraud. He did not bring suit in his individual capacity, he joined himself as trustee of the corporation for which he was trustee as co-plaintiff, and he was met with the rule that nobody can sue on a contract under seal unless it is the person whose seal is affixed to the document. But the appellate division said, in effect, "That applies, it is true, to suits on contract, but it does not apply to suits against the validity of a contract. Anybody who is defrauded by a contract can bring suit as plaintiff to set aside the contract." So, also, I think, here. The plaintiff was not suing on the contract, but he was suing to recover to get an accounting, to recover damages, for a fraud which was practised in procuring this contract. I think he would have had a right of action at law without reference to equity at all, but if he resorted to equity, then he must offer to restore what he received. In doing so, it would be incidentally part of the action to ask that the contract be rescinded. But it was not necessary to recovery or to the assertion of the rights of the plaintiff that the contract should be rescinded. That is illustrated by the former decision in this case, and the law of New York would not differ, as I understand it, from the law here.

I have said that there is no right to contribution in equity. That is established by the case of Gridley, Rec'r, and Life Ins. Co. v. Finck et al., 173 N. Y. 455.

Mr. HEMENWAY: One moment.

The WITNESS: I see a mistake which I myself have made there, when I say no right of contribution in equity. I mean no right of contribution in equity between wrongdoers, and I had not previously cited authorities for that statement. I have come to it in my notes, and I wish to cite the authorities for that statement.

Mr. HEMENWAY: The part of your answer to which I ob-
1251 ject is that where you said there is no difference between the law of New York and the law of Massachusetts—He is an expert simply on the law of New York.

HAMMOND, J.: Cannot you state what the law of New York is without comparing it with the law of Massachusetts?

The WITNESS: If your Honor please, I have referred not to the law of Massachusetts as that law is generally admitted, but I have referred to the decisions at the earlier stage of this record as shown on the record. That was what I was referring to.

Mr. HEMENWAY: Your Honor will save my objection.

HAMMOND, J.: The question here is what the New York law is, and I doubt if we get along much if you say it is the same there as it is here. You may state what it is there, and we will take care of what it is here.

Mr. HEMENWAY: That is why I asked that that part of his answer be stricken out.

HAMMOND, J.: It does not give us any idea of what you think

the law of New York is by saying you think it is the same as it is here. We don't care to know what your idea of the law here is.

The WITNESS: I do not think it is material to what I have said. I have endeavored to give you my idea of the law of New York without comparing it with the law of Massachusetts. If I inadvertently fell into a comparison, I do not think it is material to my answer.

HAMMOND, J.: Very well. You may consider that your saying that the law of Massachusetts is the same as the law of New York is not to be regarded as giving us any light as to what the law of New York is.

The WITNESS: There was no partnership here between the executors of Lewisohn and Mr. Bigelow; if there had been, I think that question is disposed of by the case of Booth v. Powers, in 56 N. Y., where it was said that a judgment obtained against one of two partners in a previous action with respect to the same state of facts was not binding upon his surviving partner when the surviving partner was sued after his death. Mr. Lewisohn was not sued here as trustee for Mr. Bigelow; he was sued as a wrongdoer. The New York cases, some of which I have cited, distinguish between a man sued in his individual capacity and a man sued in his representative capacity, and they hold that if a man is a party to a suit in a representative capacity, he is not bound in his individual capacity. They distinguish between his individual capacity, although he is interested in the same question, and his representative capacity. Now

1252 Lewisohn's executors here were not sued in any sense in a capacity as representing Mr. Bigelow; they were sued as having part of the assets of the estate of Lewisohn in their hands, and to the extent that Lewisohn's estate was liable either to his legatees or next of kin or creditors; they would have represented those persons or that class of persons, to the extent, however, only of the assets in their hands or of claims against the estate of Lewisohn. But as Lewisohn had no claim against Bigelow for contribution, Bigelow had no claim against Lewisohn for contribution, and Bigelow, therefore, is not a creditor of Lewisohn, and could not be represented by Lewisohn's executors. We did not ask the return of any trust property from Lewisohn. I say "we;" I mean the plaintiffs here. They did not ask the return of any property held by him in trust, but only that he should answer for a wrong.

Now there is another feature of New York law which I do not think I should neglect. It is the law of New York that two estoppels of contrary effect set the matter at large, and that principle is declared in Shaw v. Broadbent, 129 N. Y. 111. I have assumed that in looking at the record of the case I could consider what the Massachusetts court has hitherto done in this case, as shown by the record, and for that reason it seems to me that proposition of New York law is pertinent in this answer. The plaintiff in the former suit did not attack Lewisohn's title to any trust property, nor his beneficiaries' title to the trust property. It is shown affirmatively that the trust relation had ceased before the suit was instituted. And this affords additional reasons, to my mind, for concluding that

Lewisohn's executors did not, in any sense, represent Bigelow in this suit.

Now, reverting to the condition of the record in Massachusetts, I think it is pertinent to say that, under the law of New York, the law of the case as established by the Court of Appeals in the case governs later. If the Court of Appeals in a case has once established the law in the case, and the case is sent back for a new trial, the court below cannot disregard the law as established by the Court of Appeals. That was established in Genet v. Delaware & Hudson Co., 2 Appellate Division, 491, and 14 Appellate Division, 177. In that case the Court of Appeals, on a demurrer, had construed a written contract and had given leave to amend. Subsequently, the pleadings were amended, but the contract was the same. It being contended that the contract should be construed in accordance with the law of Pennsylvania, evidence of distinguished justices of Pennsylvania was taken with respect to the meaning of the contract in Pennsylvania on appeal to the appellate division. The appellate division held it was not proper in the cause at that stage to take evidence as to the meaning of the contract, the Court of Appeals having construed the contract, it being a question of law how the contract should be construed.

1253 That is my answer.

(By Mr. McClennen:)

Q. Have you examined the authorities cited by the various witnesses for the defendant on this subject of New York law?

A. I have examined all of those authorities which were brought to my atention; whether any additional authorities have been cited on this proposition I do not know.

Q. Will you refer to those authorities, and state, in your opinion, under the New York law, their bearing upon the issue?

A. The case of Pray v. Hegeman, 98 N. Y. 351——

Mr. Hemenway: One moment. I don't see why his construction of the cases in New York is competent.

Mr. McClennen: It is my supposition, if your Honor please, that the law of New York depending upon the text of adjudicated cases, the opinion of no expert presented to a Massachusetts court accustomed to deal with the interpretation of cases is of the slightest importance. But if it is so important as to call for the introduction of one dozen opinions on the part of the defendant, then I think I must proceed on the theory that some one may consider it important. If the opinion of a New York lawyer is important in determining what those cases amount to, then it is important in determining what the cases cited by the other side amount to.

Hammond, J.: I will take the same course here as I have in the taking of the testimony. If you think it is not material, Mr. Hemenway, I will note your objection.

Mr. Hemenway: It will do no harm to note my objection and exception.

Hammond, J.: The stenographer will note your exception to the testimony of this witness' interpretation of those New York cases

and their bearing upon the question and their bearing upon the issue before us. That is a fair statement to make?

Mr. HEMENWAY: I think so.

HAMMOND, J.: I, myself, am a good deal of the opinion of Mr. McClennen, that it is not of any consequence, but if he thinks it is, you cannot tell how I or anybody else may think at the time of the argument.

The WITNESS: Shall I proceed?

HAMMOND, J.: If I have properly stated your objection and exception.

The WITNESS: The case of Pray v. Hegeman, 98 N. Y., 351, was a case——

(By Mr. HEMENWAY:)

Q. One moment. Is that a case that you say that we have put into the case?

A. Yes; that is one of the first cases cited by Mr. Byrne, Mr. Olney, and several others.

Q. Then they are cases that are referred to in the depositions?

HAMMOND, J. I understood the question to refer to those in the depositions.

1254 A. I have not heard the depositions read, but these are cases which I was told were in the depositions.

[The question put to the witness was read by the stenographer.]

Mr. HEMENWAY: So that he is to interpret the authorities that are cited by the witnesses in support of their opinions?

HAMMOND, J.: Well, that I understand to be the question. If I were sitting here and passing, as ordinarily I am, upon the admission of evidence, I should rule it out, but I let it go in, as I have done several times before. I agree with Mr. McClennen, that I do not think it is of the slightest consequence. Therefore, subject to your exception, he may proceed to answer the question.

Mr. HEMENWAY: One moment.

HAMMOND, J.: Is it your purpose to have the witness go over seriatim these various cases?

Mr. McCLENNEN: That was my intention, your Honor. That is, it being obviously a question that is dependent upon the decisions in New York, it seemed to me that the value of the depositions presented by our opponent is most clearly shown——

HAMMOND, J.: You are asking this witness to interpret the language of the courts of New York, and that is to be determined by whom? Suppose a dozen of the counsel, skilled in New York law and practice, come in here and put their interpretation upon it, do you think this court will pay any attention to that interpretation of the language?

Mr. McCLENNEN: As I said before, I should suppose not, but that is all that any of this evidence is. There is no law in New York except the language contained in the decisions.

HAMMOND, J.: There is a great deal more.

Mr. McCLENNEN: The conclusions to be drawn from that language are best to be determined by an inspection of that language.

HAMMOND, J.: Well, he has given his idea of the law of New York. However, as I have said once or twice here, I have not been going on as I should if I were sitting with a jury, and if you desire to put it in, I am going to let it go in subject to Mr. Hemenway's exception that it is immaterial, and of no bearing upon the question.

Mr. McCLENNEN: If I am not imposing too much upon the court.

HAMMOND, J.: If I remember rightly, there is a long list of authorities.

Mr. McCLENNEN: Yes, there is.

HAMMOND, J.: Do you expect this witness to dissect those cases?

1255 Mr. McCLENNEN: I think the length of the list of authorities is much greater than their pertinency to anything that the witness has said, therefore the discussion will be very short in most instances, and I doubt if, after the case of People v. Stephens is disposed of, there is any case in the list that requires any lengthy comment.

HAMMOND, J.: Well, let him be as general as he can and still answer the question, and he may go on.

Mr. HEMENWAY: It is the very generality that is objectionable. The opinions speak for themselves. He is not to give an epitome of what is in the case; that is like putting on a lawyer——

HAMMOND, J.: I agree with you as to that, but the other side want to do it, and I think if counsel stands up in good faith and says that the exigency of the case may, in some aspects, require this testimony, I am inclined to let it in.

Mr. HEMENWAY: Subject to my objection and exception.

(By Mr. McCLENNEN:)

Q. Mr. Boston, I will ask you to bear in mind the suggestion of the court to make your distinguishing remarks as to each case as brief as you possibly can, so that it may be in the nature of a communication to the court on the scope of the case.

A. In the case of Pray v. Hegeman, 98 N. Y., 351, it was determined in that case, first, that Hegeman was sued as executor in his representative character. The presumptive remaindermen were parties. It was held that that judgment was available to those beneficiaries interested in the estate to the extent that those not in esse at the time of the suit were represented by the presumptive remaindermen, and that the creditors of such persons were bound by the estoppel of their debtor with respect to his interest or alleged interest in the estate. That was not an action in tort, but an action to determine the interest of the debtor in the estate.

(By HAMMOND, J.:)

Q. I understand on that ground you throw that case aside?

A. I throw all these cases aside, for the reasons that I shall state as not being pertinent to the present inquiry.

Jordan v. Van Epps, 85 N. Y. 427; that was the construction of

a statute in New York providing for partition of real property. The widow of one of the parties was a party to the action, that is, the widow of the former owner was a party to the action, and could have set up her right.

Mr. HEMENWAY: One moment in regard to this. I understand that these are some cases that you have put in evidence.

Mr. MCCLENNEN: These are cases that your witnesses based their opinions upon in their depositions.

1256 HAMMOND, J.: The question calls simply for cases on which your witnesses based their opinions.

Mr. HEMENWAY: Is not this a case of yours that is referred to in this list?

Mr. MCCLENNEN: I dare say that every case that any witness has referred to is on that list, as well as every case referred to by this witness. I intended to have it so, because I wanted to have in the record all the authorities which any of your witnesses have referred to. This case was in evidence by one of your witnesses before it was put upon my list. If there are any of these cases that you do not rely upon and do not think back up your witnesses' opinions, I do not care to have them distinguished, but I assumed that your witnesses based their opinions upon the cases which they cited, and I think, in order to give value to those opinions, it is proper that I show what they amount to.

Mr. FARLEY: May it please the court, our objection which we wish to have put upon the record is this: that in order in part to limit the scope of the inquiry now and hereafter we put in a strictly limited list of cases. This did not include a vast number of those which the plaintiff has put in. Now, among the cases cited by some of our witnesses, there are cases which we have not put in evidence except in so far as they are referred to by our witnesses, and we understand that does not put them in evidence. Some of them, without committing myself to any expression of opinion, may be merely taken to be arguendo by the witness. But we do object to their putting on their witness to explain away cases we have not put in and that they have. For instance, this case of Pray v. Hegeman, as I understand it, is a case that they have put in evidence. Now they put this man on to distinguish, discuss, or dissect it, and it is on that ground that we wish to have our objection noted.

HAMMOND, J.: I do not think there is any need of any answer. Whether these cases have been cited by anybody or have not been cited by anybody, whether they have been relied on by witnesses called by the plaintiff, I do not think this evidence that is now going in is of any materiality; I do not think it is pertinent to any issue raised by this answer. But counsel for the plaintiff is desirous of taking any advantage which they may be entitled to, and if it does become material he desires to have it go in. It must go in now if it ever goes in. Your objection may be noted, and the evidence will go in. You have limited your objection much more narrowly than Mr. Hemenway did.

Mr. FARLEY: No, sir. I wished to add that specific objection in addition to the objection of a general character. I ought, perhaps, to

state, in further explanation, we do not question their right to put in these cases.

1257 HAMMOND, J.: I think the fact that they have already put them in is entirely immaterial on the question whether they may be put in evidence, provided that they have been put in by you or relied upon by any witness.

Mr. FARLEY: We submit it is simply like a party putting in evidence and then putting on another witness to explain it away; and so it is immaterial.

HAMMOND, J.: I will save your exception. You may go on.

The WITNESS: As I say, the case of Jordan v. Van Epps, 85 N. Y. 427, construed the partition statute of the state of New York as intended to cut off an inchoate right of dower, and therefore the widow, who was a party to the suit, whose dower was not provided for in the suit, was bound by the judgment and could not subsequently set up the right of dower, because she was an actual party to the former suit.

The case of Smith v. Smith, 79 N. Y. 634, is a mere memorandum of opinion, but as far as appears from the opinion the party in the second action had previously been called on to defend the previous action, and did so. He was assignor, and the defendant in the previous action was liable to him.

The case of Clemens v. Clemens, 37 N. Y. 59, was an action to partition lands which had formerly been set off in partition suit to the present owners. The petitioner in the second suit refused to plead for descent in title. The parties interested in the second action except the petitioner were before the court in the former action, except that contingent remaindermen and persons not in esse at the time of the former action were held by the court in the second action to be represented by the persons who were before the court. It was there said that the previous decision was directly in point and was conclusive on the parties, and those claiming under them, with respect to the whole matter, and came within the legal purview of the original action, and that every one in the second action claimed the identical property which was the subject of the first action; and the decision does not extend to persons who are not parties and not privies; and it does decide that the same point must be in issue in the previous action.

Doty v. Brown, 4 N. Y. 41, was an action in replevin, and the right of one of the parties depended on the validity of a bill of sale; the question of fraud in the bill of sale had previously been tried between the same parties. The bill of sale was the same, but the goods in the replevin were not the same as those previously replevined; but the question as to the validity of the bill of sale was the same in the two cases, and the parties to the two actions were identical.

Griffin v. Long Island R. R. Co., 102 N. Y. 449. There the plaintiff had sued previously in two capacities which he had
1258 as receiver of the Long Island Railroad. He subsequently sued in the same capacities the trustees for the same property, and the validity of his appointment was in issue. It had been in

issue from the previous case, and the court held that the parties were bound by the determination in the previous case; it determined that the issues were the same.

In Campbell Printing Press & Manufacturing Co. v. Walker, 114 N. Y. 7, it was said that estoppel extends to every material matter within the issues expressly litigated and determined, and also to matters not expressly determined, which were, in fact, in the thing expressly stated and decided, although not actually litigated or considered. That is a general statement, and is not made with respect to the controversy now before this court on these records.

In Thomson v. Sanders, 118 N. Y. 252, it was held that parties were barred by previous judgments between them, establishing the construction of a bond issued already in a second suit.

I have examined the case of Henry v. Allen, 151 N. Y., at page 1, but I do not find that it appears to be pertinent in any respect, and I do not know whether the citation was a correct one or not.

Earle v. Earle, 173 N. Y., at page 480. I have already referred to that at length. It merely limits the general expression "might have been litigated," as used by previous opinions of the Court of Appeals.

I have previously said that I would later give the citation of the case where a widow sued a second time for her dower, although she was a party to the first suit. That case appears to have been the case of Mallory v. Horan, 49 N. Y. 111.

I have already referred to the case of Featherstone v. The President and Directors of the Turnpike Co., 71 Hun, 109. That was a case where the plaintiff in an action for negligence against the turnpike company was held to be estopped by a judgment in favor of the wrongdoer against the same plaintiff, on the ground of contributory negligence. The former defendant and the present defendant were not joint wrongdoers, and the rule that one wrongdoer could not recover against another or compel constitution [sic] by another did not apply. The court said that the relation was analogous to Pray v. Hegeman. I do not know that the court said that, but I will say that the relation was analogous to Pray v. Hegeman, and to a case of master and servant. The court said that in such a case judgment in favor of one on a ground equally applicable to both is judgment against all; that is, cases of a character where there is no joint wrongdoer.

Castle v. Noyes, 14 N. Y. 329. In that case, the former defendant was the servant of the present plaintiffs, and they appeared to
1259 defend him on their own title. If it had gone the other way they would have been estopped. It is there said that the estoppel includes the parties who had the right to appear, to control the action, and to appeal from the judgment, and that plaintiffs had his right when called in by their servant to defend him; there it was their duty to him on their implied contract to save him harmless. And it is also said that there is no contribution between joint trespassers.

The case of Portland Gold Mining Co. v. Stratton's Independence, 58 Fed. Rep. 68, was not a New York judgment.

The case of Emma Silver Mining Co. v. Emma Silver Mining Co. was a case in 7 Fed. Rep. 408, and was a decision in New York, but not in the state courts. That, too, was the question of Pray v. Hegeman.

The case of Reich v. Cochran, 151 N. Y. 122, was a case where the same question, in substance, had been involved in a previous case of the relation of landlord and tenant after a lease was effected.

I do not know whether the case of Greenwich v. Marvin was cited or not.

I think the case of Gleason v. Northwestern Mutual Life Insurance Co. was mentioned, but I do not know. That was a case where two different people sued on the same policy of life insurance. The administrator in another suit of the former owner and the alleged assignee of the same policy of insurance, and the plaintiff in the second action had had notice of the pendency of the first, that he was interested in the same policy of insurance or claimed under it against the same defendant. That was held a bar under the full faith and credit clause of the Constitution of the United States. The question of privy was not discussed.

The case of Thorne v. De Breteuil, 175 N. Y. 64.—I don't know whether, in my answer to the former question, I stated I was counsel in that case or not, but I was. I investigated in that case the subject of res adjudicata. There the question was merely whether a prior judgment bound the same parties. The people who were parties in the second case were parties to the first case, except that perhaps their children had not been born at the time of the prior suit, but that question is not important, as I remember, now, the case; their children, claiming remainders in property in which the parties were interested during their lifetime, occupied the relation to them of remaindermen with respect to their interests, and in the prior suits everybody in being at the time of the prior suits was before the court.

The case of Heuch v. Powers, 84 Hun, 546, was a case where a party to the second suit had been named as the defendant in the second action. He had not been served, but an answer had been filed in his behalf by an attorney in court. The court held that he was a party to the former suit.

1260 Stearns v. Shepard, 91 App. Div. 49. In the opinion by Judge Ingraham it is true that in his general proposition he says that the term "parties" includes all directly interested in the subject matter who have a right and are given an opportunity to make defence, prepare proceedings, examine and cross-examine witnesses, and appeal. I have, in my previous answer, I think, fully explained how that is limited by other decisions of the court and by the Court of Appeals. That was in the appellate division, you see. In that case the plaintiff was only a nominal plaintiff, and the real party in interest was the one that was held bound.

In Smith v. Smith, 79 N. Y. 634, already referred to, is a memorandum of decision. The participation was by a person who was ultimately liable on the note.

In Bracken v. Atlantic Trust Co., 39 App. Div. 67, it was the bondholder, the privy, who was seeking to enforce his collateral.

In Castle v. Noyes, 14 N. Y. 329, it was said that the term "parties" includes real and substantial parties who, although not on the record, had a right to control proceedings and appeal from judgment; and under that rule the testator and the parties now before the court would have been bound by the record so that his representative might insist that the determination was conclusive upon his adversary. The case, however, was one of master and servant, the master actually bringing suit against his servant, and the question was the question of the plaintiff's title; and it was adjudged against him in his suit against the servant, and it was held it could not be relitigated.

Bush v. Knox, 2 Hun, 576, was a question whether a bill of sale was absolute. The former judgment was in favor of another person, so the present plaintiff had to indemnify; and the defendant directed the other plaintiff to bring the suit, and agreed to indemnify him, and was present at the trial. The court said it was a record inference that he had a right to control the former proceeding. I say the court said so, because I think it did; I am not sure. This is my recollection of the case, and I have not the case before me.

Van Koughnet v. Dennis, 68 Hun, 179, was a case where a wife was estopped by her acts under prior judgment for her husband on the same facts.

National Park Bank v. Whittemore, 7 N. Y. Rep. 456, was a case where a motion was made in the same action; and though the party to the assignment, the party to the record, I think, appeared and moved to vacate the attachment, or his assignor appeared and moved to vacate the attachment—no; he had appeared and moved to vacate the attachment and to file a bond on the appeal. But it was held that he was bound by the decision there on account of his participation. This was a second petition for the same relief.

1261 The case of Kent v. Hudson River R. R. Co., 22 Barb. 278. The former suit was by the assignee, and was said to have been notified by the principal, who was a party to the second suit.

Stedman v. Patchin, 34 Barb. 218, was the case of an owner. The first case was a judgment against the master of a vessel on a bond which he gave to release the vessel on attachment. The subsequent suit was against the owner. The owner had defended the previous action. It was held that his action in that particular showed authority for litigation.

Kolb v. National Surety Co., 176 N. Y. 233, was an action to restrain the enforcement of a judgment against joint tort feasors by the authority of one of them who had paid the judgment and was now attempting to enforce it against the other parties to the judgment. The court in that case says that the general proposition is true that no right of contribution between wrongdoers can be enforced in a court of equity which alone would have jurisdiction to refuse to lend aid, and it did not feel the authority should be subrogated to the plaintiff; that he was the purchaser of the judgment and innocent of wrongdoing; on the other hand, that the plaintiff in this second suit, who was a joint tort feasor, is entitled to no relief in equity.

Tyng v. Clarke, 9 Hun, 269, was a case where a trustee of a corporation was sued for a debt of the corporation. It was held that he could take advantage of a judgment that the corporation was not indebted. The reason there given was there were three decisions, one of them dissenting, two of them giving agreeing opinions, but they did not agree in their reasons. One of them put it on the ground that in that case the trustee had the right of subrogation through the corporation, because it paid its debt; if that right was extinguished by the previous case, his security had been ended.

King v. Barnes, 109 N. Y. 267, was a case for specific performance and for the enforcement of the terms of an agreement. There was no question of fraud between the parties to the agreement. In that case their relation, it is true, was defined as a joint adventure. That was an action for an accounting among persons jointly interested, and their other interests were treated as analogous to those of parties. It did not determine that they would represent each other on any of the questions in the suit, nor what would have been their relation had the corporation sued them for fraud.

The case of Lawrence v. Hunt, 10 Wend. 81, was a suit on the same contract between the same parties and another, and no stranger was involved.

Jackson v. Griswold, 4 Hill, 522, was a suit which held that a mere surety is not bound by a judgment against his principal. It distinguishes a case where the debt is not destroyed by the judg-
1262 ment. It says that the indemnitee is bound to let the indemnitor come in, but that a mere surety is not bound to defend even on notice, but on such notice the surety could come in and defend; consequently the surety who was actually defending was not bound because the principal might have dismissed the bill or declined to appeal; that it would have been different if they had severally come in with the consent of the opposite party.

In Leavitt v. Walcott, 95 N. Y. 212, the parties to the action were the same as the parties to the previous action, and the proposition was that all matters, either of fact or of law, which might have been or actually were litigated were conclusive upon the parties.

The case of Demarest v. Darg, 32 N. Y. 281, was a case between the same parties.

The case of Prescott v. Le Conte, 83 App. Div. 482, was a case where the relation between the parties was that of landlord and tenant, and a party who had not been a party to the previous case had actual notice of the pendency of the action, and the court said he had the right to assume charge, and that the rule of estoppel applied where any privity exists and where the party is liable over. In this case the party in the second action was the party ultimately liable.

Kelly v. 42d St. R. R. Co., 39 App. Div. 500, was a case where the defendant was liable over. It was also said that the binding effect would have extended to all who had the right to appear at the trial and to appeal.

The case of Brewster v. Hatch, 122 N. Y. 349,—well, I have not made enough of a memorandum of that case to now intelligently discuss it.

The case of Getty v. Devlin, 54 N. Y., was an action for an accounting in equity against the executor of the offender. The court did enter judgment against the executor of the principal offender for the whole amount—this was in the court below; it then entered judgment for contribution against the other wrongdoers. But the plaintiff did not appeal from the judgment as failing to give them entire relief against the other wrongdoers, and the other wrongdoers did not appeal from the judgment giving contribution against them. They were parties to the same suit, and it was in the same suit. The court said that these parties were not before it, they had not appealed, and did not discuss their rights; they only discussed the right of the executor who made the appeal, and it held that they were not injured by the judgment against co-wrongdoers for contribution; but it did not establish the law that contribution between wrongdoers is proper. There are may decisions to the contrary which I have already cited.

1263 In the case of Fowler v. Bowery Bank, 47 Hun, there was a question of the operation of the substitution of a sheriff's indemnity. I do not see that it is pertinent to this case.

So far as I know, there are no other cases which have been cited which I have examined.

Cross-examination.

(By Mr. HEMENWAY:)

Q. You are now a partner of Mr. Hornblower's?

A. I am.

Q. And Mr. Hornblower has given a deposition in this case?

A. I believe that he has.

Q. As to the other depositions that have been put into the case by the defendant, I assume that you have read those?

A. I don't know that I have read all. I assume that I have read what were copies of most of them. I recall reading copies of what purported to be the depositions of Mr. Terry, Mr. Wadhams, Mr. Keener, Judge O'Brien, Mr. Byrne.—I think I have read a copy of the deposition of Judge Stover, if such deposition has been submitted. I do not recall at the instant that I have read any other deposition. Perhaps, if the names of other witnesses are mentioned, I can recall them.

Q. You have discussed this case pretty minutely with counsel for the plaintiff in this action?

A. I discussed it pretty minutely yesterday, telling him what I expected to say. I saw him previously; I did not at that time discuss it minutely with him. He left with me copies of the record, he left with me a copy of the memorandum that he either was preparing or had prepared on the subject. I read those memoranda, and I subsequently made an independent investigation, beginning with the digests, and my examination was made independent of the memorandum, the use which I made of the memoranda being merely to see if I was examining the digests for what I deemed the pertinent cases, whether I had included all of the cases in the memorandum. I did not tell counsel for the plaintiff in extenso what I have testified

to here; I told him in substance what, in my opinion, was the law in New York, and in substance my reason for the citing of some cases.

Q. Now I noticed that, in referring to the case of People v. Stephens, you used the expression that some people thought that that case was authority for certain propositions. To whom did you refer as "some people"?

A. I referred only to those witnesses whose deposition, or copies of whose depositions, I had read; I referred to those witnesses who referred to that case as establishing the proposition for which they contended.

1264 Q. Now you recognized that this was a bill in equity filed by the plaintiff against the executors of Mr. Lewisohn?

A. I did; that is to say, that the New York bill was.

Q. That is the case to which I refer. And you recognized that there was a demurrer to that bill?

A. I did; I recognized there were several demurrers in the course of the litigation, and that there were two demurrers to the bill as amended.

Q. And you recognized that the demurrers, both in the United States Circuit Court and in the Circuit Court of Appeals and in the Supreme Court at Washington, were sustained?

A. I recognized that the demurrer to the whole complaint, as amended, was sustained; I do not recall that the demurrer to part of it was sustained. I also recognized that there were two grounds assigned for the demurrer to the whole complaint, and I recognized that the demurrer to the whole complaint was not sustained upon the specific ground that there was a defect of parties defendant.

Q. And you recognized that a mandate came down from the Supreme Court, and that, in pursuance of that mandate, judgment was entered for the defendant in that bill?

A. I did,—the judgment which was entered.

Q. Now that being the case, Mr. Boston, in your opinion, was anything decided in that case?

A. Yes.

Q. What, in your opinion, was decided in that case?

A. In my opinion, it was decided in that case that the plaintiff had no cause of action in equity against the defendants, the executors of Leonard Lewisohn. In my opinion it was declared, in that case, that it was the opinion of the Supreme Court of the United States that on the state of facts set forth in the record as a matter of law the plaintiff had no cause of action. I did not understand, however——

Q. I am asking simply what it did,—what the opinion decided?

A. I have stated what it did decide, but in order to state it carefully——

Q. I do not care for what it did not decide; it would take a great while to say that.

A. No; I have not fully stated what I think it did decide.

Q. Well, then, go on,—as to what it did decide.

A. The case, in my opinion, decided that there was no cause of

action in favor of this plaintiff on the facts stated in that bill against the executors of Leonard Lewisohn.

Q. Now if this bill had been brought in the lifetime of Leonard Lewisohn, and Leonard Lewisohn had been made the defendant, and there had been the same judgment, or a similar judgment to the one entered in this case against his executors, what would the case have decided then?

A. It would, in my opinion, have decided that there was no cause of action on the facts stated, in equity, against Leonard Lewisohn.

1265 Q. If judgment had been entered in such a supposed case in favor of Leonard Lewisohn, and afterwards a similar bill had been brought against Leonard Lewisohn in his lifetime, whether or not to that bill the judgment in the first case could be pleaded in bar,—identically the same bills, only filed at different times?

A. It could be pleaded in bar to the extent of the decision. It would decide that no cause of action in equity existed against Leonard Lewisohn. If the bill was a bill in equity I think it would be a bar.

Q. That was my presumption, another bill precisely in form, only bearing a different date, but subsequent to the first supposed bill.

A. This decision was rendered on the demurrer?

Q. Yes.

A. It was decisive of the point raised by the demurrer. It would not be admissible as a mere bill of complaint; it would have to be properly introduced by the proper pleading.

Q. Properly introduced by proper pleading, have you any doubt that it would have been a bar in New York?

A. To a bill in the same terms?

Q. Exactly the same terms.

A. If the defence pleaded *was* that no cause in equity was shown, it would be a bar.

Q. Could it be pleaded as res adjudicata?

A. Under the same circumstances, yes; under the same circumstances as I supposed in my former answer.

Q. Well, on your theory, do I understand you to say, or to mean, that there is no difference in the matter of pleading? That is to say, on the filing of this second supposed bill, suppose there had been simply a pleading of res adjudicata in bar of that bill, would not that have been sufficient to have met that bill without going through the preliminary form of demurring and carrying it to the United States Supreme Court?

A. It would certainly be a bar to the extent of the decision; it would be a bar to the relief prayed for in the present bill, and it would be a bar as between the same parties, certainly, to the same alleged cause of action similarly stated in equity.

Q. Well, to put your answer a little briefer, isn't it simply this: that if a second bill, identical in its terms except as to its date, had been filed and a plea in bar had been put in in answer to that bill, that it would have been a good plea?

A. It would sustain the defence——

Q. Can't you answer "yes" to that? Wouldn't it be a good plea

in bar? Do you have any doubt as to that? I am sure I have not made my question plain if you have.

A. In that form of action it would be a plea in bar.

Q. Why, I speak of that form of action when I assume that the bills, are identical and that they are both bills in equity; that is part of my assumption.

1266 A. Then my answer is, it would be a plea in bar in the identical suit between the same parties, provided it was properly pleaded.

Q. And a good plea in bar to the suit as res adjudicata?

A. But it would only determine the issues that were raised by the judgment and decided by the judgment, and that issue was that there is no cause of action in equity.

Q. Would it not be ground sufficient for the dismissal of the bill so that the judgment would be identical, or the same as the judgment in the first suit proposed?

A. It undoubtedly would,—a judgment that the cause was dismissed for want of equity.

Q. And that would be the cause for the dismissal, of course, of the second bill?

A. It would.

Q. Well, now, assuming that such a bill had been brought in the lifetime of Mr. Lewisohn, suppose Mr. Lewisohn's death intervening and another bill was brought, against whom would that bill have to be brought in New York?

A. If it was a bill with respect to Lewisohn, it would have to be brought against his executors.

Q. I assume on the allegations of the bill that had been filed in his lifetime, and another suit had been brought for identically the same matters. It would have to be brought against whom?

A. It could certainly be brought against his executors, and, in my opinion, it would have to be brought against his executors; but I can understand a situation in which it might also be brought against his heirs at law; but you have not assumed any additional facts.

Q. No. I merely assume the additional fact that the bill would allege the death of Mr. Lewisohn as a resident, or leaving property in New York of some kind, being sufficient to confer jurisdiction for the appointment of his executors, and the due appointment of his executors is such a case.

A. With those additional facts, his executors would be the proper parties defendant, and with those facts only I think they would be the sole necessary parties defendant.

Q. Well, a bill in equity is in personam, is it not, as opposed to in rem?

A. It is.

Q. Well, the executors in New York are the representatives as to personal transactions and claims of the deceased, are they not?

A. The executors in New York by law take no title to the real property of the decedent. There is devolved upon them, by operation of law,—we consider them executors by operation of law after

their qualification as executors,—the right to the personal property of the decedent within that jurisdiction; and if it was his domicile at the time of his death, it devolves upon them the right of succession to his personal property, wherever located, subject,
1267 however, to the right of local administration with respect to property located outside of the state.

Q. Do not the terms of the will of the testator determine as to what the title to the property of the testator is?

A. I have said that by operation of law the executor takes no title to real property. The testator can devise his real property to the executor, and in that event the executor takes title as his devisee, to do with the title to the property what the testator has directed. It is possible that before the admission of the will to probate, the heirs at law are presumptively the owners of his property, but it is true that that the executors are vested with the legal title to his personal property, certainly within the state, and if he died domiciled in the state, elsewhere, regardless of the terms of the will. A man cannot, by will, prevent his executors from becoming entitled upon their qualification to his personal property, subject to the duty to do first what the law imposes on them, and then what the will imposes on them.

Q. Well, then you considered that this bill, which was filed against the executors of Lewisohn, was in personam?

A. I did.

Q. And that the cause of action survived in New York you assumed, did you not?

A. I assumed that the cause of action survived in New York against the executors; I may add to that, in their representative capacity as executors of Lewisohn.

Q. Well, suppose this bill I have assumed, one identically like the one that I have assumed in New York, had been filed in New York, and the record had all been made up exactly as it is in the pending suit, and the bill was dismissed; that being the case, suppose the present bill had been filed by the plaintiff in this case, could the executors of Mr. Lewisohn, after the death of Mr. Lewisohn, in any way take advantage of a judgment in the suit that had been brought in his lifetime; if so, how?

A. Now I must have misunderstood your question, and I should like to have it read over again.

Q. [Question read.]

A. They could not take advantage of the judgment in the last suit supposed, because they would not be parties to the suit, they would be strangers to the last suit supposed, and they would not be on the record; there would be nothing alleged against them, and they would not be entitled to be heard. They could take advantage of the judgment that had been previously entered against them in any suit where their liability was in dispute and they were parties to the record, but they could not take advantage of the judgment in the previous suit, in a suit in which they were not parties, and in which no claim was alleged to them. You speak of this present bill.
1268 Q. Wait a moment. I am afraid you do not understand my question.

A. That is the reason that I asked that it be read over again.

Q. Let me put another question to make it perfectly clear. I have assumed that a bill identical in terms had been brought against Mr. Lewisohn in his lifetime.

A. Yes.

Q. And that the same steps had been taken that had been taken in the suit in New York, resulting in a judgment for Mr. Lewisohn in his lifetime.

A. You mean a judgment in the same terms?

Q. In the same terms exactly. That then Mr. Lewisohn had died. After his death, that the same plaintiff had brought a bill against his executors in identically the same terms of the first bill, and simply alleging that they were the executors duly appointed and serving, properly appointed; then the executors have before them this bill in this very case; they find that a bill had been filed in Mr. Lewisohn's lifetime and it had been dismissed for want of equity, and the record had been made up as it is made up in this suit; then the executors come to you as counsel and say, "Can we take any advantage, can we use the prior judgment obtained against or obtained by Mr. Lewisohn in his lifetime?"

A. Why, of course they could take advantage of that judgment to the same extent that Mr. Lewisohn could take advantage of it if he had lived, with this exception: that they might not have in their hands all of the assets that Mr. Lewisohn had during his lifetime; but to the extent of the assets in their hands, they, in their representative capacity, would be entitled to take advantage of any decree rendered in favor of Mr. Lewisohn during his lifetime to the extent that the decree was operative on Mr. Lewisohn.

Q. Well, that being the case, whether or not the judgment in the present New York suit is of any force?

A. If you will be kind enough to distinguish which present suit you mean, to prevent me from making the same mistake I did before.

Q. The New York suit.

A. The judgment in the New York suit is of no force for any person other than the party named in the suit or his personal representatives; by that I mean his executors.

Q. It becomes a question of privity?

A. It undoubtedly does,—of either privity or succession. Successors are privies; there are privies who are not successors.

Q. That is true. But the word "privity" in law or "privy" in law, as I understand it, is used in distinction from "party."

A. It does not include all the world besides parties, but it has a meaning different from the meaning of "parties."

Q. The parties in this suit were the executors of Lewisohn?

A. Yes.

Q. Then it becomes a question of law who is in privity
1269 with them,—the executors?

A. It is a question of law upon the facts. The facts, of course, determine what law is applicable.

Q. And in regard to privity, whoever was in privity with Mr. Lewisohn in his lifetime is in privity with his executors?

A. No. The Court of Appeals of the state of New York has decided the contrary in Thomson v. American Surety Co. in 170 N. Y. Whoever claims the property in the hands of the executors is in privity with the executors to the extent that they have assets in their hands for distribution to the claimants; but it is not true, as I understand the law, that whoever was in privity with Mr. Lewisohn is in privity with his executors.

Q. So far as this suit pending in New York is concerned, the executors, you tell us, represent Mr. Leonard Lewisohn?

A. No, I do not tell you that. I tell you they represented the people who claimed Mr. Lewisohn's property either as legatees or as creditors, but the executors do not represent Mr. Leonard Lewisohn. Mr. Leonard Lewisohn is dead. The executors are privies of Lewisohn by devolution of their title to the extent of the things which they took as assets.

Q. Well, I will take your term, then, that the executors are privies and not the representatives of Leonard Lewisohn.

Mr. McCLENNEN: One moment. That is not his term.

A. I did not say they were not the representatives of Leonard Lewisohn. They are styled his personal representatives. There is no privity with the people who were privies to Leonard Lewisohn and are not necessarily in privity with such people; they may be in privity with such people, by reason of some fact arising after Leonard Lewisohn's death, or at the time of his death, or they may be privies to people from whom Leonard Lewisohn claimed estate that devolved upon him.

Q. Well, you would assume that the executors of Leonard Lewisohn, so far as a judgment obtained against him in his lifetime was concerned, were privy to him?

A. Undoubtedly, with the exception that the privity only extends to the property which devolves upon them by reason of their being his personal representatives.

Q. That is their liability, but it is not a personal liability; that is what you mean by that, that it is to be paid out of the estate. Is not the personal liability in New York the cost they may incur in a case prosecuted by or defended by them?

A. It is, with this exception: the power is in the court to charge the cost against the assets in their hands. The court does it in cases where it does not appear affirmatively to the court that the action was prosecuted recklessly or in the executors' wrong.

Q. That is true, but that is another step to the one I intended to ask you. The one I intended to ask you is: If an executor in
1270 New York, representing the deceased, were to bring an action,—on a promissory note, for instance,—and judgment should be for the defendant, would not the executor in the first instance, to the defendant in the suit be liable for the costs?

A. He would; the law says so. He might be entitled to reimbursement in his accounting.

Q. That I understand to be the law.

A. And I think also it is a matter governed by the code of civil procedure, but I do not undertake to carry that in my mind. Al-

though a party there recovering costs might, upon application to the proper court, have execution for costs against the estate of the decedent in the hands of the executor without resorting directly to the executor, but he could not do it without leave of the court.

Q. Then will you tell us, confining yourself simply to a judgment obtained in the lifetime of a party in his favor,—you have already told us that that would inure to the benefit of his executors named in his will——

A. It would, in cases where they were sued.

Q. Wait a moment, I do not want to repeat all that. Now the next question is: Is there any other person under the law of New York to whom the benefit of that judgment would inure; if so, to whom?

A. Yes, it would inure to the benefit—now are you suggesting the benefit of the second judgment recovered by the executors or the benefit of the first judgment recovered against Lewisohn?

Q. I am referring to the first judgment against Lewisohn.

A. It would inure to the benefit of all persons who took property through Lewisohn subsequent to the rendition of the first decree, and possibly to all persons who took part with notice of the pendency of the action after its institution, and those persons would include the executors, upon whom the property of any person devolves at the time of his death, or at the time of his or their qualification, and it might include other people who were in privity with Lewisohn. But I am asked to assume that the bill was the same as the present, and I do not now think of anybody who would be in privity with Lewisohn on the statement of facts in the bill except the people claiming his estate or some interest in it at his death.

Q. You have read the decision of Mr. Justice Holmes in this case?

A. I have.

Q. And although you say that that is not a part of the judgment roll, still, in your capacity as expert you consider it of some weight, do you not?

A. I was not asked to say whether that opinion was right or wrong or whether the law of New York would hold in accordance with that opinion or not. I undoubtedly think that that opinion——

Q. Did you hear my question? [Question read by the stenographer.]

1271 A. Why no. In my capacity as expert on the New York law, which is the only thing I have appeared here to testify to, I considered it of no weight whatever. It might be that judges in New York would give it respect and might declare it to be the law of New York, but it does not determine the law of New York, nor does it determine my view as an expert on the questions that were asked me.

Q. That is to say, if you were asked in regard to a transaction in New York if suits had been tried in the federal court and an opinion had been delivered, in considering the question submitted to you as to what the law of New York was, you would pay no attention to any federal decision?

A. Not unless the federal decision decided the law of New York.

If the federal decision decided the law of New York then I would pay attention to it. If I were asked my opinion as to what the Court of Appeals of New York might subsequently declare, I should pay attention to the opinion, but I would not expect the Court of Appeals of New York to reverse itself by reason of a contrary decision of the Supreme Court of the United States in a matter not involving the law of New York or in a matter not involving the federal law.

Q. Then you do not mean to say that, in considering what the law of New York is, you utterly ignore federal decisions, do you? Do you mean to say that as a lawyer?

A. I have stated the only federal decisions which I have considered in the law of New York on the question which I——

Q. One moment. Just answer my question.

A. You asked me what I meant to say and I am telling you what I mean to say.

Q. Tell it quickly.

A. Decisions I have seen previously?

Q. [Question read by the stenographer.] Now answer my question.

A. In determining the law of New York I first endeavored——

HAMMOND, J.: It does not seem to me that you understand the question. The question may not convey to you the same idea it does to me, but I understand the question, Mr. Boston, to be whether, in considering what the law of New York is, you have considered, as being of any weight whatever in your mind, the opinion given by Mr. Justice Holmes in this case.

The WITNESS: I have read the opinion given by Mr. Justice Holmes in this case. I did not consider it as bearing on any of the questions I have answered in my previous examination because I do not think it refers to them in any respect; therefore I did not consider it as bearing on this decision.

HAMMOND, J.: I understand the question is asked whether, in giving your answers here in this case, you have considered the decision of Mr. Justice Holmes as having any bearing whatever.

1272 The WITNESS: No, I have not considered it as having any bearing whatever on the questions I have been asked.

[Recess until 2 P. M. and resumed.]

(By Mr. HEMENWAY:)

Q. Then, in forming your opinion upon what the New York law is, you would base it upon the statutes, where there are past statutes, or on code or decided cases of the state courts of New York?

A. That is true if all the decided cases of the state courts of New York had considered the question at all. Of course if there were no decided cases I could not consider them, and if the cases had not decided the point I could only use them by way of argument with respect to the point.

Q. Well, with regard to the evidence that you have given as to the application of the New York law to the facts of these bills in

equity, have you rested your opinion upon the decided cases in New York?

A. I have.

Q. Now will you state, in your opinion, which of the cases decided in New York, in any of its state courts, comes nearest to the case in question? By "nearest" I mean nearest as a precedent.

A. Now that you have used the words "as a precedent," I would correct the answer I was about to give. I was going to say that undoubtedly, in its circumstances, the case which comes the nearest is the case which is reported in 51 Howard's Practice, the case of People v. Stephens. I have stated already, in my answer to the principal question, why I do not regard that case as a precedent.

Q. It is unnecessary to repeat what you have already testified to. Now, barring that case, what case comes nearest to the matters alleged in the bill in equity in New York?

A. I think that probably the case of Gerrod v. Stagg, in 10 Howard's Practice, comes nearest to the facts in the present case, although it was not a bill in equity.

Q. Well, what case next to that?

A. In all probability the case next to that which comes nearest on its facts to the present case is the case of Getty v. Devlin, 70 N. Y. 504.

Q. Now you have in your testimony made frequent use of the word "wrongdoers." Do you make any distinction between wrongdoers and joint tort feasors?

A. I make no distinction between the word "wrongdoers" and the word "tort feasors;" I do make a distinction between the words "wrongdoers" and "joint wrongdoers," because I have not described wrongdoers as joint wrongdoers. If I should describe joint wrongdoers, I should consider that "joint wrongdoer" is the exact equivalent of "joint tort feasor."

Q. Then in the case in New York you assume, do you not,
1273 that on the allegations of the bill Lewisohn and Bigelow are joint tort feasors?

A. I do consider that they are joint tort feasors, and in speaking of them as joint tort feasors I am describing them merely, and am not saying anything as to the nature of their liability.

Q. But as joint tort feasors?

A. That is a proper description of them.

Q. Then in the consideration of your testimony, have you assumed that the law as laid down in the reports of decisions in the state of New York differs from the law as laid down in the federal courts of New York?

A. Yes. I have considered that the case of Emma Silver Mining Co. v. Emma Silver Mining Co. in 7 Federal Reporter, does not in its language express the law of New York, although I think that the decision, as I remember the case, was properly rendered on its facts, in my opinion.

Q. And of course you assume the law of New York to be different from the law as laid down in the opinion of Mr. Justice Holmes in the New York case?

A. Why, no, I do not. I do not understand that Mr. Justice Holmes was deciding——

Q. I am simply asking you now. I did ask you a question about it, and I understood your answer to be that there was a difference between the law of New York, as laid down in the opinions reported, from the opinions, and the law laid down in the opinions in the New York federal courts?

A. I limited myself to the only opinion of the New York federal courts which, in my opinion, has any bearing on the question of the effect of the New York judgment on the Massachusetts action, and that opinion is the decision in the case of Emma Silver Mining Co. v. Emma Silver Mining Co., reported in the 7th Federal Reporter. I know of no other federal decision with respect to the law of New York on the subject which I am now discussing.

Q. And having read the opinion of Mr. Justice Holmes delivered in this case in New York, you find nothing there about their being,—Bigelow and Lewisohn,—joint tort feasors, do you?

A. I have read the opinion, and I find in the opinion what is in it. I have not read it recently; I don't recall whether the opinion describes them as joint tort feasors or not, but whether it does or not I should so describe them—whether it does or not.

Q. Haven't you become familiar enough with that opinion to know that it describes the allegations of fact in the bill as not constituting any fraud?

A. I undoubtedly have.

Q. And, of course, if there is no fraud, there can be no tort feasor?

A. I undoubtedly have. I was not asked my opinion as to whether this bill described a tort or not.

Q. No; but you have cited cases of joint tort feasors.

A. I have described these men as joint tort feasors.

1274 Q. And joint wrongdoers. Now what I want to get is your authority for so styling them; that is, the source of your information.

A. They are so described in the language of the bill. The language of the bill. The language of the opinion, in my opinion, does not prevent them from being joint tort feasors. The language of the opinion, in my opinion, only decides that there is no cause of action, because in the opinion of the judge writing the opinion there was no tort which the plaintiff could recover for. I understand the opinion did not say that these people were not joint tort feasors; on the contrary, I understand that the opinion did say that it was not passing on their liability to anybody but the plaintiff; but it did not say that they were not joint tort feasors, nor did it say that they had not committed a fraud; but it did say that the plaintiff was not entitled to recover for that fraud, because the plaintiff had not been injured, and the plaintiff had not been injured for the reason that the plaintiff was a mere shell behind which the men who were sued as wrongdoers stood, and that a man could not cheat himself; but it did not say

that a man could not cheat other people, and it describes them as if they were joint tort feasors with respect to other people.

Q. I will confine you, if you please, to this action pending in New York. You do not wish to change your testimony, which was incorporated in a question of mine, perhaps, rather than in your answer, that if there is no fraud there can be no tort feasor?

A. That appears to me so axiomatic that I would, of course, admit what you say; there can be no dispute about it.

Q. Now you have cited the case of Thorne v. DeBreteuil, and have stated that you were counsel in that case. Were not Mr. Olney and Mr. Byrne, who have given depositions in this action now pending here in Boston, also of counsel in that case?

A. They were. They represented, in that case, different interests; I represented the same interest identically that Mr. Byrne did.

Q. I simply asked if they were not of counsel in that case?

A. Well, they were not all counsel for the same clients; that is what I mean.

Q. I understand; but they were all interested in that litigation?

A. As counsel; yes.

Q. And in the questions that were raised by it?

A. They all participated as counsel.

Q. And Mr. Byrne—he represented jointly with you, and in common with you, the same interests, did he not?

A. He did. I, at the time, was associated with Mr. Byrne, and together we did work in that case for the same clients.

Q. Now you have referred in your testimony to section 449 of the code in New York in reference to that part of your testi-
1275 mony that applies to express trustees, stating that the language of the decision applied to express trustees. Has it not been decided in New York that, although the language applies to the plaintiff, yet by construction also it applies to the defendant, and not only to express trustees, but to implied trustees?

A. I am not aware that that is true. Mr. Stanchfield, whose deposition I have read, but did not refer to in my former testimony, as I remember, says it is true. I don't know whether it is true or not.

Q. You are familiar with the allegations of the bill in New York. Did I understand you to state, in your direct examination, that on the allegations of that bill, considering its subject matter and its prayer for rescission, or damages in lieu of rescission, that Mr. Bigelow would not be a necessary party. You so stated, did you not?

A. It is my opinion that he was not a necessary party.

Q. And you further stated that he was not only not a necessary party, but, in your opinion, not a proper party?

A. I stated that, and I stated the reason for it.

Q. You understand that there is a distinction between a necessary party and a proper party in pleading in New York?

A. I undoubtedly do.

Q. And your reasons why a stranger is not bound by the judgment were two: First, that he did not have his day in court, and, secondly, that there was no mutuality. Now in order to constitute a judgment as an estoppel is it necessary that between the parties to the

record in all cases there must be mutuality? Are there no exceptions to that general rule?

A. There are apparent exceptions to that general rule. I have explained the only exceptions that seem to me to be apparent. As I now recall, they are exceptions where the fact in issue between the two parties is an essential fact—by that I mean a disputed question of fact in the cause—an essential fact to be proved by one or the other of the parties in the second action, and it is the fact of the relations between the parties to the other cause,—such, for instance, as whether they sustained the relation to them of principal and agent, master and servant, principal and surety, husband and wife, and possibly similar cases of mutual relationship between the parties. In those cases the judgments are held to be the best evidence of the fact that there was a relation between the two parties, or that there was not a relation between the two parties. That question of the relationship between the parties and the particular relationship between the parties, having once been litigated between the parties, no better evidence of the fact of their relationship can be given, and the judgment is held to be the best evidence of the fact. The only other case that I now recall which is an apparent exception to the rule of mutuality is, as I have stated, where a person has elected his remedy and has chosen a remedy which is absolutely inconsistent with the second position assumed. In that case
1276 evidence of the election is admissible. If the election has gone beyond recall at the time of the institution of the suit, the mere fact of the institution of the suit is sufficient evidence of the election; if the election has not gone beyond recall until the entry of judgment, then you must show the entry of judgment. There are cases—I do not consider them exceptions to the rule with respect to mutuality—where the judgment in the first case is not entirely conclusive of the judgment in the second case. In such cases the judgment is conclusive in the second case with respect to all of the facts which could have been litigated in the first case under the issues made; but where there is an essential fact necessary to be proved in the second case, such as the fact that a man was principal or that he was surety, or facts with respect to the particular defence which he has, he is not bound by the determination against the person with whom he has been in some relation, because that question of his relation has not been litigated in the former suit.

Q. You say that there are exceptions to the rule, do you, of mutuality?

A. I have stated every exception I think of.

Q. The exceptions you have stated are those which you have at present in mind. Would you state that the exceptions you have stated are exhausted, and that there are no others?

A. No, I would not.

Q. They are simply all that you have in mind?

A. No, I would not state that anything is certain in the law. I have stated all that I can now think of.

Q. That is right. Well, now you have alleged or testified that in

several cases to which you have referred there was no contribution between the defendants, and that the courts have so held——

A. No, the courts have not held that there is no contribution between defendants.

Q. Wait a moment.—have so held in actions in delicto. Now is that the universal rule, or are there exceptions to it?

A. I have stated the exceptions to that rule already. I have stated that where the cause of action grows out of neglect and there are two people, one of whom is answerable for the acts of the other by reason of the relation between them, they are not regarded as joint tort feasors if one is mutually responsible for the acts of the other and was not himself an actor in the wrong. In such cases there is not only contribution, there is indemnity, and the person who is not an actor is entitled to indemnity from the person whose wrong resulted in the injury; it is not a question of contribution at all.

Q. Then your answer would be: "Yes, there are exceptions"?

A. No, I have stated that there are what are apparently exceptions, but it is not a question of contribution at all.

Q. Well, then, will you state that there are no exceptions?

1277 It is immaterial to me which way you put it.

A. I will state that I know of no exception. I have characterized the case I suggested in my previous answers as not an exception to the rule, because it does not relate to contribution at all, but relates to indemnity.

Q. You said a great deal in your testimony on direct examination in regard to participation. Did you intend for the court to infer from your testimony that there was participation only in cases where a party had a right to appear?

A. I did not intend to say that there was participation only in those cases; I did intend to say that, in my opinion, based upon the cases which I have examined, the effect of participation is limited to cases where there was not a right to participate unless the party is admitted to the record as a party. In that event, his admission to the record constitutes him a party, and takes him out of the category by which I would describe a participant.

Q. Well, it takes him entirely out of the category——

A. —of mere participants, and makes him a party.

Q. Makes him a party of record?

A. Yes, but so far as the principle——

Q. Oh, I mean in the case of a suit where there is one plaintiff and one defendant only on the record.

A. Yes.

Q. Now does participation in the defence or with the plaintiff consist only in those cases where another party has a right to intervene and become a party to the record?

A. No; it does not extend necessarily only to cases where he has the right to become a party to the record. There are cases where he has no right to become a party to the record, where his relation to the matter is such that he has right to appear in court and be heard. There are cases where, after the institution of an action, an assignee will not be substituted in place of his assignor who was plaintiff at

the inception of the action, and yet he has a right to be heard, although he is not a party to the record. That case is the case of Hirschbach v. Bock, to which I have already referred and in which I was of counsel. In that case the court refused to permit the assignee to be substituted, or the assignee's attorneys to be substituted, as a party; and yet the assignee, in my opinion, had a right to be heard in that action, because he had succeeded to the cause of action pending the litigation, and the Court of Appeals affirmed my view, I think, in the case of Hirshbach v. Fitzgerald, in 157 N. Y. So I would not use, as qualifying words, "the right to become a party on the record." I would limit it to the case of a party who has a legal right to appear and defend.

Q. Even in a case where a party has not the legal right to intervene and defend, does he not become a participant in the case when he does intervene and take part in a trial and endeavor to support either the plaintiff or the defendant? In such a case as that, is he not a participant in law, even although he is not a party
1278 on the record, and although he had no right to intervene?

A. You have used the word "intervene."

Q. I do not mean intervene in law; I do not mean it in that technical sense.

A. I assume that you do not. If he be a participant not intervening in the technical sense, my idea is that his mere participation, independent of the right, does not make him a party bound by the judgment. And I think that view is sustained by a large number of cases.

Q. Do you know of any cases in New York state that take the contrary view and say that a party is bound by the judgment because of the mere fact that he did intervene or did take part in the trial in court?

A. I know of no contrary decisions where the right did not exist.

Q. Well, now, you have stated the fact, the law of New York as a fact, that where there is a decision in the courts and a trial, that that becomes the law of that case?

A. I have so stated.

Q. Well, you do not assume that to be the law of the case, supposing it were pending before a single judge, there was a demurrer, the demurrer was overruled, the trial proceeds, and then it comes to a final decision, and the presiding judge says, "I have so ruled in reference to the demurrer; I think that I was mistaken in the law"?

A. At that stage?

Q. At that stage of the case wouldn't he have the right—isn't it usual and customary in the courts for judges to change their opinions and make a final decision in accordance with what they believe to be the law of the case, irrespective of what they may have ruled earlier in the trial as a question of law?

A. It depends on whether they are passing on the same question or not, properly before them for review.

Q. I assume the same question.

A. I say "properly before them for review." My understanding

of the law of New York is if a presiding justice of the appellate division has determined the law of the case on demurrer and there is no ground at the time for reargument, and the case at a subsequent time comes up on a subsequent appeal and not on appeal from a former decision, that the court is bound by its former decision.

Q. The same judge?

A. The same judge.

Q. And the same court?

A. And the same court at a subsequent stage of the action, provided the point was decided by him properly at the previous stage of the action; I should think without motion for reargument that matter is determined by the court, and that the subsequent appeal will not bring that matter up for review, unless the matter is specified in the notice of appeal as ground for appeal.

1279 But you cannot appeal to a court in New York from its own decision; you must appeal to a higher court, and if you have not appealed to the Court of Appeals from interlocutory judgment to sustain the demurrer or overrule the demurrer, and you subsequently come up from appeal on the final judgment, and you have not specified the appeal to the Court of Appeals, but appeal from interlocutory judgment which has not been previously before the Court of Appeals, you cannot get the Court of Appeals to rule on that question. The Court of Appeals itself regards its decision which it has made at a previous stage in the action as binding on it. I say it so regards it; I do not know whether there is any "unless." I think the case of Getty v. Devlin in 54 N. Y. and the case of Getty v. Devlin in 70 N. Y. determines that fact as the law of New York when it refers to the previous decision in Getty v. Devlin in 54 N. Y. But it is not true, as far as I know, that the same judge passes again, at a later stage of the action, on the same question which he has previously passed upon, unless there is a motion before him, for reargument. It is also the rule in New York that a co-ordinate branch of the court will not review the decision of another branch of our court with equal power. Perhaps I ought to add to my answer that when a case has been appealed to the appellate division and a new trial has been granted on the ground that there was an error of law committed in the first trial, and the same case has gone to the Court of Appeals, and the Court of Appeals has declared the law applicable to the same state of facts, and it comes back to the lower court for a new trial, then the lower court is bound to apply, in my opinion, the law as determined by the Court of Appeals on the facts presented to it in the new trial rather than the law as determined by the appellate division in the same case. That is just what happened in the case of Hirshbach v. Bock, to which I have so frequently referred. When it came up on the new trial, they refused to regard the decision of the Court of Appeals as res adjudicata in the case, because the defendant had not appealed, but he regarded it as the rule of law applicable to the case and dismissed the complaint on the same state of facts. His action in that regard was not reported, so far as I

know, and I am not aware of any similiar question having arisen in New York. But I was counsel in the case, and I know what he did.

Q. The doctrine of estoppel by reason of res adjudicata rests on public policy, and that public policy rests upon two grounds: that the plaintiff or defendant shall have but one day in court; secondly, that there should be an end of litigation: is that not true?

A. No, I do not think it is.

Mr. HEMENWAY: That is all.

The WITNESS: I ask leave of the court to say there were two questions submitted to me. I was asked if the two things were not true, and I answered, I do not think the two things are
1280 true. I should like to say which of the two I do not think is true.

HAMMOND, J.: If you desire to explain your answer, in justice to yourself, you may do so.

The WITNESS: I do: will you read the question, please?

[The question is read by the stenographer.]

The WITNESS: I think the second ground is true; I think the first ground is not true, as stated. I think if it were limited to people who were parties to the first litigation and their privies it would be true.

HAMMOND, J.: Well, gentlemen, are you through with this witness?

Mr. HEMENWAY: That is all.

Mr. MCCLENNEN: That is all, Mr. Boston.

I have already offered, your Honor, a list of cases which I intended to make comprehensive of all that have been cited by any of the witnesses, but to avoid any possible omission I should like to ask that any cases that have been referred to by any of the witnesses or by Mr. Boston be admitted as part of the record.

Mr. HEMENWAY: I think it would be easy to look at the list of cases he has already put in, and, in order that we can have them all together, I think he had better add to it by name and volume because, in some instances, Mr. Boston does not state them in that way.

HAMMOND, J.: If the other side insist on that, I think you ought to do it.

Mr. MCCLENNEN: May I do that after the commissioner has written out the testimony, by putting it in the form of a list?

HAMMOND, J.: What you intend to do is to hand to him a list of the cases which have been alluded to by this witness in testifying?

Mr. MCCLENNEN: Or by the deponents whose depositions have been put in by the defendant.

Mr. HEMENWAY: We have the same privilege, of course.

HAMMOND, J.: Yes, as to each of you,—the cases you rely upon, whether they have been stated here or not.

Does that close the evidence, Mr. McClennen?

Mr. McCLENNEN: Yes, your Honor; that is all the evidence for the plaintiff.

HAMMOND, J.: Anything in reply?

Mr. HEMENWAY: We expect to have here the deposition of Mr. Parker, and that we want to put in.

HAMMOND, J.: I would like to dispose of this matter to-
1281 day in some way or other: have you reason to believe that the deposition of Mr. Parker is on the way?

Mr. FARLEY: I was informed by the commissioner from whom we expected to have it, that he was expected back to New York to-day. I think we can get it.

HAMMOND, J.: It is manifest that all this examination has gone on upon the depositions already in. I do not know what there will be in the direct of that other deposition to object to; I don't know that there will be anything further if he answers the same questions: I suppose it will be cumulative, will it not?

Mr. HEMENWAY: We do not expect it will be contradictory of anything we have put in: cannot we use the deposition, when it comes, just as we have the others, submitting it to the other side?

HAMMOND, J.: That might be, but if there is something in that deposition which would lead the plaintiff to put in additional testimony, that is the trouble about it. I think I will leave this question here; that the deposition can go in—in the first place, it is a question whether you get it or not—after you hear from them whether they want to make any objections or not.

Mr. McCLENNEN: As to the Milburn deposition which has been put in, though not read, I simply would like to make the same objections as in the case of the other depositions.

Mr. HEMENWAY: I move to strike out the "not read;" it has been constructively read.

Mr. McCLENNEN: Not read by me.

HAMMOND, J.: You desire to have your objections stand against the Milburn deposition?

Mr. McCLENNEN: Yes, your Honor.

HAMMOND, J.: Very well, they may stand against it.

Mr. HEMENWAY: But not on the ground that it has not been read.

HAMMOND, J.: I think it is generally understood that this case is not to be argued before me. I have assumed that. I understand the expectation of both parties is that the case is not to be argued before me.

Mr. McCLENNEN: I had assumed so, largely from what the court said.

HAMMOND, J.: I see no additional fact that it is necessary for me to find.

Mr. McCLENNEN: I should suppose not.

HAMMOND, J.: Well, then, I suppose the proper disposition of this case will be, first, a reservation of the facts found upon the pleadings, the facts found by Judge Sheldon, and the evidence. You
1282 have reserved, I suppose, in every case—do you think it is open to you—that the evidence does not warrant the finding?

Mr. HEMENWAY: Certainly.

HAMMOND, J.: Very well, on the evidence and the findings of Judge Sheldon. The findings will stand, because under the rules applicable to the evidence in the case the court sees no reason to contradict them.

Mr. HEMENWAY: And to have no further force by reason of this reservation than when the case went up before?

HAMMOND, J.: It stands as it did before.

Mr. MCCLENNEN: That is, the reservation, in substance, is the same as if there were final decrees and appeals taken therefrom subject to such modification as the full court deems proper by reason of this new matter.

HAMMOND, J.: Well, I do not think you need to make it a matter of form. If you can agree about form, I will sign the reservation; if you cannot agree upon it, I will hear you as to form and then sign it. When can you do that?

Mr. MCCLENNEN: Well, I can submit to Mr. Hemenway a form this afternoon.

HAMMOND, J.: I think you ought to get it out at once in regular form.

Mr. HEMENWAY: Well, there are certain matters that have arisen, and upon which Mr. Justice Braley passed, as, for instance, that we ought to be enjoined from prosecuting a suit anywhere else, and that came up on a petition for such injunction. The injunction was entered and the defendant duly appealed. Now we want to make that a part of the record, so that the whole case may go before the court.

HAMMOND, J.: I suppose there is no objection to that.

Mr. MCCLENNEN: I assume that is all part of the record.

HAMMOND, J.: Well, that disposes of this case, then.

GEORGE C. BURPEE,
Commissioner.

Copy.

Attest:

—— ——, *Clerk.*

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1*a* COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *December* 17, 1909.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Old Dominion Copper Mining & Smelting Co. vs. Albert S. Bigelow, decided on the 19th day of June, 1905.

HENRY WALTON SWIFT,
Reporter of Decisions.

1½*a* *Bill in Equity.*

Filed October 7, 1902.

The following statement of the case is taken from the opinion of the court:

This cause came on to be heard on two demurrers. The defendant filed a demurrer to the whole bill, and what purported to be a demurrer to so much of the bill "as seeks to have the sale of certain parcels of real estate conveyed to the plaintiff by Leonard Lewisohn rescinded, and to have the defendant ordered to return to the plaintiff the consideration paid by the plaintiff for said conveyance." On the plaintiff's stipulating that in case the demurrers or either of them should be sustained on the merits, the bill, or so much thereof as the demurrers apply to, should be dismissed, the cause was reserved for the consideration of the full court.

The case stated in the bill, so far as material here, in in effect as follows. The defendant and one Lewisohn, at some time before March, 1895, formed the plan of buying the property of the Old Dominion Copper Company of the City of Baltimore (hereinafter spoken of as the Baltimore company), and four certain mining claims and a mill site standing in the name of one Keyser (hereinafter spoken of as the real estate here in question), with a view to reselling them at a profit to a corporation to be organized by them for that purpose. Their scheme was first to buy all the stock of the Baltimore company. Having got control of that company through their ownership of all of its capital stock, they were to organize a new company, and before the stock of the new company was issued and while it was entirely in their control as the organizers of
2*a* it, they were to sell to it the property of the Baltimore company and the real estate here in question, for a specified number of shares of the new company, the balance of shares in the capital stock of the new company being sold to the public to provide working capital and to build additions. All this was done. The plaintiff was the new corporation. The defendant and Lewisohn got the money with which to buy all shares in the capital stock of the Baltimore company from a syndicate (hereinafter called the Dominion Syndicate) which they organized for the purpose and to which they agreed to pay two dollars for every dollar paid into the syndicate treasury in case the scheme was a success, with a privilege given to the syndicate members of taking shares at par

in the new corporation in place of money. Five-sevenths of the stock of the Baltimore company were bought of the executors of one Simpson, for a sum not more than $613,137.39; and the other two-sevenths, together with the real estate here in question, of one Keyser and "other persons to the plaintiff unknown," for a sum not exceeding $175,182.11; and thereupon the real estate here in question was conveyed to Lewisohn. These transactions were carried through on July 8, 1895. On the same eighth day of July, 1895, the plaintiff corporation was organized by seven persons employed by the defendant and Lewisohn for the purpose, apparently with a capital stock of $1,000, divided into forty shares of $25 each, which were issued to the incorporators but were in fact paid for by the defendant and Lewisohn. On July 9, 1895, the incorporators met, chose themselves directors, and increased the authorized capital stock from $1,000 to $3,750,000, composed of one hundred and fifty thousand shares of $25 each. At a meeting of the directors held on July 11, 1895, pursuant to instructions from the defendant, five directors resigned, and the defendant and Lewisohn, together with three members of the Dominion Syndicate, were appointed in their places. Thereupon the defendant and Lewisohn took their seats on the board. The other three new directors were not present. After these changes in the directorate, the directors present at the meeting were the defendant, Lewisohn, one Evarts, "the attorney employed by said defendant and said Leonard Lewisohn to attend to the incorporation of the plaintiff corporation and to carry out their said plan and conspiracy," and one Buffam, a person "selected" and "employed" by the defendant and Lewisohn "to act as director and assist them in carrying out said plan and conspiracy." Thereupon the defendant through said Evarts presented to the board an offer to sell to the plaintiff corporation the property of the Baltimore company for one hundred thousand shares in its capital stock, and Lewisohn offered to sell to the plaintiff corporation the real estate here in question for thirty thousand shares in its capital stock. These offers were accepted and the stock was in fact subsequently issued in accordance therewith. Of the thirty thousand shares issued for the real estate here in question the defendant received sixteen thousand four hundred and ten, and Lewisohn thirteen thousand five hundred and ninety. Of the one hundred thousand shares issued for the property of the Baltimore company, eighty thousand were issued to the syndicate, and the other twenty thousand were issued to the defendant and Lewisohn for their expenses and services. Of this twenty thousand the defendant received ten thousand nine hundred and forty, and Lewisohn nine thousand and sixty. It is alleged that at this time the fair market value of the shares in the capital stock of the plaintiff corporation was par, and "continued for a long time thereafter to be of such or greater value."

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The bill goes on to allege that no disclosure was made of the profit made by the issue of the thirty thousand shares for the real estate here in question to the persons who subscribed for the twenty thousand shares issued for working capital, or to the members of the

syndicate to which the eighty thousand shares were issued (except to the defendant and Lewisohn, members thereof). It is alleged also that from July 11, 1895, to April 4, 1902, the plaintiff corporation was in effect in control of the defendant and Lewisohn. Thereafter investigations were begun which resulted in the filing of this bill on October 7, 1902. It is alleged further that Lewisohn died on March 5, 1902, and at the time of his death was a resident and citizen of the city of New York; that the executors of his will are also residents and citizens of the city of New York; that no executors or legal representatives have been appointed or are within this Commonwealth; that there is no property within the Commonwealth belonging to said estate; and that it is impossible to get service within
4a this Commonwealth on the executors of the will of Lewisohn.

It is also alleged that the real estate here in question, at the time of the sale to the plaintiff, was "of substantially no value, to wit, of a value not exceeding five thousand (5,000) dollars, and * * * [was] * * * known by said Lewisohn and by the defendant when" they acquired the same and when they offered to sell the same to the plaintiff, "to be of substantially no value"; and that said "property has since said conveyance remained undeveloped and is now in substantially the same condition that it was in at the time of the conveyance" to the plaintiff.

The plaintiff alleges that it "desires to rescind the sale" of said real estate, "and has offered to convey" it "to the defendant, or to such person as he may request, upon receiving from said defendant" said thirty thousand shares, "or if and in so far as said shares have been disposed of, upon said defendant's duly accounting therefor; but said defendant refused to make any such restitution or accounting." After alleging a continued readiness to convey, the bill concludes with a prayer that the court will declare the sale of the mining claims and of the mill site rescinded, and will direct the defendant to return the thirty thousand shares or, if and in so far as said shares are no longer in his control, to account to the plaintiff therefor, or, in the alternative, in case it is held that the sale is not rescinded and that the plaintiff is not entitled to rescind that sale, for damages. There is also a prayer for general relief.

It was stated at the bar that another bill had been brought for relief in respect of the issue of the one hundred thousand shares, and that the only relief here sought was in respect of the thirty thousand shares issued in payment for the real estate here in question.

The result of these transactions was that for the property for which the defendant and Lewisohn had paid not more than $788,319.50, the plaintiff corporation issued one hundred and thirty thousand shares of its capital stock having a market value of at least $3,250,000, a profit of at least $2,460,000. Of these one hundred and thirty thousand shares, eighty thousand (which were worth at least $2,000,000) went to the syndicate; twenty thousand (worth at least $500,000) went to the defendant and Lewisohn for serv-
5a ices and expenses; and thirty thousand (worth at least $750,000) went to the defendant and Lewisohn for the real

estate here in question; and the balance, twenty thousand, to the public (apparently with the exception of the original forty shares issued to the incorporators and paid for by the defendant and Lewisohn).

L. D. Brandeis & W. H. Dunbar, for the plaintiff.

A. Hemenway, (J. W. Farley with him,) for the defendant.

LORING, *J.* [After the foregoing statement of the case.]

The only question now before us is whether the plaintiff is entitled to any relief on these facts. If it is, it is not necessary to determine what that relief is. An attempt has been made to force a decision on the nature of the relief at this time by demurring "to so much of said bill as seeks to have the sale of certain parcels of real estate conveyed to the plaintiff by Leonard Lewisohn rescinded, and to have the defendant ordered to return to the plaintiff the consideration paid by the plaintiff for said conveyance." But there is no part of the bill which seeks rescission. This demurrer is not a demurrer to a part of the bill; it is to the whole bill so far as it seeks rescission. This so called demurrer to a part is in fact an assignment of causes of demurrer to the whole bill, and will be so treated.

The defendant has contended that on the facts stated in the bill no case is made out for relief in respect of thirty thousand shares issued for the four mining claims and the mill site.

It will be useful to get a clear conception of what is and what is not alleged in the bill, and of the rights of the parties in such a transaction as that here set forth.

It was settled by the recent case of Hayward v. Leeson, 176 Mass. 310, that a promoter of a corporation stands in a fiduciary relation to the corporation of which he is a promoter.

It is clear that on the facts stated the defendant was a promoter of the plaintiff corporation.

It is not alleged here that the defendant made any misrepresentation as to the price paid by himself and Lewisohn for the property resold to the plaintiff at an advance, as was the case in Gluckstein v. Barnes, [1900] A. C. 240; S. C. below, sub nomine In re Olympia, [1898] 2 Ch. 153; Hichens v. Congreve, 1 Sim. 420. Where one standing in a fiduciary relation makes such a misrepresenta-
6*a* tion it may well be that the purchaser can keep the property and force the vendor to make good the representation by paying to him, the purchaser, the difference between what was in fact paid by the vendor and what he represented that he paid for it.

Further, the defendant is not liable here on the ground that the plaintiff corporation is entitled to the benefit of the original purchase of the real estate here in question, as a beneficiary is entitled where a person standing to him in a fiduciary capacity buys for himself and resells to him, the beneficiary, at a profit when he ought originally to have bought for the beneficiary. In such a case the purchaser can keep the property and charge the defendant with the difference in price. Parker v. Nickerson, 137 Mass. 487, 497.

When the defendant and Lewisohn bought this real estate they were under no obligation to make the purchase of it for the plaintiff

corporation, which was not then in existence. Having bought the property at that time and paid for it with what as between them and the plaintiff corporation was their own money, they could have kept it or resold it to the plaintiff corporation or to anybody else, as they saw fit. The fact that the property was bought with a view to reselling it to a corporation to be organized for the purpose, and that that purpose was ultimately carried into effect, does not give to the corporation subsequently organized in execution of the original purpose a right to the benefit of the purchase. That was considered in New Sombrero Phosphate Co. v. Erlanger, 5 Ch. D. 73, 118, 119; and at still greater length in that case on appeal, Erlanger v. New Sombrero Phosphate Co. 3 App. Cas. 1218, by Lord Hatherley, at p. 1242, Lord O'Hagan, at p. 1255, and Lord Blackburn, at pp. 1267 and 1268. It is enough to say that we agree with what is there said. For a case where no relief was given because it was not made out that the company was entitled to the benefit of the original purchase, see Ladywell Mining Co. v. Brookes, 35 Ch. D. 400.

The situation then was this. The defendant and Lewisohn were, so far as this case goes, the absolute owners of the four mining claims and the mill site. We say the absolute owners so far as this case is concerned, because the rights of the Dominion Syndicate in this real estate, if any, are not here in question, and therefore so far as this case is concerned their rights, if any, may be disregarded. Being the absolute owners of it, the defendant and Lewisohn could do with that property as they pleased,—let it lie idle, work it, or sell it, as they thought best, and if they determined to sell it they could sell it to any one they might choose. If they chose to sell it to a stranger they could make the sale at arm's length, they could ask any price they pleased, and were under no legal obligation to state what it had cost them. On the other hand, if they elected to make a sale of it to one standing to them in a fiduciary relation, they were under an obligation to make a full disclosure to the beneficiary of all the facts known to them material to the property and the purchase, or see to it that the fiduciary had adequate independent advice. That is an obligation resting upon every fiduciary who makes a sale of his own property to his beneficiary, no matter whether it is a case of trustee and cestui que trust, guardian and ward, solicitor and client, or promoter of a corporation and the corporation itself.

7a

There is no pretence that in the transaction in question the plaintiff corporation was represented by an independent board.

The defendant has sought in the first place to distinguish the case at bar from Hayward v. Leeson, 176 Mass. 310, on the ground that in the prospectus in that case there was the false statement that the capital stock represented actual value, without inflation, while a substantial part of it had been issued to the defendants and their associates for nominal services. But that fact was not spoken of in the opinion as the ground of the decision. The opinion went on the broad ground mentioned above. This false representation was spoken of in connection with a contention on the part of those defendants that they were not liable because of a finding made by

the Superior Court that the defendants did not conceal the transaction from the knowledge of future stockholders. The case of New Sombrero Phosphate Co. v. Erlanger, 5 Ch. D. 73; S. C. on appeal, Erlanger v. New Sombrero Phosphate Co. 3 App. Cas. 1218, is on all fours with the case at bar in this respect. In that case there was no misrepresentation.

In the second place the defendant contends that the corporation cannot complain because the facts were known to the four directors who took part in the purchase and to the holders of all
8a shares of capital stock of the corporation outstanding when the contract of purchase here in question was made, and because the purchase was acquiesced in by them. Their contention is that this result follows because one buying shares from a shareholder who acquiesces is bound by the acquiescence of his vendor. The four directors present at the directors' meeting when the real estate in question was sold by the defendant and Lewisohn to the plaintiff corporation for thirty thousand shares, were the defendant and Lewisohn, their attorney, and one Buffam, "a person selected by them and employed by them to act as director and assist them in carrying out said plan and conspiracy." On the allegations of the bill the defendant and Lewisohn are to be treated as the owners of all the shares then outstanding, and therefore the transaction is to be taken to have been known to and acquiesced in by all the then stockholders.

It is proper to pause here and see just what this contention means. When this contract was made on July 11, 1895, the authorized capital stock had just been increased from forty shares to one hundred and fifty thousand shares of $25 each, that is to say, from $1,000 to $3,750,000. Of the authorized capital stock, only forty shares, or $1,000 had then been issued. As we have said, these forty shares are to be treated on the allegations of the bill as the property of the defendant and Lewisohn. The scheme of the defendant and Lewisohn as to this capital stock of $3,750,000, divided into one hundred and fifty thousand shares, was to issue eighty thousand shares (or $2,000,000) to the syndicate, or sell them to the public for cash to provide $2,000,000 to be paid to the syndicate; twenty thousand shares (or $500,000) to themselves for their services and expenses as promoters; twenty thousand shares (or $500,000) to the public for cash for working capital; and the balance, thirty thousand shares (or $750,000) to themselves for the real estate here in question. And this scheme was carried out. In carrying it out no disclosure was made to the persons who took the syndicate's eighty thousand shares (except those of the eighty thousand issued to the defendant and Lewisohn as members of the syndicate), nor to those who took the twenty thousand shares sold to the public for cash for working capital. Of the eighty thousand issued to or
9a for the syndicate it is alleged that the defendant received four thousand. It is not alleged that any of this eighty thousand were issued to Lewisohn. The contention is that inasmuch as the defendant and Lewisohn owned all the forty shares of the corporation, amounting to $1,000, outstanding when the sale here in

question was made by them to the corporation, the corporation is barred from complaining that a full disclosure of the material facts was not made by them to it.

Since the argument was made in the case now before us it has been decided by the Circuit Court of the United States for the Second Circuit in Old Dominion Copper Mining Co. v. Lewisohn, 136 Fed. Rep. 915, that this contention is correct. In that case a demurrer was sustained to a bill against the executors of Lewisohn, which is the counterpart of the bill now before us, on the ground that the point was concluded by two earlier cases, one in that court, Foster v. Seymour, 23 Fed. Rep. 65, and the other in the Court of Appeals in that Circuit. McCracken v. Robison, 57 Fed. Rep. 375.

Foster v. Seymour, 23 Fed. Rep. 65, was a case where the owners of a mine conveyed it to a corporation organized by themselves in payment for all its capital stock, to the par value of $10,000,000. The owners of the mine were the trustees of the corporation when the exchange was made. Afterwards this stock was sold on the market. The thing complained of in Foster v. Seymour was that the mine was in fact worth only $100,000. A stockholders' bill was brought in behalf of the corporation to make the trustees "account to the corporation for a fraudulent disposition of its capital stock." The statute under which the corporation was organized provided that stock could be paid for in property. It is to be observed of this case that the bill did not seek to set aside the purchase for a failure to disclose a material fact in selling the property of the company. The thing complained of was not that the property had been bought for $100,000 and sold for $10,000,000. It was that the mine in payment for which the whole capital stock of the corporation was issued was in fact worth only $100,000.

The other case on the authority of which Old Dominion Copper Mining Co. v. Lewisohn was decided (McCracken v. Robison, 57 Fed. Rep. 375) is a case where four men, including the defendant in error, Robison, by the expenditure of their own moneys
10a organized a corporation to build a specified railroad, subscribing for the proportion of stock required as a preliminary by the laws of Michigan, procured the right of way and local aid in the form of donations of land and money to the enterprise, and with such assistance and with their own moneys undertook to furnish the roadbed and cross ties for the whole road ready for laying the track and completing the superstructure. They then caused the corporation to agree with the plaintiffs in error in consideration of their (the plaintiffs in error) agreeing to complete the road, to issue to them (the plaintiffs in error) all the capital stock and bonds of the corporation, the plaintiffs in error agreeing to pay the defendant in error individually one half the profit afterwards commuted by agreement to $150,000. For this $150,000 this action was brought, and the plaintiffs in error set up in defence that the contract sued on was an illegal contract on which no action could be maintained in a court of law. Here the capital stock and bonds were issued to the plaintiffs in error for laying the track and completing the superstructure of a road of which the right of way, the roadbed, grading and cross ties had been paid for by the defendants in error and by the

donations and not by the corporation or the plaintiffs in error. So long as the corporation did not complain of the transaction, there would seem to be no reason why an agreement by which the incorporators were to be reimbursed for money expended by them in building the road was not valid.

In both Foster v. Seymour and McCracken v. Robison (in addition to what has been pointed out above) all the capital stock was issued to the directors and promoters who made the sale to the corporation complained of in payment for the property so sold. In such a case the transaction complained of is acquiesced in not only by all those interested but by all who it is contemplated shall be interested in the corporation except as third persons should acquire the interest of some one or more of those persons. Such third persons are bound by the acquiescence of their vendors, and such corporation is bound by the acquiescence of all its stockholders. See In re Ambrose Lake Tin & Copper Mining Co. 14 Ch. D. 390. See also In re Postage Stamp Automatic Delivery Co. [1892] 3 Ch. 566.

It is hardly necessary to point out the difference between
11*a* such a case, where the scheme of the corporate organization does not contemplate there being any stockholders other than those who buy the stock issued in the transaction complained of, and a case like that now before us, where ninety-six thousand out of one hundred and fifty thousand shares are to be issued to persons to whom no disclosure was made.

Again, the case stated in the bill now before us does not come within the decision in In re British Seamless Paper Box Co., 17 Ch. D. 467, where all persons acquiesced who were to have an interest so far as the scheme went which the parties then had, and where there was a subsequent change made in the scheme in good faith by which other persons were brought in.

The case submitted to us for decision here by the defendant's demurrer to this bill is a case where (disregarding the forty shares subscribed for to organize the corporation) the whole capital stock was one hundred and fifty thousand shares, of which fifty-four thousand shares were to be issued to the promoters for services and for the sale of the land here in question, and the remaining ninety-six thousand were to be issued to persons to whom the facts of this sale were not disclosed.

The question arises whether in such a case the rule enforced in Hayward v. Leeson, 176 Mass. 310, applies.

In Hayward v. Leeson it was held by this court that a corporation was not barred in the recovery of secret profits made by promoters by the fact that the promoters owned all the stock of the corporation when the agreement was made to pay them the profits recovered in that case. The secret profits agreed upon, paid and recovered in that case were paid up shares of capital stock of the par value of $700,000 for services as promoters out of a capital of $3,000,000, the rest of which was subscribed to and paid for by the public in cash. To the cases cited in Hayward v. Leeson on this point, 176 Mass. at p. 320, should be added Gluckstein v. Barnes, [1900] A. C. 240, the decision of the House of Lords on appeal from In re Olympia,

[1898] 2 Ch. 153, made after the opinion in Hayward v. Leeson was written.

The question which we have to decide here is whether the difference in the way in which this transaction was carried through leads to the opposite result. If in the case at bar the ninety-six
12a thousand shares not issued to the promoters had been offered to the public for cash to be used in buying the property of the old Baltimore company and for working capital, and had been taken by them, the case at bar would have come directly within the decision in Hayward v. Leeson.

We see no reason why the rule enforced in Hayward v. Leeson does not apply to the case stated in the bill now before us.

The defendant has insisted that the corporation is barred in this case because if it (the corporation) is allowed to recover in such a suit the purchasers of the fifty-four thousand shares issued to the defendant and Lewisohn would get their share of the sum recovered and to that extent the purchasers of these shares would not be bound by the acquiescence of their vendors. That is true. That was true in Hayward v. Leeson. In that case the purchasers of the seven hundred and fifty thousand shares would have got their share of the sums recovered by the receiver in behalf of the corporation if there was any part of those sums left after the debts were paid. The argument is an old one and was disposed of by Lord Justice James in New Sombrero Phosphate Co. v. Erlanger, 5 Ch. D. 73, 118, 119. A corporation is not precluded from recovering for a fraud on it (the corporation) because the party committing the fraud is a stockholder.

Again, the corporation is not barred because when the agreement was made it acquiesced in the trade and it was then, from a legal point of view, fully born. That was equally true in Hayward v. Leeson and the cases cited in that case. The answer to that suggestion is that from a business point of view the agreement was not made to bind the corporation with a capital of $1,000 which was the corporation then in fact in existence, but to bind the corporation with a capital of $3,750,000. It was to that corporation with a capital of $3,750,000 that a full disclosure ought to have been made, and to that corporation no disclosure ever was made.

On the case stated in this bill the defendant was a promoter of the plaintiff corporation; being a promoter he stood in a fiduciary relation to it; on selling to the plaintiff the real estate here in question he was bound to disclose all facts known to him material in the sale since it was not independently represented; the price at which the property recently had been bought with a view to reselling it to the plaintiff corporation was at any rate a material fact which
13a he was bound to disclose; the knowledge of the defendant and Lewisohn was not equivalent to a disclosure to the plaintiff corporation, although they owned all the stock of the plaintiff corporation outstanding at the time the sale was made; and although fifty-four thousand out of one hundred and fifty thousand shares of the capital stock ultimately issued were issued to them; the defendant violated the duty which he owed the plaintiff in not disclosing that fact; and for this reason the contract here in question was not binding on the plaintiff.

On the facts stated the property sold having remained unchanged, the contract came to an end on the plaintiff's electing to rescind and tendering a reconveyance of it back to the defendant.

The only question of importance left is whether this bill can be maintained in the absence of the executors of the will of Lewisohn, who has since died.

The fact that the legal title to the real estate here in question stood in Lewisohn's name is not fatal to the plaintiff's maintaining this bill. Had the defendant been the sole owner, the fact that the title stood in the name of a man of straw and the contract had been made with the man of straw would not have made any difference in the result that the contract was ended. The fact that Lewisohn, also a promoter, had about a half interest in the contract does not affect the result unless his death and the fact that his executors reside in New York and that no legal representatives of his estate have been appointed or can be appointed in Massachusetts make a difference.

We are of opinion that these facts do not make a difference in the right of the plaintiff to maintain this bill.

On the contract thus coming to an end by the offer to restore the property which had remained unchanged, the defendant and Lewisohn were bound as matter of contract to return the consideration received by them under this contract. But in our opinion that is not the only remedy open to the plaintiff. The thirty thousand shares were obtained from the plaintiff by the defendant and Lewisohn in violation of the duty owed to it by them by reason of the fiduciary relation in which they stood to the plaintiff. The fact that on the recission of the contract the plaintiff corporation could have sued to recover back from the parties to the contract the consideration received by them under it does not preclude the plaintiff from charging the defendant directly with the violation of this fiduciary duty and compelling him to make restitution of what was so acquired by them. The plaintiff can waive its remedy founded on the implied contract to return the consideration on the contract's being rescinded, and sue for the tortious violation of the duty owed by them to it because they stood to it in a fiduciary relation. In a suit founded on such an equitable tort Lewisohn's executors are not necessary parties. Such a bill may be brought against either.

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Although the allegation made in the bill as to the real estate here in question remaining undeveloped and unchanged makes a decision on the point unnecessary, it is proper to point out that it has been laid down in this Commonwealth that in some cases a party to a contract who has a right to rescind is entitled to some remedy where the article sold has been consumed or altered before he has become aware of the facts which give him that right. Parker v. Nickerson, 137 Mass. 487. As to what the law is in England on this point, see Ladywell Mining Co. v. Brookes, 35 Ch. D. 400; In re Cape Breton Co., 29 Ch. D. 795; S. C. on appeal, sub nom. Bentinck v. Fenn, 12 App. Cas. 652. See also In re Ambrose Lake Tin & Copper Mining Co. 14 Ch. D. 390, 394.

It is hard to see why the defendant is not liable in solido for the whole thirty thousand shares, including those received by Lewisohn.

See Hayward v. Leeson, 176 Mass. 310, 324, and cases there cited, to which should be added Gluckstein v. Barnes, [1900] A. C. 240; Trull v. Trull, 13 Allen 407. But it is not necessary to express a final opinion on this point.

If the defendant does in fact restore the whole consideration he will be subrogated to the real estate here in question, on the same principle on which a trustee making restitution of money improperly invested is subrogated to the improper investment.

A few technical objections remain to be disposed of, namely:

1. That the plaintiff has a complete and adequate remedy at law. There is a remedy in equity to compel restitution of money taken in violation of the duty owed by a fiduciary. Hayward v. Leeson, 176 Mass. 310, is an example. See also Warren v. Para Rubber Shoe Co. 166 Mass. 97, 104. This court now has full equity jurisdiction. Niles v. Graham, 181 Mass. 41.

15a 2. The defendant contends that the allegations as to the purchase of the property of the Baltimore company either are surplusage and are to be disregarded, or they make the bill multifarious. As no relief in respect to those allegations is sought here, the bill is not made multifarious by them. So far as necessary to tell the story of the sale here complained of, it was proper to describe the sale of the Baltimore company's property, and those allegations, to that extent, are not surplusage.

3. We see nothing inconsistent in the prayer for a rescission of the contract and in the prayer for damages by which (although inaptly put) we suppose the plaintiff intended what we have held it is entitled to.

The entry must be that

The so called demurrer as to part of the bill shall stand as an assignment of a cause of a demurrer; demurrer overruled.

1 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *December* 17, 1909.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Old Dominion Copper Mining & Smelting Co. vs. Albert S. Bigelow decided on the 14th day of September, 1909.

HENRY WALTON SWIFT,
Reporter of Decisions.

1½ RUGG, *J.*:

These are suits in equity, by which the plaintiff seeks to recover secret profits made by the defendant as one of its organizers, in selling to it while under the absolute control and management of himself and his associate, one Lewisohn, certain mining properties belonging to him and Lewisohn. The allegations of the bills are set out at length in 188 Mass. 315, where one of the cases was considered upon demurrer. After the overruling of the demurrer the defendant answered, and the cases were heard before a single justice, who entered decrees in favor of the plaintiff in both cases and filed a re-

port of the facts found by him. Except as to matters immaterial so far as the questions of law are involved, he found that the allegations were sustained. Briefly recapitulated, the facts appearing in the report upon which the plaintiff rests its claim are that in April, 1895, the defendant and Lewisohn formed a device to secure the control of the stock (the par value of which was $500,000) of the Old Dominion Copper Company of Baltimore City, called the Baltimore Company, and the title to certain other neighboring mining properties, called the outside properties, and to cause these properties and the real estate of the Baltimore Company to be transferrd to a new corporation (which they should procure to be organized with a much larger capital), for an increased price. Options were secured upon these properties, and the price agreed to be paid by the defendant and Lewisohn to the owners was $1,000,000, divided in the proportion of 547/1000 by the defendant, and 453/1000 by Lewisohn. The outside properties were regarded by all parties as of little or no value and were thrown in as a makeweight in the purchase of the stock of the Baltimore Company. The single justice, while finding that they could not be said to be of no value, was satisfied that their value did not exceed $50,000. No examination to ascertain their value was made by the defendant or Lewisohn, or by any one in behalf of the plaintiff. For the purpose of providing himself with funds to meet in part his financial obligations for the purchase of
2 the properties, the defendant, before taking up the options, organized an underwriting syndicate and another syndicate called the Old Dominion Syndicate. It is not necessary to state the details of these arrangements, further than to say that it is found as a fact that the defendant did not deal fairly with the members of the syndicate in the division of his profits, and did not disclose to the great majority of them the fact of the secret profit. The obligation of purchase was assumed wholly by the defendant and Lewisohn and the device for the organization of the new corporation was entirely theirs. Although, as first conceived, it was the avowed intention of the defendant and Lewisohn (which the defendant expressed to various members of the syndicate) to form a new corporation with a capital stock of $2,500,000 which should take the property of the Baltimore Company and the outside properties for $2,000,000 of its capital stock and procure a working capital of $500,000 by the sale of the rest of the capital stock to the public for cash at par, they proceeded to organize the plaintiff corporation under the laws of New Jersey, with a capital stock of $3,750,000, divided into one hundred and fifty thousand shares of the par value of $25 each. But it was the intention of the defendant and Lewisohn (as found by the single justice) that "twenty thousand shares of the capital stock of the plaintiff should be issued to new subscribers at par; and this was done in the summer and fall of 1895." This organization was conducted and controlled wholly by the defendant and Lewisohn through themselves and their agents and representatives. Without providing the plaintiff with an independent board of officers or representatives they, as the responsible and only managers of the plaintiff, acting in its name, contracted with themselves as mine owners

to sell to it the real estate of the Baltimore Company for $2,500,000 of the capital stock of the plaintiff and the outside properties, of trifling value at best, for $750,000 of such capital stock, and to sell to the general public for working capital the remaining $500,000 of capital stock of the plaintiff at par, without disclosing that they had sold property costing them only $1,000,000 for three and a quarter times its cost.

The first meeting of the stockholders was held on July 7, 1895, at which $1,000,—the lowest amount of capital with which a
3 corporation organized under the laws of New Jersey could begin business,—was paid in by Lewisohn. This money, although deposited to the credit of the plaintiff company upon its organization, was afterwards returned by it to Lewisohn in an accounting with him. A meeting of the directors was held in New York on July 11, 1895, at which the defendant became a director and the president of the plaintiff and Lewisohn a director. Votes were passed to increase the capital stock and two separate votes for the purchase of the mining properties for the prices in stock before indicated. The stock, the market value of which was fully as great as its par value, was issued to the defendant and Lewisohn and one Dumaresq, their nominee, by votes of September 18, 1895, on that or the following day. At the same time a certificate for the remaining twenty thousand shares of stock of the par value of $500,000 was made out in the name of "Thomas Nelson, treasurer," but this stock is found to have belonged to the corporation, and Nelson had no right to act respecting it, as it was taken up by direct subscriptions of the public. The conveyances of the mines by the Baltimore Company and of the outside properties by Lewisohn were not made until December, 1895, or January, 1896. The intrinsic value of the property conveyed by the Baltimore Company is found to have been not more than $1,000,000, although its market value, largely due to the skillful manipulation of the defendant and Lewisohn, and "the ingenious manner in which they created a desire on the part of men interested in mines, as investors or speculators, to be allowed to join in the transaction they were carrying out," was something less than $2,000,000. The report proceeds: "But, taking the most favorable view of the situation possible for the defendants, he and Lewisohn did, by reason of their failure to disclose the real facts as aforesaid, make out of their sale to the plaintiff company a secret profit of fifty thousand shares of its capital stock, of which the defendant's portion was twenty-seven thousand three hundred and fifty shares, and Lewisohn's portion was twenty-two thousand six hundred and fifty shares. If he had fully disclosed the facts to the plaintiff company and secured for it independent advice, it would not have given to him this secret profit: * * * Lewisohn and he were acting in the formation and execution of the scheme together and in
4 concert. Each of them was doing his part to carry out a joint scheme, which was intended to inure to the advantage of both. The control exercised by them over the plaintiff company was a joint control, and was exercised by them for the benefit of both. A proper disclosure of the real facts by either would have frustrated

the schemes of both; they both acted together in pursuance of a common design, and for the profit of both." "During all these transactions the full control of the plaintiff company was in the hands of and was exercised by the defendant and Lewisohn, who were its promoters and who themselves determined upon and dictated, under the advice of their counsel, everything that was done by the plaintiff company or in its behalf; it had no directors, representatives, or advisers other than themselves or their agents; and they did not disclose to it any of the facts which have been stated. This continued to be the case until April, 1902. * * *

"The result of his and Lewisohn's transactions with the plaintiff company was that for the $1,000,000 of their own and their associates' money which they invested, they received, subject to the payment of legitimate expenses of not over $20,000, stock to the par value of $3,250,000, and of the actual value of at least that amount; that is, at the rate of more than three dollars for one. He gave to the members of his syndicate two dollars for one, either wholly in stock or half in cash and half in stock, as they elected. With a few individual exceptions he did not disclose the facts to them. The very great majority of the members of his syndicate did not become aware of the details of what he and Lewisohn had done." The capital stock issued to defendant and Lewisohn was stamped "Issued for property purchased." The law of New Jersey required that such stock be issued only "to the amount of the value" of the property so purchased. Pub. Laws of New Jersey, 1889, p. 414, § 4; 1893, p. 444, §2. The vote of July 11, 1895, to purchase the mining properties was in fact passed by a majority only of the board of directors, for three do not appear to have been present at that time. At the directors' meeting of September 18, 1895, when the votes to issue thirty thousand full paid shares to the defendant and Lewisohn and one hundred thousand like shares to their nominee Dumaresq were passed, seven directors were present, the five aside from
5 Bigelow and Lewisohn being their tools, and at the end of the record of that meeting all the directors signed an assent to the acts done, and Bigelow and Lewisohn, signing for thirty thousand shares of capital stock, Dumaresq signing for one hundred thousand shares of the capital stock, and "Thomas Nelson, Treasurer," signing for twenty thousand shares of capital stock, being the whole number of shares, signified a written approval of the acts of that meeting. The single justice found that the twenty thousand shares were the property of the plaintiff, and that Nelson had no right to attempt to act as their holder.

1. The defendant strenuously contends that certain facts found by the single justice are not supported by the evidence. He first attacks the finding, vital to the plaintiff's case, that the scheme of the defendant and Lewisohn, as framed and executed, contemplated that twenty housand shares of stock in the plaintiff corporation should be issued to new subscribers at par, and that the defendant and Lewisohn did not agree to take all the stock in the plaintiff corporation in return for the mining properties conveyed to it and $500,000 in cash for a working capital. He argues that the evidence

required a finding that Bigelow and Lewisohn agreed as a part of their scheme to take all the capital stock in return for the mines and $500,000 in cash. He also assails the findings, that the property conveyed to the plaintiff by the defendant and Lewisohn for one hundred and thirty thousand of its shares of a par value of $3,250,000 was worth intrinsically not more than $1,000,000, and that its market value, due to the skilful manipulation of the defendant and Lewisohn and their ingenious baiting of the stock market, was less than $2,000,000; and he contends that the evidence demonstrates the truth to be that the plaintiff paid no more than it was worth.

The evidence was oral, documentary and in depositions. The rule of practice respecting such a contention as this has been often declared. In an appeal in equity from a final decree, where all the testimony is reported, it is the duty of the appellate court to examine the evidence and decide the case on its merits, both as to the facts and the law; but where the evidence upon disputed issues is partly oral, the findings of fact of a single justice will not be disturbed unless plainly wrong. Jennings v. Vahey, 183 Mass. 47. Lindsey
6 v. Bird, 193 Mass. 200. It becomes necessary, therefore, to examine the evidence upon this point somewhat in detail.

The offers of the Baltimore Company for the sale of its property to the plaintiff, and of Lewisohn for the sale of the outside properties, were in writing, and the votes of the plaintiff accepting them were spread upon the records of the directors' meeting of July 11, 1895. These provided distinctly for the issue of one hundred and thirty thousand shares of the plaintiff's capital stock in payment for these conveyances. The records of the plaintiff show no vote touching the issue of the remaining twenty thousand shares. If, as claimed by the defendant, it was then contemplated that these shares should be issued to him and Lewisohn at par for cash, it seems probable that a vote to this effect would then have been passed. The only vote respecting the issue of these remaining shares was that of the directors on September 18, 1895, when, after a vote authorizing the issue of a certificate for one hundred thousand shares to Dumaresq (who was the nominee of Bigelow and Lewisohn) and another for thirty thousand shares to Bigelow and Lewisohn, it was voted that the treasurer of the company be "instructed to issue twenty thousand shares * * * to such parties as have subscribed for the same." If it was then under-stood that Bigelow and Lewisohn had agreed to take all the shares, including the twenty thousand for cash at par and were the subscribers therefor, no sufficient reason appears for not saying so in the vote, instead of adopting a phrase suited to express an intent to issue the shares to the general public. Moreover, at this time, as shown by the only subscription list of the plaintiff, the general public had subscribed generously for stock. The language of the vote aptly refers to such subscribers. The only paper, which appears by the evidence to have been signed by subscribers for stock, was dated July 18, 1895, two months before the vote to issue the twenty thousand shares was passed. The certificate for the twenty thousand shares was issued in the name of

"Thomas Nelson, Treasurer," he being the treasurer of the plaintiff. It is ingeniously argued that in this matter Nelson was acting as the treasurer of those who had become subscribers to stock and not as treasurer of the plaintiff. But he treated their payments as
7 if made to the treasurer of the plaintiff. If this certificate had been in truth issued to the nominee of Bigelow and Lewisohn in return for their obligation to pay cash for its face value, naturally it would have been issued without any official title attached, as was that to their nominee, Dumaresq. It is a significant coincidence that the form of certificate selected was the same which, in other companies controlled by the defendant, was used when stock was in fact treasury stock. This certificate was subdivided in the autumn of 1895, and nineteen thousand six hundred and fifty shares were issued to various subscribers, who paid for them directly to the plaintiff, and not to Bigelow or Lewisohn. The remaining three hundred and fifty shares, although subscribed for, were not taken by subscribers. They were not taken or paid for by Bigelow or Lewisohn, but about two years later were sold by direction of Nelson, who was still the treasurer of the plaintiff, through brokers, and their face value credited on the plaintiff's books to treasury stock and the excess above par, for which they were sold, to the interest account. This sum does not appear to have been the equivalent of interest due from the defendant and which should have been paid, if he originally subscribed for the shares, and his name does not appear in connection with them on the plaintiff's books. The transaction respecting the subdivision of this certificate was conducted in substance on the footing of original subscribers, and not of purchasers from Bigelow. The names of those, to whom the shares were issued, appear upon the "Corrected List" of the plaintiff, which was its only record of subscription, and in which the shares taken by each are described as "allotments." If they were subscribers to the defendant and Lewisohn merely for stock held by them, there was no reason why their names should appear on the plaintiff's subscription list. Notices were sent to these subscribers by the treasurer of the plaintiff, and not by Bigelow, and checks were returned payable to the order of the treasurer, and were deposited directly to the credit of the plaintiff, although notices and subscriptions to the syndicate formed by Bigelow to aid him in furnishing the purchase price were sent by and returned to Bigelow. Various written statements of Bigelow, as for instance that they proposed "to open the bag just a little to the public" and that the public were
8 "starving" for the shares, appear inconsistent with the theory that he and Lewisohn were the subscribers for the entire capital stock. These and other circumstances are sufficient to warrant the finding of the single justice. Apparently he credited contemporaneous acts, entries and other writings with their natural inferences rather than the direct oral and other testimony to the contrary given at the trial. It cannot be said that in this he was plainly wrong.

The finding as to the value of the property conveyed by the defendant and Lewisohn to the plaintiff is also supported by testimony

and cannot be disturbed. The evidence touching this matter came from various sources. The former owners had operated the mine with some degree of success on a capitalization of $500,000. They had greater experience and a more intimate knowledge respecting it than any one else, and they seem to have been men accustomed to large business operations and not unfamiliar with mining. They do not appear to have been under any compulsion to sell. The price for which such owners in fact sold their property might well have been regarded as the best test of its value. But the finding was approximately double this sum. Although other circumstances perhaps might have supported a higher valuation, there is no ground for holding this plainly, or even probably, wrong.

These are the main facts relied upon by the plaintiff. Other findings are controverted by the defendant. Without discussing them in detail it is enough to say that a careful examination of the voluminous record discloses no reason for doubting their correctness.

2. At the threshold lies the question as to what law determines the character of these transactions and the liability of the defendant therefor. The votes to purchase the real estate of the Baltimore Company and the outside properties were passed at a meeting of the plaintiff's board of directors held in New York, but they were not New York contracts in the sense that they are to be governed necessarily by the law of New York. As found by the single justice, "It was the intention of the parties that these agreements should be carried out and consummated by the delivery of the deeds and the issue of certificates of stock in Massachusetts, where it was intended that the offices of the company should be, and where they
9 were established, in Boston, and where, in fact, they were so carried out. It was intended that the business of the company, outside the actual mining and smelting operations, which were to be conducted in Arizona, should be carried on in Massachusetts; and this was done." Where a contract is made with a purpose by the parties to it that it shall be performed in a particular place, its validity and interpretation are to be determined by the law of the place where it is to be performed. It is made with a view to that law. Pritchard v. Norton, 106 U. S. 124. Hall v. Cordell, 142 U. S. 116. Andrews v. Pond, 13 Pet. 65. Hamlyn v. Talisker Distillery, [1894] A. C. 202. American Malting Co. v. Souther Brewing Co. 194 Mass. 89. The ruling of the single justice that the transaction is to be determined according to the law of this Commonwealth appears to have been right.

But, however that may be, the single justice has found as a fact that the law of New York applicable to the case is the same as that of Massachusetts. The only evidence as to the New York law before the single justice was the following cases decided by the courts of that State: Blum v. Whitney, 185 N. Y. 232; Seymour v. Spring Forest Cemetery Association, 144 N. Y. 333; Barr v. New York, Lake Erie & Western Railroad, 125 N. Y. 263; Brewster v. Hatch, 122 N. Y. 349; Getty v. Devlin, 54 N. Y. 403; Campbell v. Cypress Hills Cemetery, 41 N. Y. 34; Colton Improvement Co. v. Richter, 55 N. Y. Supp. 486; and there were also admitted de bene Old Do-

minion Copper Mining & Smelting Co. v. Lewisohn, 148 Fed. Rep. 1020; S. C. 136 Fed. Rep. 915; and McCracken v. Robison, 57 Fed. Rep. 375, decided in the United States Circuit Court for the district of New York.

The defendant's attack upon this finding stands upon a somewhat different basis from that upon the other findings of fact, because this rests wholly upon documentary evidence, and the appellate court stands precisely as did the justice, who heard the case, in respect of opportunities to weigh evidence and draw inferences from it. The trial court has not here the advantage of seeing the witnesses and judging of their credibility by personal observation. Hence no special presumption exists in favor of his finding. Harvey-Watts Co. v. Worcester Umbrella Co. 193 Mass. 138. But
10 the decision must be made upon the evidence which was before the single justice. The cases in the federal courts are not evidence as to the law of New York, for the reason that, this being a question of general law, the federal courts declare the law upon their own views and are not bound by decisions of State courts. Olcott v. Supervisors, 16 Wall. 678, 689. Burgess v. Seligman, 107 U. S. 20, 33, 34. Pleasant Township v. Ætna Ins. Co. 138 U. S. 67, 73. Moreover, the federal cases cited do not purport to declare what is the law of New York. While none of the decisions of the New York courts is based upon facts precisely like those in the case at bar, Brewster v. Hatch, 122 N. Y. 349, and Campbell v. Cypress Hills Cemetery, 41 N. Y. 34, are so nearly akin in essential features, and the statement of legal principles in each is such as to lead to the conclusion that the finding of the single justice was correct.

Blum v. Whitney, 185 N. Y. 232, is relied upon by the defendant as announcing a different doctrine; but it does not so appear to us. Several corporations and their officers there joined in a written contract for the formation of a new corporation with a fixed capitalization and for the transfer of their several properties to it for a definite amount of its stock. The maximum amount that might be paid for the capital stock of a certain other corporation was fixed by implication in the agreement. All the persons contemplated, and none others, became members of the new corporation. These were treated by the court as together constituting the organizers of the corporation. The fact that the maximum price permitted by the agreement was in fact paid for the capital stock of the other corporation and that a great profit was obtained by some of the organizers was regarded not as a fraud upon the corporation but upon the associates in the organization. It was held not to be a case for the application of the law governing promoters. This case cannot be considered as stating a rule in conflict with the finding of the single justice.

In its practical results it is not of much consequence whether the law of the situs, either of Massachusetts or New York, or of the forum, governs, for upon this record and the findings before us, the law of this Commonwealth controls the rights and obligations of the parties.

3. The next inquiry is as to the liability of the defendant.
11 The plaintiff seeks to establish this on the ground that the defendant and Lewisohn framed a scheme, which was an

entirety and which as a whole comprised the organization and continued management of the plaintiff by themselves, their agents and representatives, until the completion of the project; this scheme was the capitalization of the plaintiff for $3,750,000; the sale to it of their property, costing and intrinsically worth $1,000,000, but having in the market a value not over $2,000,000, for $3,250,000; the sale to the general public at par for cash of the remaining $500,000 of stock; and all this without providing the plaintiff with any independent board of officers or advisers to pass upon the wisdom of the purchase and without disclosing the substance of the transaction and their extraordinary profit to the purchasers of its stock for cash at par. This scheme was an entity, one part of it was just as essential as any other part, and one part was the procurement of $500,000 in cash from the unenlightened public as a working capital for the new company.

It has been decided, apparently by a unanimous court, that such a transaction creates a liability on the part of the defendant to account for his profits to the plaintiff in this proceeding. Hayward v. Leeson, 176 Mass. 310. One of the present suits was before the court as reported in 188 Mass. 315, and after an elaborate review of the authorities and examination of the grounds for judgment, it was held that the defendant was liable, notwithstanding the opposing decision on the precise point by the United States Circuit Court in Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 136 Fed. Rep. 915. Since the decision reported in 188 Mass. 315, the above entitled case against Lewisohn has been considered by the United States Circuit Court of Appeals (148 Fed. Rep. 1020) and by the Supreme Court of the United States (210 U. S. 206) and without dissent a conclusion has been reached contrary to that of this court. The deference due to a decision by the highest court in the land and the intrinsic importance of the question at issue require a reconsideration of our own cases, a re-examination of the authorities and a careful consideration of the principles involved.

The plaintiff seeks to recover a secret profit made by the
12 promoters in the sale of their own property to the corporation, basing its claim on the general and well recognized proposition that a promoter cannot take lawfully a secret profit and will be held to account for it if he does.* Fundamentally the action is to recover profits obtained by a breach of trust. There is a distinct finding by the single justice that the defendant and Lewisohn were the promoters of the plaintiff. This finding is amply justified by the evidence. In their brains it was conceived, by their direction the formalities of its incorporation were carried out, their resources provided its mines, their influence and reputation with those desir-

* Parker v. Nickerson, 112 Mass. 195, 196. Parker v. Nickerson, 137 Mass. 487, 497. Bagnall v. Carlton, 6 Ch. D. 371. Emma Silver Mining Co. v. Grant, 11 Ch. D. 918, 936. Nant-y-Glo & Blaina Ironworks Co. v. Grave, 12 Ch. D. 738. Lyndney & Wigpool Iron Co. v. Bird, 33 Ch. D. 85. Whaley Bridge Calico Printing Co. v. Green, 5 Q. B. D. 109. Chandler v. Bacon, 30 Fed. Rep. 538. Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 119, 120. Hinkley v. Sac Oil & Pipe Line Co. 132 Iowa, 396, 402, 403. Fred Macey Co. v. Macey, 143 Mich. 138, 152. Zinc Carbonate Co. v. First National Bank of Shullsburg, 103 Wis. 125. Pietsch v. Milbrath, 123 Wis. 647. Cox v. Coal & Oil Investment Co. 61 W. Va. 291, 305.

ing to invest in mines procured its working cash capital. The word "promoter" has no precise and inflexible meaning in this country. In England it is defined by statute. St. 7 & 8 Vict. c. 110, § 3. See also St. 30 & 31 Vict. c. 131, § 38. But even there the duties of promoters as fiduciaries to the company are matters of common law cognizance. Erlanger v. New Sombrero Phosphate Co. 3 App. Cas. 1218, 1269. In a comprehensive sense "promoter" includes those who undertake to form a corporation and to procure for it the rights, instrumentalities and capital by which it is to carry out the purposes set forth in its charter, and to establish it as fully able to do its business. Their work may begin long before the organization of the corporation, in seeking the opening for a venture and projecting a plan for its development, and may continue after the incorporation by attracting the investment of capital in its securities and providing it with the commercial breath of life. It is now established without exception that a promoter stands in a fiduciary relation to the corporation in which he is interested, and that he is charged with all the duties of good faith which attach to other trusts. In this respect he is held to the high standards which bind
13 directors and other persons occupying fiduciary relations.*

That the promoters stands in the relation of a fiduciary to the corporation which he organizes seems to be conceded in Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 210 U. S. 206. The questions to be answered are, whether this rule is applicable, and if it is, whether the plaintiff is in a position to assert its claim.

Notwithstanding this fiduciary relation the promoter may sell property to the company which he is promoting. But in order that the contract may be absolutely binding he must pursue one of four course: (*a*) He may provide an independent board of officers in no respect directly or indirectly under his control, and make full disclosure to the corporation through them; (*b*) He may make a full disclosure of all material facts to each original subscriber of shares in the corporation; (*c*) He may procure a ratification of the contract after disclosing its circumstances by vote of the stockholders of the completely established corporation; (*d*) He may be himself the real subscriber of all the shares of the capital stock contemplated as a part of the promotion scheme. The defendant does not contend upon this report that either of the first two courses was followed. He does rest his claim chiefly upon the third and fourth courses. As applied to the facts of this case these two come to the same thing, for the reason that on the findings of the single justice the defendant and his associate were subscribers for only one hundred and thirty thousand shares out of a total — one hundred and fifty thousand and in the light most favorable to them they held all the shares which had been issued at the time of the ratification, but not all which it

* Dickerman v. Northern Trust Co. 176 U. S. 181, 202. Yeiser v. United States Board & Paper Co. 107 Fed. Rep. 340. Chaffe v. Berkley, 141 Iowa, 344. Getty v. Devlin, 54 N. Y. 403; S. C. 70 N. Y. 504. Loudenslager v. Woodbury Heights Land Co. 13 Dick. 556, 560. Exter v. Sawyer, 146 Mo. 302, 322. Johnson v. Sheridan Lumber Co. 51 Ore. 35. Camden Land Co. v. Lewis, 101 Maine, 78. Cox v. Coal & Oil Investment Co. 61 W. Va. 291, 305. The Telegraph v. Loetscher, 127 Iowa, 383. Hayward v. Leeson, 176 Mass. 310, and cases cited at p. 318.

was proposed to issue as a part of the scheme of promotion. The point to be determined, therefore, is whether the promoter is immune from liability if he and his associates are owners of all
14 the issued stock at the time of the act complained of, although intending as a part of their plan the immediate issue of further stock to the public without disclosure, and whether, while a substantial portion of the stock intended to be issued to the public remains unissued, a vote of ratification of the breach of trust will protect him.

A review of the authorities seems to demonstrate that there is a liability of the promoter to the corporation when further original subscribers to capital stock contemplated as an essential part of the scheme of promoters came in after the transaction complained of, even though that transaction is known to all the then stockholders, that is to say, to the promoters and their representatives.

Erlanger v. New Sombrero Phosphate Co. 3 App. Cas. 1218, is one of the most important and thoroughly considered cases, and, as it has been said to be a case often misunderstood (Lord Davey in Salomon v. Salomon, [1897] A. C. 22, 57), it is well to consider it at length. It was first heard by Vice-Chancellor Malins under the name of New Sombrero Phosphate Co. v. Erlanger (5 Ch. D. 73), then by the justices of appeal (5 Ch. D. 102), and finally by the House of Lords, where it was twice argued. The facts were these: Erlanger and his associates, hereafter spoken of as the syndicate, bought of the official liquidator of a broken down company the lease of a phosphate island, for £55,000. The agreement for purchase was signed on September 11, and was subject to the approval of the judge, which was given on September 15, 1871. By its terms the contract was to be completed on November 15, 1871. The syndicate then organized the New Sombrero Phosphate Company under St. 25 & 26 Vict. c. 89 (3 App. Cas. 1264). The articles of association of the new corporation were signed on September 20, 1871, and the company registered on September 20 or 21 (5 Ch. D. 76). On registration the corporation was created under 25 & 26 Vict. c. 89, § 18 of which provided that upon registration "the subscribers * * * shall thereupon be a body corporate * * * capable forthwith of exercising all the functions of an incorporated company." The signers of the articles of association were tools of the syndicate. The members of the first board of directors were named in the articles
15 of association. Two were out of the country and would not attend meetings; others were an employee of Erlanger, a retired admiral of the English navy, whose shares necessary to qualify him as a director were paid for by Erlanger (5 Ch. D. 107, 108), and the mayor of London; three directors made a quorum, and the last three named attended the meetings. The syndicate anticipated its payments required by its contract and acquired the lease of the island on September 21, 1871. The first meeting of the directors was held on September 29, 1871, at which was produced and approved by resolution an agreement between one Evans (in whose name in behalf of the syndicate the contract for the purchase of the lease from the offical liquidator was made), and one Pavy (acting for

the new company), dated September 20, whereby Evans sold and Pavy for the company bought the lease of the island for £80,000 in cash and £30,000 in paid up stock. In the discussion of this case in 210 U. S. at p. 216 this contract is stated to have been "provisional on the shares being taken and the company formed," but we do not so understand it as set forth in 5 Ch. D. 75, 76 and 95. It was subject to the new company being registered (which was done on September 20 or 21), and to the contract with the official liquidator being approved by the judge (which was done on September 15) and duly performed (which was done on September 21) and to the confirmation by the company (which was given by vote of the directors on September 29, who were in this regard clothed by the articles of association with all the authority of the corporation itself, 3 App. Cas. 1273, 1274), but it contained no other provisional features. The directors adopted the contract between Evans and Pavy without investigation into its merits, and in ignorance of the profit made by the syndicate except as Evans had such knowledge. After this the public oversubscribed. The stock was issued, £30,000 to the syndicate and £100,000 to the public; and on November 2 £80,000 was paid to the syndicate by the company. 5 Ch. D. 96. Respecting this agreement for sale by the syndicate it is further said in 210 U. S. at p. 217, that "the contract seems to have reached forward to the moment when they [the public] subscribed. As it is put in 2 [1 is meant] Morawetz, Corp. (2d ed.) § 292, there was really no company till the shares were issued," and on this ground it is
16 stated by the court at p. 216 that the English case "seems to us far from establishing a different doctrine for that jurisdiction." We cannot accede to this interpretation. The company was fully formed the moment it was registered. The subscription for the shares required as a prerequisite to registration under the English statute established the company as fully as the forty shares subscribed and the $1,000 for capital stock, paid into the plaintiff's treasury on or before July 11, 1895, established it. It was enabled to make any contract within the scope of its powers. That is settled by the plain language of 25 & 26 Vict. c. 89, § 18, quoted above. But it also has been expressly so decided. It was said in Salomon v. Salomon, [1897] A. C. 22, at p. 51: "When the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate 'capable forthwith,' to use the words of the enactment, 'of exercising all the functions of an incorporated company.' Those are strong words. The company attains maturity on its birth. There is no period of minority—no interval of incapacity." This apparently demonstrates the error of the further statement in 1 Morawetz, Corp. (2d ed.) 279, that "Before any shares were issued the existence of the corporation was a fiction." The remark of Lord Cairns (3 App. Cas. at p. 1239) to the effect that the contract for the sale of the island was "provisional on the shares being taken and the company completely formed" was made in connection with the defense of laches and not in the discussion as to the liability of the defendants (which he had concluded on an earlier page), and refers only to the fact that the scheme of the defendants

to get £80,000 in cash out of the new company under their contract with it was dependent as a practical matter on the shares being taken by the public, and does not and cannot apply to the phraseology of the contract itself, for respecting that it is not correct. The only conditions named in the contract were that the company should be registered and confirm the contract and the contract of the syndicate with the official liquidator be performed. (See 5 Ch. D. 75, 76 and 95.) The distinction which appears to be established between the Erlanger case and the present one, by the decision of the United States Supreme Court, 210 U. S. 206, is that if promoters organize a company with a capital of $3,750,000
17 and sell to it through their dummy directors property bought by them for this purpose, for $3,250,000, in paid up shares, and then get by public subscription $500,000 for working capital, the transaction is valid. But if promoters, having bought property for £55,000, organize a company with a capital of £130,000, and while they are the only bona fide stockholders by vote of their director sell to it their property for £110,000, to be paid £80,000 in cash and £30,000 in paid up shares, £100,000 being subscribed in cash by the public, the transaction is void. The only difference between the two cases is that in the Erlanger case the promoters were paid a part of the purchase price in money, the proceeds of public subscription, and received paid up shares, which they took in payment of the balance of the purchase price when the stock was issued to subscribers, while in the present case the whole purchase price was paid in stock, which was issued before any stock was issued to the public although after a substantial public subscription. In other words, the order in which the transaction is carried out, and not its substantial nature, makes the difference between liability and immunity of the promoter. It is true that in the Erlanger case, until after ratification by the company of the contract previously made in its behalf for the purchase of the lease of the island, the mayor of London by acting as a director was liable to take shares of stock and intended to, and did subsequently, take and pay for fifty shares. He and possibly one other (3 App. Cas. 1228) appear to have been the only persons up to that time connected with the company, who subsequently became stockholders, who were not agents of the promoters. But it is also the fact (as stated by Jessel, M. R., in 5 Ch. D. at p. 112) that "Up to this time there was not really a single bona fida shareholder distinct from the promoters," and of course all these assented to the transaction. If this is a vital circumstance, that case is distinguishable in principle from the one at bar and from the case decided by the United States Supreme Court. This appears to us to be a difference upon an immaterial matter. It is of no consequence whether in fact the dummy directors know of the terms of sale and the breach of trust of the promoters. It does not appear in the present case that the nominees of Bigelow and Lewisohn knew any more about the profit the latter were making than did the directors of the New Sombrero
18 Company of the profits of the syndicate. The point is that in both cases the directors were selected with the purpose that

they should be the mere instruments of the promoters, and they carried out the will of their masters. Under the English statute the instruments of the promoters in the New Sombrero Company, while its directors, were as fully clothed with all the powers of the corporation and as much the holders of all its stock as were the seven directors of the plaintiff holding in all forty shares of the plaintiff at the time the contract of sale in the present case was made. If the assent of all the stockholders is good in the one case, by the same token it should be equally good in the other; and the breach of trust in the one is equally a breach of trust in the other. This case seems to us an authority in favor of the plaintiff.

In New Sombrero Phosphate Co. v. Erlanger, 5 Ch. D. 73, 123, it was said by Baggallay, L. J.: "The syndicate were, in substance, not only the vendors of the property, but also the promoters of the company, and in such a case the syndicate, as promoters, being in a fiduciary relation to the company, it was essential that the public, who were invited to become, and who were expected to become, the shareholders of the company, and to constitute the company, should have the fullest information as to all the surrounding circumstances." See also Jessel, M. R., S. C. at p. 113. In re British Seamless Paper Box Co. 17 Ch. D. 467, at p. 471, it was said by Jessel, M. R.: "If promoters make an arrangement to get a profit for themselves out of what is apparently paid to the vendors, it is immaterial whether the contract with the vendors is approved of by the directors of the company, who are the promoters, just before the allotment or just after: in both cases it is intended to cheat the future shareholders; and of course it makes no difference whatever that the persons who at the time, the allotment was made, were in fact the promoters or their nominees, knew of the fraud. You can defraud future allottees as well as present allottees." In the same case on appeal Cotton, L. J., said (17 Ch. D. at p. 479): "The directors stand in a fiduciary relation to the whole company, that is, not only to the existing members but to all whom they intend to bring in." In Broderip v. Salomon, [1895] 2 Ch. 323, at p. 329, it was said
19 by Vaughan Williams, J. (whose conclusion was approved in S. C. sub nomine Salomon v. Salomon, [1897] A. C. 22): "Of course, purchasing at an exorbitant price may be a fraud, even if all the shareholders know of it, if there is an intention to allot further shares at a later period to future allottees." This point was apparently left open in the House of Lords, [1897] A. C. at p. 37. In In re Leeds & Hanley Theatres of Varieties, [1902] 2 Ch. 809, at p. 823, occurs this language: "At first there were only four directors * * * and the seven necessary signatories of the memorandum of the association. When it is said that the promoters stood in a fiduciary position towards the company, that does not mean that they stood in such a relation to these directors and these seven signatories. It means that they stood in a fiduciary relation to the future allottees of shares—to the persons who were invited to come and take up the shares of the company." In Gluckstein v. Barnes, [1900] A. C. 240, 257, Lord Robertson says: "The people for whom

these gentlemen [the promoters] were bound to act were their coming constituents, the persons out of whose money they proposed to make their gain." In Densmore Oil Co. v. Densmore, 64 Penn. St. 43, at p. 50, it is said: "Where persons form such an association, or begin or start the project of one, from that time they do stand in a confidential relation to each other, and to all others who may subsequently become members or subscribers, and it is not competent for any of them to purchase property for the purposes of such a company, and then sell it at an advance without a full disclosure of the facts." This language is quoted with approval and applied in Burbank v. Dennis, 101 Cal. 90, 98, and in South Joplin Land Co. v. Case, 104 Mo. 572, 580. To the same point, Pittsburg Mining Co. v. Spooner, 74 Wis. 307, 321-323. In Pietsch v. Milbrath, 123 Wis., 647, at p. 656, it is held that "Persons who act as promoters of a corporation do not necessarily cease to be such when the corporation is organized to do business. * * * So long as there are prospective original subscribers for stock and the promoters and those concerting with them remain in control of the corporation, it is in a position to be deceived. * * * It is deceived in a legal sense when it is rendered helpless by its managers as to protecting those invited to subscribe for its stock, and is then used to aid in defrauding them."

This is supported by Fred Macey Co. v. Macey, 143 Mich. 20 138, 152, a case singularly like the one at bar in its essential features, where relief was granted to the corporation against the promoters although they subscribed for all the capital stock. Other cases which in principle reach the same result are Yeiser v. United States Board & Paper Co. 107 Fed. Rep. 340, 348; London Trust Co. v. Mackenzie, 62 L. J. Ch. (N. S.) 870; Hinkley v. Sac Oil & Pipe Line Co. 132 Iowa, 396. It was said in Groel v. United Electric Co. 4 Robbins, 616, 622: "There can be no question that promoters are liable to the corporation for profits secretly made by them in its promotion, and that such liability arises in cases where future allottees of stock are concerned. Knoop v. Bohmrich, 4 Dick. 82. Plaquemines Tropical Fruit Co. v. Buck, 7 Dick. 219. Loudenslager v. Woodbury Heights Land Co. 13 Dick. 556, affirming the principle established in the court of chancery in Woodbury Heights Land Co. v. Loudenslager, 10 Dick. 78." In Central Trust Co. v. East Tennessee Land Co. 116 Fed. Rep. 743, and Camden Land Co. v. Lewis, 101 Maine, 78, 95, Hayward v. Leeson, 176 Mass. 310, to this point is cited with approval. St. Louis, Fort Scott & Wichita Railroad v. Tiernan, 37 Kans. 606, and Stewart v. St. Louis, Fort Scott & Wichita Railroad, 41 Fed. Rep. 736, were both decided on the assumption that the promoters took all the stock, although it appears that later some stock was issued to municipalities through which the tracks of the promoters' railroad corporation ran, but whether as a part of the original plan of promotion does not appear, and no weight is attached to this circumstance in the opinions. Numerous other cases which have been cited do not bear upon this point for the reason that in each of them the owners of the property conveyed have owned either the entire capital stock of the corporation or all that it was contemplated to issue. See Foster v. Seymour,

23 Fed. Rep. 65; McCracken v. Robison, 57 Fed. Rep. 375; Barr v. New York, Lake Erie & Western Railroad, 125 N. Y. 263; Blum v. Whitney, 185 N. Y. 232. In re Ambrose Lake Tin & Copper Mining Co. 14 Ch. D. 390; Salomon v. Salomon, [1897] A. C. 22; In re British Seamless Paper Box Co. 17 Ch. D. 467; Seymour v. Spring Forest Cemetery Association, 144 N. Y. 333; Hutchinson v. Simpson, 92 App. Div. (N. Y.) 382; Tompkins v. Sperry, 96 Md. 560; Langdon v. Fogg, 18 Fed. Rep. 5; Flagler Engraving Machine Co. v. Flagler, 19 Fed. Rep. 468; Insurance Press v. Montauk
21 Fire Detecting Wire Co. 103 App. Div. (N. Y.) 472; Higgins v. Lansingh, 154 Ill. 301; In re Baglan Hall Colliery Co. L. R. 5 Ch. 346. In all these cases it was also true that no shares were ever issued (so far as appears) other than those to the promoters, except that in In re British Seamless Paper Box Co. 17 Ch. D. 467, at a time considerably subsequent to the organization of the corporation, a change in the scheme was made in good faith by which others were brought in as subscribers.

In this respect the question is one of intention of the promoters. If they actually intend at the time the company is brought out to remain its sole owners and that it shall not receive the money of innocent shareholders in the future, then although thereafter the exigencies of the company may be such as to require the issue of additional stock, they may not be responsible. In re British Seamless Paper Box Co. 17 Ch. D. 467, is an illustration of this principle. There it was found that the promoters were and intended to remain the sole proprietors of the property of the company and the sole members of the company. Cotton, L. J., at p. 479, said: "Here it is an established fact that when the company was formed it was intended to be a private company, that is, it was intended to carry it on without calling in the public, or issuing any shares except to the then existing shareholders. Therefore the doctrine that directors may not take a profit for themselves is inapplicable, because all the members knew that they intended to make a profit. It is true that some new members were subsequently taken in. If shortly after this transaction a prospectus had been issued and the public had been invited to come in and take shares, no court would have listened to directors who said that it was not intended to take in fresh members. But this was commenced and carried on entirely as a private company, and a considerable time elapsed before they asked any one to join them."

In Wills v. Nehalem Coal Co. 52 Ore. 70, a corporation was organized by promoters with a capital of $150,000. More than half was issued to promoters and their tools in return for property of one of them conveyed at an overvaluation. Afterwards shares were sold to the public without disclosure of the great profit made by promoters. Relief was granted. The contention that the cor-
22 poration had assented with full knowledge of the facts by all who were the stockholders at the time of the sale was disposed of on the ground that in substance a wrong was done the corporation in diminishing the common fund held for the benefit of all the stockholders by issuing a part of its capital stock for property

worth less than its face value. In Richlands Oil Co. v. Morriss, 108 Va. 228, the facts as stated in the opinion were that the promoters, having acquired the control of certain oil leases for an insignificant price, "proceeded to transfer these leases to a company which they organized upon a capitalization of 1,000,000 shares (the par value of each share being $1), and distributed 600,000 of those shares to themselves; and having perfected the organization of the company by making themselves the president, secretary, treasurer, and directors undertook to market the residue of the shares of stock, amounting to 400,000, without informing the public as to the true condition of affairs." The suit of the corporation was upheld. Upon the point we are now discussing these two cases are indistinguishable in principle from the cases at bar.

This review of decisions seems to establish abundantly the proposition that promoters stand in a fiduciary position toward the corporation, as well when as a part of the scheme of promotion uninformed stockholders are expected to come in after the wrong has been perpetrated, as when at that time there are shareholders to whom no disclosure is made. We find no authority opposed except the Lewisohn cases in the federal courts (210 U. S. 206).

If the question is examined on principle apart from authority, the same result appears clear. The starting point is that a promoter is a fiduciary to the corporation. To use the words of Lord Cairns in Erlanger v. New Sombrero Phosphate Co. 3 App. Cas. 1218, at p. 1236: Promoters "have in their hands the creation and moulding of the company; they have power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and begin business." The corporation is in the hands of the promoter like clay in the hands of the potter. It is to this person, absolutely helpless and incapable of independent
23 initiative or uncontrolled action, that the promoter stands as trustee. It is not necessary to inquire how far he may be trustee also for shareholders or associates. In the present case the inquiry relates wholly to his obligation to the corporation. The fiduciary relation must in reason continue until the promoter has completely established according to his plan the being which he has undertaken to create. His liability must be commensurate with the scheme of promotion on which he has embarked. If the plan contemplates merely the organization of the corporation his duties may end there. But if the scheme is more ambitious and includes beside the incorporation, not only the conveyance to it of property but the procurement of a working capital in cash from the public, then the obligation of faithfulness stretches to the length of the plan. It would be a vain thing for the law to say that the promoter is a trustee subject to all the stringent liabilities which inhere in that character and at the same time say that, at any period during his trusteeship and long before an essential part of it was executed or his general duty as such ended, he could, by changing for a moment the cloak of the promoter for that of director or stockholder, by his own act alone, absolve himself from all past, present or future liability in his capacity as promoter. The plain-

tiff was fully organized and authorized to do business on July 8 and 11, 1895, when only $1,000 in capital stock had been paid in. It would be an idle ceremony indeed to establish for promoters the obligations of trustees, and at the same time hold that by their tools and with only $1,000 paid in, and that as a mere form (for it was soon after repaid to one of them) they could vote to themselves a wholly unwarranted profit of $1,250,000, kept secret from other initial shareholders, because at that moment they were the only stockholders. By such a course the law would be holding out apples of Sodom to the wronged corporation. Corporations can be formed through irresponsible agents with ease. If these agents can vote away a substantial part of the capital stock for property of comparatively small value, and still with immunity to themselves and their principles receive from the uninformed public cash subscriptions for the rest of the capital stock, the organization and management of corporations might readily become a "system of frauds." Peabody v. Flint, 6 Allen, 52, 55. It is answered that the plaintiff
24 has assented to the transaction with full knowledge of the facts. But it has not assented when it stood where it could act independently. The assent to the wrongful act of the promoters was given at the behest and by vote of the promoters themselves, while still occupying the position of protectors to their own creature, while it was bound hand and foot by them and prevented from taking any action except through them as a step in its further exploitation, and while their trust was uncompleted. The corporation although by law fully organized was still in its swaddling clothes, so far as the plans of the promoters were concerned. The value of their stock taken in return for their mining property was dependent in a substantial degree upon the corporation having $500,000 in cash for a working capital. They could not perfect their plans nor reap their contemplated profit, except by retaining their hold upon the corporation until the public had made this contribution. In one sense it is true that the plaintiff was completely organized on July 11 and on September 20, 1895. It was fully competent to be bound by its contracts and ratification of contracts with those dealing with it at arm's length. But it was not free from its ward-ship to its promoters, whose scheme from the first looked forward to a corporation with treasury filled by subscriptions from the unenlightened public. The corporation was not dealing with these fiduciaries upon an independent ground. The plaintiff, although a legal corporation from July 8, leaned wholly upon its promoters, because they made it so to lean, until long after the events here in controversy. An assent under these conditions can be of no greater effect than the assent of a minor under guardian-ship to the breaches of trust of his guardian.

The situation is akin to the conveyance of property by a man solvent but in contemplation of insolvency. Such conveyance is not wrong until the contemplated indebtedness is incurred which makes him an insolvent. Then the executed evil intent stretches back and invalidates the original conveyance. Here the conveyance to the corporation with the secret profit, when there are no unin-

formed subscribers to stock, if nothing more is ever done, is not an actionable tort. But the vicious intent looks forward to the procurement of money from the ignorant public by means of
25 original subscriptions and the execution of this evil intent extends backward to contaminate the sale and its profit.

Stress has sometimes been laid upon the fact that the promoters were paid a part of their purchase price out of the public subscriptions. But there is no difference in principle between such a case and the present, where a substantial part of the value of the stock taken by the defendant and Lewisohn depended upon the cash subscriptions to be made by the public for the remaining shares not issued to the promoters.

But it is further argued that, the entire capital stock outstanding at the time being in the hands of the promoters, the sale of the property to the corporation was merely changing the form of title of the promoters from owners of real estate to that of shares of stock, and that, there being then no other shareholders, no wrong was done. It has been decided that where persons own the entire authorized capital stock of the company and take it in payment for the conveyance of their property at a grossly exaggerated price, nobody can be heard to complain. The leading English cases upon this point are In re Gold Co. 11 Ch. D. 701, In re Ambrose Lake Tin & Copper Mining Co. 14 Ch. D. 390, In re British Seamless Paper Box Co. 17 Ch. D. 467, and Salomon v. Salomon, [1897] A. C. 22. But these and many other like cases cited on pages 185 and 186 ante are where the promoters owned all the outstanding capital stock and intended to remain the sole proprietors and did not purpose that there should be, as a part of the promotion plan, a substantial issue of stock for cash to the public. This is pointed out in London Trust Co. v. Mackenzie, 62 L. J. Ch. (N. S.) 870, 875. The distinction is clear between cases of that class and those like the present, where the promoters took for themselves a large number of shares of stock without adequate consideration and without disclosure to the detriment of the corporation and all its future shareholders, at the same time planning that there should be immediate public subscriptions. It is one thing to take all the shares of a corporation in payment for physical property conveyed. It does not much matter to the stockholders in such a case whether the total is one hundred and thirty thousand shares or one hundred and fifty thousand shares. But
26 it is a very different thing to take $\frac{130,000}{150,000}$ of capital stock of a corporation whose assets consist of the same physical property, and in addition $500,000 in money subscribed by others. The latter course affects the other stockholders and the corporation itself, and it gives the promoters something appreciably more valuable than what they contribute. It is true that in Salomon v. Salomon and in some other cases there was a part of the authorized capital stock which was not issued, but it was not proposed to be issued as a part of the scheme of promotion and the original shareholders intended to remain the only shareholders. It was to be issued or not in the remote future, as the exigencies of the corporation in the actual conduct of its business might require, but, in any event, it

was not to be issued for the purpose of starting the corporation on its course. This circumstance materially affects the question here to be considered. Most, if not all, corporation laws provide in some form for an increase of capital stock. It is of no consequence upon such a point as this, whether the capital stock originally authorized is large but not all issued or whether it is at first small and subsequently an increase is authorized. This seems to be the view taken by the English courts, for it is said by James, L. J., in In re British Seamless Paper Box Co. 17 Ch. D. 467, "If they [the promoters] were intending, although then constituting the whole company, that other people should come in afterwards to whom what had been done would be injurious, the court would feel no difficulty in saying as Lord Langdale did in Society of Practical Knowledge v. Abbott, 2 Beav. 559, that they intended to commit a fraud."

The fundamental reasoning upon which these cases can rest is not that no wrong has been committed, but there is no one to enforce the remedy. All courts recognize the soundness of the doctrine that no man can be on both sides of the same bargain with justice to all interests. The principle that one cannot rightfully sell property, belonging to him in his private right, to himself in a trust capacity is universal.

If this aspect alone is looked at and the corporation is regarded as a distinct person, it cannot be said that the corporation is not wronged by such a breach of duty by promoters. It is only when the corporate personality is disregarded and its component elements as stockholders alone are considered that it can be said
27 that no harm is done on the ground (as was said in Salomon v. Salomon, [1897] A. C. at p. 57) that "the company is bound in a matter intra vires by the unanimous agreement of its members." But looking through the form of the corporation to the stockholders and treating them as the corporation is an exception to the otherwise firmly established universal rule that the corporation is a separate legal entity for all purposes, even though all its stock be held by a single interest and it be to all practical intents merely the instrument of the stockholder. Conley v. Mathieson Alkali Works, 190 U. S. 406. Peterson v. Chicago, Rock Island & Pacific Railway, 205 U. S. 364, 390. We perceive no reason for extending this exception to a case like the present.

The real ground of the decisions of which Salomon v. Salomon is a type is that the corporation is estopped by the circumstance that all persons with financial concern in the matter have assented with knowledge, and thus the lips of everybody are sealed. It is not that no wrong has been done, but that whatever wrong has been done has been condoned. The maxim "Volenti non fit injuria" is invoked. This, however, is setting up confession and avoidance and not a bar to the main cause of action.

The theory upon which corporations are founded is that they are artificial persons, distinct and separate from officers and stockholders. Corporate liabilities do not attach to the latter. The wrong which the defendant and his associate did in this case was in selling property worth intrinsically $1,000,000 and in the market at most $2,-

000,000 for $3,250,000 without revealing that they were making a secret profit. The wrong was done to the corporation. It affected all its shareholders, present and future alike. It is generally admitted that if there are existing stockholders ignorant of the wrong, redress may be had. But it is had through the corporation or for the benefit of the corporation and not by the stockholder in his own right. The wrong is not done to the shareholders as individuals, nor to the shareholders collectively, it is done to the corporation as an independent being, and thus indirectly the rights of those who are or who may become stockholders are affected. In buying the promoters' mine,
28 the directors of the corporation acted for the corporation, as such, without regard to who were the then stockholders, or even if there were no stockholders. Whoever becomes an originally contemplated shareholder coming in afterwards has as much right to say that the rights of the corporation were not protected and to insist that it should assert its remedy for the wrong done it, as one in at first but not informed. Subsequent subscriptions to original stock as a part of the scheme of promotion do not change the identity of the corporation, but remove an impediment to the enforcement of a remedy for a wrong previously done the corporation. The wrong is not done when the innocent public subscribes, but when the sale was made to the corporation at a grossly exaggerated price with secret profit. The occasion for complaining of this wrong comes when the promoters issue to the public the balance of the stock in order to provide the money necessary to set the corporation on its feet and to give thereby the contemplated value to the stock taken by themselves in payment for their mines. The exemption of the promoter from liability to the corporation for a sale without disclosure when he takes the entire issue of capital stock is an exception to the general rule imposing upon him the liabilities of a trustee. If this exception is to be extended to a case like the present, it leaves nothing of substantial value in the original rule. It might still reach small and grosser forms of want of fidelity to corporations, but would leave unharmed the vastly greater and more refined variety illustrated by the present case. It would point the way to general immunity for the wary.

It is also urged that the maintenance of this suit works an injustice to the defendant in requiring a repayment to the corporation, which will result in a benefit to the thirteen fifteenths of the capital stock taken by the defendant and Lewisohn (who condoned the wrong) as well as to the two fifteenths subscribed for by the innocent public. The size of the repayment which may be required of the defendant is due to the enormous profit taken at the outset. Apart from the unjust profit taken by the promoters, their interest in the plaintiff was only eight seventeenths, or, tested by the cost and intrinsic value of the property conveyed, four seventeenths. The true answer, however, is given by Jessel, M. R., in New Sombrero Phosphate Co. v. Erlanger, 5 Ch. D. 73, at p. 111. "It is said that is not doing
29 justice, and that the suit cannot be maintained in this form, because it will not do justice. But that argument goes too far, because it would apply to a case of the grossest fraud in every in-

stance in which one or more of the actual shareholders of a company took part in that fraud. If the argument were once allowed to prevail, it would only be necessary to corrupt one single shareholder in order to prevent a company from ever setting the contract aside. It may be said you give to the shareholder, who was a party to the fraud, a profit, because he will take it in respect of his shares, and since as between co-conspirators there is no contribution, therefore his brother conspirators, who are made liable for the fraud, cannot make him repay his proportion. But the doctrine of this court has never been to hold its hand and avoid doing justice in favor of the innocent, because it cannot apportion the punishment fully amongst the guilty. A dozen parties to a fraud may be defendants, and one decree or judgment go against all, and if it is a fraud of such a character that none of them can bring an action for contribution, the plaintiff may at his will and pleasure enforce that judgment against any one of them, and perhaps pass over the most guilty of them; still there is no remedy as between those who commit the fraud. It is one of the punishments of fraud that there is no such remedy, and that a guilty party, though not the most guilty, may suffer the greatest amount of punishment. It is one of the deterrents to men to prevent their committing fraud." See also Stockton v. Anderson, 13 Stew. (N. J.) 486.

It is said further that the result reached is harsh from the business man's point of view. A discussion of this aspect of the case involves ethical considerations. Courts are constantly dealing with the various relations of the business world. Legal principles are applied to these transactions, but such principles "have almost always been the fundamental ethical rules of right and wrong." Robinson v. Mollett, L. R. 7 H. L. 802, 817. Upon its distinctly moral side, there is little to the credit of the defendant and his associate. The offering by the defendant as promoter for public subscription for cash at par a substantial part of the capital stock of a corporation, the rest of whose capital stock had been issued for property conveyed to it under a law which permitted such stock to be issued only for the real value of property, was equivalent to a representation that no fictitious value had been placed upon the property so acquired. But the distinct finding of the single justice is that the real value was less than one third the price for which the defendant and Lewisohn sold it. Nothing can be said in support of a business enterprise carried on by promoters, which involves the purchase by them of mines, vesting and intrinsically worth $1,000,000, with money in substantial part solicited from associates on representations that a corporation is to be formed with a capitalization of $2,500,000, of whose stock $2,000,000 is to be issued for the conveyance to it by them of the mines, and the rest for cash; the actual organization of the corporation under the laws of a State which permitted the issuance of capital stock for property conveyed only to the real value of the property, with a capital stock of $3,750,000, of which $3,250,000 is issued as fully paid for the conveyance of the mines; the settlement with a very great majority of the associates on the basis of a sale for $2,000,000 of stock as at first represented, the promoters retaining $1,250,000 of shares as a secret profit, intending also to procure from

the public subscriptions for $500,000 of stock in cash at par and actually carrying out this purpose, the promoters themselves during all these manipulations having entire control of all executive offices of the corporation. In the absence of compelling authority, we cannot set the seal of judicial approval upon such business policies. See Bigelow v. Old Dominion Copper Mining & Smelting Co. 4 Buch. (N. J.), 71 Atl. Rep. at pp. 176 and 177.

Both on authority outside of our own cases and on principle, it appears to us that the defendant should be held liable. But in this jurisdiction the matter does not stand quite on the basis of an original proposition. In two thoroughly considered opinions in recent years, Hayward v. Leeson, 176 Mass. 310, and Old Dominion Copper Mining & Smelting Co. v. Bigelow, 188 Mass. 315, this court has held that liability existed in a case like this. It is not necessary to repeat the arguments of these decisions. There is thus added to considerations which otherwise exist, the force of the doctrine of stare decisis. One or both of these cases have frequently been cited by courts of other jurisdictions and always with approval until Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 148
31 Fed. Rep. 1020; S. C. 210 U. S. 206. No arguments have been adduced not considered in those cases, and no points now brought forward were not there discussed. While the rule of stare decisis does not prevent the overruling of those cases, they should not be disturbed unless they now appear to be so clearly wrong as to have no sound support. Mabardy v. McHugh, 202 Mass. 148. It must appear that the law was "misunderstood or misapplied." 1 Kent Com. 475. There was no misconception of the points involved when these cases were decided, nor any lack of discernment in their application to the affairs of corporations. It does not appear that they have become archaic or inapplicable by reason of business evolution since they were announced. On the contrary, the tendency of custom since the first case was decided has been rather in the direction of more strict accountability of those owing duties to corporations and their stockholders. At all events, we perceive no occasion to relax these principles of accountability for breaches of trust. The mere fact that the Supreme Court of the United States has since decided the question differently is not alone a sufficient consideration for reversing our decisions. It is only when the reasoning of its decision is of convincing power and compels the conclusion that our cases were wrongly decided that it must command our support in other branches of the law than those where it is supreme under the Federal Constitution. With great respect to the decision in 210 U. S. 206, we are constrained to adhere to the law as laid down in the earlier cases in this Commonwealth.

We have discussed the question as if the same legal principles are involved now as were presented upon the demurrer. There are, however, certain aspects of the evidence which seem to us to make it essentially different and materially stronger for the plaintiff. When the votes to purchase the mines of the promoters were passed on July 11, only forty shares of stock had been subscribed for or

issued. The votes were passed by the directors alone and there was no vote by the stockholders at this time. It is true that the directors comprised all the stockholders, but on that date they were acting wholly in their capacity as directors, that is, as trustees. They did not attempt, so far as any records show, to shift their character
32 as trustees for that of individual stockholders. They did not pursue the careful course of separation of these dual capacities by calling a stockholders' meeting, which was followed in North-West Transportation Co. v. Beatty, 12 App. Cas. 589, nor did they assent in writing as stockholders. So far as the records show up to this point, there was only a directors' vote for the purchase. Moreover, the records of the plaintiff show that at the opening of this meeting only six of the seven directors were present. Four of these six directors resigned as did also the absent seventh director, their resignations were accepted and their successors were chosen. But of the five newly chosen directors, only two were present and took their seats. Thus there were four directors, a bare quorum and majority, present when the offers for the sale of the mines were presented and the votes for their purchase were passed. These votes to purchase were not consummated until December, 1895, and January, 1896, when the deeds were delivered to the plaintiff. The vote to issue the certificates of stock in payment for the conveyances of mines was passed on September 18, 1895. Under date of July 18, 1895, the only subscription list of the plaintiff was signed. Upon this list appear the names of those outside persons who subscribed for the $500,000 of working capital for the plaintiff. The money was paid by some of the outside stockholders before September 18, and at least as early as September 10, 1895. Stock certificates were made out for the number of shares allotted to each under date of September 18. The rights of all these persons as subscribers had become fixed at least as early as September 10, 1895, before which date the subscriptions were all received, and when notices of their acceptance and demands for payment were sent out. These circumstances amply support the finding of the single justice that issuance of the twenty thousand shares to the public was in the summer or fall of 1895. These stockholders were entitled to have a disclosure made to the corporation through independent officers. There is no pretense that any disclosure was made to these subscribers. On September 18, 1895, the directors of the plaintiff voted to issue the stock as before stated—thirty thousand shares to Bigelow and Lewisohn, one hundred thousand to their nominee Dumaresq, and there was made out the certificate for the remaining twenty thousand
33 shares to "Thomas Nelson, Treasurer," and these four, professing to represent all the stock of the plaintiff, signed the written approval of all previous acts of the directors. This is the first attempt of the stockholders to act respecting this subject. As before pointed out, the certificate to Nelson was wrongfully issued; except as it belonged to outside subscribers, it was treasury stock. There were then other stockholders of the plaintiff who had paid for their stock, although they had not received their certificates, but the plaintiff had their money and they were entitled to be treated as

stockholders. Chester Glass Co. v. Dewey, 16 Mass. 94. Chaffin v. Cummings, 37 Maine, 76. Hawes v. Anglo-Saxon Petroleum Co. 101 Mass. 385, 395. Their certificates were dated September 18, 1895, and issued directly. These circumstances show that at the first and only time when there was an effort on the part of the promoters to secure a ratification of their wrongful acts, there were certain shareholders who were not represented and who did not themselves sign in assent and who were in fact ignorant of the wrong done the corporation. Further, they do not show that at any time from the organization of the corporation onward was there a moment when all the stockholders or directors knew of the material facts as to the defendant's relation to the corporation. In this view of the facts, which is supported fully by the evidence, there appears to be no assent by the corporation with knowledge of the facts by all those who at any time constituted all the stockholders, except by assuming the knowledge of Bigelow and Lewisohn on July 11, 1895, when there were only forty shares of stock for which the latter had paid, to be the knowledge of all the stockholders, although there were then seven shareholders as to whose actual knowledge of the scheme there is no evidence, although all were the tools of the defendant and Lewisohn. It is only by treating these subscriptions as a sham that knowledge even of the owners of the forty shares can be found. But these subscriptions were necessary to the organization under the New Jersey law. Hence the rule of Salomon v. Salomon, [1897] A. C. 22, and like cases has no application to these facts, nor does the difficulty meet "the petitioner at the outset that it has assented to the transaction with the full knowledge of the facts," (210 U. S. 211, 212,) unless it is said that in fact knowledge by
34 the plaintiff's dominant stockholders is knowledge by the corporation. But the defendant was committing a breach of trust on his principal, the plaintiff, and where one is committing a wrong in his own interest his knowledge does not bind the corporation, which might in an innocent transaction be affected by his knowledge. Indian Head National Bank v. Clark, 166 Mass. 27. Produce Exchange Trust Co. v. Bieberbach, 176 Mass. 577, 588. These considerations mark the case as different in material respects from that which was stated in Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 210 U. S. 206, and bring it clearly within the well recognized rule of promoters' liability, laid down in the numerous and undisputed cases, before cited. The Supreme Court of the United States has never passed upon these facts nor upon such a case as is thus presented. We know of no authority which countenances a different decision upon them than that here reached. The conflict between the federal courts and this court in this respect appears to be not upon the merits of the case as disclosed upon the present record. See Bigelow v. Old Dominion Copper Mining & Smelting Co. 4 Buch. (N. J.), 71 Atl. Rep. 153, 175.

But there is still another aspect in which the case differs from that presented in the federal court and in our previous decision. The defendant held out to subscribers of his syndicate, before the incorporation of the plaintiff, that its capital stock was to be $2,500,000

and that they would get for one share in the Baltimore Company two in the new company and that the rest would be sold to furnish the working capital. The right of these parties to become stockholders in the plaintiff company was fixed before its first meeting of stockholders was held, because they had signed the syndicate agreement and had made two payments on account of their subscriptions. They were sharers thus in the profit of $1,000,000 above the costs of mines. But they were also entitled to disclosure of the secret profit of $1,250,000 more taken by the defendant and Lewisohn and it is found that most of them were ignorant of it. Respecting any sale to the plaintiff in which they had agreed to become shareowners on any other basis than that of two for one, they were entitled to disclosure. This is quite aside from any rights they may have had against Bigelow for not treating them fairly on the division
35 of profits. It stands on different ground. In that relation they were sharers in promoters' profits and they received what they expected. But they had also agreed to be subscribers to stock of the plaintiff. In that character they were not promoters, but stockholders and entitled to all their rights. That they knew there was to be a sale for $2,000,000 and a profit of two for one was no reasonable ground for expectation that the defendant would take a large additional secret profit. As to this secret profit, the members of the syndicate had the same rights as the outside public, that is, they were entitled to a disclosure to an independent and impartial board of officers who should be in a position to act for the interests of the corporation as opposed to those of the promoters. In this regard the case is like Arnold v. Searing, 3 Buch. (N. J.) 262, where the defendants were held liable.

4. It is argued that, even though the ratification in writing be disregarded, still the acts of the stockholders of the plaintiff after some of them knew of the fact that there was some profit to Bigelow and Lewisohn beyond that accruing to all the other members of the syndicate has amounted to a ratification. The complete answer to this argument is that the single justice has found that until shortly before the bringing of these suits neither the stockholders nor the company had gained any knowledge as to the facts upon which the claim is now based, that the very great majority of the stockholders never knew or assented to the operations by which the secret profit was obtained and did not have knowledge of or access to the books or records of the corporation. The votes of ratification of 1899 and 1901 being passed under these conditions do not bind the plaintiff.

5. Several other objections are made to the granting of relief to the plaintiff. It is urged that the plaintiff ought not to recover because, a large majority of its stock being held by a Maine corporation, an agreement has been entered into by that corporation and certain trustees by which it was attempted to provide for the conduct of these suits and sequestrate the proceeds to holders of negotiable certificates. But this agreement is one to which the plaintiff is not a party, and it was made long after these suits were instituted. If it is illegal, it may be set aside in appropriate proceedings,
36 but the rights of the plaintiff for the benefit of all its stockholders cannot be refused enforcement on such ground.

6. The defence of laches cannot prevail. It is found as a fact that as soon as the defendant and his associates released their absolute control of the plaintiff, the action was seasonably begun. The plaintiff is held to the exercise of diligence after the discovery of the facts, but there can be no laches so long as there is no knowledge of the wrong complained of and no failure to avail one's self of reasonable opportunities to ascertain the facts. So long as the plaintiff was wholly in the power of the defendant, it could not be charged with knowledge. Mere lapse of time is no bar to relief under these circumstances. Lydney & Wigpool Iron Ore Co. v. Bird, 33 Ch. D. 85. Lagunas Nitrate Co. v. Lagunas Syndicate, [1899] 2 Ch. D. 392, 433. Twin-Lick Oil Co. v. Marbury, 91 U. S. 587.

7. Nor is the statute of limitations a bar. The time limited by the statute does not begin to run against a breach of trust, where there is a fiduciary duty to disclose the facts on which the cause of action rests, until the facts have or ought to have been discovered. Atlantic National Bank v. Harris, 118 Mass. 147. R. L. c. 202, § 11. The ground of the defendant's liability is his breach of trust as a promoter.

8. It follows from what has been said as to the nature of the wrong done by the defendant that he is liable in solido. The act of the defendant and Lewisohn was a joint act for the benefit of both. Their subdivision of the profits made cannot affect the right of the plaintiff. The breach of trust, which they as promoters committed, was in the nature of a tort. This renders them liable severally as well as jointly and for the whole damage. Hayward v. Leeson, 176 Mass. 10, 324, and cases cited. 188 Mass. at p. 329. Feneff v. Boston & Maine Railroad, 196 Mass. 575, 581. Gluckstin v. Barnes, [1900] A. C. 240. Bigelow v. Old Dominion Copper Mining & Smelting Co. 4 Buch. (N. J.), 71 Atl. Rep. 153, 176.

9. As to the character of relief which can be afforded, it is said first that rescission is the only remedy open to the petitioner. The single justice has found that the situation of the parties and the properties is not such as to make it just at this time to order
37 a rescission. The evidence justifies this finding. It was decided in this case at its earlier stage, 188 Mass. 315, 329, that rescission is not the only remedy. Hayward v. Leeson, 176 Mass. 310, 321. Parker v. Nickerson, 137 Mass. 487. We are not disposed to question the correctness of the decision upon this point. When one has committed a breach of trust, there is no occasion to be over-solicitous to see that the faithless fiduciary should not make reparation for the wrong done. In re Olympia, [1898] 2 Ch. 153, 169. Lyndney & Wigpool Iron Ore Co. v. Bird, 33 Ch. D. 85, 94. The essence of the suit is that a secret profit was taken by the promoters. The obvious remedy is a return of the secret profit. The difficulty of ascertaining the amount of that profit, which troubled the court in In re Cape Breton Co. 29 Ch. D. 795 does not exist here. See Bentinck v. Fenn, 12 App. Cas. 652; Gluckstein v. Barnes, [1900] A. C. 240; In re Leeds & Hanley Theatres of Varieties, [1902] 2 Ch. 809; Yale Gas Stove Co. v. Wilcox, 64 Conn. 101.

10. The plaintiff has also appealed from the decrees in its favor.

It presses its appeals on the ground that it is entitled to recover the difference between the market value of the shares received by the defendant and Lewisohn and the cost to them of the property conveyed to it. This is the measure of recovery where there is a fiduciary relation at the time of the purchase. But there is no finding here that such relation existed at the time the defendant and Lewisohn purchased the property. There is no evidence which requires such a finding. The corporation was not organized until a considerable period after the options had been secured. The defendant and Lewisohn were, during all this time, free to do as they chose with their purchase so far as the plaintiff was concerned. This has been before decided, 188 Mass. 321. The plaintiff contends in the alternative that its measure of damage is the difference between the intrinsic value of the property conveyed and the value of the stock issued therefor. Market value is the standard commonly applied where property has such value. It is only in cases where the value of property cannot be fairly ascertained by the application of this test that resort is had to any other. The single justice appears to have experienced no difficulty in determining that value of
38 these mines. There are no exceptional circumstances which call for the application of any other than the ordinary rule.

11. Since the decision of this case on demurrer, reported in 188 Mass. 315, and the entry of the decrees by the single justice after a full hearing upon the facts, the defendant has been permitted to file a supplementary answer. Old Dominion Copper Mining & Smelting Co. v. Bigelow, 199 Mass. 488. He there sets up, as a bar to the plaintiff's claim, a judgment of the Circuit Court of the United States for the Southern District of New York, entered on July 23, 1908, in favor of the defendants in a suit like one of the present suits in all particulars, except that it was prosecuted against the executors of the will of Lewisohn, the defendants' demurrer to the plaintiff's bill being sustained and the final decree being entered, whereby the claim against Lewisohn was held to be without foundation, and he contends that the matter is thereby res judicata as to himself. The supplemental answer further avers that the issues were the same as those here involved, and that the present defendant was a privy to the judgment in that case, and participated in the defense, and acted with Lewisohn's executors throughout the entire pendency of the suit. The Lewisohn suit was heard in the Circuit Court of the United States and on appeal in the United States Circuit Court of Appeals, and afterwards upon certiorari in the Supreme Court of the United States. 210 U. S. 206. On these supplemental answers a hearing was had before a single justice, who reserved questions arising thereon for the consideration of this court upon the pleadings and all the evidence.

One of the two suits before us seeks to set aside the conveyance of the outside properties and secure the return of the thirty thousand shares of capital stock issued therefor, and the other to recover damages resulting from the conveyance to the plaintiff of the mines and other real estate of the Baltimore Company for the excessive valuation of one hundred thousand such shares. In other respects the

two bills are alike. Two suits (the bills in which have the same allegations as these, mutatis mutandis), were brought against the executors of Lewischn in the United States Circuit Court for the Southern District of New York. The one relating to the
39 outside properties and the issue of the thirty thousand shares was decided ultimately by the United States Supreme Court, and a final decree was entered dismissing the suit. In the other suit respecting the issue of one hundred thousand shares for the mines and other real estate of the Baltimore Company, no decree has been entered, and it appears to be still pending. Separate offers of sale were presented and separate votes were passed by the directors of the plaintiff for the purchase of the outside properties for thirty thousand shares of its full paid non-assessable capital stock and for the purchase of the property of the Baltimore Company for one hundred thousand like shares. Separate votes were also passed to issue the thirty thousand shares to the defendant and Lewisohn and to issue the one hundred thousand shares to Dumaresq. Probably the defense of res judicata cannot apply to the suit respecting one hundred thousand shares, for the suit touching those shares against Lewisohn's executors has never gone to judgment and is still pending. The res at issue in that suit, which appears to be somewhat different from that involved in the other, has therefore never become judicata This circumstance is noted in passing. In some aspects of the case it may be important and perhaps decisive. In view of the ground, upon which this opinion is based, however, it makes no difference in the result and we do not further advert to it.

It appears that the fundamental questions in the suit in the federal court were precisely the same as those raised in the present suit relating to the thirty thousand shares and passed upon in 188 Mass. 315. The present defendant was not a party to the suit in the federal court, but there is evidence that he participated in the defense of it.

The plaintiff objects that the order of the single justice allowing the defendant to file the supplemental answers was erroneous. This order was made in the exercise of judicial discretion, and unless such discretion was wrongly exercised it must stand. The facts averred in these answers could not have been pleaded when the original answers were filed, for the events they set up have occurred since. It is urged that the decree in favor of the executors of Lewisohn was entered in the United States Circuit Court before the
40 trial upon the merits in this court, and might have been pleaded in bar notwithstanding the proceedings in the Supreme Court of the United States upon a writ of certiorari. But even if this be the law, the single justice cannot be said to have erred in permitting the defendant to set up a decree, which rests upon a decision of the court of last resort made after the close of the hearing upon the merits in the present suits. The decree in the federal court, although founded upon a demurrer, may under proper circumstances be a bar to another suit, as well as one founded upon a hearing of evidence. Yates v. Utica Bank, 206 U. S. 181, 183.

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Northern Pacific Railway v. Slaght, 205 U. S. 122, and cases cited at 130. In the view that we take of the case, it is not necessary to discuss other objections urged by the plaintiff to the force of this decree or the similarity of the issues in the two sets of suits.

12. The most important and difficult question is whether the contention of the defendant is sound that the decree of the federal court is a complete bar to the present suits. His argument is that under the law of New York the decree of the Circuit Court of the United States is a bar to the maintenance of another suit for the same cause of action by the same plaintiff against him, and that, under art. 4, §1, of the Constitution of the United States, the effect given by the law of New York to the decree must be given by this court, in order that it receive the constitutionally required full faith and credit. The constitutional provision is as applicable to a decree of the Circuit Court in the Southern District of New York as to a decree in the State courts. Deposit Bank v. Frankfort, 191 U. S. 499, 515. Central National Bank v. Stevens, 169 U. S. 432, 460. The general effect of the decree (except as to matters of law or practice arising under the statutes of the United States, which have no bearing in the present case) is governed by the law of the State of New York where the federal court was sitting. Hancock National Bank v. Farnum, 176 U. S. 640, 645, citing Crescent City Live Stock Co. v. Butchers' Union, 120 U. S. 141, 147; Metcalf v. Watertown, 153 U. S. 671, 676; Pittsburgh, Cincinnati, Chicago & St. Louis Railroad v. Long Island Loan & Trust Co. 172 U. S. 493.

But before we reach the consideration of the effect of the decree and the interpretation that should be given to it under the
41 laws of New York, there is a preliminary and fundamental question as to the precise meaning of the full faith and credit clause of the Federal Constitution as applied to the circumstances of this case.

An analysis of the defendant's contention shows that his defense of estoppel by res judicata rests upon the ground that he was either a party or privy to the New York judgment. It is not and cannot be urged that the New York suit was a proceeding in rem as to the plaintiff's cause of action. It was a personal suit. Except in proceedings in rem, there is no such thing known to the law as an adjudication of a cause of action, which can be availed of as res adjudicata by any others than by parties and their privies. The doctrine of stare decisis stands on a wholly different ground. The contention is that, even though the court was convinced that its former decision upon the merits was erroneous and desired to correct the mistake by deciding the later case differently, the decision against the plaintiff would prevent such correction of error. The fact that a party has fully litigated his cause of action in one suit and has been defeated is of no avail in another suit, to which a stranger to the first suit is a party, involving precisely the same issues. This principle is illustrated by many cases. Keokuk & Western Railroad v. Missouri, 152 U. S. 301. Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co. 120 U. S. 141, 155. Moore v. Albany, 98 N. Y. 396. Trimmer v. Rochester, 130 N. Y. 401. Stone v. New York, 138 N. Y. 124. Wallace v. Straus, 113 N. Y. 238.

Collins v. Hydorn, 135 N. Y. 320. Groth v. Washburn, 39 Hun 324. Furlong v. Banta, 80 Hun, 248.

The defendant can prevail on his supplementary answers only upon the ground that he was either a party or privy to the judgment rendered in the United States Circuit Court. The defendant Bigelow was not a party to that suit, and he does not assert that he was. The extent of his contention is that he was in privity with the executors of Lewisohn, and therefore entitled to the benefit of the judgment in their favor.

The first matter for determination is this: Does the full faith and credit clause require the courts of all other States to give effect to the law of any particular State, where a judgment may be entered, as to who are privies to such judgment, or does it permit or require the courts of the State where a third person sets up the de-
42 fense that he is privy to a judgment entered in the courts of another State to decide that question according to its own law? Hence it becomes necessary to inquire what has been decided by the Supreme Court of the United States, whose decisions upon this as a federal question are binding upon all State courts.

It was said in Smithsonian Institution v. St. John, 214 U. S. 19, at pp. 28 and 29: "Without doubt the constitutional requirement, art. IV, §1, that 'full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State,' implies that the public acts of every State shall be given the same effect by the courts of another State that they have by law and usage at home. This is clearly the logical result of the principles announced as early as 1813 in Mills v. Duryee, 7 Cranch, 481, and steadily adhered to ever since. Hancock National Bank v. Farnum, 176 U. S. 640, 642." But the broad language of this decision, as well as the comprehensive phrase of the Constitution itself and of the act of Congress in pursuance thereof are to be read and interpreted in the light of the thing intended to be accomplished, and "of some established principles, which they were not intended to overthrow." Huntington v. Attrill, 146 U. S. 657, 685. Many cases have arisen in which this phase of the subject has been discussed. It has been generally held that, no matter how clear may be the language of the statute, nor how decisive the decisions of the courts, of the sister State, as to the scope and effect of judgments upon residents of other States, yet in certain aspects such judgments may and ought to be narrowly scrutinized and the constitutional injunction given a reasonable interpretation. It was said in Public Works v. Columbia College, 17 Wall. 521 at p. 528: "The clause of the Federal Constitution which requires full faith and credit to be given in each State to the records and judicial proceedings of every other State, applies to the records and proceedings of courts only so far as they have jurisdiction. Whenever they want jurisdiction the records are not entitled to credit." This was a case where three of five partners appeared in an action against the copartnership, the other two mem-
bers being non-residents not served with process and not ap-
43 pearing, and under the law of New York a judgment could be rendered under these circumstances against the copartnership. But it was held that the absent partners were not bound by

a judgment so entered. In D'Arcy v. Ketchum, 11 How. 165, a judgment was entered against a non-resident defendant, who had not appeared or been served with process, in accordance with a statute of New York, permitting such course where joint debtors were sued and one only appeared. This statute had been adjudged valid by the courts of New York. It was admitted that the defendant was a joint debtor with the person served in New York, yet it was held that the Constitution and acts of Congress did not purport to give effect to State judgments as binding upon non-resident defendants not served with process and not appearing. See Goldey v. Morning News, 156 U. S. 518, 521.

It was said, in the recent case of Brown v. Fletcher, 210 U. S. 82, 88, that "the constitutional question does not preclude the courts of a State in which the judgment of a sister State is presented from inquiry as to the jurisdiction of the court by which the judgment is rendered. See the elaborate opinion by Mr. Justice Bradley, speaking for the court, in Thompson v. Whitman, 18 Wall. 457. That opinion has been followed in many cases. * * * Even record recitals of jurisdictional facts do not preclude oral testimony as to the existence of those facts." Old Wayne Life Association v. McDonough, 204 U. S. 8, 15. These principles are illustrated in application to a variety of facts: for example, as to whether attachment of property gives power to enter a judgment of effect beyond the property attached, Pennoyer v. Neff, 95 U. S. 714, 730; as to the limits of jurisdiction of parish courts in the settlement of estates, Simmons v. Saul, 138 U. S. 439, 448; as to whether the return of service is sufficient to confer jurisdiction, Knowles v. Gaslight & Coke Co. 19 Wall. 58; as to whether the judgment is responsive to the issues tendered, Reynolds v. Stockton, 140 U. S. 254, 265; as to whether an attorney had authority to appear, Cooper v. Newell, 173 U. S. 555, 566, Hall v. Lanning, 91 U. S. 160; as to whether the cause of action was such as to give the State court jurisdiction to render a judgment entitled, according to settled principles of public and international law, to enforcement by other courts, Wisconsin v. Pelican Ins. Co. 127 U. S. 265; as to whether judgment rendered upon appearance by prothonotary, authorized by statute of
44 the State where judgment was entered, was within the terms of a power of attorney, Grover & Baker Sewing Machine Co. v. Radcliffe, 137 U. S. 287, 295; as to validity of decree of foreign court respecting devolution of real estate within another State, Clarke v. Clarke, 178 U. S. 186, 195; as to effect of decree for future payment of alimony, Lynde v. Lynde, 181 U. S. 183; as to whether divorce obtained by the court having jurisdiction of persons of both parties must be recognized in their domiciliary state, Andrews v. Andrews, 188 U. S. 14, German Savings & Loan Society v. Dormitzer, 192 U. S. 125, 128; as to effect of foreign divorces obtained ex parte, Bell v. Bell, 181 U. S. 175, Streitwolf v. Streitwolf, 181 U. S. 179, Atherton v. Atherton, 181 U. S. 155, Haddock v. Haddock, 201 U. S. 562; as to whether one was "holder" of note within the meaning of a warrant of attorney authorizing confession of judgment, National Exchange Bank v. Wiley, 195 U. S. 257, 269;

as to whether determination of domicil of deceased person by appointment of personal representatives foreclosed similar inquiry in other States, Thormann v. Frame, 176 U. S. 350; as to whether service on public officer impliedly authorized to receive service for a foreign corporation, in respect of business transacted by it in one State, was also impliedly authorized to the same extent as to business not there transacted, Old Wayne Life Association v. McDonough, 204 U. S. 8, 22; as to whether a corporation is really doing business in the State in which service is made, within the rule that it is essential to jurisdiction over a foreign corporation having neither property nor agent in the State that it be doing business there, Commercial Mutual Accident Co. v. Davis, 213 U. S. 245 and cases cited at 255, Caledonian Coal Co. v. Baker, 196 U. S. 432; as to whether administration could be granted upon the estate of a living person, Scott v. McNeal, 154 U. S. 34; as to the sufficiency of service by publication, Smith v. Woolfolk, 115 U. S. 143 and cases cited, Clark v. Wells, 203 U. S. 164, 171; as to whether in fact hearing had been granted to one alleged to be an alien enemy, Windsor v. McVeigh, 93 U. S. 274; as to judgment of foreclosure against alien enemy, Lasere v. Rochereau, 17 Wall. 437; as to sufficiency of scire facias to keep alive a judgment, Owens v. Henry, 161 U. S. 642; as to legality of constructive service, Brooklyn v. Insurance Co. 99 U. S. 362,
45 Freeman v. Alderson, 119 U. S. 185, Empire v. Darlington, 101 U. S. 87, Pana v. Bowler, 107 U. S. 529; as to validity of statute imposing personal liability for local assessment upon nonresident landowner, Dewey v. Des Moines, 173 U. S. 193; as to sufficiency of any steps necessary to confer jurisdiction, Howard v. De Cordova, 177 U. S. 609; as to validity of statute authorizing collection of execution for unpaid balance due on stock subscriptions from foreign stockholders in a corporation, Wilson v. Seligman, 144 U. S. 41; as to whether recital of settlement of cause in a judgment rested on an unfulfilled promissory agreement, Jacobs v. Marks, 182 U. S. 583; as to whether the State court having once rendered final judgment could without notice reopen case and enter a different judgment, Wetmore v. Karrick, 205 U. S. 141, 149. In all these cases it was held that judgments of the courts of sister States, valid there, might be refused recognition elsewhere without doing violence to the federal Constitution. This review of some of the decisions of the Supreme Court of the United States shows how full and complete is the inquiry permitted into the circumstances by which it is contended that the judgment of the court of the sister State binds the person as to whom it is invoked. Such judgments do not stand upon the same footing as domestic judgments. They may be attacked collaterally. Huntington v. Attrill, 146 U. S. 657, 685. There is nothing in the Federal Constitution or laws to prevent the most searching investigation, "into the jurisdiction of the court in which the judgment is rendered, over the subject matter, or the parties affected by it, or into the facts necessary to give such jurisdiction." Fuller, C. J., in Thormann v. Frame, 176 U. S. 350.

The present contention is that the judgment in favor of the executors of Lewisohn avails the defendant because they were privies respecting the subject matter of the suit. We do not find it to be the

law of New York that in a suit in New York the defendant would be entitled to prevail on any other ground. The underlying question is one of jurisdiction. The defendant was not a party to the suit against Lewisohn. He was not served with process. No attempt was made by himself or by the plaintiff to join him as a party. Indeed, the bill in the Lewisohn suit alleges that Bigelow cannot be
46 made a party by reason of residence outside the jurisdiction, and this fact is not controverted. It follows that the United States Circuit Court for the District of New York acquired no jurisdicion to render a judgment binding upon or in favor of Bigelow, unless he was a privy with Lewisohn.

It has been several times said that a judgment concludes, and may be invoked by, one who is a privy. Minneapolis Association v. Canfield, 121 U. S. 295, 308. Mitchell v. First National Bank of Chicago, 180 U. S. 471, 480, and cases cited. These are general statements, however, and we do not find that the precise point has ever been decided as to the effect which must be given to the judgment in the courts of one State touching privies, non-resident in the first State, and domiciled in the one where the question arises. Strong arguments can be conceived to support the proposition that except as to property rights arising by succession only those can be bound as privies, who are domiciled within the State where the judgment is rendered. But we do not pursue this inquiry. For the purposes of this discussion we assume without deciding that such a judgment binds privies of this description. Whether or not he was a privy is fundamental to the jurisdiction of the United States Circuit Court to enter a judgment, which as to Bigelow was capable of becoming res judicata.

At the outset it is to be observed that the domicil of the defendant is in this Commonwealth, and that domicil generally determines the particular territorial jurisprudence to which every individual is subjected. Grover & Baker Sewing Machine Co. v. Radcliffe, 137 U. S. 287, 298.

The foundation of the doctrine of res judicata is that there has been a judicial inquiry into the subject matter, in which the person to be affected by the judgment has had an opportunity by representative to be heard fully. The inquiry as to jurisdiction is in its last analysis, whether one was in such relation to the action in the sister State as to be bound by its judgment. Ordinarily, the question of jurisdiction is whether one was in law a party to the judgment. Whether a court has jurisdiction of a person depends upon whether he was really a party to it. The cases we have reviewed show that this is to be determined by the courts of the government
47 where it arises according to its jurisprudence, subject to the duty imposed by the Constitution of the United States. The law of the State whose courts entered the judgment does not control. Where it is not contended that one was a party, it is equally an inquiry as to jurisdiction to determine whether he was a privy to one who was a party. By parity of reasoning, whether one is a privy to a judgment rendered in a sister or foreign State must also be determined by the law of the sovereignty where the question arises.

Privity was not a matter in issue in the suit, judgment in which is pleaded, nor can it be determined by an inspection of the judgment roll. It must be decided by evidence outside the record. It is not to be settled according to the law of the State where the judgment is rendered. This plainly appears from D'Arcy v. Ketchum, 11 How. 165. The substance of the New York statute, there decided not to be entitled to full faith and credit when followed by the courts in entering judgment, was that, in cases of joint debtors, all non-residents should be privies with any domestic fellow or joint debtor duly served with process and bound by the judgment. See to substantially the same effect Harris v. Hardeman, 14 How. 334; Ewer v. Coffin, 1 Cush. 23; Stone v. Wainwright, 147 Mass. 201; Phelps v. Brewer, 9 Cush. 390. The same principle is illustrated in Hall v. Lanning, 91 U. S. 160, and Public Works v. Columbia College, 17 Wall. 521, where, by statute or usage, all partners were treated as so much in privity that appearance and defense by one bound all his copartners. Yet such a statute or usage was held not entitled to full faith and credit in the sister State.

We understand these federal cases in principle to cover the question before us, and to decide in substance that legislation or judicial determination of one State, that its domestic judgments shall bind non-residents decided by it to be privies, have no extraterritorial force, and are not entitled to recognition under the full faith and credit clause of the Federal Constitution. The same conclusion follows from the cases above cited, which permit inquiry into the extent of the powers of an agent to subject his principal to the jurisdiction of a foreign court.

But whether or not we interpret these decisions aright, as being decisive against this contention of the defendant, it seems to us that on reason it must be the law that the ascertainment of those
48 non-residents not served with process nor appearing, who are bound by the judgment of a sister State as privies, must be by the courts of the jurisdiction where the question arises, and not by those of the State in which the judgment is rendered. This rests primarily upon the considerations touching the constitutional provision and the reason for its enactment. Its purpose was not to enlarge or change the jurisdiction of the courts of the several States. It was a recognized principle of international law, at the time the Constitution was adopted, that where parties had once fairly litigated a dispute in the courts of any civilized government, the same question ought not to be tried anew. But such judgments were commonly regarded as prima facie evidence of the matter decided and might be re-examined under some circumstances, the whole subject resting in comity and not in obligation. Bissell v. Briggs, 9 Mass. 462. Hilton v. Guyot, 159 U. S. 113, 181. In this regard the several colonies before the Declaration of Independence were as to each other foreign nations. Differences of practice grew up, as to the way in which judgments of foreign courts should be proved, and the precise weight to be attached to them. It was in this state of the law that the Constitution was adopted. Diversity of practice was turned into uniformity by the Constitution, which prescribed the effect to be given to

judgments of courts, and empowered Congress to legislate further as to forms of proof. But it was not intended to enlarge the jurisdiction of the courts of the several States, or confer any new power upon them. It has simply made certain and of universal application between the several States that which before rested only in comity, and does still as to judgments of courts of foreign nations. It was intended merely to be regulative. It "establishes a rule of evidence rather than of jurisdiction." Anglo-American Provision Co. v. Davis Provision Co. (No. 1) 191 U. S. 373. Cole v. Cunningham, 133 U. S. 107, 112. Bissell, v. Briggs, 9 Mass. 462, 467. "Judgments recovered in one State of the Union, when proved in the courts of another government, whether State or national, within the United States, differ from judgments recovered in a foreign country in no other respect than in not being re-examinable on their merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the
49 cause and of the parties" Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 292. Hanley v. Donoghue, 116 U. S. 1, 4. Hilton v. Guyot, 159 U. S. 113, 185. Union & Planters' Bank v. Memphis, 49 C. C. A. 455, 465, and cases cited. This is further illustrated by what was said by Mr. Justice Gray, in Lynde v. Lynde, 181 U. S. 183, at pp. 186, 187: "By the Constitution and the act of Congress, requiring the faith and credit to be given to a judgment of the court of another State that it has in the State where it was rendered, it was long ago declared by this court: 'The judgment is made a debt of record, not examinable upon its merits; but it does not carry with it, into another State, the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another State, it must be made a judgment there; and can only be executed in the latter as its laws may permit.'"

In other words, the question whether the plaintiff can try its case here against Bigelow after failing against the estate of Lewisohn arises after full faith and credit have been given to the New York decree, and is not included in giving it full faith and credit. The decree does not have the effect contended for by the defendant proprio vigore. Whether it should bar the plaintiff from another suit is a question of public policy. Such a question must be decided according to the law of the State where it arises.

This conclusion is strongly supported by the argument of convenience. It is a principle of the common law that a judgment binds the parties and their privies. But there is no generally prevailing definition of privity which can be automatically applied to all cases. Who are privies requires careful examination into the circumstances of each case as it arises. Its determination is often difficult for a court possessed of plenary jurisdiction. But if the question who are privies is to be decided as a fact under the law of a foreign jurisdiction upon such evidence as the parties may be able to produce complication is multiplied. The present case furnishes a capital illustration of the evil workings of such a rule. The courts of authority in New York seem not to have decided the precise question we now have to pass upon. Eminent lawyers have been called by both parties to testify

as experts. But no two of them agree in their definition of privies, although several think that the executors of Lewisohn and the
50 defendant were privies. There is great diversity in the details of the views expressed by those called by the defendant as to the exact grounds upon which they say the plaintiff would be barred in the courts of New York in a suit against Bigelow. We cannot conceive that it was the intent of the framers of the Constitution to put parties to the expense, inconvenience and unsatisfactory method of resorting to this class of testimony in order to establish their rights, when courts exist in every State, which could with much less difficulty determine the question according to the law of the forum. There is nothing inconsistent with this result in Whitman v. Oxford National Bank, 176 U. S. 559, and Hancock National Bank v. Farnum, 176 U. S. 640. These cases decided that the liability imposed upon stockholders in Kansas corporations, by the Constitution and laws of that State, were contractual in their nature, and were enforceable in the courts of other jurisdictions. These decisions in effect hold that the laws of a sovereign power, as to the rights and liabilities arising out of the relations between a domestic corporation and its stockholders, are binding upon the latter as contracts, because they assented to be so bound by voluntarily becoming such stockholders. Bernheimer v. Converse, 206 U. S. 516, 529. Tilt v. Kelsey, 207 U. S. 43, 47, simply decided in substance that a judgment in rem by a court having jurisdiction thereof binds everybody interested in it. Laing v. Rigney, 160 U. S. 531, held that on the facts shown the State court had jurisdiction of all persons sought to be charged. None of these decisions are apposite to the point now under discussion.

We are, therefore, of opinion that whether Bigelow was in such privity with the executors of Lewisohn, respecting the litigation in New York, as to be able to invoke, in his own defense, the judgment there rendered, is a jurisdictional question to be determined by the law of this Commonwealth, subject to the Federal Constitution.

It remains to inquire whether, according to the law of this Commonwealth, the Circuit Court for the District of New York had such jurisdiction of the defendant as to enable him to invoke its judgment as a bar in the present suit, on the ground of res judicata. This in turn depends upon the question whether the defendant was
51 a privy with the defendants in the Lewisohn suit, or in such relation to it that he can plead the judgment in favor of the Lewisohn estate, as an estoppel against the plaintiff. The evidence shows that he knew of the suit, and through his counsel gave such assistance in the preparation of the briefs for the arguments of that suit as might have been expected. But, as he was not a party, this fact is not of much importance. It is treated by most of the expert witnesses called by the defendant as to the New York law as of no consequence. Privity depends upon the relation of the parties to the subject matter, rather than their activity in a suit relating to it after the event. Participation in the defense because of general or personal interest in the result of the litigation does not make one privy to the judgment. Stryker v. Goodnow, 123 U. S. 527, 540. People v. Knickerbocker Ins. Co. 106 N. Y. 619.

The liability of the defendant, as has been poiated out, according to the law of this Commonwealth, is one arising ex delicto. The wrong committed was a tort, in which the defendant and Lewisohn acted in concert. The finding of the single justice, supported by the evidence is, in substance, that they were joint tortfeasors. The inquiry then is, whether one of several joint tortfeasors can plead a judgment in favor of his joint tortfeasor against a plaintiff claiming to have been injured by their joint act as an estoppel in a suit by the same plaintiff against himself.

This can hardly be regarded as an open question in this Commonwealth. In Sprague v. Oakes, 19 Pick. 455, which was an action for trespass quare clausum fregit, it was said, respecting such a defense, "The defendant was neither a party nor privy to that judgment, was not bound by it, nor could he take advantage of it." This case has never been overruled or questioned and must be regarded as stating the law of this Commonwealth. There are other authorities to the same point. Lansing v. Montgomery, 2 Johns. 382. Marsh v. Berry, 7 Cowen, 344. Moore v. Tracy, 7 Wend. 229. Gittleman v. Feltman, 122 App. Div. (N. Y.) 385. Atlantic Dock Co. v. Mayor & Aldermen of New York, 53 N. Y. 64. Tyng v. Clarke, 9 Hun. 269. Calkins v. Allerton, 3 Barb. 171, 174. Goble v. Dillon, 86 Ind. 327. Thompson v. Chicago, St. Paul & Kansas City Railroad, 71 Minn. 89. Three States Lumber Co. v. Blanks, 118 Tenn. 627.

The reason upon which these decisions rest is that there can be no estoppel arising out of a judgment, unless the same parties have had their day in court touching the matter litigated, and unless the judgment is equally available to both parties. It requires no discussion to demonstrate that a judgment in the Lewisohn suit against the defendants would not have fixed liability upon the present defendant. Hence there can be no estoppel under our law or under the general principles of jurisprudence, because it is not mutual. Brigham v. Fayerweather, 140 Mass. 411, 415. Dallinger v. Richardson, 176 Mass. 77, 83. Worcester v. Green, 2 Pick. 425, 429. Biddle & Smart Co. v. Burnham, 91 Maine, 578. Moore v. Albany, 98 N. Y. 396. "Estoppels to be good must be mutual." Litchfield v. Goodnow, 123 U. S. 549, 552. Nelson v. Brown, 141 N. Y. 384, 390. Bigelow could not have appeared as of right and made a defense to that suit. No judgment can be regarded as res judicata as to any matter where the rights in the subject matter arise out of mutuality, and not by succession, unless the party could, as matter of right, appear and defend, even though he may have had knowledge of the suit. Otherwise, he might be bound by a judgment as to which he had never had the opportunity to be heard, which is opposed to the first principles of justice. Brabrook v. Boston Five Cents Savings Bank, 104 Mass. 228, 233. There is no privity between joint wrongdoers, because all are jointly and severally liable. Corey v. Havener, 182 Mass. 250. Feneff v. Boston & Maine Railroad, 196 Mass. 575, 581. Pinkerton v. Randolph, 200 Mass. 24, 28. There is no right of contribution between joint wrongdoers, where they are in pari delicto with each other. Churchill v. Holt, 127 Mass.

165. They are equally culpable, and the wrong complained of results from their joint effort. The right of recovery over by a municipality against a person, whose wrong created a defect in the highway (Holyoke v. Hadley Co. 174 Mass. 424) is no exception to this rule, because the tort committed by each of the wrongdoers is diverse in character, and rests upon a different basis of liability, and there is a right of indemnity in favor of the municipality. Lowell v. Glidden, 159 Mass. 317, 319. We are aware of no instance of joint participation in a common tortious en-
53 terprise where there is any right of contribution. One comprehensive definition of privies is such persons as are "privies in estate—as donor and donee, lessor and lessee and joint tenants; or privies in blood—as heir and ancestor; or privies in representation—as executor and testator or administrator and intestate; or privies in law—where the law without privity in blood or estate casts land upon another, as by escheat." Buckingham v. Ludlum, 10 Stew. 137, 141. Douglass v. Howland, 24 Wend. 35, 53. Joint tortfeasors come within none of the classes thus described. The definition in 1 Greenl. Ev. § 535, adopted by the Supreme Court of the United States, in Litchfield v. Goodnow, 123 U. S. 549, 551, namely, "Mutual or successive relationship to the same rights of property" equally fails to include joint tortfeasors. If we turn to the law of privity as illustrated in actions against partnership and joint debtors, the soundness of this conclusion is confirmed. It has been repeatedly decided that an administrator of a decedent in one jurisdiction is not in privity with an administrator of the same estate appointed in another jurisdiction, and that a judgment against one such administrator is not res judicata to the other. Ingersoll v. Coram, 211 U. S. 335, and cases cited. Johnson v. Powers, 139 U. S. 156. In Chase v. Henry, 166 Mass. 577, it was held that discharge in insolvency in this Commonwealth did not bar the debt of a copartnership, one member of which was a non-resident, although two were residents and the copartnership had a regular place of business here. It has been several times held that judgment against one surviving partner upon a claim against the partnership was not admissible in evidence against the executors of a deceased partner, although the existence of the partnership was not disputed. Buckingham v. Ludlum, 10 Stew. 137. Moores' Appeals, 34 Penn. St. 411. Sturges v. Beach, 1 Conn. 507. Larison v. Hager, 44 Fed. Rep. 49. The converse, which is exactly parallel to the present case, namely, that a judgment in favor of one partner or joint and several debtor will not avail his associate in liability, has often been decided. Townsend v. Riddle, 2 N. H. 448. McLelland v. Ridgeway, 12 Ala. 482. State Bank v. Robinson, 13 Ark. 214, 221. Detroit v. Houghton, 42 Mich. 459, 460. It is difficult to conceive of persons more closely identified with their common
54 business than joint debtors and partners, and if judgments against one do not bind his associate, we do not see how persons occupying the less intimate relation to each other, which Bigelow and Lewisohn did, can be bound as privies. See also Williams v. Bankhead, 19 Wall. 563, 570.

Apart from authority and on principle the same result seems necessary. Joint tortfeasors act in unison respecting a common wrongful enterprise. It is one of the penalties, which the common law (differing in this respect from the civil law) inflicts upon those who jointly engage in intentional violation of the rights of others, that each shall be left to bear the natural results of his conduct. Courts will not lend their aid in adjusting the conflicting claims of wrongdoers touching their own turpitude.

An injured party is given the right to pursue his remedy, either singly or together, against those who thus cause injury, and may proceed to judgment against all in separate actions. He is barred only by a satisfaction. An inevitable corollary of these generally undisputed propositions and one consonant with a fundamental sense of justice is that a party has a right to try his case against everybody who has done him a wrong by immediate and direct culpable action. He is not precluded by a failure against one alleged joint wrongdoer from attempting to pursue another. He is entitled to his day in court against a particular adversary. We believe there are no exceptions to this rule stated in this form. The cases where judgment in favor of an active agent or servant avails a passive principal or master (Portland Gold Mining Co. v. Stratton's Independence, 158 Fed. Rep. 63 and cases cited), or where the relation of indemnitor and indemnitee exists (Port Jervis v. First National Bank of Port Jervis, 96 N. Y. 550) do not constitute exceptions to this rule, but stand on a different ground.

For another reason the New York judgment in favor of Lewisohn seems not to be a bar. The joint actor with the defendant was not the defendant in the New York suit, but it was prosecuted against his executors. If it be assumed that there was a kind of privity between the two who acted in concert, that privity was broken by the death of one. There is no privity between Lewisohn's exec-
55 utors and Bigelow. Ela v. Edwards, 13 Allen, 48. Merrill v. New England Ins. Co. 103 Mass. 245, 249. Thomson v. American Surety Co. 170 N. Y. 109. It cannot be said that the plaintiff has elected to pursue his remedy against the estate of Lewisohn to the exclusion of his rights against Bigelow. As between joint tortfeasors the doctrine of election has no application, and moreover the plaintiff sought the New York forum voluntarily only in the sense of being compelled to go there that a court might acquire jurisdiction of those defendants.

The determination that the relation between Lewisohn and Bigelow was that of joint tortfeasors respecting a cause of action arising ex delicto disposes also of the argument pressed by the defendant, that Lewisohn was trustee, agent or representative of Bigelow to such an extent that he was in privity with him. See Bigelow v. Old Dominion Copper Mining & Smelting Co. 4 Buch. (N. J.), 71 Atl. Rep. 153, 176.

The conclusion is, therefore, that the matters set up in the supplemental answers do not preclude the plaintiff from continuing the prosecution of the present suits.

Both parties have introduced a large amount of evidence as to the

law of New York touching the effect which would by its courts be accorded to the judgment against the plaintiff in the Lewisohn litigation in a suit like the present pending in its courts against the defendant. In the view which we take of this case that question has become wholly immaterial, and we do not pass upon it.

13. The defendant has briefly argued that a decision for the plaintiff in these suits involves a denial to him of due process of law, the equal protection of the laws, and an impairment of the obligation of contracts. It does not seem necessary to discuss these arguments further than to say that they do not appear to us to have any application to the issues here pending.

14. The present cases were upon the calendar of the full court for argument at its January sitting, 1908. Upon motion of the defendant based upon representations as to the need of delay to enable him to prepare a brief, they were assigned as the first cases for argument at the March sitting of this court, 1908. A few days before the coming in of the court at that sitting, the present defend-
56 ant applied to the Court of Chancery in the State of New Jersey, where the plaintiff is domiciled, and secured a temporary injunction against its prosecution of these suits. The suit in New Jersey was decided adversely to the plaintiff by the chancellor, in whose elaborate opinion one of the vice-chancellors concurred, on August 8, 1908. Bigelow v. Old Dominion Copper Mining & Smelting Co. 4 Buch. (N. J.), 71 Atl. Rep. 153. This decision was not by the court of last resort, and the present defendant, the plaintiff there, asserted that he intended to prosecute an appeal to the highest court in the State of New Jersey. Thereupon, on motion, an interlocutory decree was entered by a single justice of this court, restraining the defendant, "his attorneys, agents and servants from further prosecuting the action commenced by said Bigelow against the plaintiff in the Court of Chancery in the State of New Jersey * * *; and from commencing or prosecuting any other suit or proceeding either in law or in equity, except in this court, against the plaintiff to prevent it from obtaining the final decision and decree of this court or in any manner to delay or impede the presentation of said case." These suits were then pending before the full court under R. L. c. 159, § 19. This statute, however, does not prevent the entering by a single justice of decrees respecting interlocutory matters which may call for a speedy hearing and decision, but in no wise affecting the questions covered by the final decree. R. L. c. 159, §§ 17, 21, 22. Parker v. Nickerson, 137 Mass. 487, 491. The defendant appealed from this interlocutory decree and from a refusal of the single justice to modify or vacate it.

It is a general principle of chancery jurisprudence that, as between courts of co-ordinate and concurrent jurisdiction, the court which first obtains possession of a transaction shall dispose of it without interference from other courts. Riggs v. Johnson Co. 6 Wall. 166, 196. Home Ins. Co. v. Howell, 9 C. E. Green, 238. The jurisdiction of courts of equity to restrain a citizen suitor from prosecuting litigation in another State is well settled. Cunningham v. Butler, 142 Mass. 47; S. C. sub nomine Cole v. Cunningham,

133 U. S. 107. The present suits were begun October 7, 1902. This court plainly had jurisdiction of the subject matter and the parties. The defendant made no contest in these respects, but proceeded to hearing upon the merits and accepted the jurisdiction of the
57 court up to the point of argument before the full bench. It was manifestly proper that at this stage of the proceedings, in view of his conduct of the suits theretofore, he should be restrained from attempting to interfere in courts of other jurisdiction with the conclusion of this litigation. It is hardly necessary to say that the interlocutory decree does not purport to restrain him from enforcing whatever rights he may have to a writ of error from the Supreme Court of the United States to the final judgments which may be entered in this court. His full rights under the Federal Constitution are preserved. The decrees are to be so modified as to include the costs of these appeals, and as modified are affirmed.

So ordered.*

KNOWLTON, *C. J.*:

This is an important case. The decrees from which the appeal was taken to this court call for the payment of considerably more than two million dollars. The questions of law involved are far-reaching. As I do not agree to the opinion of the majority of the court, I deem it my duty to state the reasons for my dissent.

The fundamental question is, what right and power has a corporation to bind itself, acting through its stockholders in confirmation of the doings of its directors, in the transaction of business, after it has been completely organized under the law of the State of New Jersey, and after the amount of the capital required to authorize it to do business under the statute has been paid in, but before the whole of its capital stock has been issued or subscribed for. The plaintiff corporation was established under the laws of the State of New Jersey. Its rights and powers, and the rights of its stockholders, depend upon the law of that State. Unless it has suffered a wrong as a corporation of that State it has no standing here.

To organize a corporation under the laws of New Jersey, articles of association in writing must be signed by not less than three persons, stating the name of the company, the place or places where its business is to be conducted, the object for which it is to be formed, "the total amount of the capital stock of such company, which shall not be less than two thousand dollars, the amount with which they will commence business, which shall not be less
58 than one thousand dollars, and the number of shares into which the same is divided, and the par value of each share." It must also contain a statement of the names and residences of the stockholders and the number of shares held by each, with the "period at which such company shall commence and terminate, not exceeding fifty years." Gen. Sts. of New Jersey, 912-946, §§ 10-189. The certificate must be proved and acknowledged, and

* The case was taken to the Supreme Court of the United States by writ of error.

then recorded as deeds of real estate are required to be recorded. It must also be filed in the office of the secretary of state. When this has been done, the company is a corporation from the time of the commencement of the period fixed in the certificate.

The report of the single justice, with the evidence, shows that the plaintiff corporation was organized in all respects in compliance with the statute, that the requisite amount of capital to qualify it to commence business was paid in in cash, and that the corporation was legally authorized to do any business within the purposes of its organization. Although but a small part of its authorized capital had been paid in or subscribed for, it was permitted by law to exercise all the powers of a corporation and to perform all its contemplated functions for fifty years, if it could obtain money or credit sufficient for the purpose. It then made contracts with the defendant Bigelow and his associate Lewisohn, who were the promoters of it, and who therefore stood in fiduciary relations to it, which contracts would be voidable as fraudulent for that reason, unless there was a full and fair disclosure of the facts to the corporation, as represented either by an independent board of directors who were in a position properly to protect its rights, or by its existing stockholders who were the owners of it. The directors were selected by the defendant and Lewisohn, and they were not impartial and independent officers, qualified properly to represent the corporation in matters where its interests might be adverse to those of the promoters. Indeed, as stockholders, they were then the representatives of the promoters. The capital which they paid in under their subscriptions was paid with money furnished by the promoters, and the beneficial interest in all the stock of the company, as it was then organized, was in the defendant and Lewisohn, who were the real owners of the entire corporation. Under these con-
59 tracts, and in payment for property conveyed to the corporation, thirty thousand shares of stock were issued to the defendant and Lewisohn and taken in their names, and one hundred thousand shares were issued to Philip E. Dumaresq, "who took them as the nominee and for the benefit and subject to the orders of the defendant and Lewisohn." These shares "were held for and controlled by the defendant and Lewisohn." Twenty thousand shares more, which made up the total authorized capital of the company, were found by the judge to have been still the property of the corporation itself, and they were intended to be issued to independent subscribers for a working capital. They then stood in the name of Thomas Nelson, treasurer. More than two months after the original contracts were made, and while the ownership of the stock was as above stated, all the directors of the corporation signed, in the record book, a statement approving of the previous action of the board in making these contracts, and a similar statement was signed by the defendant and Lewisohn and Dumaresq as stockholders, and by Nelson as a stock-holding treasurer.

Upon these findings the defendant and Lewisohn were the owners of all the authorized capital stock of the corporation, except the

twenty thousand shares in the treasury, which belonged to the corporation, and through the corporation they owned that also. As stockholders, they knew all the facts affecting the validity or propriety of the contracts which they had made with the company. At that time they had no interest adverse to that of the corporation, for they were the sole owners of the corporation. One question is whether this ratification with full knowledge, by all the stockholders, was binding upon the corporation. Another question is whether the contracts were valid when originally made, having been agreed to with full knowledge by the only persons beneficially interested in the corporation. More specifically, the broad question is whether a corporation, which has full power to make every other kind of a contract within the purposes of its organization, is powerless to make a contract, or through its stockholders to ratify a contract, with one standing in a fiduciary relation to it.

There is no question of fraud upon the corporation; for all of the owners of it were fully informed in regard to the transactions, and approved of them. Under such circumstances there can
60 be no fraud. After a corporation is fully organized, the stockholders for the time being own and control it. In a broad sense, they are the corporation, although the corporation as a separate entity may exercise its powers as an individual, under their direction and for their benefit. The power of a corporation through its stockholders, choosing proper agents, to deal formally with those in a fiduciary relation to it is established beyond the possibility of question. It matters not that the fiduciaries are themselves stockholders, if the other stockholders are not misled. And it matters not whether they constitute all of the stockholders, or only a part of them, if all the stockholders know all the facts and consent to the transaction.

The only question that seems to me debatable, on this branch of the case, is whether the power of the corporation, or of its stockholders, to act in matters of this kind is taken away by the fact that its stock is not all issued, and that a part of it is retained to be issued to obtain working capital, or for other purposes. On principle, it is difficult to see how this can affect its right under the law to do business of this kind, as it may do business of every other kind.

It is suggested that to make contracts with one in a fiduciary relation may be detrimental to the interests of the corporation, and constitute a fraud upon persons subsequently subscribing for stock not then issued, even if the existing stockholders know all the facts and are content. But it is to be noticed that, under the law of New Jersey, the organization of a corporation does not necessarily give any indication or suggestion as to the value of its stock. It does not indicate that more than $1,000 of capital has been actually paid in, if that sum is fixed in the articles of association as the amount necessary to qualify it to do business. As to the balance of the shares, it does not show whether much, or little, or nothing at all has been paid upon them. It does not indicate that contracts have or have not been made with the corporation, and if they have been made, whether they are advantageous or disadvantageous to it. Under this system, everybody is bound to know that, apart from the general facts

of organization which appear of record, one buying stock or subscribing for it must ascertain by inquiry if he would know whether it is of large value or of no value. Evidently the statute was intended
61 to give very broad latitude to organizers of corporations, and to give corporations full powers to contract, while only a small amount of stock has been issued, which may be owned by a very few persons.

Promoters, as well as directors, stand in a fiduciary relation to a corporation. They do not stand in such a relation directly to particular stockholders, or to a particular class of stockholders. Their relation to stockholders is only as the stockholders claim through the corporation by virtue of their ownership of it. Through the corporation, promoters and directors stand in this relation to those who own stock while their fiduciary relation to the corporation continues. They are never in such a relation to those who become stockholders after their relation to the corporation has ended. Their fiduciary relation to the corporation extends through it to all the owners of it. The stockholders for the time being are all the owners of it. These stockholders can sell its property, or wind it up, or control it as they please. No one else has any interest in it, and the directors or promoters have no relations, as such, to any one else. If additional stock is issued after their relations to the corporation are terminated, they are not and they never were in fiduciary relations to the takers of this new stock. In this respect there is no difference between directors and promoters. All this is said in reference to corporations which are regularly and completely organized, and are authorized to do business and fully to exercise their powers and franchises under the law, notwithstanding that a part of their authorized capital has not been taken. Of course, if a corporation is merely in an inchoate condition, and has not acquired the power to exercise its franchises, a different rule would apply.

So too, promoters may enter into arrangements with underwriters or syndicates or single persons who expect to take stock, and may thus assume obligations. In the present cases I do not intimate that the defendant might not be held liable to some of the persons who arranged with him to take a part in the enterprise.

But whatever may be thought of the conduct of promoters who make contracts with a corporation while they are the sole owners of it, and whether it be held that their fiduciary relations
62 extend to future stockholders or only to those who are the owners while this relation exists, the question before us is whether, under the law of New Jersey, a corporation is powerless to bind itself as to such contracts, when they are entered into with the assent of the existing stockholders, all of whom have full knowledge of the facts. On principle, I think that a corporation organized in that State is not so crippled. Let us consider the authorities.

In re Ambrose Lake Tin & Copper Mining Co. 14 Ch. D. 390, was a case in which a sale of property was made to a corporation by the promoters of it, which would have been voidable for fraud if the promoters had not been the owners of its stock. It was held that, inasmuch as the vendors were themselves the stockholders

of the company and knew all the facts, there was no fraud upon the corporation. In this case the judges thought that one of the purposes of these promoters was to obtain profit from future purchasers of the stock who were ignorant of the transaction; but under the circumstances the corporation could not avoid the contract. In North-West Transportation Co. v. Beatty, 12 App. Cas. 589, a contract or purchase of property by a corporation was entered into by directors with one of their number. It was held that the vendor was entitled to exercise his voting power as a stockholder to ratify the contract. He controlled a majority of the votes through ownership of his stock, acquired in a manner authorized by the constitution of the company. It was held that his exercise of his power could not be deemed oppressive for this reason. Sir Richard Baggallay, in delivering the unanimous opinion of the privy Council, said, "Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, and consequently upon the company, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject matter opposed to, or different from, the general or particular interests of the company." Referring to dealings with a director acting in a fiduciary capacity, he said: "Any such dealing or en-
63 gagement may, however, be affirmed or adopted by the company, provided such affirmance or adoption is not brought about by unfair or improper means, and is not illegal or fraudulent or oppressive towards those shareholders who oppose it." In this case ratification was by only a small majority of the stockholders.

Salomon v. Salomon, [1897] A. C. 22, was a case in which the proprietor of a business organized a corporation with a capital stock of forty thousand shares, of the par value of one pound each. He, his wife, his daughter and his four sons took one share each. With only seven shares taken, he sold out his business to the corporation for a price which might be found to be much more than it was worth. He then took twenty thousand shares more of the stock; the remaining nineteen thousand nine hundred and ninety-three shares never were issued. The company soon became insolvent, and a receiver, in the interest of creditors, sought to hold this organizer and promoter for fraud upon the corporation. It was held upon these facts that there was no fraud and no liability. Lord Chancellor Halsbury quoted from the headnote in Erlanger v. New Sombrero Phosphate Co. 3 App. Cas. 1218, and then said, "But if every member of the company—every shareholder—knows exactly what is the true state of the facts (which for this purpose must be assumed to be the case here) Vaughan Williams, J.'s conclusion seems to me to be inevitable, for no case of fraud upon the company could here be established." He said this in a case in which only seven shares of stock out of an authorized capital of forty thousand shares had been issued when the contract with the promoter was made. This case seems to me fully to cover the case at bar, in which the only fraud

proved was the constructive fraud of a sale to a corporation from one in a fiduciary relation to it.

Other cases establish the proposition that it makes no difference that not all the stock of the company has been issued, if the holders of all outstanding stock agree. In St. Louis, Fort Scott & Wichita Railroad v. Tiernan, 37 Kans. 606, and Stewart v. St. Louis, Fort Scott & Wichita Railroad, 41 Fed. Rep. 736, a part of the stock, although not a large amount, was issued to municipalities after the transaction to which the stockholders agreed. In Hutchinson v. Simpson, 92 App. Div. (N. Y.) 382, a large amount of stock
64 was held in the treasury for other corporate uses. The same was true in Blum v. Whitney, 185 N. Y. 232, which in its reasoning and the authorities cited is a very strong case for the defendant. Only a part of the authorized stock had been issued when the contract was made in In re British Seamless Box Co. 17 Ch. D. 467, and more was issued about a year and a quarter afterwards. Tompkins v. Sperry, 96 Md. 560, is an important case supporting the proposition that stockholders may bind the corporation in transactions of this kind which are voidable for constructive fraud. Except as I shall state hereafter, I know of no case which holds that it makes any difference that not all the stock has been issued, if the corporation is completely organized and authorized to go on with its ordinary business. There are dicta of some English judges, indicating that such a transaction, when it is expected that a prospectus will be issued under the English practice inviting subscriptions for stock from the public, would be fraudulent as against future stockholders. These are in opinions in which the judges hold that there is no fraud upon the corporation as there was knowledge and consent of the stockholders, and they seem to assume that the corporation is not fully organized and qualified to do business. But they are without discussion or seeming consideration of the question when a corporation and its stockholders become competent to make binding contracts as to such matters. Other cases which support the defendant's position are Foster v. Seymour, 23 Fed. Rep. 65, McCracken v. Robison, 57 Fed. Rep. 375, and Barr v. New York, Lake Erie & Western Railroad, 125 N. Y. 263.

This court, in Hayward v. Leeson, 176 Mass. 310, in dealing with a corporation established under the laws of Tennessee, held that the receivers of the company might maintain a suit for fraud against promoters, notwithstanding that the stockholders, at the time of the transaction, knew all the facts and agreed to the contract. The particulars of the statute of Tennessee, as to the organization of corporations, do not appear in the report of the case. When the present suits came before the court upon a demurrer, Hayward v. Leeson was followed and held to govern them. 188 Mass. 315. The precise questions which were then before us have been considered by the Circuit Court of the United States and the United States Cir-
65 cuit Court of Appeals in the second circuit, in a suit brought by this plaintiff against Lewisohn's heirs and upon a demurrer to averments of fact against Lewisohn substantially identical with those against the defendant in the present suits, there was a decision

for the defendants. Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 136 Fed. Rep. 915; S. C. 148 Fed. Rep. 1020. As appears by the record before us, five judges of the federal courts in that circuit, at different stages of the proceeding, agreed in their view of the law of the case. The suit was then carried to the Supreme Court of the United States, and the justices of that court were unanimous in sustaining the defendant's demurrer. Upon the averments of the bill, they treated Bigelow and Lewisohn as the real owners of the corporation when the contracts were made, through their appointees, who took the stock which they paid for. The judge who wrote the opinion sat as Chief Justice with those other members of this court who took part in the decision of Hayward v. Leeson. The view expressed in the opinion of the Supreme Court of the United States is at variance with a part of the reasoning and with the decision in Hayward v. Leeson. This latest decision must be treated as establishing the law for the federal courts. The cases cited show that the law is settled in the same way in some of the State courts.

In addition to the deference that a unanimous opinion of the justices of the Supreme Court of the United States should receive in any other court, it is for me a very important consideration that, upon questions which will often be litigated in the federal tribunals by reason of the diverse citizenship of the parties the law ought to be the same in the State courts as in the federal courts. It would be unfortunate if, in this large class of cases, the rights of a suitor should depend upon whether he is finally held subject to the jurisdiction of a federal court or to that of a State court.

It seems to me that the great weight of authority, upon the turning point of this case, is in favor of the defendant. I do not regard the case of Erlanger v. New Sombrero Phosphate Co. 3 App. Cas. 1218 (5 Ch. D. 73), relied on by the plaintiff, as having any bearing upon the question on which the present case turns, namely, when is a corporation so far organized that its stockholders, acting with full knowledge, can bind it? No such question arose in that
66 case, and there was no occasion to consider such a question. So far as appears, the question was never thought of. The court was dealing with a fraud upon a corporation whose stockholders were ignorant of the facts that constituted the fraud, and took no action in regard to the matter. It seems to me that the dicta of certain English judges relied on by the majority of the court overlook the fact that the fiduciary relation of promoters of a corporation is of no practical consequence if the promoters are the sole owners of the corporation, and if, at the time of the transaction in question, the corporation is legally organized and qualified to do every kind of business, although this fact is generally recognized by the English courts. I also think that the judges uttering the dicta were influenced by the statutory provision in the English law for the issuing of a prospectus to the public, inviting subscriptions to the stock, after the corporation is organized in other particulars. There is no such provision in the statute of New Jersey.

It is also to be remembered that the dicta were uttered in connection with decisions that the corporation was bound by the

knowledge and action of all its existing stockholders, notwithstanding that only a part of the authorized stock had been taken. One or two of the dicta are in other cases in which no question in regard to action by all the stockholders with knowledge arose. In Pietsch v. Milbrath, 123 Wis. 647, 651, it appears that the plaintiffs took their stock upon grossly false representations as to the organization of the corporation, and they were allowed a remedy. Yeiser v. United States Board & Paper Co. 107 Fed. Rep. 340, 348, was a case of gross, active fraud, and some stockholders who were ignorant of the facts were brought in before the transaction in question was consummated. Of course, this decision is of no effect as against the later adjudication in 210 U. S. 206, covering the precise question before us. Neither of these two cases seems to me important in reference to the question on which the present decision depends. I think the corporation in the present case is bound by the knowledge and consent of its stockholders.

The defendant relies upon the independent defense that the decision against the plaintiff, upon the same averments of fact in
67 the suit against the other of the two joint actors, is a bar to the present claim, as res judicata. Evidence was introduced to prove the law of New York, where the decree was entered. The defendant called thirteen witnesses of the greatest eminence and distinction, who testified as experts in law that, in their opinion, under the law of New York, the decree would be a bar to these suits if they were brought against this defendant in the courts of that State. Many of these witnesses had had a long judicial experience. Three of them had sat in the Court of Appeals, two of them for long terms, and one as a Chief Judge. Several others had served a long time in the Supreme Court of New York, sitting in the general term and the appellate division. Others had held other high positions in their profession, and all of them were lawyers whose opinions are entitled to great weight. The plaintiff called two eminent lawyers who expressed a contrary opinion. Many decisions of the courts of New York were also put in evidence. The defendant contended that, if the decree is a bar under the law of New York, it is equally so when pleaded in Massachusetts.

If it were necessary to consider this branch of the defense, it perhaps would be a grave question whether the defense was or was not made out. But as to that I express no opinion, preferring to rest this opinion on the other ground.

I am authorized to say that Mr. Justice Morton concurs in this opinion.

Hammond, J.: Upon the questions (1) whether the facts found by the single justice are supported by the evidence and should stand, (2) whether "the transaction is to be determined by the law of Massachusetts," (3) whether the plaintiff has been guilty of laches, (4) what shall be the nature of the relief (if there is any relief), (5) what effect shall be given to the judgment rendered in the Lewisohn case by the Circuit Court of the United States for the Southern District of New York, (6) whether a decision for the plaintiff in

these suits involves a denial to the defendant of due process of law or the equal protection of the laws, and (7) whether the interlocutory order entered by a single justice enjoining the defendant from further prosecuting his suit against the plaintiff elsewhere except in this court should stand. I agree with the majority of the court.

But upon the question on the merits, namely, whether upon the facts found the defendant is answerable to the plaintiff, I agree with the dissenting opinion filed by the Chief Justice; and for the reasons stated therein I think that the bills should be dismissed.

68 COMMONWEALTH OF MASSACHUSETTS.
Suffolk, ss:

Supreme Judicial Court.

In Equity. No. 8099.

OLD DOMINION COPPER MINING & SMELTING COMPANY
v.
ALBERT S. BIGELOW.

Application for Writ of Error.

To the Honorable Marcus P. Knowlton, Chief Justice of the Supreme Judicial Court:—

And now comes the defendant in the above entitled cause and respectfully represents that on the twenty-sixth day of October 1909, this Court upon and in accordance with a rescript from the Supreme Judicial Court for the Commonwealth, the highest Court in the State, entered a final decree in said cause in favor of the plaintiff and against the defendant, in which decree, and in the proceedings had prior thereto in this Court, certain errors appear to the prejudice of the defendant, as recited in the annexed assignment of errors.

Wherefore, the defendant prays that a writ of error to this Court from the Supreme Court of the United States may issue in his behalf for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

By His Attorneys, ALFRED HEMENWAY.
C. H. TYLER.
O. D. YOUNG.
B. E. EAMES.

69 UNITED STATES OF AMERICA:

Supreme Court of the United States.

ALBERT S. BIGELOW, Plaintiff in Error,
v.
OLD DOMINION COPPER MINING AND SMELTING COMPANY,
Defendant in Error.

Assignment of Errors by Plaintiff in Error.

And now comes Albert S. Bigelow, plaintiff in error in the above entitled cause, and, in connection with his application for a writ of error, makes this his assignment of errors.

(1) The Court erred in deciding that the final judgment or decree dated July 23, 1908, in the Circuit Court of the United States for the Southern District of New York in the suit brought by the Old Dominion Copper Mining & Smelting Company, complainant, against Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, as Executors of the last will and testament of Leonard Lewisohn, deceased, defendants, set forth in the supplemental answer herein and duly proven upon the trial, was not a bar to the prosecution of this action against the plaintiff in error in the Supreme Judicial Court of Massachusetts, and that said decree did not estop the plaintiff (defendant in error) from prosecuting its said cause in the Supreme Judicial Court of Massachusetts and did not render the matters in issue in said suit in said Circuit Court res adjudicata in said cause in the Supreme Judicial Court in Massachusetts, and thereby denied to said decree full
70 faith and credit in violation of Article IV, Section I, of the Constitution of the United States and of the Acts of Congress enacted pursuant thereto.

(2) The Court erred in not giving full faith and credit to the decree of the Circuit Court of the United States for the Southern District of New York, made in the suit duly brought and pending in the said Court by the Old Dominion Copper Mining & Smelting Company, complainant, against Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, as Executors of the last will and testament of Leonard Lewisohn, deceased, defendants, as set forth in the supplemental answer herein and duly proven upon the trial of this cause, in violation and disregard of Section 1, Article IV, of the Constitution of the United States.

(3) The Court erred in not granting a decree herein in favor of the plaintiff in error dismissing the complaint for the reason that the decree entered in the Circuit Court of the United States for the Southern District of New York in the suit brought by the Old Dominion Copper Mining & Smelting Company, complainant, against Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, as Executors of the last will and testament of Leonard Lewisohn, deceased, defendants, as set forth in the supplemental answer herein and duly proven upon the trial, conclu-

sively adjudged and determined in favor of the plaintiff in error that no cause of action existed in favor of the defendant in error against the plaintiff in error by reason of the matters set forth in the bill of complaint herein, and in refusing to so adjudge, the Court denied to the plaintiff in error the right claimed by him under the Constitution of the United States, to wit,—that full faith and credit be given in the Commonwealth of Massachusetts to the judicial proceedings of the Circuit Court of the United States
71 for the Southern District of New York.

(4) The Court erred in not granting a decree herein in favor of the plaintiff in error dismissing the complaint, inasmuch as the defendant in error was estopped from maintaining in the Supreme Judicial Court for the Commonwealth of Massachusetts the bill of complaint in this action against the plaintiff in error by reason of the decree entered in the Circuit Court of the United States for the Southern District of New York in the suit brought therein by the Old Dominion Copper Mining & Smelting Company, complainant, against Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, as Executors of the last will and testament of Leonard Lewisohn, deceased, defendants, since the decree in favor of the defendants in said action was also in favor of the plaintiff in error as a privy or representative of the defendants therein and of the decedent, Leonard Lewisohn, and in refusing so to adjudge, the Court denied to the plaintiff in error the full faith and credit of the judicial proceedings in the Circuit Court of the United States for the Southern District of New York, above referred to, contrary to Section 1, Article IV of the Constitution of the United States.

(5) The Court erred in not granting a decree in favor of the plaintiff in error dismissing the complaint, inasmuch as the decree entered in the Circuit Court of the United States for the Southern District of New York, in the suit duly brought and pending therein by the Old Dominion Copper Mining & Smelting Company, complainant, against Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn, and Philip S. Henry, as Executors of the last will and testament of Leonard Lewisohn, deceased, defendants, as set forth in the supplemental answer herein and proven upon the trial,
72 conclusively adjudged and determined in favor of the plaintiff in error that the defendant in error was not entitled to recover against the plaintiff in error by reason of the matters alleged in the bill of complaint herein; and inasmuch as the plaintiff in error was a party by representation to the said action in the Circuit Court of the United States for the Southern District of New York, and inasmuch also as he participated in the said action in connection with the defendants therein and became and was entitled to the benefit of the said decree in all respects to the same extent as though he had been an actual party defendant therein; that, therefore, the Court denied to him in this action the full faith and credit of the decree therein in violation of Section 1, Article IV of the Constitution of the United States.

(6) The Court erred in not granting a decree herein in favor of

the plaintiff in error dismissing the complaint upon the ground that the decree entered in the Circuit Court of the United States for the Southern District of New York, in the suit brought therein by the Old Dominion Copper Mining & Smelting Company, complainant, against Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, as Executors of the last will and testament of Leonard Lewisohn, deceased, defendants, set forth in the supplemental answer herein and proven upon the trial under the laws of the State of New York inured to the benefit of the plaintiff in error as fully and completely as though he had been a party defendant in said action; and that in refusing to give such effect to the said decree, the Supreme Judicial Court of Massachusetts denied to the plaintiff in error the right claimed by him under the Constitution of the United States, to wit,—that full faith and credit be given in
73 the Commonwealth of Massachusetts to the judicial proceedings of the Circuit Court of the United States for the Southern District of New York, aforesaid, in violation of Section 1 of Article IV, of the Constitution of the United States.

(7) The Court erred in deciding that the final judgment or decree dated July 23, 1908, in the Circuit Court of the United States for the Southern District of New York in the suit brought by the Old Dominion Copper Mining & Smelting Company, complainant, against Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, as Executors of the last will and testament of Leonard Lewisohn, deceased, defendants, set forth in the supplemental answer herein and duly proven upon the trial, was not a decree in rem or the equivalent thereof, establishing that as between the defendant in error, on the one side, and the plaintiff in error and Leonard Lewisohn, on the other side, the title to the outside properties, so called, was in the defendant in error and the title to the stock issued in exchange therefor was in the plaintiff in error and the said Lewisohn, and that said decree was not a bar to the prosecution of this action against the plaintiff in error in the Supreme Judicial Court of Massachusetts, and did not render the matters in issue in said suit in said Circuit Court res adjudicata in said cause in the Supreme Judicial Court of Massachusetts and thereby denied to said decree full faith and credit in violation of Article IV, Section 1, of the Constitution of the United States and of the Acts of Congress enacted pursuant thereto.

(8) The Court erred in deciding that the validity of the contracts and transactions in issue was not governed by the laws of the State of New York and that by said laws as existing at the time said contracts and transactions were entered into the same were
74 not valid and binding, and thereby impaired the obligation of such contracts and transactions in violation of Article 1, Section 10, of the Constitution of the United States and denied to the plaintiff in error due process of law and the equal protection of the laws with respect to such contracts and transactions in violation of Section 1 of the 14th amendment to the Constitution of the United States, and denied full faith and credit to the laws of the State of New York in violation of Article IV, Section 1, of the

Constitution of the United States and of the Acts of Congress enacted pursuant thereto.

(9) The Court erred in deciding that the corporate action necessary to be taken by the defendant in error in order to authorize its irrevocable assent to the contracts and transactions in issue and to become bound by the same, was not governed by the law of the State of New Jersey, and that by such law as existing at the time said contracts and transactions were entered into, the necessary corporate action was not taken by the defendant in error to constitute its assent to the contracts and transactions in issue and to bind the corporation irrevocably thereby, and thereby impaired the obligation of such contracts and transactions in violation of Article 1, Section 10, of the Constitution of the United States and denied to the plaintiff in error due process of law and the equal protection of the law with respect to such contracts and transactions in violation of Section 1 of the 14th amendment to the Constitution of the United States and denied full faith and credit to the laws of the State of New Jersey, in violation of Article IV, Section 1, of the Constitution of the United States and of the Acts of Congress enacted pursuant thereto.

75 (10) The Court erred in deciding that the contract entered into between the defendant in error on the one side and the plaintiff in error and Leonard Lewisohn, late of the City of New York, deceased, on the other side, duly authorized by the defendant in error and assented to with full knowledge by all existing shareholders and directors of the defendant in error, was not valid and binding and in holding that the same was voidable and rescindable by the defendant in error or that the defendant in error had any right of action arising out of the matters included in said contract, and thereby impaired the obligation of such contract in violation of Article 1, Section 10, of the Constitution of the United States and denied to the plaintiff in error due process of law in violation of Section 1 of the 14th amendment to the Constitution of the United States.

(11) The Court erred in deciding that the validity of the contracts and transactions in issue was not conclusively established by the final judgment or decree entered on July 23, 1908, in the Circuit Court of the United States for the Southern District of New York, upon a mandate from the Supreme Court of the United States, in the suit brought by the Old Dominion Copper Mining & Smelting Company, complainant, against Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, as Executors of the last will and testament of Leonard Lewisohn, deceased, defendants, set forth in the supplemental answer herein and duly proven upon the trial, and thereby denied full faith and credit to the decision of said Circuit Court and of the Supreme Court of the United States in violation of Article IV, Section 1, of the Constitution of the United States, and of the Acts of Congress enacted pursuant thereto, and impaired the obligation of said contracts and transactions

76 in violation of Article 1, Section 10, of the Constitution of the United States, and denied to the plaintiff in error due process of law and the equal protection of the law with respect to

such transactions in violation of Section 1, of the 14th amendment to the Constitution of the United States.

(12) The Court erred in deciding that where the defendant in error entered into a contract with the plaintiff in error and Leonard Lewisohn, which contract was duly authorized by the defendant in error and assented to with full knowledge of all the facts by thirteen fifteenths (13/15) of the entire authorized capital stock of the defendant in error, (being all the then existing shareholders) a recovery could be had in the name of the defendant in error from the plaintiff in error charging the latter with the whole results of said transaction so that the proceeds of such recovery inured to the benefit of holders of said 13/15 of the stock which so assented to the transaction with full knowledge, and thereby impaired the obligation of said contract and transaction in violation of Article 1, Section 10, of the Constitution of the United States and denied to the plaintiff in error the due process of law in violation of Section 1 of the 14th amendment to the Constitution of the United States.

(13) The Court erred in that its decision permitting avoidance or rescission by the defendant in error of a contract entered into between the defendant in error on the one side and the plaintiff in error and Leonard Lewisohn on the other side, duly assented to by the defendant in error and by all its existing shareholders with full knowledge of all the facts and in the absence of any breach of duty or wrong whatsoever as to the subsequent purchasers of the remaining authorized capital stock is an attempted creation of a fictitious
77 right in the name of the artificial entity called a corporation in the absence of any injury direct or indirect to the rights or interests of any shareholder and is a denial to the plaintiff in error of the due process of law in violation of Section 1 of the 14th amendment to the Constitution of the United States.

(14) The Court erred in deciding that the Estate of Leonard Lewisohn having been discharged from liability in connection with the matters and transactions in issue by final decree of the Circuit Court of the United States for the Southern District of New York in an action there brought and prosecuted by the defendant in error, which decree was set forth in the supplemental answer herein and duly proven upon the trial, the plaintiff in error, a joint actor with said Lewisohn in said transactions, could be held liable to the defendant in error in solido, not only for alleged profits made by him but also for alleged profits made by said Lewisohn in connection with said matters and transactions, and thereby denied to the plaintiff in error due process of law and the equal protection of the law in violation of Section 1, of the 14th amendment to the Constitution of the United States.

(15) The Court erred in deciding that, the plaintiff in error and Leonard Lewisohn having jointly contracted with the defendant in error and an action to rescind or avoid the contract having been brought by the defendant in error against the Estate of said Lewisohn (the plaintiff in error being out of the jurisdiction) and such rescission or avoidance having been denied on the merits, a similar action could be maintained against the plaintiff in

error in the Supreme Judicial Court of Massachusetts, and thereby impaired the obligation of such contract in violation of Article 1, Section 10, of the Constitution of the United States
78 and denied to the plaintiff in error due process of law and the equal protection of the laws in violation of Section 1 of the 14th amendment to the Constitution of the United States.

(16) The Court erred in deciding that, the contract between the defendant in error on the one side and the plaintiff in error and Leonard Lewisohn on the other side being valid where made, could, nevertheless, be avoided and rescinded and that such decision could be reached under the guise of judicial interpretation and was not in fact and law judicial legislation, and thereby impaired the obligation of such contract in violation of Article 1, Section 10, of the Constitution of the United States, and denied to the plaintiff in error due process of law in violation of Section 1 of the 14th amendment to the Constitution of the United States.

(17) The Court erred in that its decision that the contract between the defendant in error on the one side and the plaintiff in error and Leonard Lewisohn on the other side, being valid where made, could, nevertheless, be avoided and rescinded was in effect and substance an act of judicial legislation, retroactive in character, purporting to create a breach of duty on the part of the plaintiff in error to the defendant in error as of the time when said contract was made by reason of matters taking place subsequently at the time the additional stock of the defendant in error was issued to the public, and purporting to create a right of action in the corporation nunc pro tunc, and was in violation of the provisions of the Constitution of the United States and the amendments thereof requiring a separation between legislative and judicial powers and was an abridgement of the privileges and immunities of the plaintiff
79 in error as a citizen of the United States and a denial to him of due process of law in violation of Section 1 of the 14th amendment to the Constitution of the United States.

(18) The Court erred in deciding that, where the defendant in error, by its own act and during the pendency of this action in causing substantially all its capital stock to be impounded in the treasury of a Maine corporation had deprived the plaintiff in error of the power of obtaining and returning an amount of such stock equal to the amount issued by it to the plaintiff in error and said Lewisohn, the defendant in error was entitled to any remedy other than rescission and in deciding that, even if the plaintiff in error was unable to return such stock he was not entitled to account for its value and receive a reconveyance of the property and was liable to respond in damages as in an action at law, and the Court thereby denied to the plaintiff in error due process of law in violation of Section 1 of the 14th amendment to the Constitution of the United States.

(19) The Court erred in deciding that the defendant in error could recover from the plaintiff in error money damages in two separate actions based upon parts of one and the same transaction offering rescission as to one part and not as to the other, and the

Court thereby impaired the obligation of said contract and transaction in violation of Article 1, Section 10, of the Constitution of the United States and denied to the plaintiff in error due process of law and the equal protection of the laws with respect thereto in violation of Section 1 of the 14th amendment to the Constitution of the United States.

80 (20) The Court erred in deciding that it could lawfully enjoin the plaintiff in error from prosecuting his appeal from the judgment or decree obtained against him by the defendant in error in the Courts of the State of New Jersey or from taking action elsewhere than in Massachusetts, even in the Federal Courts, and thereby abridged the privileges and immunities of the plaintiff in error as a citizen of the United States and denied to the plaintiff in error due process of law and the equal protection of the laws, all in violation of Section 1 of the 14th amendment to the Constitution of the United States.

(21) The Court erred in deciding that the defendant in error was entitled to recover from the plaintiff in error on account of the matters and things in issue in this cause and thereby denied and violated the rights of the plaintiff in error under the provisions of Article 1, Section 10, and Article IV, Sections 1 and 2, of the Constitution of the United States, and Section 1 of the 14th amendment to the Constitution of the United States and the Acts of Congress enacted pursuant to the foregoing provisions.

ALFRED HEMENWAY,
C. H. TYLER,
O. D. YOUNG,
B. E. EAMES,
Attorneys for Plaintiff in Error.

81 Supreme Court of the United States.

ALBERT S. BIGELOW, Plaintiff in Error,
v.
OLD DOMINION COPPER MINING & SMELTING COMPANY, Defendant in Error.

Prayer for Reversal.

To the Honorable the Supreme Court of the United States:

And now comes the above named Plaintiff in Error, and, in connection with his writ of error issued by this Court to the Supreme Judicial Court of Massachusetts, he prays for a reversal of the judgment or decree against him entered by the Supreme Judicial Court of Massachusetts in an action brought by the Defendant in Error against the Plaintiff in Error in said Supreme Judicial Court, sitting in Suffolk County, and numbered there in Equity, No. 8099.

ALFRED HEMENWAY,
C. H. TYLER,
O. D. YOUNG,
B. E. EAMES,
Solicitors of Albert S. Bigelow, Plaintiff in Error.

82 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Old Dominion Copper Mining & Smelting Company, a New Jersey corporation, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in the city of Washington, in the District of Columbia, on the* twenty-seventh day of January, next, pursuant to a Writ of Error filed in the Clerk's Office of the† Supreme Judicial Court of the Commonwealth of Massachusetts, wherein Albert S. Bigelow, of Colasset, in the Commonwealth of Massachusetts, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Marcus P. Knowlton, Chief Justice of the Supreme Judicial Court of Massachusetts, this twenty-ninth day of December, in the year of our Lord one thousand nine hundred and nine.

[SEAL.] MARCUS P. KNOWLTON,
Chief Justice of Supreme Judicial Court.

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*Not exceeding 30 days from the day of signing.
†Name of Court to which Writ of Error is directed.

83 BOSTON, MASS., *December* 30, 1909.

Due and sufficient service of the within citation is hereby acknowledged this day on behalf of the defendant in error within named, Old Dominion Copper Mining & Smelting Company, reserving all rights including the right to move to dismiss.

BRANDEIS, DUNBAR & NUTTER,
Attorneys for Defendant in Error,
Old Dominion Copper Mining & Smelting Company.

[Endorsed:] 8099. Eq. Old Dominion Copper Mining & Smelting Co'y vs. Albert S. Bigelow. Citation.

84 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

I, Walter F. Frederick, Clerk of the Supreme Judicial Court within and for the County of Suffolk and Commonwealth of Massachusetts, hereby certify that the papers hereunto annexed are an exemplifica-

tion of the Record in the case of Old Dominion Copper Mining & Smelting Company, Plaintiff, against Albert S. Bigelow, Defendant, in said Supreme Judicial Court determined, and attached thereto and transmitted with said Record, are true copies of the Commissioner's Reports of the Evidence; copies of the several opinions of the Supreme Judicial Court for the Commonwealth, each attested by the Reporter of Decisions; a copy of the application for writ of error; a copy of the assignment of errors; and the original citation with acceptance of service endorsed thereon.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Boston, this fourth day of January in the year of our Lord one thousand nine hundred and ten.

[SEAL.] WALTER F. FREDERICK, *Clerk.*

85

8099.

[*Bond on Writ of Error.*]

Know all Men by these Presents, That we, Albert S. Bigelow, of Cohasset, in the Commonwealth of Massachusetts, as Principal, and American Bonding Company of Baltimore, a Maryland corporation, as surety, are held and firmly bound unto Old Dominion Copper Mining & Smelting Company, a New Jersey corporation, in the full and just sum of Ten Thousand Dollars ($10,000.00) to be paid to the said Old Dominion Copper Mining & Smelting Company, its successors or Assigns; to which payment well and truly to be made we bind ourselves, our Heirs, Executors, and Administrators, and successors, jointly and severally, by these Presents.

Sealed with our seals, and dated the twenty-second day of November, in the year of our Lord one thousand nine hundred and nine.

Whereas lately at a sitting of the Supreme Judicial Court of Massachusetts, at Boston, within and for the County of Suffolk, in a suit depending in said Court between said Old Dominion Copper Mining & Smelting Company, plaintiff, and said Albert S. Bigelow, defendant, a decree was entered against the said defendant, Albert S. Bigelow, and the said Defendant, Albert S. Bigelow, having procured a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Old Dominion Copper Mining & Smelting Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now the condition of the above obligation is such, that if the said Albert S. Bigelow, plaintiff in error, shall prosecute his said writ of error to effect, and answer all costs, if he fail to make his plea

good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

ALBERT S. BIGELOW. [L. S.]
AMERICAN BONDING COMPANY OF BALTIMORE. [L. S.]
By BERTRAM G. WATERS, *Vice Pres't.*

Attest:

A. A. DORITY, *Ass't Sec'y.*

Signed, sealed and delivered in presence of

W. A. S. CHRIMES.

Approved:
But not to operate as supersedeas.

MARCUS P. KNOWLTON, *C. J. S. J. C.*

A true copy of the bond taken by the Chief Justice at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the Supreme Judicial Court for the County of Suffolk and Commonwealth of Massachusetts.
Attest:

WALTER F. FREDERICK,
Clerk Supreme Judicial Court.

86 [Endorsed:] 8099. Eq. Old Dominion Copper Mining & Smelting Co'y vs. Albert S. Bigelow. Copy of Bond in Proceedings in error to United States Supreme Court. Original bond filed & lodged in Clerk's office Dec. 31, 1909.

Endorsed on cover: File No. 21,982. Massachusetts Supreme Judicial Court. Term No. 192. Albert S. Bigelow, plaintiff in error, vs. Old Dominion Copper Mining & Smelting Company. Filed January 26th, 1910. File No. 21,982.

BIGELOW *v.* OLD DOMINION COPPER MINING AND SMELTING CO.

ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

Nos. 191, 192. Argued March 5, 6, 1912.—Decided May 27, 1912.

One of two joint tort-feasors was sued in the Circuit Court of the United States for New York, jurisdiction being based solely on diversity of citizenship, and the bill was dismissed; the other joint tort-feasor, who resided in Massachusetts, and was not, and could not, be made a party defendant in the New York suit, having been sued in the state court of Massachusetts, set up the New York judgment,

claiming that under the full faith and credit clause of the Constitution of the United States the judgment dismissing a suit based on the same cause of action against one alleged to be his joint tort-feasor was a bar to the suit, and that the Massachusetts courts were bound to give to the judgment the same effect as an estoppel as against subsequent suits on the same cause of action. *Held* that:

Although one of two joint tort-feasors may be individually interested in the result of a suit against the other, the result is merely that of precedent and not of *res judicata*, and the courts of another State are not under obligation to follow the decision.

Assistance by one of two joint tort-feasors in the defense of a suit against the other, because of interest in the decision as a judicial precedent affecting a case pending against him in another State, does not create an estoppel as to the one so assisting in the defense.

Where the cause of action against joint tort-feasors is *ex delicto*, and several as well as joint, one of the tort-feasors not sued is not a privy to one that is sued so that a judgment dismissing the case against the latter is a bar to another suit against the latter.

Where the remedy of the plaintiff in a suit against one of two joint tort-feasors depends upon the defendant's own culpability, failure to recover in a prior suit on the same facts against the other is not a bar.

When dealing with the estoppel of a judgment, privity denotes mutual or successive relationship to the same right of property, and while there is diversity of opinion as to whether the estoppel can be expanded so as to include joint tort-feasors not parties, the sounder reason, as well as weight of authority, is that failure to recover against one is not a bar to a suit or an individual cause of action against the other.

Where the jurisdiction of the Circuit Court of the United States depends entirely upon diversity of citizenship, that court administers the law of the State, and its judgment is entitled to the same sanction as would attach to a judgment of a court of that State, and is entitled in the courts of another State to the same faith and credit which would be given to a judgment of the court of the State in which the Circuit Court which rendered it was sitting.

Where a judgment of the court of another State is set up as a bar, the effect of that judgment in the courts of the State which rendered it is a question of fact to be determined by the court in which it is set up.

Although a judgment dismissing the bill against one of two joint tort-feasors may be a bar in the State where rendered against a suit on

the same cause of action against the other joint tort-feasor, the courts of another State may, without denying full faith and credit to such judgment, determine for itself under principles of general law whether or not such judgment is a bar to suits against the other tort-feasor.

Under § 1 of Art. IV of the Constitution and § 905, Rev. Stat., the judgment of a court of one State when sued upon or pleaded in estoppel in the courts of another State is put upon the plane of a domestic judgment in respect to conclusiveness of the facts adjudged; otherwise it would be reëxaminable as only *prima facie* evidence of the matter adjudged as is the case with foreign judgments.

The full faith and credit clause is to be construed in the light of the other provisions of the Constitution, none of which it was intended to modify or override.

The courts of one State are not required to regard as conclusive any judgment of the court of another State which had no jurisdiction of the subject or the parties; and the courts of the State in which the judgment is set up has the right to inquire whether the court rendering it had jurisdiction to pronounce a judgment which would conclude the parties themselves or those claiming that the judgment was effective as an estoppel.

The privity that exists between a stockholder and the corporation that makes a judgment against the corporation conclusive as against the stockholder does not exist as between joint *tort-feasors*. *Hancock National Bank* v. *Farnum*, 176 U. S. 640, distinguished.

188 Massachusetts, 315, affirmed.

THE facts, which involve the question of whether the Massachusetts courts gave to a New York judgment pleaded as a bar in a Massachusetts suit the full faith and credit which is required by § 1 of Art. IV of the Constitution of the United States and § 905, Revised Statutes, are stated in the opinion.

Mr. John C. Spooner, with whom *Mr. George Rublee*, *Mr. Joseph P. Cotton, Jr.*, *Mr. Charles H. Tyler*, *Mr. Owen D. Young*, *Mr. Burton E. Eames* and *Mr. William C. Rice* were on the brief, for plaintiffs in error:

The decrees of the Massachusetts court involve a denial of full faith and credit to the Lewisohn decree in the New York case.

The judgment of a Federal court sitting in New York is entitled in another State to the same faith and credit as a decree of a state court in New York. *Embry* v. *Palmer*, 107 U. S. 3; *Live Stock Co.* v. *Butchers' Union*, 120 U. S. 141; *Metcalf* v. *Watertown*, 153 U. S. 671; *Hancock Bank* v. *Farnum*, 176 U. S. 640; *Deposit Bank* v. *Frankfort*, 191 U. S. 499; *Riverdale Cotton Mills* v. *Alabama Mfg. Co.*, 198 U. S. 188.

The decree of a Federal court in a State must be given the same effect by the courts of that State as a decree of the state court. Cases *supra*, and see *National Foundry Works* v. *Oconto Co.*, 183 U. S. 216; *Central National Bank* v. *Stevens*, 169 U. S. 432; *Steinbach* v. *Relief Fire Ins. Co.*, 77 N. Y. 498; *Oceanic Co.* v. *Compania Translantica Espanola*, 134 N. Y. 461.

The fact that the Lewisohn decree was rendered on a demurrer does not detract from its efficacy as a bar. *Nor. Pac. Ry. Co.* v. *Slaght*, 205 U. S. 122, 130; *Yates* v. *Utica Bank*, 206 U. S. 181; *Bissell* v. *Spring Valley*, 124 U. S. 225; *Gould* v. *Evansville R. R. Co.*, 91 U. S. 526; *Alley* v. *Nott*, 111 U. S. 472; *Bouchaud* v. *Dias*, 3 Denio (N. Y.), 235, 244.

The opinions of the Circuit Court and Circuit Court of Appeals and of this court show that the bill in the Lewisohn suit was dismissed on the merits. *National Foundry Works* v. *Oconto Co.*, *supra*, at p. 234; *Baker* v. *Cummings*, 181 U. S. 117.

It is immaterial that the present suits were begun prior to the suit against Lewisohn. *Mitchell* v. *First National Bank*, 180 U. S. 471; *Nugent* v. *Traction Co.*, 87 Fed. Rep. 251; *United States* v. *Dewey*, 6 Biss. 501; *Rogers* v. *Odell*, 39 N. H. 452; *Sharon* v. *Hill*, 26 Fed. Rep. 337, 344.

The full faith and credit clause requires that the law and usage of New York should control not only as to what is decided by the decree, but also as to who is entitled to the benefit thereof. This is the plain meaning of the

language used. *Hancock Bank* v. *Farnum*, 176 U. S. 640; *Laing* v. *Rigney*, 160 U. S. 531; *Tilt* v. *Kelsey*, 207 U. S. 43.

This result cannot be defeated by the technical Massachusetts rule which denies to alleged joint tort-feasors the benefit of former adjudication as a bar. *Renaud* v. *Abbott*, 116 U. S. 277; *Hanley* v. *Donoghue*, 116 U. S. 1; *Laing* v. *Rigney*, *supra*.

The question of the jurisdiction of the Federal court to render the Lewisohn decree is not to be determined by the law of Massachusetts, but by the law of New York, subject to the limitation that that law must comply with the standards of general jurisprudence. *D'Arcy* v. *Ketchum*, 11 How. 165; *Pennoyer* v. *Neff*, 95 U. S. 714; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 289; *Huntington* v. *Attrill*, 146 U. S. 657; *Embry* v. *Palmer*, 107 U. S. 3; *Renaud* v. *Abbott*, 116 U. S. 277, 288; *Rogers* v. *Alabama*, 192 U. S. 226, 231; *German Savings Society* v. *Dormitzer*, 192 U. S. 125.

Since the New York court had undoubted jurisdiction over the plaintiff in the Lewisohn suit, there is no jurisdictional objection to giving effect to that decree as against it in Massachusetts. The rule of mutuality is subject to well-recognized exceptions. There is no requirement of mutuality of estoppel in cases like the present where the plaintiff, after failing on the merits to maintain its action, brings another suit upon the same cause of action against another defendant who acted jointly with the first defendant in the transaction. *Portland Mining Co.* v. *Stratton's Independence*, 158 Fed. Rep. 63; *Emma Mining Co.* v. *Emma Mining Co. of New York*, 7 Fed. Rep. 401; *People* v. *Stevens*, 51 How. Pr. (N. Y.) 235, aff'd, 71 N. Y. 527; *Spencer* v. *Dearth*, 43 Vermont, 98; *Williams* v. *McGrade*, 13 Minnesota, 39; *King* v. *Chase*, 15 N. H. 9; *Sonnentheil* v. *Moody* (Tex. Civ. App., 1900), 56 S. W. Rep. 1001; *Sonnentheil* v. *Texas Guarantee Co.*, 23 Tex. Civ.

App. 436; *Atkinson* v. *White*, 60 Maine, 396; *Hill* v. *Bain*, 15 R. I. 75; *Ferrers* v. *Arden*, Cro. Eliz. 668; 2 Black on Judgments (2d ed., 1902), § 781; *Green* v. *Van Buskirk*, 7 Wall. 139; *Featherston* v. *Turnpike Co.*, 71 Hun, 109; *Krolik* v. *Curry*, 148 Michigan, 214; *State* v. *Coste*, 36 Missouri, 436; *Hesselbach* v. *St. Louis*, 179 Missouri, 505; *Delaplain* v. *Kansas City*, 109 Mo. App. 107; *Montfort* v. *Hughes*, 3 E. D. Smith, 591; *Indiana Nitroglycerine Co.* v. *Lippincott Glass Co.*, 165 Indiana, 361; *Hayes* v. *Chicago Telephone Co.*, 218 Illinois, 414; *Bradley* v. *Rosenthal*, 154 California, 420; *Logan* v. *Railway Co.*, 82 S. Car. 518; *Rookard* v. *Atlanta Ry. Co.*, 84 S. Car. 190; *Biggs* v. *Benger*, 2 Ld. Raymond, 1372; *Marks* v. *Sullivan*, 8 Utah, 406, 410; *New Orleans Railroad Co.* v. *Jopes*, 142 U. S. 18; *Doremus* v. *Root*, 23 Washington, 710; *Stevick* v. *Nor. Pac. Ry.*, 39 Washington, 501; *Anderson* v. *Fleming*, 160 Indiana, 597; *Anderson* v. *Street Railroad Co.*, 200 Illinois, 329; *Muntz* v. *Algiers &c. Co.*, 116 Louisiana, 236; *McGinnis* v. *Chicago &c. Co.*, 200 Missouri, 347; *Chicago &c. Co.* v. *McManigal*, 73 Nebraska, 580; *Tyng* v. *Clark*, 9 Hun, 269; *Miller* v. *White*, 50 N. Y. 137; *Jackson* v. *Griswold*, 4 Hill, 522.

The present cases do not involve any question of joint tort or liability *ex delicto*. These cases are clearly distinguishable from the cases where the facts alleged if proved would amount to a tort, since it was decided in the Lewisohn Case that all the facts set up do not state a cause of action. The issue in the present cases under the full faith and credit clause is the effect of the Lewisohn decree in New York, and in the Federal courts, and in that jurisdiction neither Bigelow nor Lewisohn is liable *ex delicto*, or at all. Promoters' liability, in any event, is only that of a fiduciary, and in the absence of moral wrong there is a right of contribution. *Jacobs* v. *Pollard*, 10 Cush. 287; *Palmer* v. *Wick Shipping Co.*, A. C. (1894), 318; *Armstrong County* v. *Clarion County*, 66 Pa. St. 218;

First National Bank v. *Avery Co.*, 69 Nebraska, 329; *Eaton & Prince Co.* v. *Trust Co.*, 123 Mo. App. 117; *Castle* v. *Noyes*, 14 N. Y. 329; *Coventry* v. *Barton*, 17 Johns. 142; *Oceanic Steam Co.* v. *Compania Transatlantic*, 134 N. Y. 461; *Andrews* v. *Murray*, 33 Barb. 354; *Peck* v. *Ellis*, 2 Johns. Ch. 131, 136; *Kolb* v. *National Surety Co.*, 176 N. Y. 233; *Getty* v. *Devlin*, 54 N. Y. 403; *Loudenslager* v. *Woodbury Land Co.*, 58 N. J. Eq. 556; *Emma Mining Co.* v. *Grant*, 11 Ch. D. 918 (940).

The principle claimed by the defendant in error that estoppels must be mutual, has, in any event, no place in the constitutional law as against the express requirement of full faith and credit.

By the law and usage of New York, the present actions against plaintiff in error, had they been pending in New York, would have been barred by the Lewisohn decree. Cases *supra*, and *Woodhouse* v. *Duncan*, 106 N. Y. 527; *Bates* v. *Stanton*, 1 Duer, 79.

Plaintiff in error is, in any event, entitled to the benefit of said decree because he was privy with Lewisohn, not only under the law of New York, but under the general principles of law. The Lewisohn action was based upon the identical subject-matter and transaction as the cases at bar. *Ferrers* v. *Arden*, Cro. Eliz. 668.

Defendant in error, by its own choice of forum and of remedy, has litigated and determined that the title to the shares of stock, which it claims were wrongfully issued to Bigelow and Lewisohn, was rightfully in them free from any interest or equity in its favor. *Bates* v. *Stanton*, *supra*; *Kessler* v. *Eldred*, 206 U. S. 285; *Bush* v. *Knox*, 2 Hun, 576.

Lewisohn was trustee, agent and representative of Bigelow in the thirty-thousand share transaction, which was the subject-matter of the Lewisohn suit in New York. *Re Straut Estate*, 126 N. Y. 201; *Bracken* v. *Atlantic Trust Co.*, 36 App. Div. 67; aff'd, 167 N. Y. 510; *Russell* v. *Lasher*,

4 Barb. 232; *Emma Mine Case, supra; Castle* v. *Noyes*, 14 N. Y. 326; *King* v. *Barnes*, 109 N. Y. 267; *Wilcox* v. *Pratt*, 125 N. Y. 688; *Getty* v. *Devlin*, 54 N. Y. 403; 70 N. Y. 504; *Carter v. Bowe*, 41 Hun, 516; Freeman on Judgments, § 173; New York Code Civ. Proc., § 449; Bliss, N. Y. Ann. Code (1902), note "L."; *Lawrence* v. *Schaefer*, 19 Misc. 239; *Seymour* v. *Smith*, 114 N. Y. 481; *Duncan* v. *China Mutual Ins. Co.*, 129 N. Y. 237; *Coffin* v. *Grand Rapids Co.*, 136 N. Y. 655; *Hoffman House* v. *Foote*, 172 N. Y. 348; 1 Greenleaf on Evidence, p. 523; *Lichty* v. *Lewis*, 63 Fed. Rep. 535; 77 Fed. Rep. 111.

Plaintiff in error participated in the defense of the Lewisohn suit with the knowledge of all parties. *Carleton* v. *Lombard*, 149 N. Y. 137; *Van Koughnet* v. *Dennie*, 68 Hun, 179; *Woodhouse* v. *Duncan*, 106 N. Y. 527; *Demarest* v. *Darg*, 32 N. Y. 281; *Leavitt* v. *Wolcott*, 95 N. Y. 212, 221; *Oceanic Navigation Co.* v. *Compania Transatlantic*, 144 N. Y. 663; *Rumford Chemical Works* v. *Hygienic Chemical Co.*, 159 Fed. Rep. 436; *Port Jarvis* v. *First National Bank*, 96 N. Y. 550.

The Lewisohn decree is equally a bar to the one hundred thousand share suit. The question of liability in these two suits depends upon identical facts, and both suits involve parts of a single transaction. *Old Dominion Co.* v. *Bigelow*, 203 Massachusetts, 159.

Where two separate suits relate to separate properties, but the rights of the parties depend upon identical facts, adjudication in one is a bar to the other. *Bissell* v. *Spring Valley*, 124 U. S. 225; *New Orleans* v. *Citizens' Bank*, 167 U. S. 371; *Southern Pac. Ry. Co.* v. *United States*, 168 U. S. 1; *Nor. Pac. Ry. Co.* v. *Slaght*, 205 U. S. 122; *United States* v. *Land Company*, 192 U. S. 355; *Green* v. *Bogue*, 158 U. S. 478; *Dimock* v. *Revere Copper Co.*, 117 U. S. 559; *Forsyth* v. *Hammond*, 166 U. S. 506; *Johnson Co.* v. *Wharton*, 152 U. S. 252; *Bouchaud* v. *Dias*, 3 Denio, 238; *Doty* v. *Brown*, 4 N. Y. 71; *Pray* v. *Hegeman*, 98 N. Y. 351; *Park*

Hill Co. v. *Herriot*, 41 App. Div. 324; *Pakas* v. *Hollingshead*, 184 N. Y. 211; *Hirshbach* v. *Ketchum*, 84 N. Y. App. Div. 258.

The decree of the Massachusetts court involved denial of full faith and credit to the laws of New York and New Jersey. The full faith and credit clause requires full faith and credit to the statutory and common law of other States, as well as to their judgments. Elliot's Debates I, 80, 149, 272; V, 487, 504; *Chicago & Alton R. R. Co.* v. *Wiggins Ferry Co.*, 119 U. S. 615; *Smithsonian Institution* v. *St. John*, 214 U. S. 19, 28; *Banholzer* v. *N. Y. Life Ins. Co.*, 178 U. S. 402; *Allen* v. *Alleghany Co.*, 196 U. S. 458; *Johnson* v. *N. Y. Life Ins. Co.*, 187 U. S. 491; *Glenn* v. *Garth*, 147 U. S. 360; *Finney* v. *Guy*, 189 U. S. 335, 340; *Louisv. & Nashv. R. R.* v. *Melton*, 218 U. S. 36.

In the present cases full faith and credit has been denied to the common law and statutes of New York and New Jersey. Since the court below took judicial notice of the laws of New Jersey, this court should do so likewise. *Renaud* v. *Abbott*, 116 U. S. 277, 285, 286; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 445; *Eastern Building Association* v. *Williamson*, 189 U. S. 122.

Under the statutes and decisions of New Jersey, the Old Dominion Company was fully organized and of full capacity to make the contract which was made with the plaintiff in error and Lewisohn. See authorities discussed *post.*

The decisions of New York were put in evidence at the trial in Massachusetts.

The Massachusetts decrees involve an impairment of the obligation of the contract between the plaintiff in error and Lewisohn on the one side, and the defendant in error on the other side.

The question whether a valid contract existed is to be determined by this court, when it is claimed that the obligation of such contract is impaired. *McCullough* v.

Virginia, 172 U. S. 102; *Douglas* v. *Kentucky*, 168 U. S. 488; *Mobile & O. R. Co.* v. *Tennessee*, 153 U. S. 486, 492.

The corporation was fully organized and existing and competent, under the laws of the State of its organization, to make this contract. This court will take judicial notice of the foreign law where the court below did so. See authorities *supra*. The Massachusetts court fully considered the New Jersey law relating to the organization and capacity of the defendant in error.

See opinion below, especially dissenting opinion by Mr. Chief Justice Knowlton.

Under the New Jersey law the corporation was fully organized and competent to bind itself by this contract. *Old Dominion Co.* v. *Lewisohn*, 210 U. S. 206; *Old Dominion Co.* v. *Bigelow*, 203 Massachusetts, 159.

The discussion on this point in *Bigelow* v. *Old Dominion Company*, 74 N. J. Eq. 457, was *obiter*, and not supported by the authorities cited. The transaction between the plaintiff in error and Lewisohn on the one side and the defendant in error on the other side gave rise to a valid and binding contract. The contract was created in the State of New York, by the vote of the Board of Directors accepting the offers to convey the property. The rule that validity of the contract was to be governed by the law of the place of performance is always applied in aid of the contract and never for the purpose of finding it invalid. *Pritchard* v. *Norton*, 106 U. S. 124, 137; *Hall* v. *Cordell*, 142 U. S. 116; *London Assurance Co.* v. *Companhia De Moagens*, 167 U. S. 149; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 458.

The contract was fully executed by the parties and, as an executed contract, it was as far immune from attack under the laws of New York as while it was executory. *Fletcher* v. *Peck*, 6 Cranch, 87, 136; Cooley on Con. Lim., 7th ed., pp. 384, 385.

The New York law as established by the decided cases

before this contract was entered into made this contract valid and not voidable. *Parsons* v. *Hayes*, 14 Abb. N. C. 419; *Barr* v. *Railroad Company*, 125 N. Y. 263; *Seymour* v. *Cemetery Ass'n*, 144 N. Y. 333; *Thornton* v. *Wabash Ry. Co.*, 81 N. Y. 462; *King* v. *Barnes*, 109 N. Y. 267, 288; *Langdon* v. *Fogg*, 18 Fed. Rep. 5; *Stewart* v. *St. Louis R. R. Co.*, 41 Fed. Rep. 736; *DuPont* v. *Tilden*, 42 Fed. Rep. 87; *Wood* v. *Water Works Co.*, 44 Fed. Rep. 146; *Foster* v. *Seymour*, 23 Fed. Rep. 65; *McCracken* v. *Robinson*, 57 Fed. Rep. 375.

Many cases subsequent to the present contract sustain the same rule. *Hutchinson* v. *Simpson*, 92 App. Div. 382; *Insurance Press* v. *Montauk Wire Co.*, 103 App. Div. 472; *Blum* v. *Whitney*, 185 N. Y. 232.

There is a vital distinction between "future allottees" who supply money through the payment for their stock which is to go into the pockets of the promoters in payment for the property conveyed by them to the corporation, and cases like the present where the issue of stock to "future allottees" is independent of the initial transaction and does not benefit the promoters. The Massachusetts decrees involve an impairment of the contract within the decisions of this court. The liability imposed upon the plaintiff in error by the Massachusetts decrees, necessarily involves a denial of the binding force of the contract, not by reason of any extensive equity, but upon a finding in substance that the defendant in error never became bound. *Old Dominion Company* v. *Bigelow*, 188 Massachusetts, 315, 328, 329.

Such avoidance of the contract which was valid by the laws under which it arose, constitutes an impairment. The question of impairment of contract by judicial decision has been found to exist in many cases originating in the Circuit Courts of the United States. *Gelpcke* v. *Dubuque*, 1 Wall. 175; *Havemeyer* v. *Iowa County*, 3 Wall. 294; *Township of Pine Grove* v. *Talcott*, 19 Wall. 666;

Pleasant Township v. *Ætna Life Insurance Co.*, 138 U. S. 67; *Butz* v. *Muscatine*, 8 Wall. 575; *Anderson* v. *Santa Anna*, 116 U. S. 356; *Folsom* v. *Ninety-six*, 159 U. S. 611; *Stanley County* v. *Coler*, 190 U. S. 437; *Harris* v. *Jex*, 55 N. Y. 421; *Douglass* v. *County of Pike*, 101 U. S. 677; *Great Southern Fire Proof Hotel Company* v. *Johnson*, 193 U. S. 532.

The *Great Southern Hotel Case* involved a purely private contract. The same rule as to impairment by judicial decision has recently been established by this court in similar cases coming here by writ of error to the state court. *Muhlker* v. *New York & Harlem R. R. Co.*, 197 U. S. 594; *Sauer* v. *City of New York*, 206 U. S. 536.

The *Muhlker Case* involved merely the reversal of the rule of the common law by the state court and not the interpretation of any statute. The present case is stronger in favor of the plaintiff in error than the *Muhlker Case*, because the plaintiff in error is not seeking a reversal of the rule established in New York, but rather its enforcement; and the present case involves the actual setting aside of the New York contract by the courts of another State. See opinion of Mr. Justice Holmes in *Old Dominion Company* v. *Lewisohn*, 210 Massachusetts, 206. The Massachusetts decrees also constitute an impairment of the contract, in that they deny the power or capacity of the defendant in error under the laws of New Jersey to bind itself with respect thereto, and thereby they misinterpret the statutes of New Jersey relating to corporations. General Statutes of New Jersey, 1895, Vol. 1, pages 907 *et seq.;* dissenting opinion of Mr. Chief Justice Knowlton in the present case below; *Bickley* v. *Schlag*, 46 N. J. Eq. 533, 535; *Donald* v. *American Smelting Company*, 62 N. J. Eq. 729, 733.

The Massachusetts decrees involve denial to the plaintiff in error of due process of law.

The due process clause operates not only as a limita-

tion upon state legislatures, but also to restrain the state courts from denying the substance of due process, even though after hearing and after compliance with all the jurisdictional forms. *Virginia* v. *Rives*, 100 U. S. 313; *Ex parte Virginia*, 100 U. S. 339; *Scott* v. *McNeal*, 154 U. S. 34; *Chicago, Burlington & Quincy R. R.* v. *Chicago*, 166 U. S. 226; *Reynolds* v. *Chicago Traction Co.*, 207 U. S. 20.

Due process is denied by judicial decision (as distinguished from mere error) whenever fundamental principles are disregarded or vested rights acquired under settled rules of local law are divested by reversal of such settled rules, or by a decision in violation thereof. *Muhlker* v. *New York & Harlem R. R. Co., supra; In re Kemmler*, 136 U. S. 436, 448; *Davidson* v. *New Orleans*, 96 U. S. 97; *Hurtado* v. *California*, 110 U. S. 516; *Brown* v. *Levee Commissioners*, 50 Mississippi, 468; *Wulzen* v. *San Francisco*, 101 California, 15; *In re Ah Lee*, 5 Fed. Rep. 899; *Duke of Norfolk's Case*, 3 Ch. Cas. 1, 33.

The Massachusetts decrees involve retroactive judicial legislation, impairing rights of the plaintiff in error which were vested under the settled rules of law in New York. (The laws of New York and New Jersey have been examined in the preceding section.) This court will decide for itself as to the New York law. *Huntington* v. *Attrill*, 146 U. S. 657, 683, 684; *Scott* v. *McNeal*, 154 U. S. 34, 35; *Laing* v. *Rigney*, 160 U. S. 531; *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329; *Eastern Building Ass'n* v. *Williamson*, 189 U. S. 122, 127; *Finney* v. *Guy*, 189 U. S. 335, 340; *Harding* v. *Harding*, 198 U. S. 317, 331, 335; *Tilt* v. *Kelsey*, 207 U. S. 43, 57, 58.

Retrospective laws cannot be enacted to deprive parties of property rights previously vested. *Medford* v. *Learned*, 16 Massachusetts, 215; *Addams* v. *Marx*, 50 N. J. Law, 253; *Towle* v. *Eastern Railroad*, 18 N. H. 547.

The decision of the Massachusetts court falls within

the same prohibition. *Old Dominion Company* v. *Lewisohn*, 210 U. S. 206.

The Massachusetts decrees create a fictitious obligation to the defendant in error as to the transaction in question *nunc pro tunc* by virtue of subsequent acts, although at the time of the transaction it fully consented thereto and although the subsequent acts involved no breach of duty toward it.

The Massachusetts decrees also involve a denial of due process in holding the plaintiff in error liable *in solido*.

The rule of promoters' liability has always rested upon the principle that the promoter is a fiduciary. His obligation is purely equitable and does not rest upon the theory that he commits a tort. Any profit received by him is charged with a constructive trust. The Massachusetts decision holds the plaintiff in error liable for what he did not receive. The case is not one involving defalcation or loss to a trust estate, and so is not within those cases which hold one trustee liable for defaults of his co-trustee. No such rule existed when the contract in question was made, and it is now attempted to be imposed retroactively by a judicial decision of the Massachusetts court.

Mr. Edward F. McClennen and *Mr. Louis D. Brandeis* for defendants in error.

Mr. Justice Lurton delivered the opinion of the court.

The question upon which these cases have been brought to this court is whether the Massachusetts court gave to a New York judgment pleaded as a bar to a Massachusetts suit that full faith and credit required by the first section of Art. IV of the Constitution of the United States, and § 905, Revised Statutes, enacted in pursuance thereof.

The Old Dominion Copper and Smelting Company, hereafter designated the Copper Company, a corporation

of New Jersey, filed two bills in an equity court of Massachusetts against the plaintiff in error, Albert S. Bigelow, to recover secret profits realized by him, and an associate, one Lewisohn, as organizers or promoters of the Copper Company, in selling the mining properties of another corporation, called the Baltimore Company, and certain neighboring properties, designated in the transcript, "outside properties.'

The two sales were for distinct considerations. The bills alleged that when these sales were made the Copper Company was under the absolute control of the two promoters, Bigelow and Lewisohn, and that they divided the profits between them. The fundamental facts in each case were the same. The two cases were heard together in the state courts, and are now heard as if one case, though upon separate writs and distinct records.

Demurrers were interposed and overruled. The allegations of the bills are fully shown in 188 Massachusetts, 315, where one of the cases was considered on demurrer. Answers were then filed and a great mass of evidence taken. Upon a full hearing the allegations of the respective bills were held to be sustained by the proofs and final decrees were rendered for the plaintiff in sums aggregating $2,178,673.33. The decrees were affirmed in the Supreme Judicial Court.

The Federal question, upon which the judgment of this court is sought, arose in this wise: Bigelow, the plaintiff in error here, was a citizen of Massachusetts, and was, therefore, sued in the courts of that State. Lewisohn, who was Bigelow's associate promoter, was a citizen of New York. He was, therefore, sued separately in the Circuit Court of the United States for the Southern District of New York. The bills filed there were identical in every essential with those filed in Massachusetts. In the two sets of bills it was alleged that Bigelow and Lewisohn were joint promoters of the Copper Company, and

as such made the sales to it while under their entire control, and that they had realized fraudulent profits. Demurrers were interposed in the New York cases, which were sustained, and the bills dismissed. These judgments were affirmed in the Circuit Court of Appeals for the Second Circuit. The judgment in one of these cases (*Old Dominion Copper Co.* v. *Lewisohn*), that relating to the sale of the "outside properties," was brought to this court by certiorari and affirmed, the opinion being by Mr. Justice Holmes, 210 U. S. 206, where the facts of the case are stated.

The final decree in one of the New York cases was pleaded in a supplemental answer in the pending Massachusetts cases as a bar to the suits against Bigelow. The Massachusetts court adjudged that Bigelow was neither a party nor a privy to the New York suits, and was, therefore, not protected by the judgment therein.

To conclude Bigelow by the New York judgment, it must appear that he was either a party or a privy. That he was not a party to the record is conceded. He had no legal right to defend or control the proceedings, nor to appeal from the decree. He was, therefore, a stranger, and was not concluded by that judgment as a party thereto. That he was indirectly interested in the result because the question there litigated was one which might affect his own liability as a judicial precedent in a subsequent suit against him upon the same cause of action is true, but the effect of a judgment against Lewisohn as a precedent is not that of *res judicata*, and the Massachusetts court was under no obligation to follow the decision as a mere judicial precedent. Nor would assistance in the defense of the suit, because of interest in the decision as a judicial precedent which might influence the decision in his own case, create an estoppel as to Bigelow. *Stryker* v. *Goodnow*, 123 U. S. 527. Also *Rumford Chem. Works* v. *Hygienic Chem. Co.*, 215 U. S. 156.

But it is said that if Bigelow was not in every sense a party, he was privy to Lewisohn, who was, and that the estoppel of the adverse judgment in the suit against Lewisohn protected Bigelow as well.

But would that judgment, if it had been for the plaintiff in that case, have bound Bigelow in a subsequent suit by the same plaintiff upon the same facts? If not, upon what principle may he claim the advantage of it as a bar to the present suit? The cause of action was one arising *ex delicto*. It was several as well as joint. The right of action against both might have been extinguished by a settlement with one, or by a judgment against one, and satisfaction. But the claim has come in substance to this, that although the plaintiff had a remedy against Lewisohn and Bigelow severally or jointly, a failure to recover in an action against one is a bar to his action against the other, the facts being the same, although there has been no satisfaction for the injury done. The only basis upon which such a result can be asserted is that Bigelow would have been bound by the judgment if it had been adverse to Lewisohn, and may, therefore, shelter himself behind it since it was favorable to his joint wrongdoer.

It is a principle of general elementary law that the estoppel of a judgment must be mutual. *Railroad Co.* v. *National Bank*, 102 U. S. 14; *Keokuk & W. Railroad* v. *Missouri*, 152 U. S. 301; Freeman on Judgments, § 159; Greenleaf on Evidence, 13th ed., vol. 1, § 524. The mutuality of estoppel by judgment is fully recognized in both the New York and Massachusetts decisions: *Atlantic Dock Co.* v. *New York*, 53 N. Y. 64; *Brigham* v. *Fayerweather*, 140 Massachusetts, 411, 415; *Nelson* v. *Brown*, 144 N. Y. 384.

An apparent exception to this rule of mutuality has been held to exist where the liability of the defendant is altogether dependant upon the culpability of one exonerated in a prior suit, upon the same facts, when sued by the

same plaintiff. See *Portland Gold Mining Co.* v. *Stratton's Independence*, 158 Fed. Rep. 63, where the cases are collected. The unilateral character of the estoppel of an adjudication in such cases is justified by the injustice which would result in allowing a recovery against a defendant for conduct of another, when that other has been exonerated in a direct suit. The cases in which it has been enforced are cases where the relation between the defendants in the two suits has been that of principal and agent, master and servant, or indemnitor and indemnitee.

The principle upon which one may avail himself of the effect of a judgment adverse to the plaintiff in a former suit, against the immediate actor, is thus stated in *New Orleans & N. E. R. R. Co.* v. *Jopes*, 142 U. S. 18, 24, 27:

"It would seem on general principles that if the party who actually causes the injury is free from all civil and criminal liability therefor, his employer must also be entitled to like immunity. . . . If the immediate actor is free from responsibility because his act was lawful, can his employer, one taking no direct part in the transaction, be held responsible? . . . The question carries its own answer; and it may be generally affirmed that if an act of an employeé be lawful, and one which he is justified in doing, and which casts no personal responsibility upon him, no responsibility attaches to the employer therefor."

It is too evident to need argument that the remedy of this plaintiff does not depend upon the culpable conduct of Lewisohn, but upon Bigelow's own wrong, whether alone or in coöperation with Lewisohn. The liability of each was several as well as joint, and a failure to recover against one is no bar to a suit against the other upon the same facts. But a judgment not only estops those who were actually parties but also such persons as were represented by those who were or claim under or in privity with them.

What is privity? As used when dealing with the es-

toppel of a judgment, privity denotes mutual or successive relationship to the same right of property. *Litchfield* v. *Goodnow*, 123 U. S. 549. The ground upon which privies are bound by a judgment, says Prof. Greenleaf, in his work upon Evidence, 13th ed., vol. 1, § 523, "is, that they are identified with him in interest; and wherever this identity is found to exist, all are alike concluded. Hence, all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive upon him with whom they are in privity."

But it is said that the relationship of joint tort-feasors is such as to constitute privity, and that a judgment in a suit in favor of one upon the same identical cause of action, is a bar to a suit by the same plaintiff against the other wrongdoer. Whether the estoppel of a judgment is to be confined to those who were actually parties or privies in estate or interest, or may be expanded so as to include joint tort-feasors, not actually parties, is a question concerning which there is some diversity of opinion. But, as we shall later see, the sounder reason, as well as the weight of authority, is that the failure to recover against one of two joint tort-feasors is not a bar to a suit against the other upon the same facts.

Passing this for the time, we come to a consideration of the contention that whatever the general law upon this subject, if such was the effect of such a judgment under the law of New York, it was the duty of the Massachusetts court, under the full faith and credit clause, to give it like effect in the present suit.

That the judgment in question is entitled to the same sanction which would attach to a like judgment of a court of the State of New York, is plain. The United States court was in the exercise of jurisdiction to administer the laws of the State, since its jurisdiction depended solely upon diversity of citizenship. Its judgment is, therefore, entitled in the courts of another State to the

same faith and credit which would attach to a judgment of a court of the State of New York. *Dupasseur* v. *Rochereau*, 21 Wall. 130; *Deposit Bank* v. *Frankfort*, 191 U. S. 499, 514. What, then, is the effect of such a judgment, under the law of New York, as an estoppel in a subsequent suit upon the same facts by the same plaintiff against Bigelow. This was a question of fact in the Massachusetts court: *Hanley* v. *Donoghue*, 116 U. S. 1. Expert legal opinion is favorable to the view urged by the plaintiff in error, though the ground upon which such a consequence rests is by no means clear. The highest courts of New York have not clearly decided the precise question here presented. The cases referred to or commented upon by the witnesses cannot be said to clearly point to the conclusion claimed. Nevertheless, the Massachusetts court, treating the question as one of fact, accepted the view that under the law of New York this judgment would have been a bar to another suit upon the same facts against Bigelow, in the courts of New York. We shall do likewise. The Massachusetts courts held that under the general law, which was the applicable law of Massachusetts, the New York court had no such jurisdiction over the person of Bigelow as to affect him, either as a party who might have controlled the case or appealed from the judgment, and that he was in no sense such a privy as to be bound by it. Upon the general law as to the estoppel of such a judgment, that court said:

"This can hardly be regarded as an open question in this Commonwealth. In *Sprague* v. *Oakes*, 19 Pick. 455, which was an action for trespass *quare clausum fregit*, it was said, respecting such a defense, 'The defendant was neither a party nor privy to that judgment, was not bound by it, nor could he take advantage of it.' This case has never been overruled or questioned and must be regarded as stating the law of this Commonwealth. There are other authorities to the same point. *Lansing* v.

Montgomery, 2 Johns. 382; *Marsh* v. *Berry*, 7 Cowen, 344; *Moore* v. *Tracy*, 7 Wend. 229; *Gittleman* v. *Feltman*, 122 App. Div. (N. Y.) 385; *Atlantic Dock Co.* v. *Mayor and Aldermen of New York*, 53 N. Y. 64; *Tyng* v. *Clark*, 9 Hun, 269; *Calkins* v. *Allerton*, 3 Barb. 171, 174; *Goble* v. *Lillon*, 86 Indiana, 327; *Thompson* v. *Chicago, St. Paul & Kansas City Railroad*, 71 Minnesota, 89; *Three States Lumber Co.* v. *Blanks*, 118 Tennessee, 627. The reasons upon which these decisions rest is that there can be no estoppel arising out of a judgment, unless the same parties have had their day in court touching the matter litigated, and unless the judgment is equally available to both parties. It requires no discussion to demonstrate that a judgment in the Lewisohn suit against the defendant would not have fixed liability upon the present defendant. Hence there can be no estoppel under our law or under the general principles of jurisprudence, because it is not mutual. *Brigham* v. *Fayerweather*, 140 Massachusetts, 411, 415; *Dallinger* v. *Richardson*, 176 Massachusetts, 77, 83; *Worcester* v. *Green*, 2 Pick. 425, 429; *Biddle & Smart Co.* v. *Burnham*, 91 Maine, 578; *Moore* v. *Albany*, 98 N. Y. 396. 'Estoppels to be good must be mutual.' *Litchfield* v. *Goodnow*, 123 U. S. 549, 552; *Nelson* v. *Brown*, 144 N. Y. 384, 390. Bigelow could not have appeared as of right and made a defense to that suit. No judgment can be regarded as *res judicata* as to any matter where the rights in the subject-matter arise out of mutuality, and not by succession, unless the party could, as matter of right, appear and defend, even though he may have had knowledge of the suit. Otherwise, he might be bound by a judgment as to which he had never had the opportunity to be heard, which is opposed to the first principles of justice. *Brabrook* v. *Boston Five Cents Savings Bank*, 104 Massachusetts, 228, 233. There is no privity between joint wrongdoers, because all are jointly and severally liable. *Corey* v. *Havener*, 182 Massachusetts, 250; *Feneff*

v. *Boston & Maine Railroad*, 196 Massachusetts, 575, 581; *Pinkerton* v. *Randolph*, 200 Massachusetts, 24, 28. There is no right of contribution between joint wrongdoers, where they are in *pari delicto* with each other. *Churchill* v. *Holt*, 127 Massachusetts, 165. They are equally culpable, and the wrong complained of results from their joint effort."

The cause of action was one arising *ex delicto* and the liability of Lewisohn and Bigelow was several as well as joint. In many cases this court has held that a judgment without satisfaction against one of two joint trespassers is no bar to another action against the other for the same tort. The common law imposes upon each joint tort-feasor the burden of bearing the entire loss which he, in coöperation with another, has inflicted. The injured person may sue those who coöperated in the commission of the tort together, or he may sue them singly. He may recover against less than all if he sue them jointly, and may have a judgment for unequal sums against all who are joined in the suit. Or, if he sue one such wrongdoer and recover judgment, he is not estopped from suing another upon the same facts unless his first judgment has been fully satisfied. *Lovejoy* v. *Murray*, 3 Wall. 1; *Sessions* v. *Johnson*, 95 U. S. 347, 348; *The Beaconsfield*, 158 U. S. 303. If Lewisohn and Bigelow were severally liable, and a judgment against one without full satisfaction was not a bar to a suit against the other, it is difficult to see why a failure to obtain a judgment against one should be an answer to a suit against the other, who was not a party to the first suit. That a failure to recover in one suit against one such tort-feasor is not a bar to a suit in the courts of another State against another, who was not a party to the first suit, seems to be supported by considerations of justice and the weight of authority.

But did the Massachusetts court deny full faith and credit to the New York judgment by denying to it the

effect of estoppel which attached to it in the courts of New York, or may it determine for itself under principles of general law whether the judgment was a bar to the suit against Bigelow?

The answer must turn upon the construction and effect of the full faith and credit clause of the Constitution, and the act of Congress giving effect thereto. Section 1, Article IV of the Constitution reads as follows:

"Full faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The act of Congress of May 26, 1790 (1 Stat. 122, c. 11), now § 905, Revised Statutes, reads as follows:

"The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

The effect of this clause is to put the judgment of a court of one State, when sued upon, or pleaded in estoppel, in the courts of another State, upon the plane of a domestic judgment in respect of conclusiveness as to the facts adjudged. But for this provision such state judgments would stand upon the footing of foreign judg-

ments which are examinable when sued on in the courts of another country, being only *prima facie* evidence of the matter adjudged. *D'Arcy* v. *Ketchum*, 11 How. 165, 175. Thus in *Hanley* v. *Donoghue*, 116 U. S. 1, 4, it is said:

"Judgments recovered in one State of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being reëxaminable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties." Citing *Buckner* v. *Finley*, 2 Pet. 592; *M'Elmoyle* v. *Cohen*, 13 Pet. 312, 324; *D'Arcy* v. *Ketchum*, 11 How. 165, 176; *Christmas* v. *Russell*, 5 Wall. 290, 305; *Thompson* v. *Whitman*, 18 Wall. 457.

The requirement of full faith and credit is to be read and interpreted in the light of well-established principles of justice protected by other constitutional provisions which it was never intended to modify or override.

It is therefore well settled that the courts of one State are not required to regard as conclusive any judgment of the court of another State which had no jurisdiction of the subject or of the parties. *D'Arcy* v. *Ketchum*, 11 How. 165; *Board of Public Works* v. *Columbia College*, 17 Wall. 521, 528; *Thompson* v. *Whitman*, 18 Wall. 457; *Hanley* v. *Donoghue*, 116 U. S. 1, 4; *Huntington* v. *Attrill*, 146 U. S. 657, 685; *Hall* v. *Lanning*, 91 U. S. 160.

Mr. Justice Story, in his commentaries on the Conflict of Laws, § 609, says:

"It (the Constitution) did not make the judgments of other states domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other states. And they enjoy not the right of priority, or privilege, or lien which they have in the state where they are pronounced, but that only which the *lex fori* gives to

them by its own laws in their character of foreign judgments."

The general effect of a judgment of a court of one State when relied upon as an estoppel in the courts of another State is that which it has, by law or usage, in the courts of the State from which it comes. But the faith and credit to be accorded does not preclude an inquiry into the jurisdiction of the court which pronounced the judgment, or its right to bind the persons against whom the judgment is sought to be enforced.

Referring to the case of *Mills* v. *Duryee*, 7 Cranch, 481, where the language used was supposed to indicate that the effect to be given to the judgment of one State by the courts of another was in all respects that which attached to domestic judgments, Mr. Justice Bradley, speaking for this court in *Thompson* v. *Whitman*, 18 Wall. 457, 462, said that *Mills* v. *Duryee* had never been departed from "where the questions were not questions of jurisdiction. But where the jurisdiction of the court which rendered the judgment has been assailed, quite a different view has prevailed. Justice Story, who pronounced the judgment in *Mills* v. *Duryee*, in his Commentary on the Constitution, after stating the general doctrine established by that case with regard to the conclusive effect of judgments of one State in every other State, adds: 'But this does not prevent an inquiry into the jurisdiction of the court in which the original judgment was given, to pronounce it; or the right of the State itself to exercise authority over the person or the subject-matter. The Constitution did not mean to confer (upon the States) a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory.'"

The conclusiveness of the judgment relied upon in *Thompson* v. *Whitman* depended upon the locality of a certain seizure by the authorities of New Jersey under an act regulating the fisheries of that State. The question

was whether a record finding of jurisdictional facts could be contradicted. The holding of the court was that the jurisdiction could be assailed by evidence of facts contradicting those found to exist by the record pleaded as an estoppel. That case has since been accepted as determining that the binding effect of a judgment of one State, when pleaded as an estoppel in the courts of another, is open to challenge by assailing an officer's return of service, or the authority of one who assumed to accept service, or to enter an appearance, even though the judgment includes a finding of the facts necessary to confer jurisdiction. It would seem to follow that the Massachusetts court had the legal right to inquire, not only whether Bigelow was a party to the New York judgment in the sense that he might have appeared and defended, or appealed from it, but whether the cause of action and the relation of Bigelow to it, or to the parties, was such that the New York court could pronounce a judgment which would bind him, or conclude the plaintiff from suing him upon the same facts. *Knowles* v. *Gaslight Co.*, 19 Wall. 58; *Cooper* v. *Newell*, 173 U. S. 555, 556.

Bigelow was a citizen of and domiciled in Massachusetts. He was not found within the State of New York. Indeed, the pleadings in the New York court stated that he was not sued because he did not reside within the State. A judgment rendered upon constructive service against one domiciled within the State may be a good judgment *in personam* in that State, though void when sued upon outside the State. *Pennoyer* v. *Neff*, 95 U. S. 714. In *Goldey* v. *Morning News*, 156 U. S. 518, 521, it is said:

"It is an elementary principle of jurisprudence, that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appear-

ance or otherwise, of the want of due service. Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government."

See also the thorough discussion of this question in *Haddock* v. *Haddock*, 201 U. S. 562, 567, 573.

The New York court had no jurisdiction to render a judgment *in personam* against Bigelow. He was confessedly not a party. He did not voluntarily appear. He had no legal right to appear, no right to introduce evidence, control the proceedings, nor appeal from the judgment. To say that nevertheless the judgment rendered there adverse to the plaintiff in that case may be pleaded by him as a bar to another suit by the same plaintiff upon the same facts, because such is the effect of that judgment by the usage or law of New York, would be to give to the law of New York an extra-territorial effect, which would operate as a denial of due process of law. Whatever the effect of that judgment as an estoppel under the law of New York, it cannot be held an estoppel in a suit in the courts of another State between the same plaintiff and a different defendant who was not a party to the first suit. *D'Arcy* v. *Ketchum*, 11 How. 165, is clearly in point. Under a New York statute a court of that State entered judgment against a non-resident defendant who was not served and did not appear. The judgment was entered under authority of a statute permitting judgment against joint debtors where only one was notified. The non-resident defendant was sued upon this judgment, perfectly good under the decisions of New York, in the courts of Louisiana. This court, after full consideration, held that the jurisdiction of the New York court to render a personal judgment against a non-resident was open to inquiry, and that it was not to be given the effect it plainly had under the law of New York, because that court had no jurisdiction over the person of the defendant. This

case was followed in *Board of Public Works* v. *Columbia College*, 17 Wall. 521, 527, which involved the effect of a joint judgment against five persons as joint debtors, two of whom were non-residents, and were not served and did not appear. This judgment was held not to be evidence against the partners who had not appeared. Touching the effect of that judgment, this court said:

"It is sufficient for the disposition of this case that the judgment is not evidence of any personal liability of Withers outside of New York. It was rendered in that State without service of process upon him, or his appearance in the action. Personal judgments thus rendered have no operation out of the limits of the State where rendered. Their effects are merely local. Out of the State they are nullities, not binding upon the non-resident defendant, nor establishing any claim against him. Such is the settled law of this country, asserted in repeated adjudications of this court and of the state courts."

"The judgment in New York, it is true, is a joint judgment against all of the partners, against those summoned by publication as well as those who were served with process or appeared, but this joint character cannot affect the question of its validity as respects those not served. The clause of the Federal Constitution which requires full faith and credit to be given in each State to the records and judicial proceedings of every other State, applies to the records and proceedings of courts only so far as they have jurisdiction. Wherever they want jurisdiction the records are not entitled to credit."

Hall v. *Lanning*, 91 U. S. 160, was an action in a United States court for the District of Illinois upon a New York judgment against a New York partnership. It appeared that the suit in which the judgment sued upon was obtained was against all of the members of a firm upon a joint liability. The members of the partnership who were residents and were actually served assumed the right to

enter the appearance of certain non-residents, who were not and could not be notified. In the action upon this joint judgment one of the defendants claimed the right to deny the jurisdiction of the New York court to pronounce a judgment against him upon the ground that he had not been summoned, had not personally appeared and was not concluded by an appearance entered for him by his co-partners, the firm having theretofore been dissolved. The case was distinguishable from *D'Arcy* v. *Ketchum* and *Board of Public Works* v. *Columbia College*, because the partners actually served assumed authority to enter the appearance of the non-residents who were not served. The debt sued upon was a partnership debt. The contention was that the relation of partnership conferred upon partners, even after dissolution, the right to appear for their co-partners in a suit against the firm. As a question of general law, this court held that although the judgment was valid under the laws and usage of New York, at the common law no such right existed after dissolution and that the requirement of full faith and credit did not compel the courts of another State to give effect to the judgment as against the non-resident member of the firm who had not been served.

From these cases it is clear that the conclusive effect of a judgment *in personam* which is to be recognized when questioned in the courts of another State depends upon whether it is the judgment of a court which had jurisdiction over the person of the defendant sought to be bound. The estoppel here insisted upon is grounded not upon actual notice or appearance, but upon a theory as to the relation between joint tort-feasors under the laws of New York. If the Massachusetts court was of opinion that under the general law that relationship was not such as to make Bigelow a party by either privity or representation, it was under no obligation to treat the New York judgment as a bar to the suit in which it was pleaded.

The binding effect of the judgment sued upon in *Hall* v. *Lanning*, cited above, turned upon the implied power of one member of a dissolved firm to enter the appearance of his non-resident partners in a suit upon a joint debt. Under the decisions of the New York courts such a judgment bound the members whose appearance was so entered. But this court held that full faith and credit was not denied by a determination of the power of one partner to so enter the appearance of a non-resident partner and held that no such power existed.

In *Bagley* v. *General Fire Extinguisher Co.*, 212 U. S. 477, 480, the facts were these: A tenant recovered judgment against his landlord resulting from the melting of sprinkler heads in an automatic sprinkler put up in plaintiff's building by the defendant. The plaintiff gave the defendant notice to defend, which it ignored. The suit was to recover the money so paid by the landlord. It was claimed that negligence in construction was made out by the judgment rendered against the plaintiff in favor of the tenant in a court of the State of Michigan. That judgment was relied upon as estopping the defendant, who it was claimed had notice, and was, under its contract, bound to defend. The court said:

"The defendant was no party to that judgment, and there is nothing in the Constitution to give it any force as against strangers. If the judgment binds the defendant it is not by its own operation, even with the Constitution behind it, but by an estoppel arising out of the defendant's contract with the plaintiff and the notice to defend. The ground of decision in both courts below was that there was no such estoppel, the duty and responsibility of the defendant being limited by the words that we have quoted from the contract, excluding any obligation other than those set forth. The decision, in other words, turned wholly on the construction of the contract as excluding a liability over in the event that happened. Even if wrong,

it did not deny the Michigan judgments their full effect, but denied the preliminary relation between the defendant and the party to them, without which the defendant remained a stranger to them, in spite of the notice to defend."

In support of the contention that the full faith and credit clause gives to this judgment the effect, as an estoppel, which would be given to it in New York, counsel have cited the case of *Hancock Nat. Bk.* v. *Farnum*, 176 U. S. 640, 643, where it is said that the "local effect must be recognized everywhere." But that was said in respect of a Kansas judgment in favor of a creditor of a Kansas corporation, in a suit by the creditor in another State against a stockholder of the Kansas corporation to subject him to liability as a shareholder to an amount equal to his stock. But under the law of Kansas and the general law a stockholder is represented by the corporation in all actions against the corporation for corporate liabilities. The stockholder is by the very law of corporate existence an integral part of the corporation, and is bound by a judgment against it in respect of any matter within the scope of corporate powers. See *Glenn* v. *Liggett*, 135 U. S. 533; *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329, 336. In the *Farnum Case*, as in all cases of that class, there is a privity in interest and a representation in law of the stockholder by the corporation of which he is a member. The conclusiveness of such a judgment as binding each stockholder does not, however, extend to matters in which the corporation cannot be said to represent him. Thus it is said in the *Farnum Case:*

"We do not mean that it is conclusive as against any individual sued as a stockholder that he is one, or if one, that he has not already discharged by payment to some other creditor of the corporation the full measure of his liability, or that he has not claims against the corporation, or judgments against it, which he may, in law or equity,

as any debtor, whether by judgment or otherwise, set off against a claim or judgment, but in other respects it is an adjudication binding him. He is so far a part of the corporation that he is represented by it in the action against it."

There is no parallel between the relation of joint tort-feasors and that of a stockholder to his corporation. In the latter case, the stockholder, by the organic law of his corporation, is a member and represented by it so long as it keeps within its corporate powers. In the other instance one wrongdoer when sued does not represent those not sued, although they had coöperated in the wrong and were both liable.

The conclusion we reach is that the Massachusetts court did not deny full faith and credit to the New York judgment, and its decrees are therefore

Affirmed.

MR. JUSTICE HUGHES took no part in the hearing or consideration of these cases.